

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Case No. 13-ALJ-07-0494-CC

Appellate Case No. 2014-001939

James Weatherholtz,

Appellant,

v.

South Carolina Department of
Health and Environmental
Control,

Respondent.

RECORD ON APPEAL

VOLUME I OF II

ANDREW R. DE HOLL
Womble Carlyle Sandridge & Rice LLP
P.O. Box 999
Charleston, SC 29402
(843) 722-3400
Attorney for Appellant

BRADLEY D. CHURDAR
South Carolina Department of Health & Environmental Control
1362 McMillan Avenue
Suite 400
North Charleston, SC 29405
Attorney for Respondent

INDEX	1

VOLUME I

ADMINISTRATIVE LAW COURT ORDERS

Order for Prehearing Statements dated December 6, 2013	5
Order Denying Motion for Admission of Petitioner's Exhibit 16 dated April 3, 2014	7
Final Order and Decision dated June 17, 2014	8
Amended Final Order and Decision dated August 12, 2014	17

STATEMENTS TO THE ADMINISTRATIVE LAW COURT

DHEC's Agency Information Sheet dated November 19, 2013	26
Weatherholtz's Prehearing Statement dated December 23, 2013	28
DHEC's Prehearing Statement dated December 30, 2013	31
DHEC's Amended Prehearing Statement dated February 28, 2014	34

PROPOSED ORDERS

Weatherholtz's proposed final order	36
DHEC's proposed final order	50

MOTIONS

Weatherholtz's Motion for Reconsideration and Motion for Admission of Petitioner's Exhibit 16 dated March 12, 2014	61
DHEC's Return to Motion for Reconsideration dated March 24, 2014	77
Weatherholtz's Motion for Reconsideration dated June 27, 2014	79

MOTIONS (continued)

DHEC's Return to Weatherholtz's Motion for Reconsideration dated July 17, 2014	86

CONTESTED CASE HEARING TRANSCRIPT

TRANSCRIPT TABLE OF CONTENTS	96

STIPULATIONS.....	98

OPENING STATEMENTS

Mr. Weatherholtz	101
Mr. Churdar.....	104

TESTIMONY

THOMAS BESSENT

Direct Examination by Mr. Weatherholtz	117
Cross Examination by Mr. Churdar	130
Redirect Examination by Mr. Weatherholtz	167
Recross Examination by Mr. Churdar	175

JAMES WEATHERHOLTZ

Direct Testimony	178
Cross Examination by Mr. Churdar	217
Redirect Testimony	238

JEFF THOMPSON

Direct Examination by Mr. Churdar	241
Cross Examination by Mr. Weatherholtz	298
Redirect Examination by Mr. Churdar	326

VOLUME II

CONTESTED CASE HEARING EXHIBITS

Weatherholtz's Exhibit 1 (Dock Layout drawing dated May 28, 2013).....	329
Weatherholtz's Exhibit 2 (Dock Detail drawing dated May 28, 2013)	330
Weatherholtz's Exhibit 3 (Cross-Section drawing dated May 28, 2013)	331
Weatherholtz's Exhibit 4 (Critical-Line Survey dated April 25, 2013 and Location Map dated May 28, 2013).....	332
Weatherholtz's Exhibit 5 (Creek charts and sketch).....	334
Weatherholtz's Exhibit 6 (Emails between Thompson and Weatherholtz running from July 5, 2013 to August 2, 2013)	337
Weatherholtz's Exhibit 7 (Permit denial letter dated August 7, 2013).....	339
Weatherholtz's Exhibit 8 (Request for final review dated August 20, 2013 and Contested Case Hearing Request form dated October 14, 2013).....	341
Weatherholtz's Exhibit 9 (Response to request for final review dated September 5, 2013)	347
Weatherholtz's Exhibit 10 (Five aerial photographs dated February 18, 2014)...	356
Weatherholtz's Exhibit 11 (Three photographs of measuring creek with tape) ...	361
Weatherholtz's Exhibit 12 (Two photographs of receipt and pipe measurement)	364
Weatherholtz's Exhibit 13 (Five photographs of measuring creek with pipe)	366
Weatherholtz's Exhibit 14 (Three photographs of measuring creek with pipe)...	371
Weatherholtz's Exhibit 15 (Four photographs of measuring creek with pipe)....	374
Weatherholtz's Exhibit 18 (FOIA request results)	378
DHEC's Exhibit 1 (DHEC Permitting File)	430

CONTESTED CASE HEARING EXHIBITS (continued)

DHEC's Exhibit 2 (Email, charts, and sketch from Bessent)	503

DHEC's Exhibit 3 (Exhibits 4 to 20 of Weatherholtz Deposition)	508
DHEC's Exhibit 4 (South Carolina State Register Vol. 23, Issue 6, pages 22 to 23)	524
DHEC's Exhibit 5 (GIS screenshot dated March 3, 2014)	527
 OTHER DOCUMENTS	
DHEC Board letter dated September 16, 2013	528
Notice of Assignment dated October 22, 2013	530
Weatherholtz Letter to the Administrative Law Court dated February 18, 2014	531
DHEC Letter to the Administrative Law Court dated February 18, 2014	532
CERTIFICATE OF COUNSEL	533

* * *

PETITIONER'S EXHIBIT 17 IS ON FILE WITH THE COURT

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

James Weatherholtz,	)	Docket No.: 13-ALJ-07-0494-CC
	)	
Petitioners,	)	
vs.	)	ORDER FOR PREHEARING
	)	STATEMENTS
South Carolina Department of Health and	)	
Environmental Control,	)	
	)	
Respondent.	)	
	)	

IT IS HEREBY ORDERED that each party who intends to appear at the hearing must file with the undersigned's office a Prehearing Statement stating to the best of the party's ability, the following:

1. The nature of this proceeding;
2. The statutory provision(s) conferring subject matter jurisdiction to the Court and other applicable statutes and regulations;
3. The issues to be presented for determination, including any claims or defenses expected to be raised;
4. The action requested of the Court, if any;
5. A brief summary of the facts to be presented at the hearing;
6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion (In the interest of judicial expediency, all motions should be submitted to the Court within fifteen (15) days before the date of the scheduled hearing. Returns should be submitted at least five (5) days before the scheduled hearing.);
7. A list of proposed witnesses and exhibits;
8. A statement regarding the necessity of discovery, if any;
9. The estimated time required for the hearing, and any dates the parties, counsel or key witnesses are specifically unavailable during the next three months;
10. Please note if any party deems it necessary for the undersigned to conduct a prehearing scheduling conference or issue an order regarding motions, discovery, etc.

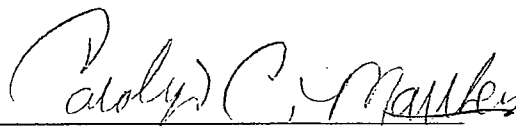
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SC ADMIN. LAW COURT

IT IS FURTHER ORDERED that the Prehearing Statement, and all subsequent pleadings, are to be **FILED DIRECTLY WITH MY OFFICE** at the address below and served on all parties within fifteen (15) days of the date of this Order. It is NOT necessary to send a copy to the Clerk of the ALC, nor to send the original to the clerk with a copy to this office. The parties have a continuing obligation to update the information provided in the Prehearing Statement, as necessary during the course of the proceeding, to render it true and accurate.

AND IT IS SO ORDERED.



CAROLYN C. MATTHEWS

SC Administrative Law Judge

December 6, 2013
Columbia, South Carolina

CERTIFICATE OF SERVICE

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

This 6th day of December 2013

By: Mary Beth Campbell
Judicial Law Clerk

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

James E. Weatherholtz,

Docket No. 13-ALJ-07-0494-CC

Petitioner,

vs.

**ORDER DENYING MOTION FOR
ADMISSION OF PETITIONER'S
EXHIBIT 16**

South Carolina Department of Health and
Environmental Control,

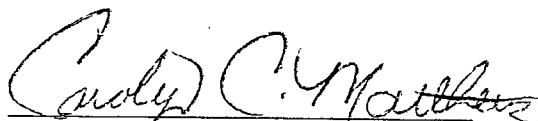
Respondent.

This matter is before the South Carolina Administrative Law Court ("ALC") on the motion of James E. Weatherholtz ("Petitioner"), who is appealing the denial of a private recreational dock application, number OCRM-13-155-D, by the South Carolina Department of Health and Environmental Control ("SCDHEC"). This case was heard before the ALC on March 5, 2014. Petitioner filed this Motion on March 12, 2014. SCDHEC responded on March 24, 2014. Petitioner filed this Motion to request that Petitioner's Exhibit 16 be included in the record of trial.

Petitioner's Exhibit 16 consists of a series of photographs taken by the Petitioner on March 1 and 2 of 2014. Petitioner submitted Exhibit 16 to SCDHEC on March 2, 2014, after the deposition of the Petitioner had already occurred. SCDHEC argues that by Petitioner providing these photographs after his deposition, an unfair disadvantage arose, especially considering the trial for the case was only a few days later. The ALC agrees with the position of SCDHEC and therefore denies Petitioner's Motion for Admission of Petitioner's Exhibit 16.

IT IS THEREFORE ORDERED that Petitioner's Motion for Admission of Petitioner's Exhibit 16 is **DENIED**.

AND IT IS SO ORDERED.


CAROLYN C. MATTHEWS
S.C. Administrative Law Judge

April 3, 2014
Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the party(ies) or their attorney(s).

This 3rd day of April 2014
BY Mary Beth Campbell
Judicial Law Clerk

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SC ADMIN. LAW COURT

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

James Weatherholtz,

Petitioner,

vs.

South Carolina Department of Health and
Environmental Control,

Respondent.

Docket No. 13-ALJ-07-0494-CC

FINAL ORDER AND DECISION

June 17, 2014

Appearances: James E. Weatherholtz, Esquire for Petitioner
Bradley D. Churdar, Esquire for Respondent

STATEMENT OF THE CASE

This matter comes before me pursuant to a Request for Contested Case Hearing filed by the Petitioner on October 14, 2013, challenging the decision of South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (hereinafter "Department" or "DHEC" or "OCRM") to deny a permit application to build a dock (Permit No. OCRM-13-155-D). A hearing was held on March 5, 2014, before the Administrative Law Court ("ALC") in Columbia, South Carolina. Based on the evidence before me, I find the denial of the permit application should be affirmed.

ISSUES FOR DETERMINATION

The Petitioner raised the following issues for determination by the ALC:

- I. Whether DHEC improperly denied the permit application based on 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) which provides "docks will not be permitted on creeks less than 10 feet wide as measured from marsh vegetation on each side." Petitioner asserts in his permit application the creek is exactly ten feet wide.
- II. Whether DHEC improperly denied the permit application based on 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) which provides "docks will not be permitted on creeks less than 20 feet wide as measured from marsh vegetation on each side unless one of the following two special geographical circumstances exists: a lot has greater than

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SC ADMIN. LAW COURT

500 feet of water frontage¹ or no potential access via dockage from the opposite side of the creek.”

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and closely passed upon their credibility, taking into consideration the burden of persuasion of the parties, I make the following Findings of Fact by a preponderance of the evidence.

1. The Petitioner, James E. Weatherholtz, owns property on and adjacent to a tributary of Kushiwah Creek (hereinafter referred to only as “Kushiwah Creek”) at 949 Compass Point in Stiles Point Plantation in Charleston, Charleston County, South Carolina.
2. Petitioner applied for a permit to build a dock out to Kushiwah Creek with a five foot by ten foot fixed pierhead and a four foot by two-hundred forty-five foot walkway.
3. Petitioner’s permit application included a survey from land surveyor Thomas Bessent indicating that Kushiwah Creek was exactly ten feet wide.
4. Mr. Bessent relied on measurements obtained by his field crew using an electronic total station instrument.
5. Mr. Bessent did not operate either the electronic total station or the prism in collecting the data used to measure the width of the creek.
6. A man named Billy Ferguson measured from a kayak while holding the prism where he determined the marsh vegetation began.
7. Billy Ferguson did not testify at the hearing.
8. Mr. Bessent reiterated his assertion that the creek width measured precisely ten feet in the area of the proposed dock.
9. Mr. Bessent also testified that he drew a cross-sectional sketch of Kushiwah creek that was marked as the last page of Petitioner’s Exhibit 5.
10. In an email Mr. Bessent sent to the Petitioner four days before trial (February 28, 2014), he described this sketch as part of the “fieldwork on this job.”

¹ Petitioner concedes that his lot does not meet the greater-than-500-feet-of-water-frontage requirement of 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii). Accordingly, the only requirement Petitioner is challenging from 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) is DHEC’s conclusion that there is in fact both potential access and actual access via dockage from the opposite side of Kushiwah Creek.

11. Mr. Bessent further described this sketch in his February 28, 2014 email to Petitioner as “a hand sketch from my file that I made during my discussion with my field crew at the time of the survey.”

12. The cross-sectional sketch showed the initial vegetation on each side of Kushiwah Creek was seven feet to nine feet apart.

13. Mr. Bessent referred to this initial vegetation on each side of Kushiwah Creek as “sprigs”. Specifically, Mr. Bessent testified that the distance across Kushiwah Creek from “sprig to sprig” was seven to nine feet.

14. Jeff Thompson, OCRM Project Manager for this permit application, reviewed the permit application and saw the submitted measurement for Kushiwah Creek was exactly ten feet wide.

15. After reviewing the permit application, Jeff Thompson and Fred Mallet, also an OCRM Project Manager, visited the site on July 11, 2013 using a 48 inch wide jonboat.

16. They arrived at Kushiwah Creek about thirty minutes before high tide.

17. Mr. Thompson testified that Kushiwah Creek is so small and shallow that even thirty minutes before high tide, the jonboat “hit bottom a time or two.”

18. Mr. Thompson testified that when he and Mr. Mallet passed the Petitioner’s next door neighbor’s dock in a 48 inch wide jonboat, they had to run the jon boat two feet into the marsh to pass by the dock and their jonboat still hit the side of the neighbor’s dock as they passed by.

19. Mr. Thompson testified that he began measuring the distance from marsh vegetation to marsh vegetation starting at the vegetation furthest out into the creek just to the left side of the jonboat.

20. Using a survey rod, Mr. Thompson and Mr. Mallet measured Kushiwah Creek’s width from the marsh vegetation on each side of the creek.

21. Mr. Thompson and Mr. Mallet took measurements only within the extended property lines of the Petitioner’s lot.

22. Mr. Thompson testified that the Petitioner’s extended property lines and the extended property lines of the neighboring property owner (who currently has actual access via dockage from the opposite side of the creek) did not conflict. Mr. Thompson testified that the

reason the extended property lines of these two parcels did not conflict is because extended property lines terminate at the edge of the water body closest to each parcel.

23. Mr. Thompson and Mr. Mallet measured the creek width at four different locations within the Petitioner's extended property lines.

24. Mr. Thompson measured the portion of Kushiwah Creek within the Petitioner's extended property lines to be seven and a half to eight feet wide.

25. Mr. Thompson does not interpret 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) as allowing him to permit a dock when just a few feet of the creek width may be greater than ten feet wide, because such a small portion of the creek would not be representative of the creek width.

26. The method of measuring creek width and the method of determining the beginning of marsh vegetation that he and Mr. Mallet used are the same methods for measuring creek width and marsh vegetation that the Department has historically used.

27. Regarding the application of 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) to this permitting decision, Mr. Thompson used a marker to draw the extended property lines of the property on the opposite side of Kushiwah creek as represented by Respondent's Exhibit 5.

28. The extended property lines of the property on the opposite side of Kushiwah Creek form an uneven "pie shape" with a short dock directly in the middle of these two extended property lines and on the opposite side of Kushiwah Creek from the Petitioner's upland property.

29. The property owner on the opposite side of the creek from the Petitioner not only has "potential access via dockage from the opposite side of the creek," but this property owner presently has actual access via dockage from the opposite side of the creek.

30. Mr. Thompson testified that, for purposes of determining whether potential access via dockage from the opposite side of the creek exists or not, it is irrelevant to his permitting decision under 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) that the dock on the opposite side of the creek in the middle of the two "pie shaped" extended property lines in Respondent's Exhibit 5 is not inside the Petitioner's extended property lines. Stated another way, Mr. Thompson considered the fact that the property owner on the opposite side of the creek presently having a dock was a relevant factor in his Reg. 30-12(A)(2)(c)(ii) analysis, despite the fact that this property owner's dock was upstream and outside of the trajectory of Petitioner's extended property lines.

31. Petitioner's permit application for the proposed dock was denied because Mr. Thompson determined that (a) Kushiwah Creek was less than ten feet wide as measured from marsh vegetation on each side; and (b) that there was both actual and potential access via dockage from the opposite side of Kushiwah Creek.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, this Court concludes the following as a matter of law:

Jurisdiction

The South Carolina Administrative Law Court has subject matter jurisdiction over this action based on S.C. Code Ann. § 1-23-600(A) (Supp. 2013) and S.C. Code Ann. § 44-1-60(F)(2) (Supp. 2013). In contested case hearings involving environmental permitting matters, the Administrative Law Judge is the fact finder and makes a *de novo* determination regarding the matters at issue. Brown v. S.C. Dep't of Health and Env'tl. Control, 348 S.C. 507, 560 S.E.2d 410 (2002); Marlboro Park Hosp. v. S.C. Dep't of Health and Env'tl. Control, 358 S.C. 573, 595 S.E.2d 851 (Ct. App. 2004). Also, this Court is required to give deference to the Department's specialized knowledge in environmental matters because "[t]he agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence." S.C. Code Ann. § 1-23-330(2013); S.C. Code Ann. § 44-1-60(F)(2). An agency's construction of a statute or regulation which it is charged with administering is generally entitled to deference by the courts and should be overturned only if "plainly erroneous or inconsistent with the regulation." Fed. Mar. Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 745-46 (1973); Ohio Valley Env'tl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 193 (4th Cir. 2009) (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)); see also Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 496, 536 S.E.2d 892, 900 (Ct. App. 2000) (citing Glover by Cauthen v. Suitt Constr. Co., 318 S.C. 465, 458 S.E.2d 535 (1995)). Petitioner, James Weatherholtz, as the party challenging the denial of the permit, bears the burden of proving that DHEC erred by denying the permit. Leventis v. S.C. Dep't of Health and Env'tl. Control, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000).

Standard of Proof

The standard of proof in weighing the evidence and making a decision on the merits at a contested case hearing is a preponderance of the evidence. Nat'l. Health Corp. v. S.C. Dep't of Health and Env'tl. Control, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989). The weight and credibility assigned to evidence presented at a hearing is within the province of the trier of fact. See S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992) (citing Greyhound Lines, Inc. v. S.C. Pub. Serv. Comm'n, 274 S.C. 161, 165, 262 S.E.2d 18, 20 (1980)). A trial judge who observes a witness is in the best "position to judge the witnesses' demeanor and veracity," and to evaluate the credibility of the testimony. Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996).

General Principles

Permits for private docks in the coastal zone are governed by the South Carolina Coastal Zone Management Act ("CZMA"), S.C. Code Ann. § 48-39-10 et. seq. (2008 & Supp. 2013), and the regulations promulgated pursuant to the Critical Area Permitting Regulations. See S.C. Code Ann. 48-39-130 (Supp. 2013). These regulations enable the Department to govern the management, development, and protection of South Carolina's critical areas by issuing permits. Id. The CZMA defines "critical area" as coastal waters, tidelands, beaches, and the beach/dune system. S.C. Code Ann. § 48-39-10(J) (Supp. 2013). More specifically, the Act defines "coastal waters" as "the navigable waters of the United States subject to the ebb and flood of the tide and which are saline waters, shoreward to their mean high-water mark," S.C. Code Ann. § 48-39-10(F) (2013). It also defines "tidelands" as "all areas at or below mean high tide." S.C. Code Ann. § 48-39-10(G) (Supp. 2013).

I. DHEC correctly denied the Petitioner's permit application for a dock construction permit because the width of the creek was not ten feet.

The Petitioner claims DHEC denied his permit request in error because his parcel included areas of Kushiwah Creek he contends are ten feet wide based on his own measurements and those taken by a land surveyor. The surveyor stated when his team "put in at high tide," a man in a kayak identified as Billy Ferguson "... physically held the prism target along the edge of the marsh grass at...20 different places along the creek." The surveyor who testified, Mr.

Bessent was “not in the boat that day,” but he “sent [his crew] out there” to the Petitioner’s lot. He further stated the points his crew measured along the vegetation were “[his company’s] interpretation of the edge of the marsh grass”. Using their measurements, the surveyor came to the conclusion the width of the creek at the dock location was ten feet.

However, DHEC staff went to the same portion of the creek and using the Department’s historical interpretation of where to begin measuring, found the creek width was only seven and one half to eight feet wide. DHEC’s historical interpretation includes only taking measurements of the creek within only the extended property lines of the lot and using a wetlands expert to determine where the marsh vegetation² begins on either side of the creek bed. Although Petitioners’ expert was deemed an expert in the field of surveying, Petitioner failed to establish that his expert had the requisite expertise to establish where marsh vegetation begins. Such expertise is a crucial component in accurately determining the width of the creek in accordance with the Department’s regulations.

The Department establishes standards for the use of pierheads and docks based on creek widths. Where the creek is found to measure less than 10 feet wide from marsh vegetation on each side, a dock may not be permitted. S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) (2013). The area of marsh vegetation where the measurement started is shown where the spartina grass begins to the port side of the bow of the boat shown in the photo on page four of Respondent’s Exhibit 1. Measuring the vegetation from the left to the right side of the bank, Mr. Thompson found that Kushiwah Creek was less than ten feet wide within Petitioner’s extended property lines. I find that Mr. Thompson was a very credible witness who had many years of experience in taking such measurements. Accordingly, Petitioner’s permit application was denied using the Department’s historical interpretation of measuring marsh vegetation.

² The marsh vegetation is *spartina alterniflora*.

II. DHEC properly denied the permit application based on S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii), because there is a lot with actual dock access from the opposite side of the creek within that property owner's extended property lines that is across the creek from the Petitioner's parcel, and therefore the Petitioner's lot fails to fall within the exception established by S.C. Code Ann 30-12(A)(2)(c)(ii).

The Petitioner argues that an exception to S.C. Code Ann. Regs. 30-12(A)(2)(c)(ii) applies, which allows a dock to be constructed on a creek less than twenty feet if there is no potential dock access from the opposite side of the creek. S.C. Code Ann. Regs. 30-12(A)(2)(c)(ii) reads:

Docks will not be permitted on creeks less than 20 feet wide as measured from marsh vegetation on each side unless one of the following two special geographic circumstances exists: a lot has greater than 500 feet of water frontage or no potential access via dockage from the opposite side of the creek.

The opposite side of the creek includes the land within the neighboring property owner's extended property lines, as defined in relation to waterfront property in S.C. Code Ann. Reg. 30-1(D)(53). There is currently a lot on the opposite side of the creek with actual dock access as well as potential dock access within his extended property lines. Therefore, since there is potential access via dockage from the opposite side of the creek, the Petitioner's lot fails to fall within the exception established by S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii).

CONCLUSION

Based on the Findings of Fact and Conclusions of Law set forth above and the applicable statutory and regulatory requirements discussed above, I find and conclude that DHEC properly denied the Petitioner's permit application.

IT IS THEREFORE, ORDERED, that DHEC's denial of Permit No. OCRM-13-155-D is **AFFIRMED**.


CAROLYN C. MATHEWS
Administrative Law Judge

June 17, 2014.
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Mary Elizabeth Campbell, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

June 17, 2014
Columbia, South Carolina



Mary Elizabeth Campbell
Judicial Law Clerk

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

James Weatherholtz,

Petitioner,

vs.

South Carolina Department of Health and
Environmental Control,

Respondent.

Docket No. 13-ALJ-07-0494-CC

**AMENDED
FINAL ORDER AND DECISION**

August 12, 2014

Appearances: James E. Weatherholtz, Esquire for Petitioner
Bradley D. Churdar, Esquire for Respondent

STATEMENT OF THE CASE

This matter comes before me pursuant to a Request for Contested Case Hearing filed by the Petitioner on October 14, 2013, challenging the decision of South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (hereinafter "Department" or "DHEC" or "OCRM") to deny a permit application to build a dock (Permit No. OCRM-13-155-D). A hearing was held on March 5, 2014, before the Administrative Law Court ("ALC") in Columbia, South Carolina. Based on the evidence before me, I find the denial of the permit application should be affirmed.

ISSUES FOR DETERMINATION

The Petitioner raised the following issues for determination by the ALC:

- I. Whether DHEC improperly denied the permit application based on 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) which provides "docks will not be permitted on creeks less than 10 feet wide as measured from marsh vegetation on each side." Petitioner asserts in his permit application the creek is exactly ten feet wide.
- II. Whether DHEC improperly denied the permit application based on 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) which provides "docks will not be permitted on creeks less than 20 feet wide as measured from marsh vegetation on each side unless one of the following two special geographical circumstances exists: a lot has greater than

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SC ADMIN. LAW COURT

500 feet of water frontage¹ or no potential access via dockage from the opposite side of the creek.”

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and closely passed upon their credibility, taking into consideration the burden of persuasion of the parties, I make the following Findings of Fact by a preponderance of the evidence.

1. The Petitioner, James E. Weatherholtz, owns property on and adjacent to a tributary of Kushiwah Creek (hereinafter referred to only as “Kushiwah Creek”) at 949 Compass Point in Stiles Point Plantation in Charleston, Charleston County, South Carolina.

2. Petitioner applied for a permit to build a dock out to Kushiwah Creek with a five foot by ten foot fixed pierhead and a four foot by two-hundred forty-five foot walkway.

3. Petitioner’s permit application included a survey from land surveyor Thomas Bessent indicating that Kushiwah Creek was ten feet wide.

4. Mr. Bessent relied on measurements obtained by his field crew using an electronic total station instrument.

5. Mr. Bessent did not operate either the electronic total station or the prism in collecting the data used to measure the width of the creek.

6. A man named Billy Ferguson measured from a kayak while holding the prism where he determined the marsh vegetation began.

7. Billy Ferguson did not testify at the hearing.

8. Mr. Bessent reiterated his assertion that the creek width measured ten feet in the area of the proposed dock.

9. Mr. Bessent also testified that he drew a cross-sectional sketch of Kushiwah creek that was marked as the last page of Petitioner’s Exhibit 5.

10. In an email Mr. Bessent sent to the Petitioner four days before trial (February 28, 2014), he described this sketch as part of the “fieldwork on this job.”

¹ Petitioner concedes that his lot does not meet the greater-than-500-feet-of-water-frontage requirement of 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii). Accordingly, the only requirement Petitioner is challenging from 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) is DHEC’s conclusion that there is in fact both potential access and actual access via dockage from the opposite side of Kushiwah Creek.

11. Mr. Bessent further described this sketch in his February 28, 2014 email to Petitioner as "a hand sketch from my file that I made during my discussion with my field crew at the time of the survey."

12. The cross-sectional sketch showed vegetation on each side of Kushiwah Creek that the crew might encounter. The hypothetical sketch depicted the initial vegetation to be seven feet to nine feet apart.

13. Mr. Bessent referred to this initial vegetation on each side of Kushiwah Creek as "sprigs". Mr. Bessent testified that the distance from "sprig to sprig" on the sketch was seven to nine feet. He further testified that the sketch was used to describe to his crew that they should measure from the main vegetation rather than the "sprigs", or initial vegetation.

14. Jeff Thompson, OCRM Project Manager for this permit application, reviewed the permit application and saw the submitted measurement for Kushiwah Creek was ten feet wide.

15. After reviewing the permit application, Jeff Thompson and Fred Mallet, also an OCRM Project Manager, visited the site on July 11, 2013 using a 48 inch wide jonboat.

16. They arrived at Kushiwah Creek about thirty minutes before high tide.

17. Mr. Thompson testified that Kushiwah Creek is so small that even thirty minutes before high tide, the jonboat "hit bottom a time or two."

18. Mr. Thompson testified that when he and Mr. Mallet passed the Petitioner's next door neighbor's dock in a 48 inch wide jonboat, they had to run the jonboat two feet into the marsh to pass by the dock and their jonboat still hit the side of the neighbor's dock as they passed by.

19. Mr. Thompson testified that he began measuring the distance from marsh vegetation to marsh vegetation starting at the vegetation furthest out into the creek just to the left side of the jonboat.

20. Using a survey rod, Mr. Thompson and Mr. Mallet measured Kushiwah Creek's width from the marsh vegetation on each side of the creek.

21. Mr. Thompson and Mr. Mallet took measurements only within the extended property lines of the Petitioner's lot.

22. Mr. Thompson testified that the Petitioner's extended property lines and the extended property lines of the neighboring property owner (who currently has actual access via dockage from the opposite side of the creek) did not conflict. Mr. Thompson testified that the

reason the extended property lines of these two parcels did not conflict is because extended property lines terminate at the edge of the water body closest to each parcel.

23. Mr. Thompson and Mr. Mallet measured the creek width at four different locations within the Petitioner's extended property lines.

24. Mr. Thompson measured the portion of Kushiwah Creek within the Petitioner's extended property lines to be seven and a half to eight feet wide.

25. Mr. Thompson does not interpret 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) as allowing him to permit a dock when just a few feet of the creek width may be greater than ten feet wide, because such a small portion of the creek would not be representative of the creek width.

26. The method of measuring creek width and the method of determining the beginning of marsh vegetation that he and Mr. Mallet used are the same methods for measuring creek width and marsh vegetation that the Department has historically used.

27. Regarding the application of 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) to this permitting decision, Mr. Thompson used a marker to draw the extended property lines of the property on the opposite side of Kushiwah creek as represented by Respondent's Exhibit 5.

28. The extended property lines of the property on the opposite side of Kushiwah Creek form an uneven "pie shape" with a short dock directly in the middle of these two extended property lines and on the opposite side of Kushiwah Creek from the Petitioner's upland property.

29. The property owner on the opposite side of the creek from the Petitioner not only has "potential access via dockage from the opposite side of the creek," but this property owner presently has actual access via dockage from the opposite side of the creek.

30. Mr. Thompson testified that, for purposes of determining whether potential access via dockage from the opposite side of the creek exists or not, it is irrelevant to his permitting decision under 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) that the dock on the opposite side of the creek in the middle of the two "pie shaped" extended property lines in Respondent's Exhibit 5 is not inside the Petitioner's extended property lines. Stated another way, Mr. Thompson considered the fact that the property owner on the opposite side of the creek presently having a dock was a relevant factor in his Reg. 30-12(A)(2)(c)(ii) analysis, despite the fact that this property owner's dock was upstream and outside of the trajectory of Petitioner's extended property lines.

31. Petitioner's permit application for the proposed dock was denied because Mr. Thompson determined that (a) Kushiwah Creek was less than ten feet wide as measured from marsh vegetation on each side; and (b) that there was both actual and potential access via dockage from the opposite side of Kushiwah Creek.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, this Court concludes the following as a matter of law:

Jurisdiction

The South Carolina Administrative Law Court has subject matter jurisdiction over this action based on S.C. Code Ann. § S.C. Code Ann. § 1-23-600(A) (Supp. 2013) and S.C. Code Ann. § 44-1-60(F)(2) (Supp. 2013). In contested case hearings involving environmental permitting matters, the Administrative Law Judge is the fact finder and makes a *de novo* determination regarding the matters at issue. Brown v. S.C. Dep't of Health and Env'tl. Control, 348 S.C. 507, 560 S.E.2d 410 (2002); Marlboro Park Hosp. v. S.C. Dep't of Health and Env'tl. Control, 358 S.C. 573, 595 S.E.2d 851 (Ct. App. 2004). Also, this Court is required to give deference to the Department's specialized knowledge in environmental matters because "[t]he agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence." S.C. Code Ann. § 1-23-330(2013); S.C. Code Ann. § 44-1-60(F)(2). An agency's construction of a statute or regulation which it is charged with administering is generally entitled to deference by the courts and should be overturned only if "plainly erroneous or inconsistent with the regulation." Fed. Mar. Comm'n v. Seatrains Lines, Inc., 411 U.S. 726, 745-46 (1973); Ohio Valley Env'tl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 193 (4th Cir. 2009) (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)); see also Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 496, 536 S.E.2d 892, 900 (Ct. App. 2000) (citing Glover by Cauthen v. Suitt Constr. Co., 318 S.C. 465, 458 S.E.2d 535 (1995)). Petitioner, James Weatherholtz, as the party challenging the denial of the permit, bears the burden of proving that DHEC erred by denying the permit. Leventis v. S.C. Dep't of Health and Env'tl. Control, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000).

Standard of Proof

The standard of proof in weighing the evidence and making a decision on the merits at a contested case hearing is a preponderance of the evidence. Nat'l. Health Corp. v. S.C. Dep't of Health and Env'tl. Control, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989). The weight and credibility assigned to evidence presented at a hearing is within the province of the trier of fact. See S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992) (citing Greyhound Lines, Inc. v. S.C. Pub. Serv. Comm'n, 274 S.C. 161, 165, 262 S.E.2d 18, 20 (1980)). A trial judge who observes a witness is in the best "position to judge the witnesses' demeanor and veracity," and to evaluate the credibility of the testimony. Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996).

General Principles

Permits for private docks in the coastal zone are governed by the South Carolina Coastal Zone Management Act ("CZMA"), S.C. Code Ann. § 48-39-10 et. seq. (2008 & Supp. 2013), and the regulations promulgated pursuant to the Critical Area Permitting Regulations. See S.C. Code Ann. 48-39-130 (Supp. 2013). These regulations enable the Department to govern the management, development, and protection of South Carolina's critical areas by issuing permits. Id. The CZMA defines "critical area" as coastal waters, tidelands, beaches, and the beach/dune system. S.C. Code Ann. § 48-39-10(J) (Supp. 2013). More specifically, the Act defines "coastal waters" as "the navigable waters of the United States subject to the ebb and flood of the tide and which are saline waters, shoreward to their mean high-water mark," S.C. Code Ann. § 48-39-10(F) (2013). It also defines "tidelands" as "all areas at or below mean high tide." S.C. Code Ann. § 48-39-10(G) (Supp. 2013).

I. DHEC correctly denied the Petitioner's permit application for a dock construction permit because the width of the creek was not ten feet.

The Petitioner claims DHEC denied his permit request in error because his parcel included areas of Kushiwah Creek he contends are ten feet wide based on his own measurements and those taken by a land surveyor. The surveyor stated when his team "put in at high tide," a

man in a kayak identified as Billy Ferguson "... physically held the prism target along the edge of the marsh grass at...20 different places along the creek." The surveyor who testified, Mr. Bessent was "not in the boat that day," but he "sent [his crew] out there" to the Petitioner's lot. He further stated the points his crew measured along the vegetation were "[his company's] interpretation of the edge of the marsh grass". Using their measurements, the surveyor came to the conclusion the width of the creek at the dock location was ten feet.

However, DHEC staff went to the same portion of the creek and using the Department's historical interpretation of where to begin measuring, found the creek width was only seven and one half to eight feet wide. DHEC's historical interpretation includes only taking measurements of the creek within only the extended property lines of the lot and using a wetlands expert to determine where the marsh vegetation² begins on either side of the creek bed. Although Petitioners' expert was deemed an expert in the field of surveying, Petitioner failed to establish that his expert had the requisite expertise to establish where marsh vegetation begins. Such expertise is a crucial component in accurately determining the width of the creek in accordance with the Department's regulations.

The Department establishes standards for the use of pierheads and docks based on creek widths. Where the creek is found to measure less than 10 feet wide from marsh vegetation on each side, a dock may not be permitted. S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) (2013). The area of marsh vegetation where the measurement started is shown where the spartina grass begins to the port side of the bow of the boat shown in the photo on page four of Respondent's Exhibit 1. Measuring the vegetation from the left to the right side of the bank, Mr. Thompson found that Kushiwah Creek was less than ten feet wide within Petitioner's extended property lines. I find that Mr. Thompson was a very credible witness who had many years of experience in taking such measurements. Accordingly, Petitioner's permit application was denied using the Department's historical interpretation of measuring marsh vegetation.

² The marsh vegetation is *spartina alterniflora*.

- II. DHEC properly denied the permit application based on S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii), because there is a lot with actual dock access from the opposite side of the creek within that property owner's extended property lines that is across the creek from the Petitioner's parcel, and therefore the Petitioner's lot fails to fall within the exception established by S.C. Code Ann 30-12(A)(2)(c)(ii).**

The Petitioner argues that an exception to S.C. Code Ann. Regs. 30-12(A)(2)(c)(ii) applies, which allows a dock to be constructed on a creek less than twenty feet if there is no potential dock access from the opposite side of the creek. S.C. Code Ann. Regs. 30-12(A)(2)(c)(ii) reads:

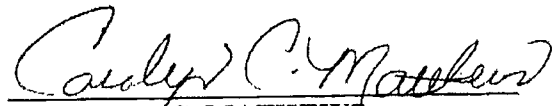
Docks will not be permitted on creeks less than 20 feet wide as measured from marsh vegetation on each side unless one of the following two special geographic circumstances exists: a lot has greater than 500 feet of water frontage or no potential access via dockage from the opposite side of the creek.

The opposite side of the creek includes the land within the neighboring property owner's extended property lines, as defined in relation to waterfront property in S.C. Code Ann. Reg. 30-1(D)(53). There is currently a lot on the opposite side of the creek with actual dock access as well as potential dock access within his extended property lines. Therefore, since there is potential access via dockage from the opposite side of the creek, the Petitioner's lot fails to fall within the exception established by S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii).

CONCLUSION

Based on the Findings of Fact and Conclusions of Law set forth above and the applicable statutory and regulatory requirements discussed above, I find and conclude that DHEC properly denied the Petitioner's permit application.

IT IS THEREFORE, ORDERED, that DHEC's denial of Permit No. OCRM-13-155-D is **AFFIRMED**.

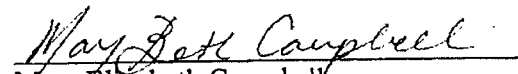

CAROLYN C. MATHEWS
 Administrative Law Judge

August 12, 2014
 Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Mary Elizabeth Campbell, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

August 12, 2014
 Columbia, South Carolina


 Mary Elizabeth Campbell
 Judicial Law Clerk

7/94

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

James Weatherholtz,

Petitioner,

vs.

South Carolina Department of Health and
Environmental Control,

Respondent.

**AGENCY INFORMATION SHEET
and NOTICE OF APPEARANCE
Contested Case**

DOCKET NO. 13-ALJ-07-0494-CC

1. Identifying information on the matter in controversy (Name and/or title of agency proceeding, statutory provisions giving rise to the controversy, file number or any other identifying information):

S.C. Department of Health and Environmental Control – OGC No. 21985

Statutory provision(s) giving rise to the controversy:

S. C. Code Ann. §48-39-10, et seq., (Supp. 2008) and 23A S.C. Code Ann. Regs. R.30-through R.30-18, (Supp. 2007).
Specifically, S. C. Code Reg. 30-11(C)(1), R.30-12(A)(2)(c)(i), and R.30-12(A)(2)(c)(ii).

August 7, 2013, decision to deny a permit for application for P/N # OCRM-13-155-D for a private recreational dock on James Island, SC.

2. Has the agency staff issued a final written decision regarding its action or inaction in this matter?

 X yes no (If yes, please attach a copy.)

3. Name, address and telephone numbers of all known parties and their attorneys, if represented:

Bradley D. Churdar
Nathan Haber
South Carolina Department of Health and
Environmental Control
1362 McMillan Avenue, Suite 400
North Charleston, SC 29405
(843) 953-0229
(843) 953-0201 (fax)
Attorneys for Petitioner SCDHEC

Contact for Petitioner

James E. Weatherholtz
949 Compass Point
Charleston, SC 29412
Telephone: (843) 425-7232
Email: jweatherholtz@wcsr.com

4. Name, address and telephone number of any persons who have exercised their legal right to object to the issuance of the permit or license:

By submittal of the Agency Information Sheet and Notice of Appearance, SCDHEC does not waive and specifically reserves any objections it may have to jurisdiction, standing matters in controversy, or any other defenses it may raise.

Pursuant to ALC Rule 8(B), notice is hereby given that the undersigned is authorized to and will be representing the above named agency in this matter. Further, by my signature below, I certify that a copy of this information sheet has been served on all parties and/or protestants by first class mail on the date shown below.



Name: Bradley Churdar, Esq.

E-mail: Bradley.Churdar@dhec.sc.gov

SC Bar #: 12829

Name: Nathan Haber, Esq.

E-mail: Nathan.Haber@dhec.sc.gov

SC Bar #: 100480

Address: SCDHEC – Office of General Counsel

1362 McMillan Avenue, Suite 400

Charleston, SC 29405

Phone: (843) 953-0200; Fax: (843) 953-0201

Paralegal: Denise Crawford

Paralegal: Denise.Crawford@dhec.sc.gov

Date: November 19, 2013

OGC #21985

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

James E. Weatherholtz,	)	Docket No. 13-ALJ-07-0494-CC
	)	
Petitioner,	)	
	)	
vs.	)	
	)	PETITIONERS' PREHEARING
South Carolina Department of Health and	)	STATEMENT
Environmental Control,	)	
	)	
Respondent.	)	
	)	

Petitioner hereby provides the following Prehearing Statement:

1. The nature of this proceeding.

ANSWER: Appeal of the denial of dock permit for application number OCRM-13-155-D submitted by James and Taryn Weatherholtz seeking a private recreational dock.

2. Statutory provision(s) conferring subject matter jurisdiction to the agency and other applicable statutes and regulations.

ANSWER: S.C. Code Annotated §48-39-10, *et seq.*

Coastal Zone Management Act and the Office of Ocean and Coastal Resource Management's Regulations, primarily:

S.C. Code Reg. Ann. 30-12(A)(2)(c)(i): Docks will not be permitted on creeks less than 10 feet wide as measured from marsh vegetation on each side.

S.C. Code Reg. Ann. 30-12(A)(2)(c)(ii): Docks will not be permitted on creeks less than 20 feet wide as measured from marsh vegetation on each side unless one of the follow two special geographic circumstances exist: a lot has greater than 500 feet of water frontage or no potential access via dockage from the opposite side of the creek.

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

ANSWER: Whether or not the Agency's denial of the requested dock permit was in accordance with the applicable statutes and rules and regulations pertaining to issuance of dock permits by the Agency.

4. The action requested of the Court, if any.

ANSWER: Reverse the denial of the requested dock permit.

5. A brief summary of the facts to be presented at the hearing.

ANSWER: Petitioner will demonstrate that the requested dock permit is in accordance with applicable statutes, rules and regulations. Specifically, Petitioner will present evidence that the subject creek has the required minimum width (10 feet) in the location where the placement of the dock is proposed. In addition, Petitioner will present evidence that no potential access via dockage from the opposite side of the creek presently exists.

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

ANSWER: None anticipated at this time.

7. A list of proposed witnesses and exhibits. Parties may supplement this list no later than ten (10) days prior to a hearing without showing good cause.

ANSWER:

Witnesses

Thomas V. Bessent, Registered Land Surveyor, Island Surveying, Inc.

James E. Weatherholtz

Exhibits

Permit application package, including survey and other documents related to the application

Correspondence between the Agency and Petitioner

Photographs showing creek widths and measurements and aerial views

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

ANSWER: Limited discovery is requested. Petitioner expects discovery to be completed within 90 days.

9. Estimated time required for the hearing, and any dates the parties, counsel or key witnesses are specifically unavailable during the next three months.

ANSWER: Petitioner expects the hearing to be completed in one day. At this time, Petitioner is unavailable February 12 and March 26, 2014.

10. Please note if any party deems it necessary for the undersigned to conduct a prehearing scheduling conference or issue an order regarding motions, discovery, etc.

ANSWER: Not applicable at this time.

Respectfully submitted,



James E. Weatherholtz
949 Compass Point
Charleston, South Carolina 29412

December 23, 2013
Charleston, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

James Weatherholtz,	)	DOCKET NO. 13-ALJ-07-0494-CC
	)	
Petitioner,	)	
	)	
vs.	)	DEPARTMENT'S PREHEARING
	)	STATEMENT
South Carolina Department of Health and	)	
Environmental Control,	)	
	)	
Respondent.	)	
	)	

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

1. Nature of the proceeding:

This contested case arises as an appeal of the Department's decision to deny permit application number OCRM-13-155-D.

2. The statutory provision(s) conferring subject matter jurisdiction and other applicable statutes and regulations:

The Court's subject matter jurisdiction arises from S.C. Code Ann. §§ 48-39-10, *et seq.* Other applicable statutory and regulatory provisions include:
23A S.C. Code Ann. Regs. 30-1 through 30-18 (Supp. 2007).
Specifically, S. C. Code Ann. 48-39-150 and S. C. Code Regs. 30-11 and 30-12.

3. Issues to be presented for determination:

Whether the Department properly applied the Coastal Zone Management Act and Critical Area Regulations in denying permit application number OCRM-13-155-D.

4. Action of the Court, if any:

The Department respectfully requests that Court affirm the Department's denial of permit application number OCRM-13-155-D.

5. A brief summary of the facts to be presented at the hearing:

The Department denied permit application number OCRM-13-155-D to Petitioner James Weatherholtz for the construction of a private recreational dock consisting of a 4' x 245' walkway leading to a 5' x 10' fixed pier on and adjacent to Kushiwah Creek at 949 Compass Point, Stiles Point Plantation, Charleston, South Carolina.

The Petitioner challenges the Department's denial of this permit application.

6. Summary of motions expected to be raised at the hearing and the appropriate authority underlying the motion:

The Department does not anticipate the filing of any motions at this time. However, the Department reserves the right to amend this Prehearing Statement to reflect the filing of additional motions filed prior to the hearing in this matter.

7. A list of proposed witnesses and exhibits is as follows:

Witnesses: Jeff Thompson, DHEC-OCRM

Blair Williams, DHEC-OCRM

Any witness named by any other party to this litigation.

Exhibits: The exhibits will consist of the Department's permitting file.

The Department reserves the right to supplement this list of witnesses and exhibits as discovery progresses and the issues in this case are more fully developed.

8. Discovery is necessary and the parties are in the process of conducting discovery.

9. The estimated time required for the hearing:

The hearing in this matter should last approximately one day.

10. No Prehearing scheduling conference or order regarding motions, discovery, etc. is necessary at this time.

Respectfully Submitted,



Bradley D. Churdar, SC Bar # 12829
Nathan M. Haber, SC Bar # 100480
South Carolina Department of Health and
Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405
(843) 953-0229
Attorney for Respondent SCDHEC
habernm@dhec.sc.gov
crawfomd@dhec.sc.gov

December 30, 2013
Charleston, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

James Weatherholtz,	)	DOCKET NO. 13-ALJ-07-0494-CC
	)	
Petitioner,	)	
	)	
vs.	)	DEPARTMENT'S AMENDED
	)	PREHEARING STATEMENT
South Carolina Department of Health and	)	
Environmental Control,	)	
	)	
Respondent.	)	
_____	)	

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

1. **Nature of the proceeding:**
This contested case arises as an appeal of the Department's decision to deny permit application number OCRM-13-155-D.

2. **The statutory provision(s) conferring subject matter jurisdiction and other applicable statutes and regulations:**
The Court's subject matter jurisdiction arises from S.C. Code Ann. §§ 48-39-10, *et seq.* Other applicable statutory and regulatory provisions include:
23A S.C. Code Ann. Regs. 30-1 through 30-18 (Supp. 2007).
Specifically, S. C. Code Ann. 48-39-150 and S. C. Code Regs. 30-11 and 30-12.

3. **Issues to be presented for determination:**
Whether the Department properly applied the Coastal Zone Management Act and Critical Area Regulations in denying permit application number OCRM-13-155-D.

4. **Action of the Court, if any:**
The Department respectfully requests that Court affirm the Department's denial of permit application number OCRM-13-155-D.

5. **A brief summary of the facts to be presented at the hearing:**
The Department denied permit application number OCRM-13-155-D to Petitioner James Weatherholtz for the construction of a private recreational dock consisting of a 4' x 245' walkway leading to a 5' x 10' fixed pier on and adjacent to Kushiwah Creek at 949 Compass Point, Stiles Point Plantation, Charleston, South Carolina.

The Petitioner challenges the Department's denial of this permit application.

6. **Summary of motions expected to be raised at the hearing and the appropriate authority underlying the motion:**

The Department does not anticipate the filing of any motions at this time. However, the Department reserves the right to amend this Prehearing Statement to reflect the filing of additional motions filed prior to the hearing in this matter.

7. **A list of proposed witnesses and exhibits is as follows:**

Witnesses: Jeff Thompson, DHEC-OCRM
Blair Williams, DHEC-OCRM
Joshua Boulware, DHEC-OCRM
Any witness named by any other party to this litigation.
Exhibits: The exhibits will consist of the Department's permitting file.

The Department reserves the right to supplement this list of witnesses and exhibits as discovery progresses and the issues in this case are more fully developed.

8. **Discovery is necessary and the parties are in the process of conducting discovery.**

9. **The estimated time required for the hearing:**

The hearing in this matter should last approximately one day.

10. **No Prehearing scheduling conference or order regarding motions, discovery, etc. is necessary at this time.**

Respectfully Submitted,



Bradley D. Churdar, SC Bar # 12829
Nathan M. Haber, SC Bar # 100480
South Carolina Department of Health and
Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405
(843) 953-0229
Attorney for Respondent SCDHEC
habernm@dhec.sc.gov
crawfomd@dhec.sc.gov

February 28, 2014
Charleston, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

James E. Weatherholtz,	)	Docket No. 13-ALJ-07-0494-CC
	)	
Petitioner,	)	
	)	
vs.	)	
	)	FINAL ORDER AND DECISION
South Carolina Department of Health and	)	
Environmental Control,	)	
	)	
Respondent.	)	
_____	)	

Appearances

Petitioner James E. Weatherholtz, licensed attorney but appearing *pro se*

Counsel for Respondent South Carolina Department of Health and Environmental Control,
Bradley D. Churdar, Esq.

Court Reporter: Andrea R. Taylor

STATEMENT OF THE CASE

This matter came before the Administrative Law Court (“ALC” or “the Court”) for a contested case hearing on March 5, 2014. Petitioner James E. Weatherholtz challenges the action of Respondent South Carolina Department of Health and Environmental Control (“DHEC”) and its Office of Ocean and Coastal Resource Management (“OCRM”) related to OCRM Permit Application No. OCRM-13-155-D. Petitioner seeks approval of his application to build a private residential dock at his residence.

FINDINGS OF FACT

After careful consideration of the sworn testimony presented at the hearing, the documents, photographs, and other exhibits admitted into evidence, and the entire record in this proceeding, I make the following Findings of Fact by a preponderance of the evidence.

On or about June 13, 2013, Petitioner submitted a permit application to build a private recreational dock with an approximately 245' walkway and a 5' by 10' pierhead from his house located at 949 Compass Point, in Charleston, South Carolina to a tributary of Kushiwah Creek (the "Creek"). Petitioner's application included a series of stamped surveys prepared by Island Surveying, Inc.:

- dock layout (Petitioner's Ex. 1)
- dock detail (Petitioner's Ex. 2)
- cross-section of the proposed dock (Petitioner's Ex. 3)
- survey showing the S.C. DHEC-OCRM critical line along the rear edge of the lot and accepted on behalf of DHEC by David J. Thompson on May 23, 2013 (Petitioner's Ex. 4)

All surveys are stamped by registered land surveyor Thomas V. Bessent (RLS #10778). The proposed dock layout and dock detail drawings show the width of the Creek as 10 feet at the proposed location of the dock.

By letter dated August 7, 2013 (Petitioner's Ex. 7), DHEC denied Petitioner's application based on two sections of the Coastal Zone Management Act and the Office of Ocean and Coastal Resource Management Regulations:

- S.C. Code Reg. Ann. 30-12(A)(2)(c)(i): Docks will not permitted on creeks less than 10 feet wide as measured from marsh vegetation on each side.
- S.C. Code Reg. Ann. 30-12(A)(2)(c)(ii): Docks will not be permitted on creeks less than 20 feet wide as measured from marsh vegetation on each side unless one of the following two special geographic circumstances exist: a lot has greater than 500 feet of water frontage or no potential access via dockage from the opposite side of the creek.

See S.C. Code Reg. 30-12(A)(2)(c) (Supp. 2013). Specifically, DHEC took the position that the Creek was less than 10 feet wide, and that potential access via dockage from the opposite side of

the Creek did exist. DHEC did not explain in its August 7, 2013 letter how that potential access from the opposite side of the Creek might exist, it simply cited the regulation.

By letter dated August 20, 2013 (Petitioner's Ex. 8), Petitioner filed a Request for Final Review. In support of his request, Petitioner cited to the stamped surveys prepared by Thomas Bessent – showing the Creek width as 10 feet – and he referenced measurements he had personally taken in sections of the Creek, including the location of the proposed dock.

As to Section 30-12(A)(2)(c)(ii), Petitioner pointed out that the only two houses with access to the Creek from the opposite side have docks in place already, neither of which is opposite the location of Petitioner's proposed pierhead and both of which are outside Petitioner's extended lot lines. The first dock extends east across the marsh to the main body of Kushiwah Creek – not to the same tributary – and the second dock is located on the same tributary but farther up the Creek from Petitioner's proposed dock location.¹ As such, Petitioner argued that there was no potential for access via dockage from the opposite side of the Creek.

On September 5, 2013, DHEC issued a staff response to Petitioner's Request for Final Review (Petitioner's Ex. 9). In that response, relating specifically to Section 30-12(A)(2)(c)(ii), DHEC noted that "there is an existing dock from the opposite shore slightly upstream from the location of his proposed dock, which demonstrates potential access via dockage from the opposite shore even if the creek was 10 feet or greater in width." DHEC's response letter makes no mention of the fact that the existing dock is outside Petitioner's extended lot lines and it does not reference the possibility that the dock might be moved to a location that actually is opposite Petitioner's proposed dock.

¹ Only one of those two houses is still at issue in the case. The first house, with the existing dock extending to the main body of Kushiwah creek, was not argued by DHEC to constitute "potential access."

During the hearing, Petitioner entered into evidence the stamped surveys listed above. Petitioner also entered photographic and testimonial evidence relating to the width of the Creek. On August 1, 2013, after receiving an email from DHEC suggesting that the Creek may be less than 10 feet wide, Petitioner measured the width of the Creek using a tape measure and his photographs show the width of the Creek is 10 feet wide and greater in the areas measured (Petitioner's Ex. 11 and Trans. 95:3 – 96:15).

In addition, Petitioner sought to provide more reliable, objective evidence of the Creek width, so he purchased a PVC pipe measuring 10 feet 5/16 inches long and affixed the pipe to the front end of his canoe. Petitioner positioned the canoe in the middle of the Creek and photographed the entire length of the PVC pipe fully within the marsh vegetation on either side of the Creek in numerous locations. Petitioner documented the creek as more than 10 feet wide in three separate areas as described below:

- Petitioner's Ex. 13 (A – E) shows the width of the Creek in multiple locations at and near the location of the proposed dock (all within Petitioner's extended lot lines). With the exception of one photograph showing a few blades of grass inside the end of the PVC pipe (Ex. 13-C), the Creek is wider than 10' in all photographs (Trans. 97:7 – 100:4).
- Petitioner's Ex. 14 (A – C) shows the area just outside Petitioner's extended lot line to the west, immediately past the bend in the Creek and before reaching the next dock upstream. The Creek width in this location is well over 10' (Trans. 100:4 – 101:18; Ex. 10-D and 10-E (aerial views)).
- Petitioner's Ex. 15 (A – D) shows the area within Petitioner's extended lot line to the east but on the other side of an existing dock immediately adjacent to Petitioner's house. The Creek width in this location is well over 10' as well. (Trans. 101:19 – 102:21).
- Petitioner's Ex. 17, present at trial, is the actual PVC pipe used by Petitioner to show the distance between the marsh vegetation on either side of the Creek.

DHEC presented photographs of one measurement taken using a measuring rod on July 11, 2013, a day when the maximum high tide was 4.7 feet. DHEC did not present a survey or a stamped drawing of any kind showing the width of the Creek.

Based on the preponderance of evidence submitted at trial, the Court finds that the Creek is 10 feet wide and greater in multiple sections, including the location of the fixed pierhead as shown in Petitioner's proposed dock layout and dock detail (Petitioner's Ex. 1 and 2).

Petitioner and DHEC also submitted evidence showing the marsh configuration in the critical area, including all lots with potential access to the same Creek. Because there are no lots directly behind Petitioner's house (only an expanse of marsh that continues all the way to the Charleston Harbor), only one house, located northwest of the proposed dock location, has any possible access to the same Creek from the other side. That house already has a dock in place, which dock is upstream from Petitioner and outside Petitioner's extended lot lines (Trans. 199:22 – 200:2). That existing dock is not directly opposite Petitioner's proposed dock location, it would not encroach on Petitioner's proposed pierhead, and, if Petitioner's permit is granted, there would be no issue of blocking navigation in the Creek created by competing pierheads directly opposite one another.

CONCLUSIONS OF LAW

I. Jurisdiction and General Principles

The ALC has jurisdiction over this case pursuant to the South Carolina Administrative Procedures Act, S.C. Code Ann. §§ 44-1-60 et seq. ("APA"), S.C. Code Ann. §§ 48-39 – 150 *et seq.*, and 23A S.C. Regulations R. 30-6. In reviewing this matter, the Court serves as the finder of fact and makes a *de novo* determination regarding the matters in controversy. *See* S.C. Code Ann. §§44-1-60, 1-23-600(B) (Supp. 2012); *Brown v. S.C. Dep't of Health and Envtl. Control*,

348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002); *see also Marlboro Park Hosp. v. S.C. Dep't of Health and Envtl. Control*, 358 S.C. 573, 595 S.E.2d 851 (2004). The proper standard of proof to be applied in a contested case before the ALC is a "preponderance of the evidence" standard. *Anonymous (M-156-90) v. State Bd. of Medical Examiners*, 329 S.C. 371, 375-376. 496 S.E.2d 17, 19 (1998); *National Health Corp. v. Dep't of Health and Envtl. Control*, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989). The weight and credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. *See S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co.*, 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992). "It is generally recognized that the trier of fact, who has the opportunity to observe the witnesses and listen to their testimony in person, is in the best position to determine issues of witness credibility." *Dixon v. Dixon*, 336 S.C. 260, 263, 519 S.E.2d 357, 358 (Ct. App. 1999).

Permits for the construction of private docks in the coastal zone are governed by the South Carolina Coastal Zone Management Act, S.C. Code Ann. §§ 48-39-19 (West Supp. 2005). Those regulations govern the management, development, and protection of the critical areas and coastal zones of the state. DHEC's Office of Ocean and Coastal Resource Management (OCRM) has the duty of carrying out South Carolina's coastal zone policies and issuing permits for docks and piers in the critical areas of the coastal waters and tidelands. S.C. Code Ann. § 48-39-130 (West Supp. 2005).

II. The Width of the Creek

Reg. 30-12(A)(2)(c)(i) states that "[d]ocks will not be permitted on creeks less than 10 feet wide as measured from marsh vegetation on each side." Petitioner submitted stamped surveys showing the width of the Creek as 10 feet in the location of the proposed dock. At the hearing, Petitioner called Tom Bessent to explain the field work that resulted in the creation of

those surveys. Tom Bessent is a member and former director of the South Carolina Society of Professional Land Surveyors (SCSPLS) and the past president of the Coastal Chapter of the SCSPLS. He has a B.S. in Marine Biology from the College of Charleston and has been registered as a professional land surveyor since 1986 (PLS No. 10778). He is experienced in critical area surveying and recreational dock placements, and he was admitted as an expert witness in the area of land surveying.

Mr. Bessent instructed his field crew to take measurements at the edge of the marsh grass on either side of the creek and those data points are reflected on Petitioner's Ex. 5, pages 1 and 2. On multiple occasions, including on cross-examination, Mr. Bessent testified that his measurements were greater than 10 feet in the area of the proposed dock ("those [data] points actually came out to 10.2 feet, something like that, 10.1, 10.2. It came out to something that started with a ten, so I felt comfortable calling it ten feet on the drawing.") (Trans. P. 55:14 – 56:12).

In addition, Petitioner provided 15 photographs of multiple and varied locations documenting measurements taken with a tape measure and a 10' 5/16" section of PVC pipe. Those photographs show the width of the Creek as greater than 10 feet in numerous places, including the location of the proposed dock.

DHEC called one witness to testify, Jeff Thompson, the OCRM project manager for Petitioner's application. Mr. Thompson testified that his measurements of the Creek width in the proposed dock location were less than 10 feet. Mr. Thompson did not take measurements or consider the width of the Creek outside that specific area (Trans. 173:18-21; 185:2-5). Importantly, Mr. Thompson explained that his reference point for taking measurements would be the sprigs on one side of the creek to the springs on the other side, as hypothetically depicted on

page 3 of Petitioner's Ex. 5 (Trans. 190:4-13). Although Mr. Thompson did not initially take measurements of any area outside the specific proposed dock location, he admitted at trial that, after Petitioner invited him and DHEC's counsel to tour the Creek together in November 2013, he did measure areas that were wider than 10 feet (areas not in the exact location of the proposed dock; rather, the areas depicted in Petitioner's Ex. 14 and 15). During that same visit, Mr. Thompson declined Petitioner's invitation to take measurements in the proposed dock location because he considered the area too small to be representative of the creek width (Trans. 192:8-16).

Petitioner and his registered land surveyor have provided survey instrument measurements and objective photographic evidence of a creek width greater than 10 feet in the location of the proposed dock as shown on Petitioner's Ex. 1 and 2. The weight of evidence in the record establishes that the creek is 10 feet wide or more in that location, among other areas in the Creek, and the requirements of Reg. 30-12(A)(2)(c)(i) are thereby satisfied.

III. Potential Dock Access from the Opposite Side of the Creek

Reg. 30-12(A)(2)(c)(ii) states that "[d]ocks will not be permitted on creeks less than 20 feet wide as measured from marsh vegetation on each side unless one of the following two special geographic circumstances exist: a lot has greater than 500 feet of water frontage or no potential access via dockage from the opposite side of the creek." Petitioner acknowledges that his lot does not have greater than 500 feet of water frontage on the Creek. Therefore, this Court must consider the potential for access via dockage from the opposite side of the Creek.

Petitioner's Ex. 10(A – E) is a series of aerial photographs showing the critical area in question. The photographs begin with an expansive view of the entire marsh beginning at the edge of the Charleston Harbor and ending at Petitioner's rear lot line (Ex. 10-A). From there, the

photographs progressively drill down to the section of the Creek where Petitioner proposes to build a dock (Ex. 10 B-E). Petitioner presented evidence that the only possible lot with potential access to the same Creek from the other side already has a dock in place. That dock is shown on the far left side of Petitioner's Ex. 10-D and is located outside Petitioner's extended lot lines. Petitioner proposes to build a dock roughly in the center of Ex. 10-D, as more specifically shown on Petitioner's Ex. 1 and 2 (dock layout and dock detail). The existing dock is not "opposite" the location of Petitioner's proposed dock and there is no threat of competing pierheads encroaching on one another or potentially blocking navigation through the Creek.

DHEC submits two reasons for denying Petitioner's application under Reg. 30-12(A)(2)(c)(ii). First, DHEC states "there is an existing dock from the opposite shore slightly upstream from the location of his proposed dock, which demonstrates potential access via dockage from the opposite shore..." (Petitioner's Ex. 9, p. 2). This argument was the only one presented to Petitioner in the Staff Response to Petitioner's Request for Final Review dated September 5, 2013. DHEC acknowledges the existing dock is outside Petitioner's extended lot lines; nonetheless, DHEC did consider that dock for the purpose of applying Reg. 30-12(A)(2)(c)(ii) and denying the application.²

Under DHEC's application of the regulation, any potential dock access from the other side, even it were a mile upstream, could be considered a dock on the "opposite shore" of the creek and sufficient to deny a permit. That interpretation leads to an absurd result. In fact, DHEC used the exact same logic to explain why it would not consider measurements outside the specific location of the proposed dock when determining the 10' creek width (Trans. 173:18 - 174:2, explaining that, "When I'm measuring a creek width for purposes of permitting, I don't

² Paradoxically, DHEC refused to consider anything outside Petitioner's extended lot lines for the purpose of applying Reg. 30-12(A)(2)(c)(i) (the 10 foot creek width requirement).

measure the creek outside the area where a dock might go. You know, I could, you know, I could run downstream far enough and I've got Charleston Harbor. I've got a thousand feet of water out there."). DHEC has identified no objective standard by which to measure proximity of that competing dock access – or closeness to a proposed dock location – in a way that can fairly and reasonably be applied to all potential applicants. Instead, under its interpretation here, DHEC might deny any permit application where, someplace upstream or downstream, potential dock access exists from the other side, even if it were nowhere close to the proposed dock location.

The word "opposite" is not defined in the regulation. "Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning." *Lee v. Thermal Engineering Corp.*, 352 S.C. 81, 91-92, 572 S.E.2d 298, 303 (Ct. App. 2002); see also *S.C. Coastal Conservation League v. Dep't of Health and Env'tl. Control*, 390 S.C. 418, 425, 702 S.E.2d 246, 250 (2010) ("[u]nless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning"). "Opposite" is defined in the dictionary as "located directly across from something else, or from each other." Wiktionary, <http://en.wiktionary.org/wiki/opposite>. The existing dock cited by DHEC as a basis for denying Petitioner's permit is outside Petitioner's extended lot lines and is not directly across from the location of Petitioner's proposed dock.

DHEC's interpretation is also inconsistent with at least one main purpose of the regulations. As testified to by DHEC's only witness at trial, creek width regulations were promulgated for ecological and navigational reasons (Trans. 157:5-10). The introductory paragraph to Reg. 30-12 actually emphasizes navigational considerations: "Docks and piers sometimes pose navigational problems, restrict public use of the water and, under certain

circumstances, possess potential for creating environmental problems.” See S.C. Code Reg. 30-12(A). This regulation is intended to ensure adequate creek width for access where competing pierheads directly across from one another might block navigation. There is no such concern raised by this existing dock, nor is there evidence of particular environmental impact. Courts may reject an agency’s interpretation of its own regulations where the plain language of the statute is contrary to the interpretation of the agency. *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003). DHEC’s consideration of docks (existing or potential) outside an applicant’s extended lot lines is inconsistent with the express language of the regulation.

Second, DHEC takes the position, for the first time at trial, that “potential access” includes the possibility that existing docks might be torn out and moved (this theory was not stated as a ground for denial in either Respondent’s initial denial letter (Petitioner’s Ex. 7) or Respondent’s Staff Response (Petitioner’s Ex. 9)). Here, DHEC argues that the existing dock outside Petitioner’s extended lot lines might be moved to a location inside those lot lines. Respondent’s Ex. 5 is a Charleston County GIS map aerial view showing the lots and approximate lot lines surrounding the critical area in question. According to DHEC, the owner of lot 017 as shown on Respondent’s Ex. 5 might tear out a relatively short existing dock, seek approval from DHEC to build a new dock 5 or 6 times longer than the original one, and build a pierhead on a section of the Creek beyond an existing dock adjacent to Petitioner’s lot to the east but nonetheless within Petitioner’s extended lot lines. This is possible because of the pie shaped-nature of lot 017 and its resulting extended lot lines that cover a huge section of the Creek (Respondent’s Ex. 5). Through a series a hypotheticals, DHEC argues that an existing dock might be moved in such a way that it could be built on the other side of the Creek within

Petitioner's extended lot lines, although not necessarily opposite (or directly across from) Petitioner's proposed dock.

There is no evidence that the owners of lot 017 have any intention of tearing out their existing dock and seeking approval to build a new one (Trans. 220:19 – 221:4). In addition, there is no substantial evidence, and certainly no guarantee, that such a permit application would be approved by DHEC. There are a number of regulations that bear on whether such a request might be granted. In fact, given the configuration of the critical area in this location, Reg. 30-12(A)(2)(c)(ii) likely would be used to deny any such application: there are multiple lots across the marsh from lot 017 that might access this section of the Creek from the other side within lot 017's extended lot lines (i.e., lots 132, 133, 135 (Petitioner's lot), and 136); in contrast, those four lot owners only have lot 017 on the other side (and it already has a dock outside the extended lot lines of 3 of those 4 houses).

Further, it is conceivable, one supposes, that the joint dock adjacent to Petitioner might be torn out and replaced with two individual docks, which, in turn, might further affect the future ability of lot 017 to move its existing dock. In particular, that new dock might be directly across from lot 017's hypothetical new placement. If that occurred, and lot 17 was required to leave its existing dock in place, then, hypothetically, Petitioner would no longer be barred by the potential for lot 017's dock to be moved. Put another way, if DHEC applied the same hypotheticals to the theoretical moving of lot 017's existing dock, then that request would be denied and Petitioner would be back where he is now, situated on a creek where the only lot on the other side already has a dock, one that is located upstream and outside his extended lot lines.

None of those facts are before the Court, however, and DHEC's consideration of hypotheticals and qualified possibilities in its permitting decisions leads to inconsistent, unfair

results, including a severe limitation on the construction of new docks that was not clearly contemplated by the legislature. In effect, DHEC would deny permit applications based on possibilities that may not, and in certain cases could not, ever happen. DHEC's broad reading and broad application of Reg. 30-12(A)(2)(c)(ii) is untenable. Regardless, even assuming DHEC's application of the regulation were appropriate, DHEC has not shown that a moved dock would necessarily result in a pierhead directly opposite Petitioner's proposed pierhead.

DHEC's counsel elicited testimony from Mr. Thompson that his interpretation of the regulations was consistent with DHEC's historical interpretation. Other than saying those words, DHEC provided no evidence of prior instances where Reg. 30-12(A)(2)(c)(ii) had been applied in such a way that a dock permit was denied because an existing dock – one outside the applicant's extended lot lines and not “opposite” the proposed dock – might be moved to a location either within those lots lines or directly across from a proposed dock location. DHEC requests agency deference for its application of the regulations, but provides no evidence that the agency has actually adopted these interpretations, as opposed to a staff member, and that the agency's construction of the regulation has been longstanding.³ In fact, DHEC provided no particularized evidence that the regulation had ever been applied in this way at all. Furthermore, because DHEC's interpretation was raised for the first time at the contested case hearing, it did not exist prior to Petitioner's Request for Final Review. There is no evidence that this interpretation was considered and accepted by the Board, either in this particular matter or otherwise. Under the circumstances, agency deference is unwarranted.

³ It is the interpretations of DHEC's Board, not its staff, which are entitled to deference from the courts. *S.C. Coastal Conservation League v. S.C. Department of Health & Environmental Control*, 363 S.C. 67, 610 S.E.2d 482 (2005); see also Randy R. Lowell and Stephen P. Bates, *South Carolina Administrative Practice and Procedure* 15-18 (2004).

The only lot across from Petitioner that might compete with Petitioner's dock has a dock in place already, that dock is outside Petitioner's extended lot lines, and it is not directly across from Petitioner's proposed dock. To deny Petitioner's permit application based on a doubtful hypothetical, without more, is unfairly prejudicial. Under the circumstances, Petitioner has satisfied the second geographical circumstance required under Reg. 30-12(A)(2)(c)(ii).

CONCLUSION

Petitioner has provided objective evidence that the width of the Creek is 10 feet and greater in various locations, including the location of the proposed dock, and Petitioner has shown that no potential access via dockage from the opposite side of the creek exists. Petitioner has met all applicable requirements under S.C. Code Reg. 30-12 and is therefore entitled to a permit authorizing the construction of a private recreational dock.

Based on the above findings of fact and conclusions of law, it is hereby ORDERED that Petitioner's recreational dock permit application is approved.

IT IS SO ORDERED.

The Honorable Carolyn C. Matthews
South Carolina Administrative Law Judge

_____, 2014
Columbia, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

James Weatherholtz,	)	DOCKET NO. 13-ALJ-07-0494-CC
	)	
Petitioner,	)	
	)	
vs.	)	FINAL ORDER AND DECISION
	)	
South Carolina Department of Health and	)	
Environmental Control,	)	
	)	
Respondent.	)	
	)	

Appearances:

For Petitioner: James E. Weatherholtz, Esq.

For Respondent: Bradley D. Churdar, Esq.

STATEMENT OF THE CASE

This matter comes before me pursuant to a Request for Contested Case Hearing filed by the Petitioner on October 14, 2013, challenging the decision of South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (hereinafter "Department" or "DHEC" or "OCRM") to deny a permit application to build a dock (Permit No. OCRM-13-155-D). A hearing was held on March 5, 2014, before the Administrative Law Court ("ALC") in Columbia, South Carolina. Based on the evidence before me, I find the denial of the permit application should be affirmed.

ISSUES FOR DETERMINATION

The Petitioner raised the following issues for determination by the ALC:

- I. Whether DHEC improperly denied the permit application based on 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) which provides "docks will not be permitted on creeks

less than 10 feet wide as measured from marsh vegetation on each side.” Petitioner asserts in his permit application the creek is exactly ten feet wide.

- II. Whether DHEC improperly denied the permit application based on 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) which provides “docks will not be permitted on creeks less than 20 feet wide as measured from marsh vegetation on each side unless one of the following two special geographical circumstances exists: a lot has greater than 500 feet of water frontage¹ or no potential access via dockage from the opposite side of the creek.”

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and closely passed upon their credibility, taking into consideration the burden of persuasion of the parties, I make the following Findings of Fact by a preponderance of the evidence.

1. The Petitioner, James E. Weatherholtz, owns property on and adjacent a tributary of Kushiwah Creek (hereinafter referred to only as Kushiwah Creek) at 949 Compass Point in Stiles Point Plantation in Charleston, Charleston County, South Carolina.
2. Petitioner applied for a permit to build a dock out to Kushiwah Creek with a five foot by ten foot fixed pierhead and a four foot by two-hundred forty-five foot walkway.
3. Petitioner’s permit application included a survey from Thomas Bessent (a local land surveyor) indicating that Kushiwah Creek was *exactly* ten feet wide (no more, no less). (Petitioner’s Exhibits 1, 2 and 3).

¹ Petitioner concedes that his lot does not meet the greater-than-500-feet-of-water-frontage requirement of 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii). In particular, Petitioner testified that “the lot has to have 500 feet of frontage on the creek or on the marsh, *which my lot does not have ...*” (Emphasis added). (Transcript 8:17-19). Accordingly, the only requirement Petitioner is challenging from 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) is DHEC’s conclusion that there is in fact both potential access and actual access via dockage from the opposite side of Kushiwah Creek.

4. Mr. Bessent relied on measurements obtained by his field crew using an electronic total station instrument. (Transcript 27:15-16).
5. Mr. Bessent testified that he did not operate either the electronic total station or the prism in collecting the data used to measure the width of the creek. (Transcript 36:25-37:4).
6. Mr. Bessent testified that a man named Billy Ferguson was in a kayak holding the prism over the location where he (Billy Ferguson) thought the edge of the marsh vegetation began. (Transcript 40:19-21; 41:21-22 and 42:8-11).
7. Mr. Bessent testified that since he was not actually out in the kayak on the creek, he was not the person making the decision about where the marsh vegetation began. Billy Ferguson made that decision. (Transcript 42:17-21).
8. Mr. Bessent testified that he had no knowledge of Billy Ferguson's educational background regarding his ability to accurately identify various stages of marsh vegetation growth. (Transcript 59:9-12).
9. Billy Ferguson was absent from the hearing, so he (Billy Ferguson) did not testify about where he placed the prism for purposes of measuring the edge of marsh vegetation. (Transcript 45:7-9).
10. During testimony, Mr. Bessent reiterated his assertion that the creek width measured precisely ten feet in the area of the proposed dock. (Transcript 31:12-14).
11. In contrast, Mr. Bessent also testified that he drew a cross-sectional sketch of Kushiwah creek that was marked as the last page of Petitioner's Exhibit 5. (Transcript 65:14-24).
12. In an email Mr. Bessent sent to the Petitioner four days before trial (on February 28, 2014), he described this sketch as part of the "fieldwork on this job." (Respondent's Exhibit 2).

13. Mr. Bessent further described this sketch in his February 28, 2014 email to Petitioner as “a hand sketch from my file that I made during my discussion with my field crew *at the time of the survey*.” (Respondent’s Exhibit 2).
14. Mr. Bessent testified that the accuracy of this sketch was “pretty close.” (Transcript 65:21-22).
15. Mr. Bessent testified that his cross-sectional sketch showed the initial vegetation on each side of Kushiwah Creek to be seven feet to nine feet apart. (Transcript 66:4-6).
16. Mr. Bessent referred to this initial vegetation on each side of Kushiwah Creek as “sprigs”. (Transcript 66:4-8). Specifically, Mr. Bessent testified that the distance across Kushiwah Creek from “sprig to sprig” was seven to nine feet. (Transcript 66:4-8).
17. Jeff Thompson (OCRM Project Manager for this permit application) testified that when he reviewed the permit application and saw that Mr. Bessent claimed that Kushiwah Creek was *exactly* ten feet wide at Mr. Weatherholtz’ property, this claim was an immediate “red flag” regarding the true width of the creek, because ten feet is the smallest creek width allowable to obtain a dock permit. (Transcript 166:10-16).
18. After reviewing the permit application, Jeff Thompson and Fred Mallet (also an OCRM Project Manager) visited the site on July 11, 2013 using a 48 inch wide jon boat. (Transcript 164:7-12).
19. They arrived at Kushiwah Creek about thirty minutes before high tide. (Transcript 185:13-15).
20. Mr. Thompson testified that Kushiwah Creek is so small and shallow that even thirty minutes before high tide, the jon boat “hit bottom a time or two.” (Transcript 170:9-11).

21. Further demonstrating how small Kushiwah Creek is, Mr. Thompson testified that when he and Mr. Mallet passed the Petitioner's next door neighbor's dock in a 48 inch wide jon boat, they had to run the jon boat two feet into the marsh to pass by the dock and their jon boat still hit the side of the neighbor's dock as they passed by.² (Transcript 170:17-23).
22. Mr. Thompson testified that he began measuring the distance from marsh vegetation to marsh vegetation starting at the vegetation furthest out into the creek just to the left side of the jon boat shown in the picture that is the fourth page of Respondent's Exhibit 1. (Transcript 182:23 to 183:6).
23. Using a survey rod, Mr. Thompson and Mr. Mallet measured Kushiwah Creek's width from the marsh vegetation on each side of the creek. (Transcript 171:4-5).
24. Mr. Thompson and Mr. Mallet took measurements only within the extended property lines of the Petitioner's lot. (Transcript 184:20 to 185:5).
25. Mr. Thompson testified that the Petitioner's extended property lines and the extended property lines of the neighboring property owner who currently has actual access via dockage from the opposite side of the creek did not conflict. Mr. Thompson testified that the reason the extended property lines of these two parcels did not conflict is because extended property lines terminate at the edge of the waterbody closest to each parcel. (Transcript 151:1-25).
26. Mr. Thompson and Mr. Mallet measured the creek width at four different locations within the Petitioner's extended property lines. (Transcript 185:24-25).

² Petitioner asserts that Petitioner's Exhibit 18 is probative in determining the width of Kushiwah Creek in 2013, since back in 2001 the Department issued a dock permit to the prior owner of Petitioner's property and the Department did not dispute the applicant's representation that Kushiwah Creek was ten feet wide in 2001. (Transcript 122:16-23). Mr. Thompson, testified that a creek's width in 2001 is not a reliable basis for determining a creek's width in 2013, because creek widths change over time. (Transcript 163:5-20).

27. Mr. Thompson testified that he measured the portion of Kushiwah Creek within the Petitioner's extended property lines to be seven and a half to eight feet wide. (Transcript 186:1-2).
28. Mr. Thompson testified that he does not interpret 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) as allowing him to permit a dock when just a few feet of the creek width may be greater than ten feet wide, because such a small portion of the creek would not be representative of the creek width. (Transcript 192:11-16).
29. Mr. Thompson testified that the method of measuring creek width and the method of determining the beginning of marsh vegetation that he and Mr. Mallet used are the same methods for measuring creek width and marsh vegetation that the Department has historically used. (Transcript Record 171-4, 173-18, 174-6).
30. Regarding the application of 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) to this permitting decision, Mr. Thompson used a sharpie marker to draw the extended property lines of the property on the opposite side of Kushiwah creek as represented by Respondent's Exhibit 5. (Transcript 196:2-10).
31. The extended property lines of the property on the opposite side of Kushiwah Creek form an uneven "pie shape" with a short dock directly in the middle of these two extended property lines and on the opposite side of Kushiwah Creek from the Petitioner's upland property. (Respondent's Exhibit 5).
32. Mr. Thompson testified that the property owner on the opposite side of the creek from the Petitioner (as demonstrated in Respondent's Exhibit 5) not only has "potential access via dockage from the opposite side of the creek," but this property owner presently has *actual* access via dockage from the opposite side of the creek. (Transcript 199:14-21).

33. Mr. Thompson testified that, for purposes of determining whether potential access via dockage from the opposite side of the creek exists or not, it is irrelevant to his permitting decision under 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) that the dock on the opposite side of the creek in the middle of the two “pie shaped” extended property lines in Respondent’s Exhibit 5 is *not* inside the Petitioner’s extended property lines. (Transcript 199:22 to 200:2). Stated another way, Mr. Thompson considered the fact that the property owner on the opposite side of the creek presently having a dock was a relevant factor in his Reg. 30-12(A)(2)(c)(ii) analysis, despite the fact that this property owner’s dock was upstream and outside of the trajectory of Petitioner’s extended property lines.
34. Mr. Thompson further testified that this Reg. 30-12(A)(2)(c)(ii) determination is consistent with the Department’s historical interpretation of this regulation. (Transcript 200:3-6).
35. Petitioner’s permit application for the proposed dock was denied because Mr. Thompson determined that (a) Kushiwah Creek was less than ten feet wide as measured from marsh vegetation on each side; and (b) that there was both actual and potential access via dockage from the opposite side of Kushiwah Creek.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, this Court concludes the following as a matter of law:

Jurisdiction

The South Carolina Administrative Law Court has subject matter jurisdiction over this action based on S.C. Code Ann. § S.C. Code Ann. § 1-23-600(A) (Supp. 2013) and S.C. Code Ann. § 44-1-60(F)(2) (Supp. 2013). In contested case hearings involving environmental permitting matters, the Administrative Law Judge is the fact finder and makes a *de novo*

determination regarding the matters at issue. Brown v. S.C. Dep't of Health and Env'tl. Control, 348 S.C. 507, 560 S.E.2d 410 (2002); Marlboro Park Hosp. v. S.C. Dep't of Health and Env'tl. Control, 358 S.C. 573, 595 S.E.2d 851 (Ct. App. 2004). Also, this Court is required to give deference to the Department's specialized knowledge in environmental matters because "[t]he agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence." S.C. Code Ann. § 1-23-330(2013); S.C. Code Ann. § 44-1-60(F)(2). An agency's construction of a statute or regulation which it is charged with administering is generally entitled to deference by the courts and should be overturned only if "plainly erroneous or inconsistent with the regulation." Fed. Mar. Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 745-46 (1973); Ohio Valley Env'tl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 193 (4th Cir. 2009) (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)). Petitioner, James Weatherholtz, as the party challenging the denial of the permit, bears the burden of proving that DHEC erred by denying the permit. Leventis v. S.C. Dept. of Health and Env'tl. Control, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000).

Standard of Proof

The standard of proof in weighing the evidence and making a decision on the merits at a contested case hearing is a preponderance of the evidence. Nat'l. Health Corp. v. S.C. Department of Health & Env. Control, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989).

General Principles

Permits for private docks in the coastal zone are governed by the South Carolina Coastal Zone Management Act ("CZMA"), S.C. Code Ann. § 48-39-10 et. seq. (2013), and the regulations promulgated pursuant to the Critical Area Permitting Regulations. See S.C. Code

Ann. 48-39-130. These regulations enable the Department to govern the management, development, and protection of South Carolina's critical areas by issuing permits. *Id.* The CZMA defines "critical area" as coastal waters, tidelands, beaches, and the beach/dune system. S.C. Code Ann. § 48-39-10(J) (2013). More specifically, the Act defines "coastal waters" as "the navigable waters of the United States subject to the ebb and flood of the tide and which are saline waters, shoreward to their mean high-water mark," S.C. Code Ann. § 48-39-10(F) (2013). It also defines "tidelands" as "all areas at or below mean high tide." S.C. Code Ann. § 48-39-10(G) (2013).

I. DEHC correctly denied the Petitioner's permit application for a dock construction permit because the width of the creek was not ten feet.

The Petitioner claims DHEC denied his permit request in error because his parcel included areas of Kushiwah Creek he contends are ten feet wide based on his own measurements and those taken by his hired surveyor. The surveyor claims when his team "put in at high tide," a man in a kayak identified as Billy Ferguson "... physically held the prism target along the edge of the marsh grass at...20 different places along the creek." (Transcript 28:13). The surveyor who testified (Mr. Bessent) was "not in the boat that day," but he "sent [his crew] out there" to the Petitioner's lot. (Transcript 29:2; 29:21). He further stated the points his crew measured along the vegetation were "[his company's] interpretation of the edge of the marsh grass" (Transcript 30:18). Using their measurements, the surveyor came to the conclusion the width of the creek at the dock location was ten feet. (Transcript 31:14). However, DHEC staff went to the same portion of the creek and using the Department's historical interpretation of where to begin measuring, found the creek width was only seven and one half to eight feet wide. DHEC's historical interpretation includes only taking measurements of the creek within only the extended

property lines of the lot and using a wetlands expert to determine where the marsh vegetation³ begins on either side of the creek bed. Although Petitioners' expert was deemed an expert in the field of surveying, Petitioner failed to establish that his expert had the requisite expertise to establish where marsh vegetation begins. Such expertise is a crucial component in accurately determining the width of the creek in accordance with the Department's regulations.

The Department establishes standards for the use of pierheads and docks based on creek widths. Where the creek is found to measure less than 10 feet wide from marsh vegetation on each side, a dock may not be permitted. S.C. Regs. 30-12(A)(2)(c)(i) (2013). The area of marsh vegetation where the measurement started is shown where the spartina grass begins to the port side of the bow of the boat shown in the photo. (Respondent's Exhibit 1 [page 4]). Measuring the vegetation from the left to the right side of the bank, Mr. Thompson found that Kushiwah Creek was less than ten feet wide within Petitioner's extended property lines. Accordingly, Petitioner's permit application was denied using the Department's historical interpretation of measuring marsh vegetation.

II. DHEC properly denied the permit application based on S.C. Code Ann 30-12(A)(2)(c)(ii), because there is a lot with actual dock access from the opposite side of the creek within that property owner's extended property lines that is across the creek from the Petitioner's parcel, and therefore the Petitioner's lot fails to fall within the exception established by S.C. Code Ann 30-12(A)(2)(c)(ii).

The Petitioner argues that an exception to S.C. Code Ann. Regs. 30-12(A)(2)(c)(ii) applies, which allows a dock to be constructed on a creek less than twenty feet if there is no potential dock access from the opposite side of the creek. The opposite side of the creek includes the land within the neighboring property owner's extended property lines, as defined in relation to waterfront property in S.C. Code Ann. Regs. 30-1(D)(53). The Petitioner's claim is flawed

³ The marsh vegetation is spartina alterniflora.

because there is currently a lot on the opposite side of the creek with actual dock access as well as potential dock access within his extended property lines. (Transcript 199:20-21).

CONCLUSION

Based on the Findings of Fact and Conclusions of Law set forth above and the applicable statutory and regulatory requirements discussed above, I find and conclude that DHEC properly denied the Petitioner's permit application.

IT IS THEREFORE, ORDERED, that DHEC's denial of Permit No. OCRM-13-155-D is affirmed.

CAROLYN C. MATHEWS
Administrative Law Judge

Dated: _____, 2014.
Columbia, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

James E. Weatherholtz,	)	Docket No. 13-ALJ-07-0494-CC
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
South Carolina Department of Health and	)	
Environmental Control,	)	
	)	
Respondent.	)	
	)	

**PETITIONER'S MOTION FOR RECONSIDERATION
AND MOTION FOR ADMISSION OF PETITIONER'S EXHIBIT 16**

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Petitioner James E. Weatherholtz submits this motion respectfully requesting the Court to reconsider its decision denying admission of Petitioner's Exhibit 16 during the trial of this case.

On March 5, 2015, this Court conducted a trial relating to Petitioner's appeal of Respondent's denial of application number OCRM-13-155-D, a private recreational dock application submitted by James and Taryn Weatherholtz. Prior to the presentation of evidence, Respondent South Carolina Department of Health and Environmental Control ("DHEC") preliminarily objected to the admissibility of Exhibit 16 on the grounds that the photographs may not be relevant. During trial testimony, after a foundation for the admissibility of Exhibit 16 had been laid, Respondent DHEC objected to Exhibit 16 on the grounds that those documents had been provided to Respondent late, after the deadline for submission of proposed exhibits to the Court.

The photographs in Exhibit 16 were taken by Petitioner on March 1 and 2, 2014. Petitioner's entire Exhibit 16 was then provided to Respondent on Sunday, March 2, 2014, with an express

invitation that Petitioner would make himself available for questions regarding the exhibits on Monday, March 3, 2014. A copy of that correspondence is attached to this motion as Exhibit A.

Because Respondent preliminarily objected to Exhibit 16 on the ground that it may not be relevant, and, by implication, not because it had supposedly been provided too late, Petitioner likewise did not object to Respondent's proposed exhibits that also had been submitted February 18, 2014, the deadline for providing exhibits to the Court prior to trial. Respondent submitted only one exhibit to the Court by the deadline (Respondent's Exhibit 1). On Monday, March 3, 2014, one day after Petitioner had already provided his supplemental exhibits, Respondent submitted four supplemental exhibits. Some of those supplemental exhibits were in response to additional documents identified by Petitioner, but that is not true for Respondent's Exhibit 5, a GIS map of the critical area behind Petitioner's house showing approximate lot lines. That document was not submitted in response to any of Petitioner's supplemental exhibits and, like Petitioner's Exhibit 16, it was provided to the Court after the February 18 deadline.

Petitioner's Exhibit 16 is a series of photographs taken of the critical area in question on March 1 and 2, 2014, one day after Respondent DHEC took the Petitioner's deposition in this case. Those photographs are a fair and accurate representation of the condition of the critical area in question and the section of Kushiwah Creek shown in Petitioner's dock permit application. Petitioner took those photographs himself and laid the proper foundation for admissibility. Petitioner offered a good cause explanation why the photographs had not been submitted as supplemental exhibits more than 10 days before the trial on March 5, 2014 (i.e., because the photographs were taken on March 1 and 2, 2014, immediately after DHEC's deposition of Petitioner on February 28, 2014).

During trial, the Court heard testimony from both parties regarding the interpretation of the term

“vegetation” and the appropriate location for taking measurements to satisfy the requirements of S.C. Reg. 30-12(A)(2)(c)(i) (stating “Docks will not be permitted on creeks less than 10 feet wide as measured from marsh vegetation on each side.”). Among other things, Petitioner’s Exhibit 16 is probative of 1) the width of Kushiwah Creek in the location of Petitioner’s proposed dock and 2) the presence and appearance of “vegetation” along the edges of the creek at the time of and in the location shown in the photographs. Petitioner’s Exhibit 16 is relevant to various issues raised during the trial.

Petitioner’s Exhibit 16 is attached hereto as Exhibit B and Petitioner proffers Exhibit 16 to the Court for consideration and inclusion in the record of trial.

Respectfully submitted,



James E. Weatherholtz
949 Compass Point
Charleston, South Carolina 29412

March 12, 2014
Charleston, South Carolina

EXHIBIT A

Weatherholtz, James

From: Weatherholtz, James
Sent: Sunday, March 02, 2014 4:04 PM
To: churdabd@dhec.sc.gov
Subject: Weatherholtz v. DHEC - 13-ALJ-07-0494-CC
Attachments: DSC_0191.JPG; DSC_0192.JPG; DSC_0193.JPG; DSC_0195.JPG; DSC_0199.JPG; DSC_0200.JPG; DSC_0201.JPG; DSC_0202.JPG; DSC_0203.JPG; DSC_0181.JPG; DSC_0182.JPG; DSC_0186.JPG; DSC_0188.JPG; Dock Permit FOIA.pdf; 79428-0000-0_20120510_095026787_Scan.pdf; FW: FOIA Request for lot at 949 Compass Point - dock permit

Brad,

Good seeing you on Friday. After my deposition on Friday morning, I took a few additional pictures this weekend. I'm also sending the DHEC file for Permit No. OCRM-01-254-G (the Canton/Nixon permit). I received this file from DHEC in response to a FOIA request. I propose these documents as supplemental exhibits.

I'm happy to discuss these items with you tomorrow at your convenience and explain the photos, as I did during my deposition.

Thanks. James.

Weatherholtz, James

From: Bradley Churdar <churdabd@dhec.sc.gov>
Sent: Sunday, March 02, 2014 5:00 PM
To: Weatherholtz, James
Subject: Re: Weatherholtz v. DHEC - 13-ALJ-07-0494-CC

James:

Please send me whatever you reference in your email as soon as possible. I need to look at this stuff.

Thanks,
 Brad

Sent from my iPad

On Mar 2, 2014, at 4:12 PM, "Weatherholtz, James" <JWeatherholtz@wcsr.com> wrote:

Brad,

I received a message indicating that your mailbox is full, but I'm re-sending without the attachments to see if this will get through, just in case that's the issue. Let me know if you receive this, and if you didn't get the attachments we can figure out how to get them to you right away.

Thanks. James.

From: Weatherholtz, James
Sent: Sunday, March 02, 2014 4:04 PM
To: churdabd@dhec.sc.gov
Subject: Weatherholtz v. DHEC - 13-ALJ-07-0494-CC

Brad,

Good seeing you on Friday. After my deposition on Friday morning, I took a few additional pictures this weekend. I'm also sending the DHEC file for Permit No. OCRM-01-254-G (the Canton/Nixon permit). I received this file from DHEC in response to a FOIA request. I propose these documents as supplemental exhibits.

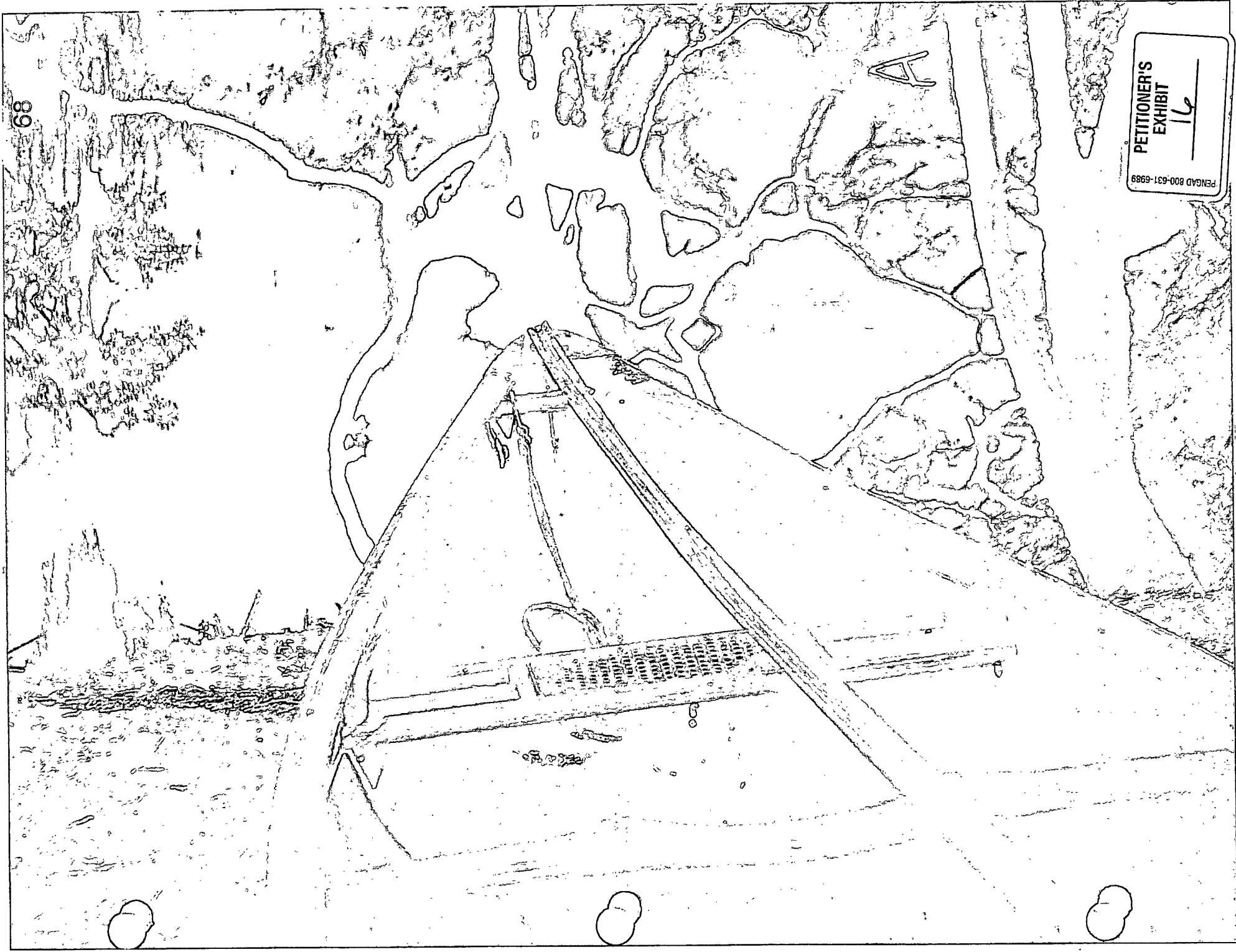
I'm happy to discuss these items with you tomorrow at your convenience and explain the photos, as I did during my deposition.

Thanks. James.

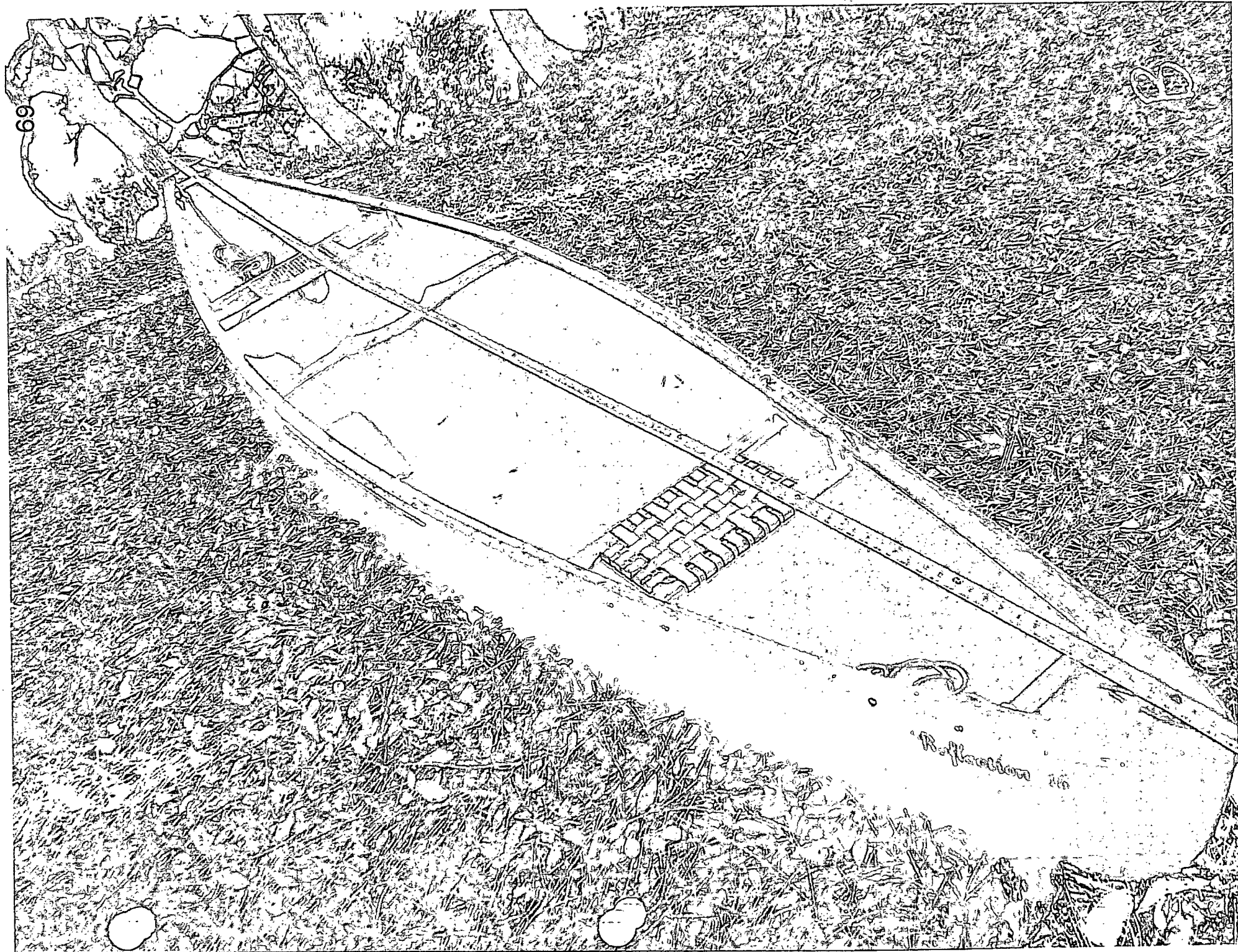
IRS CIRCULAR 230 NOTICE: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication (or in any attachment).

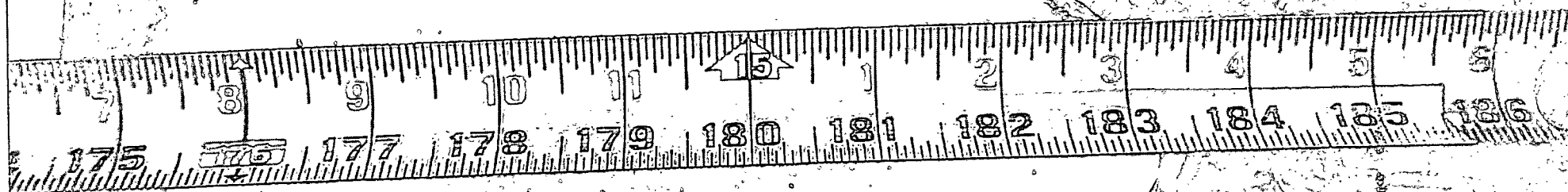
CONFIDENTIALITY NOTICE: This electronic mail transmission has been sent by a lawyer. It may contain information that is confidential, privileged, proprietary, or otherwise legally exempt from disclosure. If you are not the intended recipient, you are hereby notified that you are not authorized to read, print, retain, copy or disseminate this message, any part of it, or any attachments. If you have received this message in error, please delete this message and any attachments from your system without reading the content and notify the sender immediately of

EXHIBIT B



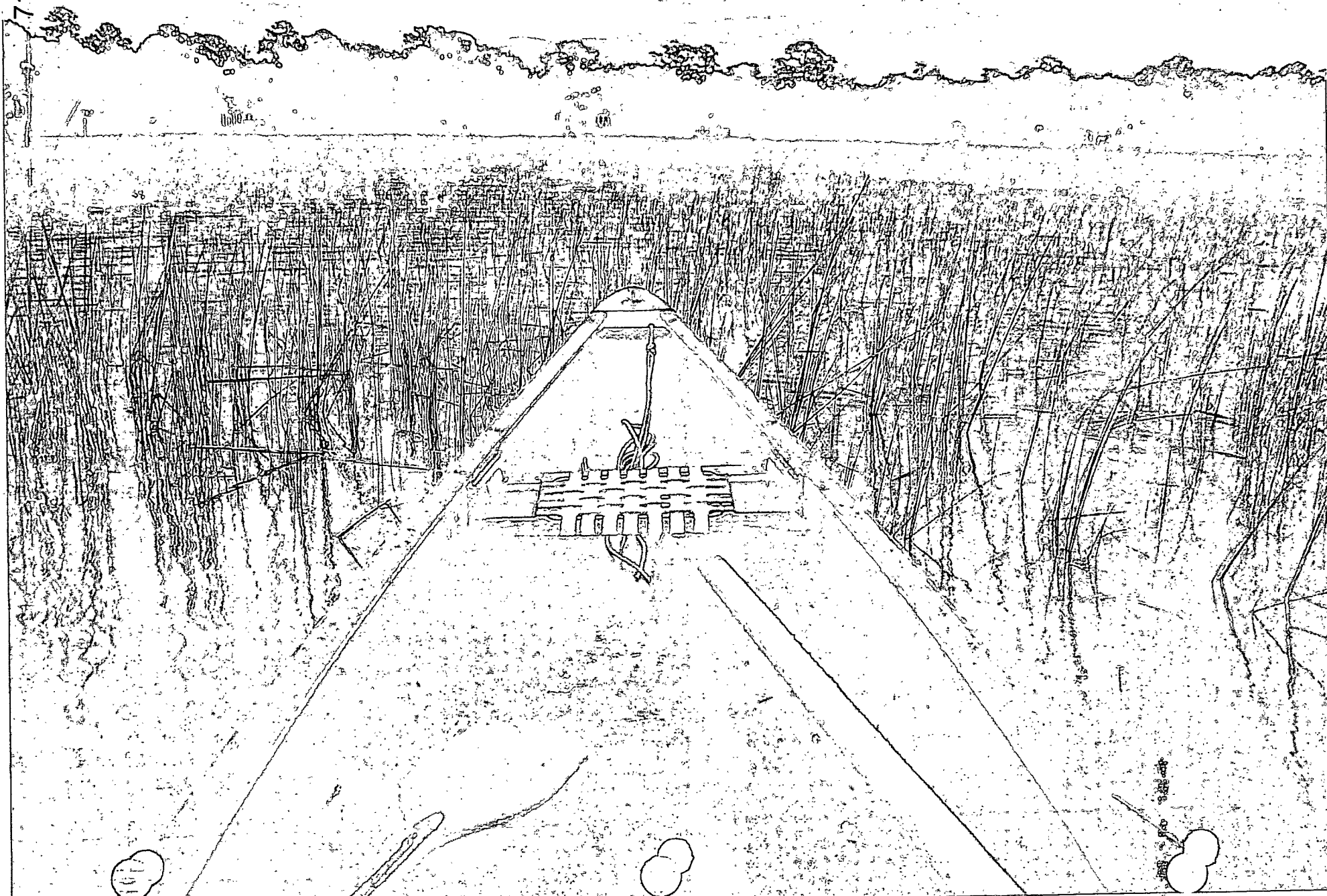
PETITIONER'S
EXHIBIT
16
PENGAD 800-631-6989

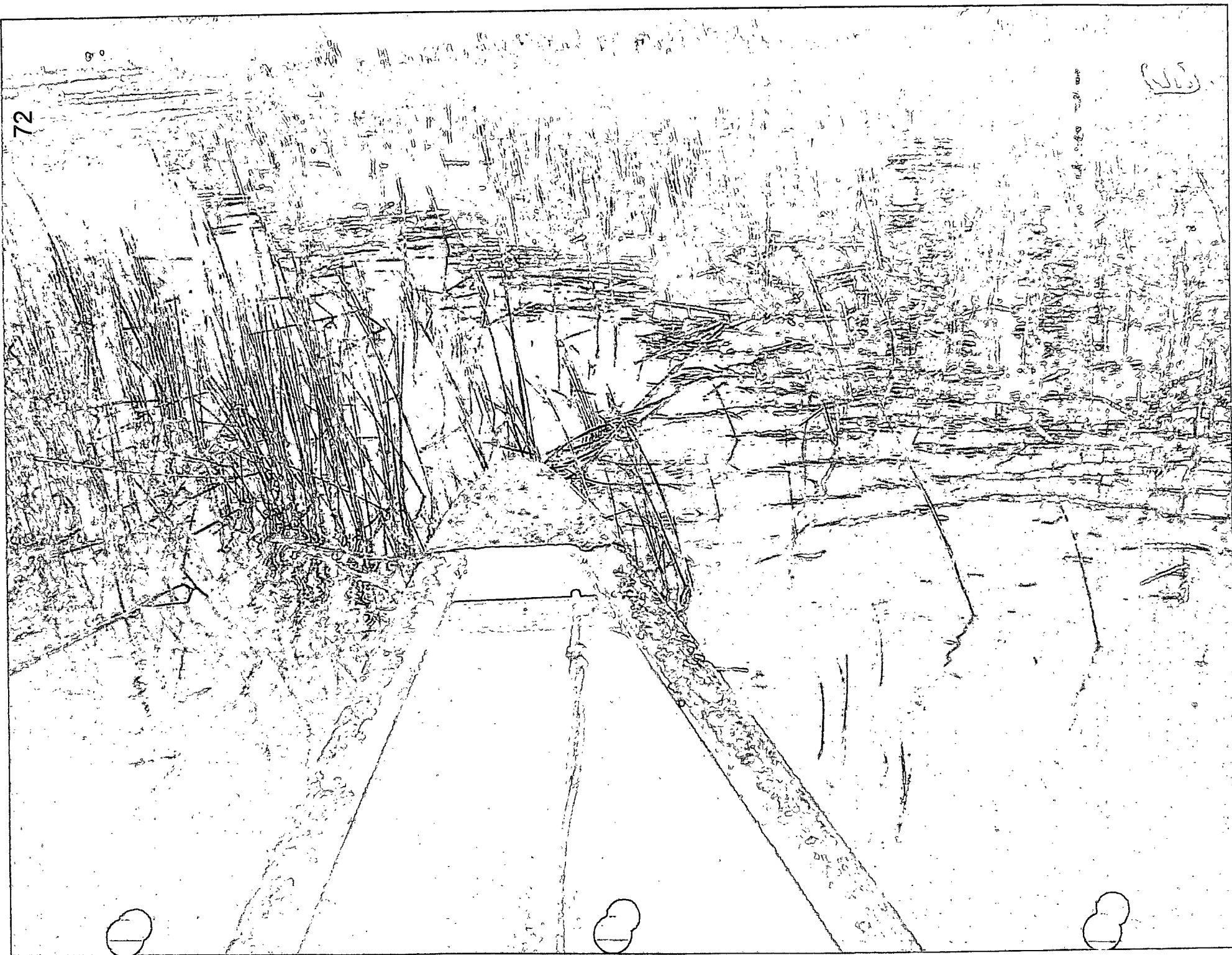


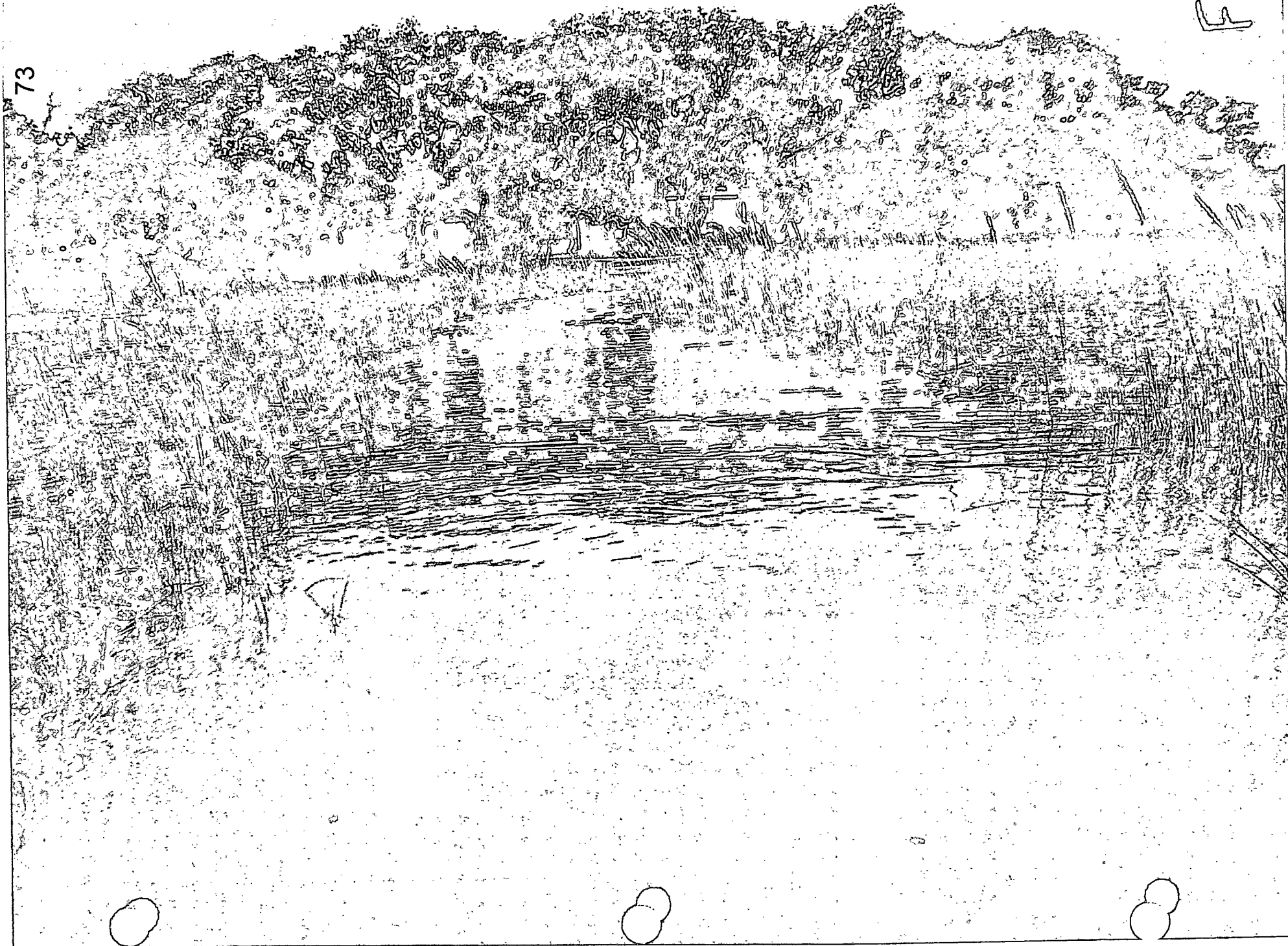


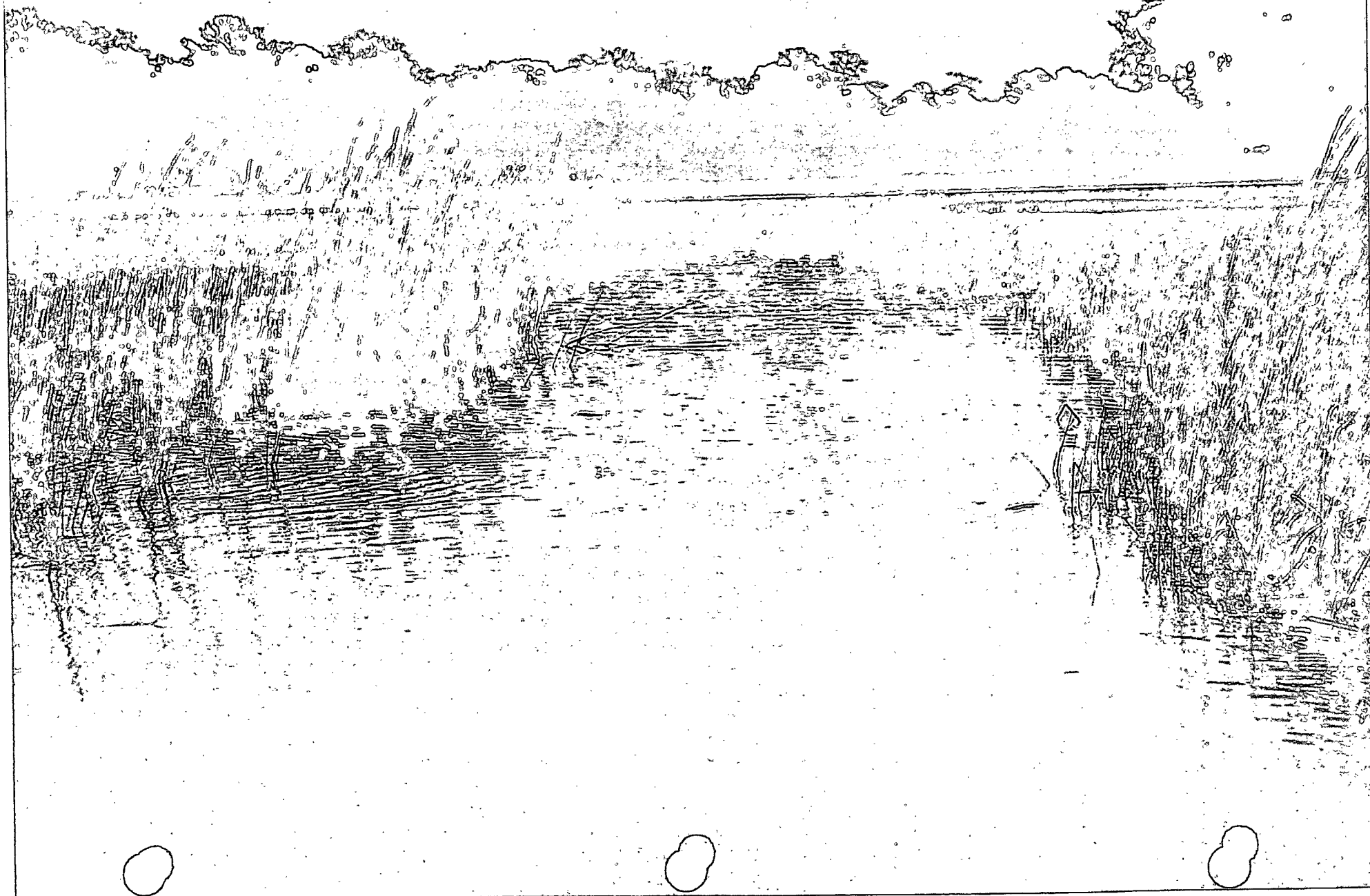


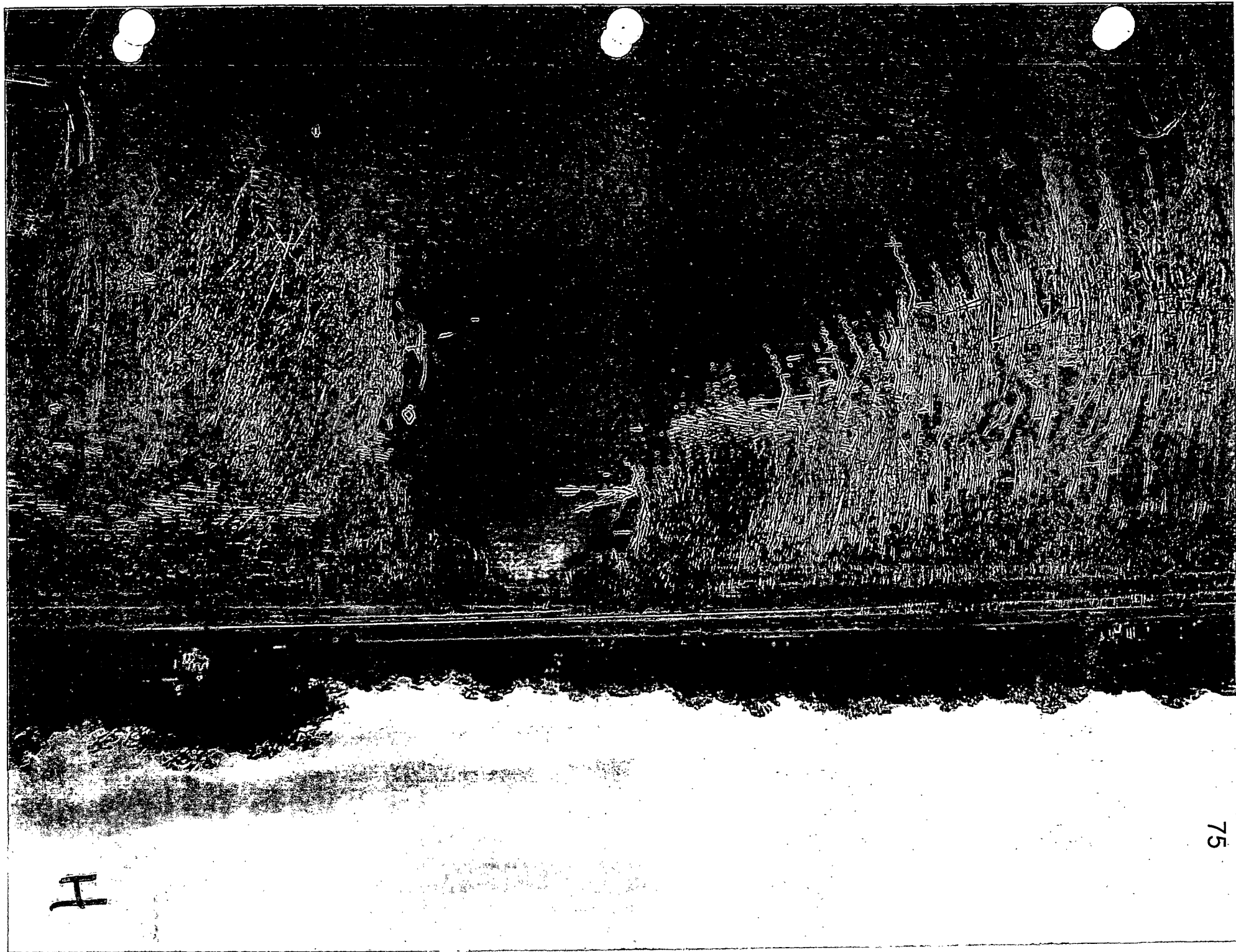
71













STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

James Weatherholtz,	)	DOCKET NO. 13-ALJ-07-0494-CC
	)	
Petitioner,	)	
	)	
vs.	)	RETURN TO MOTION FOR
	)	RECONSIDERATION
South Carolina Department of Health and Environmental Control,	)	
	)	
Respondent.	)	
	)	

The South Carolina Department of Health and Environmental Control submits this Return to the Petitioners' Motion for Reconsideration, and respectfully asks this Court to deny the Petitioners' Motion for the following reasons.

As a preliminary matter, the Petitioner's Rule 59(e) Motion is premature. Rule 59(e), SCRCF states that "[a] motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." In this case, no Final Order or judgment has even been issued yet by this Court from which the Petitioner can move to alter or amend. A trial ruling on the admissibility of evidence is not encompassed by Rule 59(e), SCRCF.

Rule 25(B), RPALC states that "[w]henver evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record... If the evidence excluded consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record." To the best of my recollection,¹ I do not believe Petitioner's Exhibit 16 was inserted in the record as Rule 25(B) requires. Assuming my recollection is accurate, this Motion is not properly before the Court based on this Rule as well as the reason stated in the above paragraph.

¹ I ordered the trial transcript on the day of the hearing, but have not yet received it.

Putting aside the procedural problems with the Petitioner's Rule 59(e) Motion, Respondent's Counsel would also point out that the photographs collectively referenced as Petitioner's Exhibit 16 were sent late Sunday afternoon (March 2, 2014) after Petitioner's deposition had already been taken. While Petitioner states that the pictures were sent "with an express invitation that Petitioner would make himself available for questions regarding the exhibits on Monday, March 3, 2014," the reality is that any "off the record" conversation between Petitioner and Respondent's counsel two days before trial would neither be under oath or recorded verbatim. And while Respondent's counsel does not intend to impugn the Petitioner's character for truthfulness, the reality is that providing these pictures after his deposition put Respondent's counsel at an unfair disadvantage.

Petitioner asserts that the aerial photo with the GIS overlay that Jeff Thompson referenced in his testimony was similar to Petitioner's Exhibit 16 in that it was provided to the Court after the February 18 deadline as well. However, the aerial picture with the GIS overlay did not put the Petitioner at any such disadvantage, because Petitioner never requested to take Jeff Thompson's deposition at any point during pre-trial preparation.

For the foregoing reasons, the Department respectfully asks this Court to deny the Petitioners' Motion.

Respectfully submitted,



Bradley D. Churdar
S.C. Bar No. 12829
Chief Counsel for DHEC/OCRM
South Carolina Department of Health and
Environmental Control
1362 McMillan Ave., Ste 400
North Charleston, SC 29405
Tel.: (843) 953-0213
Fax: (843) 953-0201

Charleston, South Carolina
March 24, 2014

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

James E. Weatherholtz,	)	Docket No. 13-ALJ-07-0494-CC
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
South Carolina Department of Health and	)	
Environmental Control,	)	
	)	
Respondent.	)	
	)	

PETITIONER'S MOTION FOR RECONSIDERATION

Pursuant to Rule 29(D) of the Rules of Procedure for the Administrative Law Court and Rule 59 of the South Carolina Rules of Civil Procedure, Petitioner James E. Weatherholtz submits this motion respectfully requesting the Court to reconsider its Final Order and Decision (the "Order") dated June 17, 2014. The grounds for this motion are as follows.

I. The Order contains Findings of Fact adopted from Respondent's proposed order that are erroneous.

A. Paragraph 8 of the Findings of Fact misstates Mr. Bessent's testimony. Paragraph 8 of the Order states, "Mr. Bessent reiterated his assertion that the creek width measured precisely ten feet in the area of the proposed dock." In actuality, Mr. Bessent testified that, through a series of measurements, his crew "found several areas that are at least ten feet." (Trans. p. 55:11-13). In response to Respondent's cross-examination questioning about whether the creek width was ten feet "on the dot", Mr. Bessent testified that "those [data] points actually came out to 10.2 feet, something like that, 10.1, 10.2. It came out to something that started with a ten, so I felt comfortable calling it ten feet on the drawing." (Trans. p. 55:14 – 56:12). Referring to his raw data plot, which was admitted as part of

Exhibit 5, Mr. Bessent testified, “I know that it’s 10.1, 10.2. It’s ten feet.” (Trans. p. 80:18-81:6). Mr. Bessent did not reiterate any assertion that the creek width is precisely ten feet; just the opposite, he rejected that notion when raised by Respondent’s counsel and testified that his measurements showed the creek width as greater than 10 feet. (Trans. p. 54:18-56:12).

B. Paragraphs 9, 10, 11, 12, and 13 of the Findings of Fact mischaracterize the last page of Exhibit 5 and misstate Mr. Bessent’s testimony. Paragraphs 9, 10, 11, 12, and 13 imply that Mr. Bessent’s hand-drawn sketch is an attempt to show actual conditions in the creek at issue and that it is reflective of his actual measurements of the distance between “sprigs” near the bed of that creek. Instead, Mr. Bessent made clear in his testimony that the sketch is hypothetical, and that it was prepared as the basis for discussions with his field crew about where to take measurements of the vegetation on either side of the creek. (Trans. p. 65:18-22). Through a series of questions from Respondent’s counsel and objections by Petitioner, Mr. Bessent reiterated and further explained the hypothetical nature of the sketch: “the third page is a hand sketch that I made during my discussions with my field crew... when I’m talking with my crew, explaining to them what we need to measure, I found it very helpful to draw a little sketch.” (Trans. p. 70:21-71:8, and, more broadly, p. 68:1-77:18). The sketch does not reflect Mr. Bessent’s measurements or findings that the distance from “sprig to sprig” is seven to nine feet, as suggested by Respondent’s proposed order and adopted in the Court’s Order. Rather, the sketch was drawn by Mr. Bessent to confirm with his field crew where they were supposed to hold the prism at the edge of the marsh grass when taking measurements with the total station instrument. Respondent’s counsel ignored that testimony

throughout the hearing, persisted in characterizing the sketch as something intended to illustrate actual conditions in the creek at issue, and Petitioner maintained his objections. (Trans. P. 187:3-189:23).

C. Paragraphs 17 and 18 of the Findings of Fact include evidence that has no relevance to the width of Kushiwah creek. Regarding Paragraph 17, the depth of the creek has no bearing on its width, and no such correlation was established in the record. In addition, there was no evidence that Mr. Thompson “hit bottom” inside Petitioner’s extended lot lines, or any place near Petitioner’s proposed dock. The fact that there may be oyster beds or some other topographical change within the overall length of Kushiwah creek is not relevant evidence to establish creek width in relation to Petitioner’s proposed dock. Similarly, the evidence cited in Paragraph 18 (that a neighbor’s dock caused the jon boat to go into the marsh) is misleading, and an additional inappropriate basis for determining creek width. As shown in the aerial photographs submitted by Petitioner (Exhibit 10), that neighboring dock protrudes well out into the middle of the creek - beyond where it should - leaving only a narrow lane for passage. The fact that this neighboring dock is located too far out into the creek should not be considered in determining creek width, or, more importantly, creek width in the location of Petitioner’s proposed dock.

II. The evidence shows that the creek width is greater than ten feet in the location of Petitioner’s proposed dock, and beyond.

Mr. Thompson measured individual, selected locations within Petitioner’s extended lot lines to show a creek width of less than ten feet. Acknowledging that those locations do exist, Petitioner established through objective photographic evidence and through a registered land surveyor (Mr. Bessent) that other locations within Petitioner’s extended lot lines are more than ten feet, especially

in the area of the proposed dock. In fact, Mr. Bessent's survey established that the creek was greater than ten feet wide for a distance of approximately 30 linear feet. (Trans. p. 81:7-18).

The regulation does not require that the entire creek, or even the entire length of the creek within an applicant's extended lot lines, must be ten feet wide or greater. *See* S.C. Code Reg. Ann. 30-12(A)(2)(c)(i). As such, it is insufficient for Respondent to simply show that there are areas within the extended lot lines where the creek is less than ten feet wide. Here, the evidence shows that the creek is greater than ten feet wide in some locations and less than ten feet wide in others. Importantly, the creek is greater than ten feet wide in the location of Petitioner's proposed dock, which is sufficient to satisfy the requirement of the regulation.

III. The regulations do not require an applicant to hire a wetlands expert to offer opinion testimony relating to where marsh vegetation begins; regardless, Mr. Bessent is so qualified and he offered admitted testimony in that regard.

Tom Bessent, a registered land surveyor, is a member and former director of the South Carolina Society of Professional Land Surveyors (SCSPLS) and the past president of the Coastal Chapter of the SCSPLS. He has a B.S. in Marine Biology from the College of Charleston and has been registered as a professional land surveyor since 1986 (PLS No. 10778). He is experienced in critical area surveying, establishing the OCRM critical line, and recreational dock placements; he has previously testified as to marsh tidal boundary discrepancies; and he was admitted as an expert witness in the area of land surveying. (Trans. p. 25:13-26:13). Mr. Bessent has experience performing surveys in marshlands and establishing critical lines. (Trans. p. 24:15-22).

The regulation calls for a measurement "from marsh vegetation on each side" of the creek. *See* S.C. Code Reg. Ann. 30-12(A)(2)(c)(i). From a boat inside the creek, Mr. Bessent's field crew measured the edge of the marsh grass on either side of the creek and those measurements are

reflected in his stamped survey. The statute does not require a wetlands expert to determine where marsh vegetation begins, and there is no evidence that the legislature expected recreational dock permit applicants to hire such an expert to establish creek width.

Nonetheless, even if the regulation were to require the use of a wetlands expert, Mr. Bessent is qualified as such by experience and education. Mr. Bessent has a B.S. in Marine Biology from the College of Charleston, he has experience in wetland surveying of various types, and he has been admitted as an expert witness in other cases involving wetlands issues. In fact, he was permitted to testify here about “where the marsh begins to grow” and his testimony was admitted into the record at the hearing. (Trans. p. 35:6-13).

IV. The regulations do not define the “opposite side of the creek” as the width of an opposing property owner’s extended lot lines.

For purposes of applying S.C. Code Ann. 30-12(A)(2)(c)(ii), the Order interpreted “the opposite side of the creek” to include the entire area within an opposing property owner’s extended lot lines. Petitioner asserts that “the opposite side of the creek” for purposes of this regulation is, at a minimum, limited to the applicant’s (or Petitioner’s) own extended lot lines, if not something less than that. Here, this broader interpretation has been used to affirm the denial of Petitioner’s permit application.

As testified to by DHEC’s witness at trial, creek width regulations were promulgated for ecological and navigational reasons (Trans. 157:5-10). The introductory paragraph to Reg. 30-12 actually emphasizes navigational considerations over environmental: “Docks and piers sometimes pose navigational problems, restrict public use of the water and, under certain circumstances, possess potential for creating environmental problems.” See S.C. Code Reg. 30-12(A). The special geographic circumstances regulation, S.C. Code Ann. 30-12(A)(2)(c)(ii), is intended to ensure

adequate creek width for access where competing pierheads across from one another might block navigation. Petitioner's interpretation of the regulation satisfies this stated objective of the regulations without being overbroad or unreasonable in application.

Petitioner's interpretation is also consistent with the express language of the regulation. S.C. Code Reg. Ann. 30-12(A)(2)(c)(ii) states that "Docks will not be permitted on creeks less than 20 feet wide as measured from marsh vegetation on each side unless one of the following two special geographic circumstances exist: *a lot* has greater than 500 feet of water frontage or no potential access via dockage from the opposite side of the creek." (emphasis added). The reference to "a lot" is to the applicant's own lot, not an opposing property owner's lot. The applicant's own lot lines, therefore, must be used to determine total frontage and whether access exists from the opposite side of the creek. To tie an applicant's dock approval to the idiosyncrasies of another property owner's lot shape and dimensions serves only to deny more applications. At the same time, it does nothing to further ensure that pierheads are not located directly "opposite"¹ one another in a creek less than twenty feet wide; using the applicant's own lots lines is sufficient to do that. Most importantly, this broader interpretation is inconsistent with the plain language of the regulation.

Here, Petitioner's permit was denied because a dock exists inside an opposing property owner's pie-shaped extended lot lines even though that dock is not within his own extended lot lines, and that existing dock is nowhere near to being directly "opposite" his proposed dock. That interpretation and outcome was not intended by the legislature when it enacted the regulation.

¹ The word "opposite" is not defined in the regulation. "Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning." *Lee v. Thermal Engineering Corp.*, 352 S.C. 81, 91-92, 572 S.E.2d 298, 303 (Ct. App. 2002); *see also S.C. Coastal Conservation League v. Dep't of Health and Envtl. Control*, 390 S.C. 418, 425, 702 S.E.2d 246, 250 (2010) ("[u]nless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning"). "Opposite" is defined in the dictionary as "located directly across from something else, or from each other." Wiktionary, <http://en.wiktionary.org/wiki/opposite>.

In support of this motion, Petitioner incorporates the transcript of testimony in this matter, the exhibits admitted into evidence, and Petitioner's proposed Final Order and Decision, a copy of which was presented to the Court on May 16, 2014 and is attached hereto as Exhibit A. In short, the creek at issue is greater than 10 feet wide in the location of Petitioner's proposed dock, as well as other areas within and outside Petitioner's extended lot lines, and there is no actual or potential dock access from the other side within Petitioner's extended lot lines. Petitioner respectfully requests that the Court reconsider its Final Order and Decision and reverse Respondent's denial of his dock permit application.



James E. Weatherholtz
949 Compass Point
Charleston, South Carolina 29412

June 27, 2014
Charleston, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

James E. Weatherholtz,	)	DOCKET NO. 13-ALJ-07-0494-CC
	)	
Petitioner,	)	RESPONDENT'S RETURN TO
	)	PETITIONER'S MOTION TO
vs.	)	RECONSIDER
	)	
South Carolina Department of Health and	)	
Environmental Control,	)	
	)	
Respondent.	)	
	)	

The South Carolina Department of Health and Environmental Control ("DHEC" or "the Department") submits this Return to the Petitioner's Motion for Reconsideration, and respectfully asks this Court ("Court" or "ALC") to deny the Petitioner's Motion.

Summary

The Department was the prevailing party in this matter. The Court's analysis follows the plain language of 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) and (ii) and the Court correctly concluded, based on the evidence presented at trial, that Kushiwah creek is less than 10 feet wide from marsh vegetation on each side and that the lot on the opposite side of the creek has both actual dock access as well as potential dock access within its extended property lines.

The Court properly rejects Petitioner's argument that using measurements taken by Petitioner and a land surveyor, he established that Kushiwah creek is greater than 10 feet wide.

The Court correctly found that Petitioner failed to establish that his land surveyor had the requisite expertise to establish where marsh vegetation begins, which is a crucial component in accurately determining creek width.

The Court correctly recognizes that the opposite side of the creek includes the land within the neighboring property owner's extended property lines, as defined in relation to waterfront property in 23A S.C. Code Ann. Reg. 30-1(D)(53)(2013).

The Court correctly found that there is a lot on the opposite side of Kushiwah creek with actual dock access as well as potential dock access within that property owner's extended property lines. Thus, the Court properly concluded that due to the potential access via dockage from the opposite side of the creek, Petitioner's lot does not fall within the exception found in 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii).

No further analysis or inquiry is necessary.

I. Return Arguments To Petitioner's Assertion That The Final Order Contains Erroneous Findings Of Fact

Petitioner asserts that the Final Order contains several erroneous Findings of Fact. In particular, Petitioner claims that paragraph 8 misstates his surveyor Mr. Bessent's testimony at trial.¹

This claim is not true.

At trial, after Mr. Bessent had previously endorsed the accuracy of his survey (which was admitted into evidence as Petitioner's Exhibits 1 thru 3), Respondent's counsel asked him "[w]hat does this survey show as the width of the creek in the proposed dock location?" Mr. Bessent responded "[i]t shows ten feet." (Trans. p. 31:12-14). On page 54 of the trial transcript, the following question and answer sequence occurred:

Question: "[Y]ou said that the -- that the creek is ten feet wide?"

¹ Presumably, the reason Petitioner asserts that paragraph 8 of the Final Order misstates Mr. Bessent's trial testimony regarding the precise width of the creek is because Jeff Thompson (OCRM Project Manager for this permit application) testified that when he reviewed the permit application and saw that Mr. Bessent claimed that Kushiwah Creek was *exactly* ten feet wide at Mr. Weatherholtz' property, this claim was an immediate "red flag" regarding the true width of the creek, because ten feet is the smallest creek width allowable to obtain a dock permit. (Trans. p. 166:10-16).

Answer: “Yeah.”

Question: “Okay. You've not said it's 10.01, 10.02. You're saying it's ten feet on the dot?”

Answer: “I'm saying ten feet, which has significance.” (Trans. p. 54:19-24)

The problem with Mr. Bessent's trial testimony is that he was inconsistent. On the one hand, he testified to the accuracy of his survey showing the creek width to be ten feet and again endorsed the ten-foot-creek-width measurement at other points during the trial such as on page 54 of the trial transcript (see above). But Mr. Bessent began to waiver in his testimony and back away from his very precise ten-foot-creek-width assertion. For example, on cross-examination Mr. Bessent claimed “that [the creek width] is 10.1, 10.2” feet. (Trans. p. 81:5-6). As this Court knows well, when a witness provides inconsistent testimony, “the ALC is the ultimate fact finder.” Savannah Riverkeeper v. S.C. Dep't of Health & Env'tl. Control, 400 S.C. 196, 205, 733 S.E.2d 903, 907 (2012).² As such, the ALC “has the prerogative to believe one part of a witness's testimony while simultaneously disbelieving other parts of the same witness's testimony.” Tims v. J.D. Kitts Const., 393 S.C. 496, 508, 713 S.E.2d 340, 346 (Ct. App. 2011). When “there is a conflict in the evidence, either of different witnesses or of the same witnesses, the findings of fact of the [ALC] as triers of the fact are conclusive.” Holcombe v. Dan River Mills/Woodside Div., 286 S.C. 223, 225, 333 S.E.2d 338, 340 (Ct. App. 1985). Here, the ALC assessed Mr. Bessent's contradictory testimony and ultimately concluded that Mr. Bessent asserted the creek to be ten feet wide. Thus, Petitioner's argument that the Order misstated Mr. Bessent's testimony that the creek was ten feet wide is unfounded and without merit.

² “[A]s the fact finder, the ALC . . . weigh[s] the evidence and assess[es] each witness's testimony and credibility prior to ruling.” MRI at Belfair, LLC v. S.C. Dep't of Health & Env'tl. Control, 394 S.C. 567, 577, 716 S.E.2d 111, 116 (Ct. App. 2011).

Petitioner also asserts that paragraphs 9-13 of the Final Order misstate Mr. Bessent's testimony regarding a hand-drawn sketch that was included at trial as Petitioner's Exhibit 5. Petitioner claims that Mr. Bessent's sketch of the conditions in the creek at issue was hypothetical and is not reflective of his measurements or findings that the distance between "sprigs" near the bed of the creek is seven to nine feet. At trial, Mr. Bessent was asked a series of questions regarding his hand-drawn sketch. A few questions were raised about the "seven feet to nine feet" wording at the bottom of the sketch. (Trans. p. 66:2). Specifically, whether the seven to nine feet was "from the point [Mr. Bessent] referr[ed] to as sprigs[.]" (Trans. p. 66:4-6). Mr. Bessent indicated that the seven to nine feet referred to the distance from "sprig to sprig." (Trans. p. 66:4-8). His trial testimony clarifies that Mr. Bessent found the distance from sprig to sprig to be seven to nine feet. Additionally, Mr. Bessent's testimony indicates that the wording included on his hand-drawn sketch refers to this distance. While Petitioner correctly asserts in his Motion that Mr. Bessent describes this sketch as "hypothetical", he (Mr. Bessent) also testified that the accuracy of this sketch was "pretty close." (Trans. p 65:21-22). Once again, because Mr. Bessent provided inconsistent testimony about Petitioner's Exhibit 5, the ALC, as the trier of fact, "has the prerogative to believe one part of a witness's testimony while simultaneously disbelieving other parts of the same witness's testimony." Tims v. J.D. Kitts Const., 393 S.C. 496, 508, 713 S.E.2d 340, 346 (Ct. App. 2011). In this instance, there is substantial evidence supporting the ALC's factual finding that Mr. Bessent's sketch reflects his measurement of the distance between sprigs and that he (Mr. Bessent) "... testified that the distance across Kushiwah Creek from 'sprig to sprig' was seven to nine feet."

Petitioner further asserts that paragraphs 17 and 18 of the Findings of Fact include evidence that has no relevance to the width of Kushiwah creek.³ Amazingly, as noted in footnote 3 below, the Petitioner further describes this Court's factual findings as "misleading" and "inappropriate." Rule 401, SCRE states that "'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." (Emphasis added). In this instance, the ALC found that Mr. Thompson's testimony regarding the difficulty he encountered when navigating Kushiwah Creek "thirty minutes before high tide"⁴ to be relevant regarding the creek width. Contrary to Petitioner's assertion in his Motion that Mr. Thompson's difficulty navigating Kushiwah Creek was due to the fact that the "neighboring dock is located too far out into the creek," there was no testimony at trial to corroborate this assertion. As the Supreme Court noted in Savannah Riverkeeper, "the ALC is the ultimate fact finder." Id., 400 S.C. at 205.

II. Petitioner's Argument that Kushiwah Creek is ten feet wide lacks credibility.

The Petitioner argues in his Motion that the area of his proposed dock and other areas of Kushiwah Creek are ten feet wide. Petitioner bases his argument on measurements taken by his hired surveyor. However, using historical interpretation of where to measure, the Department

³ Specifically, regarding paragraph 17, Petitioner asserts that "the depth of the creek has no bearing on its width, and no such correlation was established in the record. In addition, there was no evidence that Mr. Thompson 'hit bottom' inside Petitioner's extended lot lines, or any place near Petitioner's proposed dock. The fact that there may be oyster beds or some other topographical change within the overall length of Kushiwah creek is not relevant evidence to establish creek width in relation to Petitioner's proposed dock."

Regarding paragraph 18, Petitioner asserts that "the evidence cited in Paragraph 18 (that a neighbor's dock caused the jon boat to go into the marsh) is misleading, and an additional inappropriate basis for determining creek width. As shown in the aerial photographs submitted by Petitioner (Exhibit 10), that neighboring dock protrudes well out into the middle of the creek - beyond where it should - leaving only a narrow lane for passage. The fact that this neighboring dock is located too far out into the creek should not be considered in determining creek width, or, more importantly, creek width in the location of Petitioner's proposed dock." (Emphasis added).

⁴ Trans. p. 185:13-15.

found the creek to be only seven and one half to eight feet wide.⁵ Thus, the Court correctly affirmed the denial of Petitioner's permit because the creek was less than ten feet wide.

Petitioner's surveyor (Mr. Bessent) claims that when his team "put in at high tide," a man in a kayak identified as Billy Ferguson "... physically held the prism target along the edge of the marsh grass at...20 different places along the creek." (Trans. p. 28:13). However, Mr. Bessent testified that he was not in the boat the day the creek measurements were taken. (Trans. p. 73:1). In fact, assuming Mr. Bessent followed his routine practice for gathering survey data,⁶ he was not even present at the Petitioner's property on the day this data was collected. Rather he instructed his crew to find the main edge of the marsh grass as it borders the creek. (Trans. pp. 78:15-79:16). Using their measurements, the surveyor (Mr. Bessent) came to the conclusion the width of the creek at the dock location was ten feet. (Trans. p. 31:14). When DHEC staff went to the same portion of the creek they used the Department's historical interpretation of where to begin measuring. DHEC's historical interpretation includes only taking measurements of the creek within the extended property lines of the lot and using a wetlands expert to determine where the marsh vegetation⁷ begins on either side of the creek bed. Using this method, the Department found the creek to be seven and one half to eight feet wide.

Regarding Billy Ferguson's absence from trial (and lack of testimony regarding where he placed the prism when measuring the creek width), "[i]t is well settled that if a party fails to produce the testimony of an available witness or witnesses on a material issue in the cause, ... it may be inferred that the testimony, ... if presented, would be adverse to the party who fails to

⁵ Jeff Thompson's testimony is quite similar to Mr. Bessent's sketch showing the distance across Kushiwah Creek from "sprig to sprig" as seven to nine feet.

⁶ At trial, Mr. Bessent did not testify specifically regarding his presence or absence at the Petitioner's property on the day the survey data was collected. However, he did testify that "[s]ometimes I'm in the field; *usually I am not.*" (Emphasis added) (Trans. p. 47:1-2). This is the most likely course of events in light of Mr. Bessent's testimony regarding his instructions to his crew before they went to Petitioner's property. (Trans. pp. 78:15-79:16).

⁷ The marsh vegetation is *spartina alterniflora*.

call the witness.” Wisconsin Motor Corp. v. Green, 224 S.C. 460, 464, 79 S.E.2d 718, 720 (1954). “Silence then becomes evidence of the most convincing character.” Interstate Circuit v. United States, 306 U.S. 208, 226, 59 S. Ct. 467, 474, 83 L. Ed. 610 (1939). In this case, Petitioner chose not to call Billy Ferguson as a witness, despite the fact that he was the person who actually took the measurements of the creek; not Mr. Bessent. Without Billy Ferguson’s testimony, it is impossible for the fact-finder to determine the credibility and reliability of his measurements. Unlike Petitioner, the Department’s witness at trial (Mr. Thompson) was present to testify to his own actions and explain how he measured Kushiwah creek. Using the Department’s historical interpretation of where to begin measuring, Mr. Thompson found that Kushiwah Creek was less than ten feet wide within Petitioner’s extended property lines.

Petitioner’s measurements lack credibility based on Billy Ferguson’s absence from trial and Mr. Bessent’s absence from the site the day the purported measurements were taken. Thus, the Court correctly affirmed the denial of Petitioner’s permit based on the Department’s historical interpretation of measuring marsh vegetation.

III. Reply To Petitioner’s Argument That Mr. Bessent Is Qualified To Give Expert Testimony About Marsh Vegetation.

Petitioner claims that Mr. Bessent is qualified to give expert testimony concerning where marsh vegetation begins when establishing creek width. However, Petitioner fails to recognize that “[t]he qualification of a witness as an expert is a matter largely within the trial court’s discretion.” Wright v. Hiester Const. Co., Inc., 389 S.C. 504, 523, 698 S.E.2d 822, 832 (Ct. App. 2010). Therefore, as the fact finder, the ALC determines the weight and credit to be given to expert testimony. MRI at Belfair, LLC v. S.C. Dep’t of Health & Env’tl. Control, 394 S.C. 567, 577, 716 S.E.2d 111, 116 (Ct. App. 2011). Here, Petitioner’s expert was “admitted as an expert witness . . . for purposes of offering opinion testimony relating to land surveying.”

(Trans. p. 25:25- 26:3). Although, Petitioner's expert has expertise in land surveying, this does not qualify him as an expert regarding marsh vegetation. S.C. Code Reg. Ann 30-12(A)(2)(c)(i) (2013) requires measurement "from marsh vegetation on each side" of the creek, thus this Court correctly concluded that expertise in determining where marsh vegetation begins is a crucial component in accurately determining creek width.

IV. Reply To Petitioner's Argument That An Exception To Regulation 30-12(A)(2)(c)(ii) Applies.

Petitioner argues that an exception to S.C. Code Ann. Regs. 30-12(A)(2)(c)(ii) (2013) applies, which allows a dock to be constructed on a creek less than twenty feet if there is no potential dock access from the opposite side of the creek. However, the ALC rightly noted that the opposite side of the creek includes the area within the neighboring property owner's extended property lines, as defined in relation to waterfront property in S.C. Code Ann. Regs. 30-1(D)(53). Thus, this Court correctly affirmed the denial of Petitioner's permit application in accordance with S.C. Code Ann. Regs. 30-12(A)(2)(c)(ii).

Petitioner claims that the ALC's interpretation of the regulation is inconsistent with the plain language of the regulation. Specifically, Petitioner asserts that the reference to "opposite" in S.C. Code Ann. Regs. 30-12(A)(2)(c)(ii) implies a dock directly "opposite" Petitioner's lot. However, Petitioner fails to recognize that "the regulation must be construed as a whole rather than read in its component parts in isolation." Spruill v. Richland Cnty. Sch. Dist. 2, 363 S.C. 61, 64, 609 S.E.2d 524, 526 (2005). Additionally, courts "generally give deference to an agency's interpretation of its own regulation." S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc., 397 S.C. 256, 260-61, 725 S.E.2d 480, 483 (2012). If the agency's interpretation is contrary to the plain language of the Regulation it will be rejected. Id. Here, the plain language of the Regulation specifically provides a definition for waterfront property which finds

the opposite side of the creek includes the area within the neighboring property owner's extended property lines. *See* S.C. Code Ann. Reg. 30-1 (D)(53). As such, Petitioner's lot has a neighboring lot on the opposite side of the creek with actual dock access as well as potential dock access within his extended property lines. (Trans. 199:20-21). Due to the potential access via dockage from the opposite side of the creek, the ALC correctly determined that Petitioner's permit application does not fall within the exception established by S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii). Thus, Petitioner's claim that this interpretation is inconsistent with the plain language of the regulation is incorrect.

CONCLUSION

Based on the foregoing arguments, the Department respectfully requests that the Court deny Petitioner's Motion to Reconsider.

Respectfully submitted,



Bradley D. Churdar
S.C. Bar No. 12829
Chief Counsel for DHEC/OCRM
South Carolina Department of Health and
Environmental Control
1362 McMillan Ave., Ste 400
North Charleston, SC 29405
Tel.: (843) 953-0213
Fax: (843) 953-0201
churdabd@dhec.sc.gov

Charleston, South Carolina
July 17, 2014

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 13-ALJ-07-0494-CC

James Weatherholtz,

Petitioner,

v.

South Carolina Department of
Health and Environmental Control,

Respondent.

COPY

ADMINISTRATIVE HEARING

Wednesday, March 5, 2014
10:01 a.m. - 4:47 p.m.

The hearing before the Honorable Carolyn C. Matthews was held at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 5th day of March, 2014, before Andrea R. Taylor, Court Reporter and Notary Public in and for the State of South Carolina.



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

APPEARANCES

James E. Weatherholtz, Esquire
 WOMBLE, CARLYLE, SANDRIDGE & RICE
 Post Office Box 999
 Charleston, South Carolina 29402
 Pro Se Petitioner

Bradley D. Churdar, Esquire
 DHEC, Ocean & Coastal Resource Management
 1362 McMillan Avenue, Suite 400
 Charleston, South Carolina 29405
 Attorney for Respondent, DHEC OCRM

INDEX**PAGE****OPENING STATEMENTS:**

MR. WEATHERHOLTZ	6
MR. CHURDAR	10

THOMAS B. BESSENT:

MR. WEATHERHOLTZ DIRECT EXAMINATION	23
MR. CHURDAR . CROSS-EXAMINATION	36
MR. WEATHERHOLTZ REDIRECT EXAMINATION	73
MR. CHURDAR . RECROSS-EXAMINATION	81

JAMES E. WEATHERHOLTZ:

MR. WEATHERHOLTZ DIRECT TESTIMONY	84
MR. CHURDAR . CROSS-EXAMINATION	123
MR. WEATHERHOLTZ REDIRECT TESTIMONY	144

JEFF THOMPSON:

MR. CHURDAR . DIRECT EXAMINATION	147
MR. WEATHERHOLTZ CROSS-EXAMINATION	204
MR. CHURDAR . REDIRECT EXAMINATION	232

Certificate	235

EXHIBITS

Petitioner's Exhibit Number 1	21
(Dock Layout)	
Petitioner's Exhibit Number 2	21
(Dock Detail)	
Petitioner's Exhibit Number 3	21
(Cross-Section)	



Petitioner's Exhibit Number 4	21
(Survey of DHEC-OCRM Critical Line and Location Map)	
Petitioner's Exhibit Number 5	21
(Tom Bessent Field Notes)	
Petitioner's Exhibit Number 6	21
(Emails)	
Petitioner's Exhibit Number 7	21
(Dock Permit Denial Letter, August 7, 2013)	
Petitioner's Exhibit Number 8	21
(Request for Final Review August 20, 2013)	
Petitioner's Exhibit Number 9	21
(Staff Response to RFR, September 5, 2013)	
Petitioner's Exhibit Number 10	21
(Aerial Photos, A-D)	
Petitioner's Exhibit Number 11	21
(Tapes Measurements, August 1, 2013, A-C)	
Petitioner's Exhibit Number 12	21
(PVC Pipe Photos, September/October 2013, A-B)	
Petitioner's Exhibit Number 13	21
(Pipe Measurement Photos, September/October 2013, A-E)	
Petitioner's Exhibit Number 14	21
(Pipe Measurement Photos, September/October 2013, A-C)	
Petitioner's Exhibit Number 15	21
(Pipe Measurement Photos, September/October 2013, A-D)	
Petitioner's Exhibit Number 17	21
(PVC Pipe) (Exhibit was retained)	
Petitioner's Exhibit Number 18	122
(DHEC File for Permit #OCRM-01-254-G (Canton/Nixon) A-BBB)	
Respondent's Exhibit Number 1	22
(Permit File)	
Respondent's Exhibit Number 2	22
(Correspondence)	
Respondent's Exhibit Number 3	22
(Deposition Exhibits 4-20)	
Respondent's Exhibit Number 4	22
(1999 Reg. re: standards docks)	
Respondent's Exhibit Number 5	22
(Charleston GIS Aerial Photos)	



STIPULATIONS

It is stipulated and agreed that this hearing is being taken pursuant to the rules of the Administrative Law Judge Division and the South Carolina Rules of Civil Procedure.

**CREEL COURT REPORTING, INC.**

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(803) 252-3445 / (800) 822-0896

JAMES WEATHERHOLTZ V. SC DHEC

5

1 **THE COURT:** Good morning to everyone. Glad to have
2 you here. Glad everyone arrived safely given
3 the vagaries of wind and weather we've had
4 recently. I'm Judge Carolyn Matthews. I'm the
5 Administrative Law Judge who's been assigned to
6 hear the case this morning, which is entitled
7 James Weatherholtz, Petitioner, vs. South
8 Carolina Department of Health and Environmental
9 Control, Respondent, and it's our Docket Number
10 13-ALJ-07-0499-CC. And as I understand this
11 case, contested case is before me because Mr.
12 Weatherholtz has appealed the denial of OCRM's
13 permit application number 13-155D in which he
14 applied for a dock fixed with a five by ten
15 fixed pier and a four foot by 245 foot walkway
16 adjacent to Kushiwah, am I saying it right?

17 **MR. WEATHERHOLTZ:** Yes, ma'am, Kushiwah.

18 **THE COURT:** Kushiwah Creek at 949 Compass Point in
19 Stiles Point Plantation in Charleston. And the
20 basic issue is the width of the creek and
21 whether it conforms with DHEC's requirements
22 that it be at least ten feet wide and various
23 other requirements. So the way we will proceed
24 today, Mr. Weatherholtz, you're representing
25 yourself, correct?



JAMES WEATHERHOLTZ V. SC DHEC

6

1 MR. WEATHERHOLTZ: Correct.

2 THE COURT: And you are not an attorney?

3 MR. WEATHERHOLTZ: Actually, I am an attorney.

4 THE COURT: Oh, I'm sorry. I should have realized
5 that.

6 MR. WEATHERHOLTZ: I'm not appearing as one today
7 but ...

8 THE COURT: Yes, and of course, as you know, you
9 have the right to represent yourself in any
10 courtroom in the nation even if you were not an
11 attorney, so you're familiar then with our
12 rules. And the way we'll proceed today, since
13 you're the Petitioner, you bear the burden of
14 proof in this matter, and we will proceed with
15 opening statements on behalf of each party, and
16 then, Mr. Weatherholtz, you'll be allowed to
17 present whatever witnesses you have and
18 whatever exhibits and evidence is admissible
19 under the Rules of Evidence of South Carolina;
20 the same for Mr. Churdar; and then we'll have
21 brief closing statements or submission of
22 proposed orders by both parties. So whenever
23 you're ready, Mr. Weatherholtz, I'll be glad to
24 hear from you in opening.

25 OPENING STATEMENT - MR. WEATHERHOLTZ:



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JAMES WEATHERHOLTZ V. SC DHEC

7

1 **MR. WEATHERHOLTZ:** Thank you, Your Honor. As you
2 know, I'm James Weatherholtz, the petitioner in
3 this matter, and I would like to give just a
4 brief opening. I think you summarized the case
5 very well before we got started. By way of a
6 little bit of background, my wife and I built
7 this house on James Island in 2012. We moved
8 in in August. We are on the marsh. We have a
9 canoe and a kayak, and we had enjoyed being out
10 in the marsh, and we have two little girls, so
11 all of us would go out and paddle around and
12 have fun, but we could only really get access
13 to the water at the highest high tide. The
14 tide would come up to our bank at a six-foot
15 high tide or greater, that would give us an
16 hour or two on either side of high tide to get
17 access to the marsh and then to the creek from
18 there. But the more we did it, the more we
19 thought it would be nice to have a crabbing
20 dock or a fishing dock that takes us out to the
21 five or six-foot deep creek that is about 240
22 feet behind our house. So we followed the
23 normal process. I hired a local land surveyor
24 to assist me with the process of preparing a
25 drawing of a survey of the creek and of my lot



JAMES WEATHERHOLTZ V. SC DHEC

8

1 lines and where the dock was proposed to be
2 located. He helped me with the application
3 process. We submitted the application to DHEC.
4 DHEC performed field measurements and denied
5 the dock permit application basically on two
6 grounds. The first is South Carolina Code of
7 Regulations 30-12(A)(2)(c)(i), and the second
8 is (A)(2)(c)(ii). So really throughout today's
9 trial, for ease of reference, I'll just refer
10 to that as (c)(1) and (c)(2).

11 **THE COURT:** Okay.

12 **MR. WEATHERHOLTZ:** Reg (c)(1) basically says that
13 the creek has to be ten feet wide. Reg (c)(2)
14 says that if the creek is less than 20 feet
15 wide, then some special geographic
16 circumstances must exist, one of two things:
17 either the lot has to have 500 feet of frontage
18 on the creek or on the marsh, which my lot does
19 not have, or there can be no potential dock
20 access from the opposite side of the creek.
21 DHEC denied the permit application on those two
22 grounds. I'm prepared to present evidence here
23 today that that denial was improper under the
24 circumstances; that factually, the creek behind
25 my house is, in fact, ten feet wide. And I'll



1 present documentary evidence, a stamped survey
2 from a registered land surveyor. I'll present
3 some photographic evidence showing that if the
4 proposed location of the pierhead, as well as
5 other locations within my extended lot lines
6 and outside of my extended lot lines, in that
7 creek there are numerous locations that are ten
8 feet and greater. As to reg (c)(2), I have
9 evidence that there is no potential dock access
10 from the opposite side of the creek either
11 within my extended lot lines or outside of
12 that, with the exception of one existing dock
13 that is already there. So that basically will
14 be my evidence. I'll call two witnesses. I
15 have the registered land surveyor who prepared
16 the survey that was submitted with the
17 application, and then I myself will testify
18 regarding some of the things that I mentioned
19 in this brief opening. So I respectfully
20 submit that based on all that evidence that the
21 decision of DHEC ought to be overturned and the
22 dock permit application should be granted.
23 Thank you.

24 **THE COURT:** Thank you, Mr. Weatherholtz. Mr.
25 Churdar, I'll be glad to hear from you in



1 opening.

2 OPENING STATEMENT - MR. CHURDAR:

3 MR. CHURDAR: Thank you, Your Honor. If I could --
4 Your Honor, can you see that? Is that glare
5 off of my iPad make it hard to ---

6 THE COURT: No, it's fine. We can see through that.
7 I think we see the critical stuff.

8 MR. CHURDAR: Your Honor, this is -- Mr.
9 Weatherholtz has identified the -- correctly
10 identified the two bases that the Department
11 has used to deny his dock permit application
12 and 30-12, and particularly the subsections he
13 referred to as (c)(1) and (c)(2), as you can
14 see right here, that is correct that the dock
15 will not be permitted on creeks less than ten
16 feet wide as measured from marsh vegetation on
17 each side; and then the second hurdle that he
18 would have to overcome is the special
19 geographic circumstances for a dock that is
20 between ten feet and 20 feet wide. Now, what
21 you're going to hear today, Mr. Weatherholtz
22 indicted that his lot is not greater than 500
23 feet of water frontage, so the only question
24 with regard to (c)(2) is whether or not there
25 is a potential for access via dockage from the



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11

1 opposite side of the creek. That is the
2 question regarding (c)(2) that this Court has
3 to answer, did the Department properly or
4 correctly apply that? And what I think I'll
5 just -- since I'm on that, what I'd like to do
6 is show you what Jeff Thompson will be
7 testifying to today.

8 **THE COURT:** All right.

9 **MR. CHURDAR:** And he will be testifying regarding
10 this picture right there. What he will testify
11 to is this is taken from the Charleston County
12 GIS, and what Charleston County GIS has done
13 has overlaid the property lines with the aerial
14 photographs so that when the Department is
15 making a determination as to extended property
16 lines, they can look at what the property lines
17 are, and in this instance, what you have is an
18 extended property line right there. Mr.
19 Thompson -- I don't know if that showed
20 through, but Mr. Thompson will testify that
21 with regard to (c)(2) the potential access for
22 dockage on the other side of the creek would
23 allow this property owner right there with this
24 property, pie-shaped piece of property to --
25 there is at least a potential for him to

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12

1 rebuild the dock right there or directly across
2 the creek. But right now there is -- there is
3 -- and he will testify to this, it's not
4 potential access via dockage on the opposite
5 side of the creek; it's actual access via
6 dockage on the other side of the creek right
7 there. Now, what Mr. Weatherholtz will testify
8 to, if it's consistent with his deposition, is
9 that he does not believe that access on the
10 other side of the creek outside of his property
11 lines should be considered, but in reality what
12 Mr. Thompson will testify to is not only does
13 he have access right there, but he potentially
14 -- and that's all it is is potential access for
15 dockage on the other side of the creek -- he
16 potentially could reconfigure his dock for
17 access there or reconfigure his dock for access
18 there. He would be within the 1,000 feet
19 limitation to get a dock. So that's what Your
20 Honor will hear with regard to why Mr.
21 Weatherholtz does not meet the special
22 geographic circumstances requirement under
23 (c)(2).

24 **THE COURT:** All right.

25 **MR. CHURDAR:** Mr. Thompson is also -- he's going to



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13

1 be our witness. This is -- this is -- he'll be
2 the only witness. We'll have some documentary
3 evidence as well, but he will testify to the
4 Court about the policies and the purposes
5 behind why there is a limit and, you know, why
6 we -- why the Department doesn't have the
7 discretion to, you know, put a -- give a dock
8 permit for a creek that's two feet wide or one
9 feet wide. There is -- there is a limit. He
10 will explain what the policies and the purposes
11 are behind those limits and why this would be
12 in keeping with those policies. With regard to
13 the first issue, the ten-foot wide creek, what
14 you're going to see, this is -- hopefully, it
15 will not be too confusing. This is an aerial
16 photograph, and Mr. Weatherholtz and I will be
17 discussing this at some length. This is from
18 his deposition, and he has indicated that the
19 photographs that he will be submitting are
20 numbered and you -- what you see these numbers
21 up here at the top in the red, as well as this
22 one red number down here, those are deposition
23 exhibit numbers of the same photos that he's
24 going to be presenting. But I think it'll be
25 helpful for Your Honor to see the photographs

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JAMES WEATHERHOLTZ V. SC DHEC

14

1 and then make reference to Defendant's Exhibit
2 17 so that you can see where on the creek these
3 pictures are taken. Mr. Weatherholtz will
4 testify that there were a couple of sections
5 right here that he has identified as sections
6 two and three. These two sections right here,
7 there are segments the length of the creek
8 between say two to four feet, is what he will
9 testify to, two to four feet of sections that
10 he believes are ten feet wide. So they're not
11 -- they're not side by side. They're very near
12 each other, is what he will testify to, but
13 they're -- they're not contiguous. I mean,
14 there is marsh grass that separates those that
15 makes the creek less than ten feet. What Mr.
16 Thompson will testify to is the Department
17 consistently, its policy has been that you
18 don't issue a permit when you're going to be at
19 the mouth of the -- at the edge of the creek
20 covering Spartina grass. You don't -- you
21 don't have it underneath. This is a ten-foot
22 wide minimum with a pierhead of five feet deep
23 and ten feet long. You're already covering up
24 half the creek if it meets the ten-foot
25 minimum. So I believe that that is a pretty

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JAMES WEATHERHOLTZ V. SC DHEC

15

1 good summary of what the testimony and the
2 evidence will present, and when you take a look
3 at the policies behind the Act, you take a look
4 at the very narrow width of this creek and the
5 potential for access, I believe that the
6 Department has made the right decision, and I
7 believe that's what the evidence will show.

8 **THE COURT:** Thank you very much, Mr. Churdar.
9 Whenever you're ready, Mr. Weatherholtz, you
10 may call your first witness.

11 **MR. WEATHERHOLTZ:** Thank you, Your Honor. The first
12 witness that I call is Tom Bessent.

13 **THE COURT:** Mr. Bessent, if you'd please come around
14 here to our witness chair, raise your right
15 hand, I'll ask our court reporter to administer
16 the oath or affirmation.

17 **COURT REPORTER:** Spell your last name for me, sir?

18 **MR. BESSENT:** It's Bessent, B-E-S-S-E-N-T.

19 **THOMAS B. BESSENT,** having been duly sworn, testifies
20 as follows:

21 **MR. WEATHERHOLTZ:** Your Honor, if it pleases the
22 Court, I didn't realize that we had the
23 technology available in the courtroom, so I
24 prepared exhibit notebooks.

25 **THE COURT:** Whatever works for you, Mr.

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JAMES WEATHERHOLTZ V. SC DHEC

16

1 Weatherholtz, is fine with us.

2 **MR. WEATHERHOLTZ:** This is a copy of all of my
3 exhibits for your review.

4 **THE COURT:** Wonderful. Appreciate that.

5 **MR. WEATHERHOLTZ:** And this is the actual exhibits.
6 I provided Mr. Churdar with a notebook like
7 this too.

8 **THE COURT:** Thank you very much.

9 **MR. CHURDAR:** Your Honor, there is -- there is one
10 evidentiary matter that will come up. I don't
11 know if you want to address it right now with
12 regard to proposed Exhibit Number 18.

13 **THE COURT:** Okay.

14 **MR. CHURDAR:** I would object. This is the response
15 that was provided to Mr. Weatherholtz in
16 response to a FOIA request about the permitting
17 file on this property, the same property he
18 purchased.

19 **THE COURT:** Right.

20 **MR. CHURDAR:** A permit that was issued back in --
21 about 12 years ago, 12 or 13 years ago. My
22 objection, Your Honor, is based on the grounds
23 of relevance. It is -- it is not relevant, and
24 particularly the reason that I say it's not
25 relevant is because in 2003, the General



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17

1 Assembly modified 30-12, which is the
2 regulations ---

3 **THE COURT:** Right.

4 **MR. CHURDAR:** --- defining piers, specifically is
5 it's relevant to this case to include a ten-
6 foot minimum creek width. In other words, back
7 at the time that this permit was issued, there
8 was no ---

9 **THE COURT:** The ten-foot limitation at the time.

10 **MR. CHURDAR:** Correct.

11 **THE COURT:** I see it was issued 2001, July 2nd ---

12 **MR. CHURDAR:** Right.

13 **THE COURT:** --- and expired 2006. They didn't build
14 it apparently.

15 **MR. CHURDAR:** Correct, they did not and the permit
16 has expired.

17 **THE COURT:** Okay.

18 **MR. CHURDAR:** And what has come, what was in play
19 then were regulations that had been enacted in
20 1999. I had submitted those after getting Mr.
21 Weatherholtz's supplemental exhibit. I then
22 supplemented, as Your Honor is probably aware,
23 the proposed exhibit list to include the
24 regulations from 1999, but only -- I don't
25 think it's relevant to this, but only as it

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18

1 becomes relevant to the prior permit. I mean,
2 we're dealing with apples and oranges here.
3 And so I would object based on the relevance of
4 that.

5 **THE COURT:** Mr. Weatherholtz?

6 **MR. WEATHERHOLTZ:** Yes, ma'am. I agree with
7 everything he said with regard to when this
8 permit application was filed and when it was
9 approved.

10 **THE COURT:** Right.

11 **MR. WEATHERHOLTZ:** It was prior to the change in
12 regulations that required a ten-foot width.
13 I'm not submitting this for purposes of showing
14 that because a dock was previously approved for
15 this lot that I should get one too. I
16 recognize and understand that the regulations
17 have changed since this dock was permitted.
18 That's not the purpose. This file is probative
19 as to the issue of the width of the creek.
20 When the permit application was submitted, DHEC
21 sent a representative out to the site to
22 perform field measurements just as was done
23 here. That person prepared a report as was
24 done here. There's a reference in this file
25 and in that report to the fact that Kushiwah



JAMES WEATHERHOLTZ V. SC DHEC

19

1 Creek in the location of this proposed dock
2 placement is ten feet. So I would submit that
3 evidence for purposes -- as probative and
4 relevant as to the issue of the width of the
5 creek for whatever weight it holds.

6 **THE COURT:** And you were going to introduce that
7 through your testimony or through ---

8 **MR. WEATHERHOLTZ:** Right. Well, through Rule 803 --

9 -

10 **THE COURT:** --- Mr. Bessent's?

11 **MR. WEATHERHOLTZ:** --- 6 and 8 as a ---

12 **THE COURT:** Right. As a business records ---

13 **MR. WEATHERHOLTZ:** --- business record.

14 **THE COURT:** --- rule. And then ---

15 **MR. WEATHERHOLTZ:** And a report ---

16 **THE COURT:** Well ---

17 **MR. WEATHERHOLTZ:** And if I needed to use his DHEC
18 witness to lay the foundation for that, that's
19 what I intended to do.

20 **THE COURT:** Okay. Let's wait until we get close to
21 laying foundation. I'm not going to make a
22 ruling on it right now.

23 **MR. WEATHERHOLTZ:** Yes, ma'am.

24 **THE COURT:** I think you have a decent argument as to
25 relevance, and I think Mr. Churdar has a decent



JAMES WEATHERHOLTZ V. SC DHEC

20

1 argument as to its validity. So we'll wait
2 until we get to that point on that one.

3 **MR. WEATHERHOLTZ:** That's great. And one other
4 housekeeping matter, since he raised it.

5 **THE COURT:** Yes. Certainly.

6 **MR. WEATHERHOLTZ:** It's my understanding based on
7 what he said that maybe this is the only
8 exhibit he has an objection to, so ---

9 **THE COURT:** Sure.

10 **MR. WEATHERHOLTZ:** --- if that's true, I would love
11 to go ahead and admit the remaining exhibits to
12 skip over foundation laying for all of that.

13 **MR. CHURDAR:** Well, Your Honor, the -- I don't know
14 with regard to, Exhibit 16 is a cluster of ---

15 **THE COURT:** Photos.

16 **MR. CHURDAR:** --- I believe seven pictures or so
17 that he, Mr. Weatherholtz has indicated I think
18 he took this past weekend. I would -- I would
19 object on the grounds of relevance until I hear
20 why it's relevant. I'm not sure why.

21 **THE COURT:** The new photographs?

22 **MR. CHURDAR:** Correct.

23 **THE COURT:** Okay. So without objection then we can
24 admit Petitioner's Exhibits 1 through 15 and
25 17; is that okay with you, Mr. Churdar?

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JAMES WEATHERHOLTZ V. SC DHEC

21

1 MR. CHURDAR: One through 15?

2 THE COURT: And 17.

3 MR. CHURDAR: And then 17 is that pole?

4 MR. WEATHERHOLTZ: Yes, exactly.

5 MR. CHURDAR: Okay.

6 (Petitioner's Exhibit Numbers 1, 2, 3, 4, 5, 6, 7, 8,
7 9, 10, 11, 12, 13, 14, 15, and 17 were admitted into
8 evidence.)

9 MR. WEATHERHOLTZ: If you want to look at it you can
10 but it's the one that's shown in some of these
11 photos.

12 MR. CHURDAR: Okay. Sure.

13 THE COURT: And how about with respect to Mr.
14 Churdar's exhibits?

15 MR. CHURDAR: Well, I have not gotten mine marked.
16 Do you want to go ahead and do that right now?

17 THE COURT: Yes, sir.

18 MR. CHURDAR: We've discussed them and they are, I
19 think we're in agreement about that. I have --
20 the Respondent's Exhibit 1 is the -- just the
21 permit file. I just marked that as 1. Put
22 that alligator clamp on that whole document.
23 Respondent's Exhibit 2 is correspondence from
24 Mr. Bessent along with the same field notes
25 that he has provided, but the email ---



JAMES WEATHERHOLTZ V. SC DHEC

22

1 **THE COURT:** All right.

2 **MR. CHURDAR:** --- is attached to that, so I'll put
3 that as Number 2. And Number 3 I have put
4 together, which is deposition exhibits 4
5 through 20. I'm just going to include these as
6 one. So that'll be Respondent's 3. And then
7 Respondent's 4 is the 1999 regulation regarding
8 project-specific standards for docks that was
9 in effect when the prior dock permit
10 application was submitted. That will be my
11 Respondent's 4. And then Respondent's 5 will
12 be the Charleston County GIS aerial photo. And
13 those are my five exhibits.

14 **THE COURT:** Okay. And you've had a chance to look
15 at those, Mr. Weatherholtz?

16 **MR. WEATHERHOLTZ:** Yes, ma'am, I have.

17 **THE COURT:** And you have no objection?

18 **MR. WEATHERHOLTZ:** No objections.

19 **THE COURT:** Without objection then, DHEC Respondent's
20 1 through 5 admitted into evidence and parties
21 and witnesses may refer to them as necessary.
22 You may proceed.

23 **(Respondent's Exhibit Numbers 1 through 5 were marked**
24 **for identification purposes and admitted into**
25 **evidence.)**



1 **MR. WEATHERHOLTZ:** Thank you, Your Honor.

2 **THOMAS BESSENT,** having been duly sworn, testifies as
3 follows:

4 **MR. BESSENT - DIRECT EXAMINATION BY MR. WEATHERHOLTZ:**

5 Q: Mr. Bessent, would you please state your full
6 name for the record?

7 A: It's Thomas B. Bessent.

8 Q: And what do you do for a living?

9 A: I'm a land surveyor.

10 Q: And how long have you been doing that?

11 A: Since 1979. I've been registered as a
12 professional land surveyor since 1986.

13 Q: And according to your CV, it looks like your
14 South Carolina registration number as a
15 professional land surveyor is number 10778; is
16 that correct?

17 A: Correct.

18 Q: What's your educational background?

19 A: I have a degree in marine biology from the
20 College of Charleston.

21 Q: And if you would, please just describe a
22 thumbnail sketch of your work history after
23 college.

24 A: I worked at DNR, Department of Natural
25 Resources, for a brief period of time. I was



JAMES WEATHERHOLTZ V. SC DHEC

24

1 a high school science teacher for one year.
2 And then I got a job with a surveying company,
3 and I worked my way up into ownership of a
4 company called ESP, Engineering, Surveying and
5 Planning, was with them for about 20 years.
6 They did a couple of mergers. I started my own
7 company, Island Surveying, in early 2005.

8 Q: And primarily what does Island Surveying do
9 today?

10 A: We do the total range of land surveying,
11 everything from small jobs, FEMA elevation
12 certificates, right up to large industrial and
13 construction-type projects, residential, rural
14 boundary surveys, dock permits.

15 Q: In the normal course of your business, helping
16 prepare dock permit applications is something
17 that you do?

18 A: Yes, I do two or three of those per year or so.

19 Q: And as part of that, you perform surveys of
20 critical areas and you locate proposed dock
21 placements?

22 A: Yes.

23 Q: According to your CV, you are a member and
24 former director of the South Carolina Society
25 of Professional Land Surveyors; is that right?



JAMES WEATHERHOLTZ V. SC DHEC

25

1 A: Yes.

2 Q: And you're a member and past president of the
3 Coastal Chapter of the SCPLS, and you've also
4 held other offices in various committees with
5 that organization?

6 A: That's correct.

7 **THE COURT:** One moment. Could you please tell me
8 what SCPLS is?

9 **MR. WEATHERHOLTZ:** Yes, ma'am, I'm sorry. It's the
10 South Carolina Society of Professional Land
11 Surveyors.

12 **THE COURT:** Thank you very much.

13 Q: Have you ever testified as an expert witness at
14 trial?

15 A: Yes.

16 Q: Approximately how many times?

17 A: Seven or eight.

18 Q: Do you recall what your field of expertise was?

19 A: Yes, I've testified as to marsh tidal boundary
20 issues. I've testified in matters of boundary
21 discrepancies, property line disputes.

22 Q: Have you ever not been admitted as an expert
23 witness at trial when presented as such?

24 A: No.

25 **MR. WEATHERHOLTZ:** Your Honor, at this time I would



JAMES WEATHERHOLTZ V. SC DHEC

26

1 ask that Mr. Bessent be admitted as an expert
2 witness in this case for purposes of offering
3 opinion testimony relating to land surveying.

4 **THE COURT:** Mr. Churdar, any questions you would
5 like to ask of Mr. Bessent?

6 **MR. CHURDAR:** No, ma'am, I don't object.

7 **THE COURT:** All right. Then without objection, Mr.
8 Bessent, right?

9 **MR. BESSANT:** Bessent.

10 **THE COURT:** Bessent. I have to get people's names
11 right. Bessent. You are admitted as an expert
12 in the area of land surveying and may testify
13 as such.

14 Q: Mr. Bessent, would you please describe to the
15 Court what you were asked to do in this case?

16 A: You contacted me and just asked me to provide
17 you with a survey and drawings and necessary
18 documents to apply for a permit for a dock
19 behind your residence.

20 Q: And did you do that work?

21 A: Yes.

22 Q: If you would, please, take a look at that
23 exhibit notebook in front of you, and let's
24 start with tab number five, which is Exhibit 5.

25 A: That's the location map?



JAMES WEATHERHOLTZ V. SC DHEC

27

1 Q: Well, look at tab five.

2 A: Okay.

3 Q: I think it should be behind tab five.

4 A: Right.

5 Q: Okay. I'll give you a moment to just look at
6 those and once you're ready, please tell us if
7 you recognize those documents.

8 A: Yes. Yes, I recognize ---

9 Q: What are these?

10 A: This is a plot of the -- of the points, the
11 actual field data points that my field crew
12 gathered when they did your survey.

13 Q: Describe for us the process they undertook to
14 gather those data points.

15 A: These -- these points were shot using a total
16 station instrument, which we use in 95 percent,
17 almost all of the surveying that we do. No
18 matter the purpose, the basic procedures are
19 very similar. There's an electronic total
20 station. That's an instrument that measures
21 horizontal angles, distances, and vertical
22 angles. You shoot a laser beam to a target, a
23 glass prism, that reflects back to the
24 instrument. And again, that is how surveyors
25 do 95 percent of their work, whether it's



JAMES WEATHERHOLTZ V. SC DHEC

28

1 boundary surveying work, topographic work,
2 surveying like this for dock permits,
3 construction layout work. It's all done with
4 that same basic setup, the same basic
5 procedure. In this case, I had one man on the
6 land in your backyard. We had already done a
7 survey to establish your property lines and to
8 establish the OCRM critical line, and now we
9 were setting up on those same control points
10 tied into that boundary. We had a guy setting
11 up on land. We had another guy out in a kayak
12 with the prism that I just described. We put
13 in at high tide, paddled out to the creek, and
14 the man in the creek paddled up and down the
15 creek and physically held this prism target
16 along the edge of the marsh grass at, looks
17 like -- I haven't counted them, I don't know,
18 maybe 20 different places along the creek. We
19 also located the neighbor's dock to the right
20 of you as you're facing the creek, and this is
21 the raw plot. This is just the bare field data
22 that comes into our computer after we download
23 the field instruments.

24 Q: Did you go to the creek the day you took
25 measurements for the purpose of showing that it

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JAMES WEATHERHOLTZ V. SC DHEC

29

1 was, in fact, ten feet wide?

2 A: I was not in the boat at the time. I
3 supervised the job the way I do all of my
4 surveys. I talked with my guys before, during,
5 and after. I was not in the boat that day.

6 Q: What about the guys who actually went? Did you
7 have a conversation with them before they went
8 out and performed this job?

9 A: Again, before, during and after. I knew from
10 doing just preliminary research by looking at
11 aerials and so forth, I knew it was a fairly
12 narrow creek, so we discussed it in detail.

13 Q: What is the third page of Exhibit 5, the
14 sketch?

15 A: All right. That is -- I'm a big sketcher. If
16 you flip through my files in the office, I
17 can't talk without drawing something, so this
18 -- this came right out of my file, and this is
19 what the crew guys and I were discussing. I
20 really can't remember if this was done before
21 I sent them out there or when they came back
22 and they were explaining what they did, but I
23 do remember talking with my guys about this and
24 this is my interpretation. I was -- well, it's
25 kind of self-explanatory about what is the



JAMES WEATHERHOLTZ V. SC DHEC

30

1 definition of edge of grass. Where is the edge
2 of the vegetation line, because obviously it's
3 irregular. Obviously there's a heavy growth
4 line and there are some lighter little sprigs
5 of grass maybe out sticking out further. So
6 this is just my interpretation, my sketch that
7 I use with my discussion with my field crew.

8 Q: And if you go back to the first page of Exhibit
9 5, those Xs, do those represent specific
10 locations where field measurements were taken?

11 A: Yes, those are the actual points, again, where
12 the guy in the kayak held the prism out at the
13 edge of the grass. The guy on land collected
14 the point and that stored that data point, and
15 that little X with the description, the ones
16 that say E creek means edge of creek, so
17 everything that says E creek means that's our
18 interpretation of the edge of the marsh grass.

19 Q: Okay. So what happens with all that raw data
20 when you get back to the office? what do you do
21 with it?

22 A: Well, again this is what -- this is what you
23 see when you bring it in. And then you can see
24 our finished product on the actual survey
25 drawings that we submitted for the permit. We

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JAMES WEATHERHOLTZ V. SC DHEC

31

1 kind of smooth out the lines and connect the
2 dots as best we can and make a drawing out of
3 it.

4 Q: If you would, please, look at Exhibit 1.

5 A: Okay.

6 Q: What is that document?

7 A: That is one of the permit drawings that we
8 submitted. This is kind of the overall
9 picture. This shows the lot and it shows the
10 critical line. It shows the creek and it shows
11 the proposed dock location.

12 Q: What does this survey show as the width of the
13 creek in the proposed dock location?

14 A: It shows ten feet.

15 Q: If you would, please, look at Exhibit 2. What
16 is that document?

17 A: That's just an enlarged view that shows the
18 area of primary concern, which is the creek
19 itself.

20 Q: And Exhibit 3?

21 A: That is a cross-section or a side view that
22 shows a profile of the same thing from the OCRM
23 critical line out to the creek in the location
24 of the proposed dock.

25 Q: And what is Exhibit 4, just the first page?



JAMES WEATHERHOLTZ V. SC DHEC

32

1 A: Exhibit 4 is the first step in the process, and
2 that's where we went out and tied to the
3 property boundaries and surveyed the OCRM
4 critical line. And that was inspected and
5 signed off by Mr. Thompson.

6 Q: Going back to Exhibit 1, the reference points
7 that appear in your field notes relating to the
8 specific locations where you took measurements,
9 those are reflected and summarized in Exhibit
10 1; is that correct?

11 A: Correct.

12 Q: And Exhibit 1 shows that the width of the creek
13 in the proposed dock location is ten feet?

14 A: Yes.

15 Q: Can you testify here today to a reasonable
16 degree of certainty in your field of expertise
17 that the creek width in that location is ten
18 feet or greater?

19 A: Yes.

20 Q: You mentioned earlier that you measured the --
21 you took those measurements at or near high
22 tide?

23 A: Yes, that was a matter of convenience more than
24 anything else because we -- just as you
25 described in your opening statements, that's



JAMES WEATHERHOLTZ V. SC DHEC

33

1 the best time for us to slip in a kayak and
2 paddle out there and get the -- and get the
3 measurements.

4 Q: And I think you testified earlier that you have
5 experience performing measurements like this in
6 other creeks or other surveys, correct?

7 A: Yes.

8 Q: Do you always do it at high tide or have you
9 been in some creeks at low tide as well?

10 A: If it's -- if it's a sizeable deep body of
11 water, many times we'll put a power boat in and
12 put it in at a boat landing and run it around
13 and then we can do it at any stage of the tide.

14 Q: Have you ever had an opportunity to perform
15 measurements from vegetation to vegetation at a
16 lower tide that exposed the roots of the grass?

17 A: Yes. Again, we don't do it at dead low tide
18 because you can't -- sometimes there are
19 mudflats on the sides and you can't reach --
20 physically reach over to the grass at dead low
21 water. But if there's enough water in there to
22 get up to the marsh grass, yeah, we've done it
23 at all stages of the tide. I'd say that would
24 be from mid tide on up.

25 Q: Do you have an opinion whether or not there is



JAMES WEATHERHOLTZ V. SC DHEC

34

1 a difference in measuring marsh vegetation to
2 vegetation at high tide or mid tide or low
3 tide?

4 A: Well, I would think, and again, this was
5 measured at high tide, but I would certainly
6 think that in many cases marsh grass obviously
7 grows up from the mud line and as vegetation
8 grows, it spreads.

9 MR. CHURDAR: Your Honor, I would object to -- I
10 believe that this opinion that is being asked
11 of this witness is beyond the scope of his
12 recognition as an expertise (sic) in the field
13 of land surveying. That is what he was
14 qualified, as a land surveyor, an expert
15 witness to offer opinions about land surveying.
16 Any opinions regarding vegetation growth,
17 Spartina grass, that sort of thing, I don't
18 believe is within the scope of his expertise.

19 THE COURT: Mr. Weatherholtz?

20 MR. WEATHERHOLTZ: Your Honor, as a professional
21 land surveyor, he is asked to go out and
22 measure vegetation to vegetation. Part of that
23 is taking into account where the measurements
24 are supposed to be taken, how to address his
25 interpretation of that regulation. And he has



JAMES WEATHERHOLTZ V. SC DHEC

35

1 experience and expertise in where those
2 measurements are taken and how the grass growth
3 affects those measurements. I think it's
4 within the scope of his knowledge and
5 experience.

6 **THE COURT:** Well, and I think since he testified
7 earlier that he has many times assisted with
8 dock placement and other sorts of things that
9 where the marsh begins and ends would be
10 obviously critical to those, so I'll overrule
11 the Objection. You may testify with respect to
12 where the marsh grass begins to grow, Mr.
13 Bessant.

14 **A:** Okay. Yeah. All right. Of course, I'm
15 definitely not a botanist, but I know that
16 Spartina grass grows, I don't know, five, six
17 feet tall, maybe taller in some cases, and it
18 certainly leans. It branches out. This is
19 splitting hairs, but again, that's apparently
20 what we're doing today is splitting hairs, so
21 I can certainly -- I would certainly think that
22 at a lower tide if you measure to the stalks of
23 the grass at the mud line, it could
24 conceivably, probably likely would be wider
25 than if you measure it at the top where the



JAMES WEATHERHOLTZ V. SC DHEC

36

1 growth is thicker and leaning out over the
2 creek.

3 Q: But to be clear, in this case as you've already
4 testified, you measured at a higher tide so
5 those measurements would have been taken at the
6 marsh grass nearer the top of those blades than
7 at the roots?

8 A: Right. Whatever was visible, which at that
9 time would be several feet above the roots.

10 Q: Thank you, Mr. Bessent. Those are all the
11 questions I have.

12 **THE COURT:** Thank you very much. Would you please
13 answer any questions Mr. Churdar may have for
14 you, Mr. Bessent?

15 **MR. BESSENT:** Yes.

16 **THE COURT:** Mr. Churdar, your witness.

17 **MR. CHURDAR:** Okay. Thank you very much.

18 **MR. BESSENT - CROSS-EXAMINATION BY MR. CHURDAR:**

19 Q: Good morning, Mr. Bessent.

20 A: Good morning.

21 Q: You testified on direct examination that you
22 had a field crew who gathered the data points,
23 correct?

24 A: That's correct.

25 Q: Okay. So the electronic total station was not



JAMES WEATHERHOLTZ V. SC DHEC

37

1 being operated by you?

2 A: Correct.

3 Q: And the prism was not being held by you?

4 A: Correct.

5 Q: Okay. In an instant -- well, let me withdraw
6 that question. Let me -- what does it mean to
7 calibrate your surveying instruments?

8 A: About once a year we send the instruments to
9 the manufacturer or other repair place to go
10 into the electronics. Primarily has to do with
11 balancing, making sure the instrument is truly
12 level, making sure it's turning angles
13 accurately, and also the distance just to make
14 sure the pulse laser is working properly.

15 Q: Okay. And the purpose behind getting it
16 calibrated, sending it off, is for accuracy?

17 A: Correct.

18 Q: Okay. And if the information that you're
19 acquiring, if it's not properly calibrated, the
20 old expression garbage in, garbage out really
21 would apply, correct?

22 A: Right.

23 Q: I mean, you can be measuring things and doing
24 everything, but if it's not properly
25 calibrated, then it's not reliable?



JAMES WEATHERHOLTZ V. SC DHEC

38

1 A: Correct.

2 Q: The output? The calculation?

3 A: Right.

4 Q: And if it is not properly calibrated or the
5 data input that is put in is not accurate, you
6 would agree that nobody could really rely on
7 your opinion about the end result; is that
8 correct?

9 A: Yeah, if -- if there were errors then there
10 would be errors.

11 Q: Correct. Right. No, I understand. And in
12 this instance you -- you have said that you
13 send your -- your electronic total station off
14 once a year to be calibrated by the
15 manufacturer?

16 A: Yeah, about every year or so.

17 Q: Okay. Is there any other equipment that was
18 used in the project at Mr. Weatherholtz's house
19 that you would also send to be calibrated?

20 A: No, I think in this case all of the work was
21 done with that standard type of equipment.

22 Q: Okay. And does the prism need to be
23 calibrated?

24 A: No, it's -- it's very simple. It's a -- it's
25 a precision cut piece of glass that is mounted



JAMES WEATHERHOLTZ V. SC DHEC

39

1 in a holder, and there's not much that can go
2 wrong with that.

3 Q: Okay. I guess unless it got chipped or
4 something like that?

5 A: Even then, it would throw a signal back at you
6 if -- they're amazing.

7 Q: Now, if you would, tell me how long before
8 going out to Mr. Weatherholtz's house had it
9 been since you'd sent your electronic total
10 station off to the manufacturer to be
11 calibrated?

12 A: I do not have those records. I do know that on
13 a -- on a daily basis we check. That's just
14 drilled into our heads. I talk with the crews
15 about this all the time. Standard procedure,
16 any job no matter how seemingly insignificant,
17 we set up on the point. We take a back sight
18 measurement to a known point. We turn again to
19 a third known point, something that we've
20 surveyed before, another property corner,
21 temporary control point, whatever, and we know
22 immediately before we start collecting data
23 that the instrument's good, we're getting good
24 distances. If we get a discrepancy, we stop.

25 Q: Do you keep records of that?



JAMES WEATHERHOLTZ V. SC DHEC

40

1 A: Oh, yeah. That comes in the -- in the data
2 output the same display that we talked about a
3 minute ago that shows the points taken in the
4 creek, on that same day we shot other control
5 points before we even started shooting the
6 creek points.

7 Q: Is that included in the field notes that you
8 provided?

9 A: I kind of zoomed in on -- on the creek. So
10 what you see right here does not include
11 everything we shot on this job because we also
12 did a boundary survey of his lot; we also shot
13 critical line points. I didn't bring or show
14 all of those points.

15 Q: You said that there -- there was one person at
16 the electronic -- electronic total station and
17 another person in a kayak with the prism.

18 A: That's right.

19 Q: Was the -- what was that person's name in the
20 kayak?

21 A: Billy Ferguson. I've worked with Billy for
22 well over 20 years. Billy is also a
23 professional land surveyor.

24 Q: Okay. Did Mr. Ferguson use a prism rod?

25 A: When we're going out in saltwater like that, a

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JAMES WEATHERHOLTZ V. SC DHEC

41

1 lot of times we'll just rig up a temporary rod,
2 just something to hold the prism. This was on
3 probably a fiberglass level rod or -- or --
4 yeah, it was mounted on some type of rod.

5 Q: Okay. I mean, do you remember or are you just
6 saying this is what we normally do?

7 A: I can't tell you exactly. We have prism rods.
8 We have level rods with screw-ons that you can
9 put a prism on. On that particular day, I
10 don't know which -- which rod he took with him,
11 but it's really -- what matters is the end of
12 the prism itself. You can hold it in your hand
13 at the edge of the marsh and it would give
14 exactly the same amount of accuracy, so the rod
15 is just a matter of convenience. You can hold
16 it on a string or on a rod or on a pole or hold
17 it in your hand and it would shoot with the
18 same exact accuracy.

19 Q: Now, was there a bubble level on the prism rod
20 that Mr. Ferguson was using?

21 A: No, again, in this case we're talking about a
22 man in a kayak measuring marsh grass. If we
23 are -- if we're measuring a precise punch mark
24 in the top of a nail and we want to shoot that
25 to within one hundredth of a foot accuracy,



JAMES WEATHERHOLTZ V. SC DHEC

42

1 which is about one-eighth of an inch, then yes,
2 you have to make sure everything is level,
3 plumb. We mounted in a tripod the prism I'm
4 talking about, it mounts in a rod that sits in
5 a tripod. It's balanced; it's leveled; it's
6 checked; it's double-checked. That'll give you
7 accuracy of maybe an eighth of an inch. Here
8 we're talking about sprigs of grass. So again,
9 it's just a matter of physically holding the
10 prism where you think the edge of the grass is
11 and shooting that point.

12 Q: Okay. Where ---

13 A: There's no need to level it or bubble it.

14 Q: Where you think the grass is is what you said,
15 correct?

16 A: Yes.

17 Q: Okay. But since you weren't out there, you
18 were not the one making that decision ---

19 A: No.

20 Q: --- as to where the grass is, correct?

21 A: Correct.

22 Q: Okay. Now, your electronic total station
23 instrument is not robotic, correct?

24 A: This one was not.

25 Q: Okay. And tell me if I'm correct, a robotic



JAMES WEATHERHOLTZ V. SC DHEC

43

1 total station instrument would eliminate the
2 need for the extra staff person, Mr. Ferguson
3 in this case, because the operator holds the
4 reflector and controls the -- the electronic
5 total station from the observed point?

6 A: Well, again, in this case - if we had done it
7 with a robot, the controller would be Mr.
8 Ferguson. He would be out in the kayak with
9 the controller and the prism. In this case,
10 you can imagine that would be -- you know, he's
11 pretty busy out there. He's paddling around.
12 He's drifting. He's holding the kayak steady
13 and holding the prism, and in this case, it's
14 a lot more convenient to have a second man
15 running the instrument.

16 Q: Let me ask you about Mr. Ferguson. For
17 distance measuring and information to be
18 accurate, the person holding the prism
19 reflector must be holding it vertically,
20 correct?

21 A: No.

22 Q: If the prism reflector -- excuse me just a
23 second. If the prism reflector is -- it's on
24 a pole, correct?

25 A: Yes.



JAMES WEATHERHOLTZ V. SC DHEC

44

1 Q: Okay. If it's leaning away from the edge of
2 the creek into the creek, or if it's leaning
3 the other direction where it's leaning towards
4 the Spartina grass, that will impact the data
5 that's collected; isn't that true?

6 A: No, I think I can explain. I hear what you're
7 asking but -- but ...

8 Q: Here, let me -- let me just ---

9 A: Can I demonstrate?

10 Q: Well, let me just ask you -- ask you this
11 question. If this is the prism rod ---

12 A: Right.

13 Q: --- right here and the creek is right here, it
14 is your testimony that if the prism rod were
15 leaning this way away from the creek or this
16 way towards the creek, the -- it doesn't matter
17 how much it was leaning, it would have no
18 impact on the data collected?

19 A: That is exactly right because the prism is the
20 target. It's -- who cares where the bottom of
21 the rod is in this case? Again, I can explain
22 ---

23 Q: Well ---

24 A: --- surveying --- surveying a point on the
25 ground, if we were trying to accurately locate



JAMES WEATHERHOLTZ V. SC DHEC

45

1 the center of that figure there in the rug and
2 we would need to hold a prism at this -- if we
3 were holding it at this height, it would have
4 to be exactly plumb. It could not lean left,
5 right, forward or backwards from that point
6 down there if that's what we're trying to
7 locate. In this case, we were trying to locate
8 something up here (indicating). We were trying
9 to locate a marsh grass that's up here so he
10 took the prism and held it right on here. The
11 pole could be sticking back here under his arm
12 and that would be perfectly fine, but the prism
13 was on the marsh.

14 Q: But, Mr. Bessant, my question is where the
15 prism is, and you're saying it doesn't matter
16 if the pole is leaning ---

17 A: Right.

18 Q: --- this way or that way.

19 A: Right.

20 Q: Presumably Mr. Ferguson is going to be putting
21 the pole at the edge of the marsh?

22 A: No, he's putting the prism at the edge of the
23 marsh. Again, literally I -- he could have
24 held the prism in his hand and just hold it up
25 against the marsh grass and it would have been

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JAMES WEATHERHOLTZ V. SC DHEC

46

1 perfectly accurate. The pole in this type of
2 -- in this particular survey, the pole is just
3 something that he can hold on to to held him
4 hang onto the prism.

5 Q: Okay.

6 A: It's just a handle.

7 Q: But the reality is Mr. Ferguson's not here to
8 testify as to where he put that prism, correct?

9 A: Correct.

10 Q: Okay. So he's the one, Mr. Ferguson's the one
11 who could testify whether he put that at the
12 proper place in the marsh, correct?

13 A: Well ---

14 Q: Well, I mean, you can't testify to that. You
15 didn't do it, right?

16 A: Okay. Well, every survey that I've done in ---

17 Q: Could you please answer ---

18 A: --- 30 years or, well, as a professional since
19 1986, I have testified, I have signed and
20 sealed plats, I have -- that's the way
21 surveying is done. Field crews hold the prism
22 and operate the instrument. I am there before,
23 during, and after. I supervise. I analyze the
24 data. I teach them. I instruct them how to do
25 their work, but I don't physically go out and



JAMES WEATHERHOLTZ V. SC DHEC

47

1 shoot all of these shots. Sometimes I'm in the
2 field; usually I am not.

3 Q: My question was you cannot testify to whether
4 or not that prism was on the edge of the marsh
5 vegetation or not because you weren't out
6 there; isn't that correct?

7 A: That is -- that is not correct. I testify
8 about my work all the time. This is my work.
9 I signed it and sealed it, and I'm testifying
10 here to you all that these measurements are
11 correct. I'm ---

12 Q: Are you ---

13 A: --- standing by that.

14 Q: Are you testifying based on your own personal
15 knowledge of being out there?

16 A: I'm testifying based on I've worked with Billy
17 for 20 years, and he knows exactly what to do.
18 We talked about it before and after and I drew
19 the sketch that's on page 5 or whatever, and we
20 all know what he did.

21 Q: Okay.

22 A: I didn't see him where he held the prism. I
23 didn't see the guy operate the instrument, but
24 I know he did it.

25 Q: Let me ask you the question again.



JAMES WEATHERHOLTZ V. SC DHEC

48

1 A: All right.

2 Q: You cannot testify as to your own personal
3 knowledge of where the prism was held along the
4 marsh line, correct?

5 MR. WEATHERHOLTZ: Objection, Your Honor. I think
6 that's question has been asked.

7 MR. CHURDAR: It's been asked several times. It's
8 not been answered. He won't answer it.

9 MR. BESSANT: I'm testifying as to the accuracy of
10 my work. I did not see where the prism.

11 THE COURT: Wait just a minute. I believe the
12 answer is that it is not just common practice
13 but practice for 30 years and the -- the way
14 surveys are conducted is that the field crew
15 goes out, as he said, and that they follow
16 certain measurements to determine accuracy and
17 that he supervises sometimes, doesn't all the
18 time. But if he has signed it and gone over
19 with the people who are -- who he knows do it
20 correctly, then it is his work and he can
21 testify and give his opinion as to its
22 validity. I think that's what he's saying.

23 MR. CHURDAR: Your Honor, my question is not can he
24 testify about his work. My question has been
25 -- and yes, it has been asked several times but



JAMES WEATHERHOLTZ V. SC DHEC

49

1 the answer has ---

2 **THE COURT:** Mr. Churdar, I think you've ascertained
3 that he wasn't -- that he didn't do the
4 physical measurements himself. I don't think
5 there's any question about that and I think
6 you've gotten a yes answer to that he didn't do
7 ---

8 **MR. CHURDAR:** I don't think I've gotten a yes
9 answer. I've asked it, and I think it's all
10 implied to all of us in this room, but he -- he
11 has not acknowledged yes, I don't have personal
12 knowledge of that. I'm relying on someone who
13 is not here today. And I would like for him to
14 answer that question.

15 A: I have personal knowledge of how it was done.
16 I did not see it personally because I wasn't
17 there.

18 Q: So if you could tell me, you were not on the
19 water ---

20 A: Correct.

21 Q: --- correct? Okay. When he was doing this,
22 you were not using the electronic -- you were
23 not using the electronic total station,
24 correct?

25 A: That's correct.



JAMES WEATHERHOLTZ V. SC DHEC

50

1 Q: Okay. You're in sort of a supervisory role?

2 A: Yes.

3 Q: Okay. So again, what I'm asking you is you
4 don't have knowledge based on being on the
5 water to know where the prism was along the
6 vegetation line?

7 MR. WEATHERHOLTZ: Same objection, Your Honor.

8 THE COURT: And it's sustained.

9 MR. CHURDAR: So does the -- will the Court take
10 judicial notice then that Mr. Bessant answered
11 that he doesn't have personal knowledge of ---

12 THE COURT: Mr. Churdar, I think we've reached the
13 point where we're parsing words and quibbling
14 over personal knowledge. My understanding is
15 that once he signs it and supervised it and is
16 dealing with people he's dealt with for
17 decades, he is certifying with his registration
18 as a land surveyor and to various other things
19 here that those are valid measurements. He's
20 certifying to that.

21 MR. CHURDAR: And, Your Honor, here's the thing.

22 THE COURT: Yeah.

23 MR. CHURDAR: His opinion like he testified just a
24 couple of minutes ago, conceded, that whole
25 idea of garbage in, garbage out, the accuracy



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JAMES WEATHERHOLTZ V. SC DHEC

51

1 of the data that he is relying on to offer an
2 opinion is everything here because he has --
3 his opinion is this is ten feet, not ten feet,
4 one inch. I mean, one millimeter of error
5 overshooting it puts this thing below ten feet.
6 I mean, it's absolutely crucial for that point
7 to be before the Court. And so these questions
8 about whether or not he's relying on it, I
9 don't -- I don't contest but my point is, and
10 this is where I believe that I am entitled to
11 either if he's not going to answer the Court
12 will take judicial notice of it, or demand an
13 answer from him specifically ---

14 **THE COURT:** Okay. Mr. Weatherholtz?

15 **MR. WEATHERHOLTZ:** Your Honor, I object to the
16 request the Court take judicial notice of any
17 of that.

18 **THE COURT:** There's nothing that's been brought up
19 thus far that I could take judicial notice of,
20 period.

21 **MR. WEATHERHOLTZ:** He's been asking questions about
22 how he performed his work. He testified to the
23 fact that he relies on his people in the field
24 who he has trained. He testified to the fact
25 that he spoke with those individuals before and



JAMES WEATHERHOLTZ V. SC DHEC

52

1 after they gathered this data. He absorbs all
2 that information, summarizes it and puts it
3 into a survey ---

4 **THE COURT:** Exactly.

5 **MR. WEATHERHOLTZ:** --- he stamps with his registered
6 land surveyor number. That forms the basis of
7 his expert opinion testimony in this case. I
8 think that his testimony has established that
9 he was not physically present at the site.
10 That question has been asked and answered.

11 **MR. CHURDAR:** Okay. So ---

12 **THE COURT:** Yes, it has.

13 **MR. CHURDAR:** Okay. So ...

14 **THE COURT:** Well, he has submitted his data. It's
15 an expert opinion. I'm the trier of fact. I
16 will give it such weight as I deem it merits.
17 And you certainly have the right on cross-
18 examination as you have done to ask any
19 questions challenging the validity of that
20 data, and then I'll take it all into
21 consideration. And if you have any other
22 objections to it or any other questions you
23 want to ask Mr. Bessant, we will certainly
24 entertain those.

25 **MR. CHURDAR:** Okay. I sure do and I don't mean to

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JAMES WEATHERHOLTZ V. SC DHEC

53

1 beat a dead horse, Your Honor. But just so
2 that I can move on from this, it is ---

3 **THE COURT:** Sure.

4 **MR. CHURDAR:** --- it is my understanding then that
5 Mr. Weatherholtz has agreed what the testimony
6 here is, is that Mr. -- am I saying Bessent ---

7 **THE COURT:** Bessent.

8 **MR. CHURDAR:** --- Bessent, Mr. Weatherholtz agrees
9 Mr. Bessent has testified he was not out there
10 personally to collect the data that ---

11 **THE COURT:** Right.

12 **MR. CHURDAR:** --- is required ---

13 **THE COURT:** That's correct.

14 **MR. CHURDAR:** --- by using a prism.

15 **THE COURT:** That's correct.

16 **MR. CHURDAR:** Okay.

17 **MR. WEATHERHOLTZ:** Your Honor ---

18 **THE COURT:** Anything else you'd like to say?

19 **MR. WEATHERHOLTZ:** I would just say the testimony is
20 what it is and ---

21 **THE COURT:** Absolutely.

22 **MR. WEATHERHOLTZ:** --- Mr. Bessent said what he
23 said.

24 **THE COURT:** Absolutely and ---

25 **MR. CHURDAR:** And that's the problem. He's been



JAMES WEATHERHOLTZ V. SC DHEC

54

1 bobbing and weaving. I'd like for him to say
2 that.

3 **THE COURT:** I think he ---

4 **MR. CHURDAR:** I'd like for Mr. ---

5 **THE COURT:** Wait a minute. I think he has
6 acknowledged ---

7 **MR. WEATHERHOLTZ:** I think he did.

8 **THE COURT:** --- that he wasn't there and he relied
9 on his -- his employees' data.

10 **MR. CHURDAR:** Okay.

11 Q: So, Mr. Bessent, what you're testifying to is
12 where the -- for purposes of where the prism
13 is located, the prism rod itself could be
14 angled at severe angles as long as the prism
15 itself is on the grass line, on the line of the
16 vegetation?

17 A: That's exactly right.

18 Q: Okay. Would you agree that even the slightest
19 -- well, you said that the -- that the creek is
20 ten feet wide?

21 A: Yeah.

22 Q: Okay. You've not said it's 10.01, 10.02.
23 You're saying it's ten feet on the dot?

24 A: I'm saying ten feet, which has significance.
25 It's ---

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55

1 Q: Okay. So ---

2 A: --- the nearest foot. Now, when I actually go
3 to these data points, I can inverse between
4 them and get exact distances and bearings and
5 everything else. It's not realistic at all.
6 It's totally foolhardy to think that you can
7 measure a grass line to a millimeter or to an
8 inch or two. It's grass.

9 Q: And why is that?

10 A: Because it moves; it sways; it's flexible.
11 Through a series of all of these measurements,
12 we found several areas that are at least ten
13 feet.

14 Q: So in other words, this opinion is more or less
15 of a rough estimation or of ---

16 A: No, it's a very accurate location given the
17 circumstances. It's a very accurate location
18 done with very accurate methods and procedures.

19 Q: And so you're saying it is very accurate. It
20 is ten feet on the dot?

21 A: No.

22 Q: Well, Mr. ---

23 A: Ten feet on the dot would be 10.00.

24 Q: Okay. So ---

25 A: Nobody -- no surveyor in this state or probably



JAMES WEATHERHOLTZ V. SC DHEC

56

1 in the country would certify a marsh grass line
2 within one 100th of a foot. It doesn't make
3 any sense. These actual -- now, I can get the
4 data on the computer and, as I recall, in the
5 area of the dock, those points actually came
6 out to 10.2 feet, something like that, 10.1,
7 10.2. It came out something that started with
8 a ten, so I felt comfortable calling it ten
9 feet on the drawing.

10 Q: Okay. On the drawings you have referred to it
11 as ten feet?

12 A: Right.

13 Q: Okay. Now, Your Honor -- or not Your Honor.
14 Mr. Bessent, even a slight deviation as far as
15 where the prism is held, whether it is held
16 over the grass line or in the water, would make
17 a difference in your calculation, correct?

18 A: The precise location of the prism determines
19 these data points, yes.

20 Q: Okay. So a deviation whether it's over the
21 grass or over the water would impact the data
22 that you collect and the opinion that you have,
23 correct?

24 A: Yeah, wherever the prism was at that moment is
25 the data that we collected and stored.



JAMES WEATHERHOLTZ V. SC DHEC

57

1 Q: Okay. Now, when -- since you were not out on
2 the water, you don't have personal knowledge as
3 to whether Mr. Ferguson somehow had that kayak
4 anchored so it wouldn't move; is that correct?

5 **MR. WEATHERHOLTZ:** Objection, Your Honor. That, I
6 think, is the same question he answered
7 earlier.

8 **MR. CHURDAR:** Different question. Different
9 question, Your Honor.

10 **THE COURT:** All right. Would you answer that
11 question please, Mr. Bessant?

12 A: I do know that it was immobile because the
13 instrument won't shoot if it's moving. I mean,
14 it was relatively stable at the time that point
15 was taken or else the instrument wouldn't --
16 wouldn't read it. So I do know that -- that he
17 managed to wedge his kayak in the grass or put
18 the pole in the mud or whatever he did, that
19 point was stationary at the time of the shot or
20 else we couldn't have taken the shot.

21 Q: My question was you have no personal knowledge
22 as to whether he anchored his kayak?

23 A: Anchored the kayak. No, I don't think that's
24 relevant.

25 Q: Or made the kayak immobile?



JAMES WEATHERHOLTZ V. SC DHEC

58

1 A: I know the prism was -- the prism is the focus
2 here. The prism ---

3 Q: No, my question is about the kayak.

4 A: Well, again, hypothetically the kayak could
5 have been spinning around in circles if he --
6 if he was able to hold the prism stationary at
7 the edge of the marsh, and I do know that
8 happened because that's the only way the data
9 point could have been shot.

10 Q: Let me ask the question again, please.

11 A: Okay.

12 Q: You do not have any personal knowledge as to
13 whether that kayak was immobile?

14 A: I do not know if the kayak was immobile.

15 Q: Okay.

16 A: It most likely was not perfectly immobile.

17 **MR. CHURDAR:** Your Honor, I would ask that
18 speculation be stricken.

19 **THE COURT:** Which speculation?

20 **MR. CHURDAR:** It was most likely, anything after
21 that. He said he had no personal knowledge of
22 it.

23 **THE COURT:** Well, what ---

24 A: I said it was probably not immobile. I'm
25 agreeing with you.



JAMES WEATHERHOLTZ V. SC DHEC

59

1 **THE COURT:** Yeah, since he's agreeing with you, why
2 would you want that stricken?

3 **MR. CHURDAR:** Well, then I don't.

4 **THE COURT:** Okay. And again, I, as the trier of
5 fact, will look at all this stuff and see where
6 the majority lies and where the -- based on a
7 preponderance of the evidence, what's shown by
8 the testimony.

9 Q: Does Mr. Billy Ferguson have any education in
10 school that would include identifying various
11 stages of marsh vegetation growth?

12 A: I don't know that.

13 Q: Getting back to the matter of accuracy, would
14 you agree that an electronic distance meter is
15 less accurate at short distances?

16 A: No, I mean, maybe extremely short distances,
17 like maybe it may not focus at two or three
18 feet, but anything from the distance from you
19 to me and beyond it has pretty much the same
20 accuracy.

21 Q: Wouldn't the most accurate method of
22 measurement be the calibrated chain for
23 something like this?

24 A: No.

25 Q: No?



JAMES WEATHERHOLTZ V. SC DHEC

60

1 A: No, it would be very inaccurate to try to drag
2 a chain 250 feet out across marsh grass and
3 keep it exactly level and immobile and get the
4 sag out of it. That would be a very inaccurate
5 method of trying to make these locations.

6 Q: Let me ask you, with -- with a -- would a
7 calibrated chain be measured starting at the
8 upland? Wouldn't it be starting at the point
9 of the edge of the marsh?

10 A: Well, again, it depends on your purpose. We --
11 we're trying to -- to produce a map, a drawing
12 showing relative positions of things on the
13 real world, so we are tying all of this
14 information to the property, to the property
15 boundaries, so -- so yes, the measurements
16 would have to start at a known point and we're
17 tying the creek information to the land
18 information, so you would have to measure from
19 a known point on land to whatever you're trying
20 to map.

21 Q: You would have to do that to find out whether
22 this creek is ten feet wide, you're saying ---

23 A: No, no, you could -- no, you could take a rod,
24 like Mr. Weatherholtz has and go out and
25 measure the width of the creek, but to get the



JAMES WEATHERHOLTZ V. SC DHEC

61

1 position, the relative position of the creek --

2 -

3 Q: That wasn't my question.

4 A: Okay. I'm sorry.

5 Q: My question is ---

6 A: I thought it was.

7 Q: My question is in measuring the width of the
8 creek, that's all I'm talking about. Not in
9 relation to anything.

10 A: Okay. In measuring the width of the creek
11 itself ---

12 Q: And just so we're clear, let me ask the
13 question again.

14 A: All right.

15 Q: For purposes of accuracy, rather than using an
16 electronic distance meter for measuring the
17 width of the creek, wouldn't a calibrated chain
18 or something where you have a direct
19 measurement of the creek width be more
20 accurate?

21 A: I think in this case considering you're in the
22 water moving around and you're dealing with
23 moving water and a moving boat and marsh grass,
24 the most accurate way really is the way that we
25 did it. If you did it -- now, a chain itself,



JAMES WEATHERHOLTZ V. SC DHEC

62

1 I feel like going back to my little
2 demonstration on the rug here. If you're
3 measuring something precise that you can
4 physically get a man on each end of a chain
5 with plumb bobs and physically stand there and
6 measure accurately to a point, that would be
7 more accurate.

8 Q: Okay.

9 A: But in this case, this method I think is more
10 accurate because it's very impractical, almost
11 impossible, to get two men, one on each side of
12 a creek in the mud and hold a chain and try to
13 measure something accurately.

14 Q: But if you -- if you put an anchor on one side
15 and an anchor on the other side, I mean,
16 wouldn't that be more accurate?

17 A: I don't know what you mean by putting an
18 anchor.

19 Q: Well, you were talking about anchoring the
20 calibrated chain. I'm saying without regard to
21 the upland or anything else, I'm just talking
22 about measuring the creek width, if -- you
23 talked about anchoring one side and anchoring
24 the other.

25 A: I don't think I used the term anchor.



JAMES WEATHERHOLTZ V. SC DHEC

63

1 Q: Okay. Mr. Bessant, the variables that you
2 talked about as to why it was your opinion that
3 a calibrated chain would be less accurate are
4 also the same variables that are in play when
5 you're using the electronic total station;
6 isn't that correct?

7 A: Well ---

8 Q: The kayak moving around.

9 A: But you've only got half the error because
10 you're only dealing with one prism, trying to
11 hold one prism in one spot for a second or two
12 in order for the instrument to take a shot.
13 With the chain you're dealing with two ends of
14 the chain and two points on the creek
15 simultaneously, so you take all of those little
16 problems and you multiply them by at least two,
17 and therefore, you're going to get more error,
18 I would think.

19 Q: With electronic distance meter, which that
20 would be a generic term for how you measured
21 this creek width, right, electronic distance
22 meter?

23 A: Yeah, right. When that technology first came
24 out they called it EDM, electronic distance
25 meter. Now everything is all in one instrument



JAMES WEATHERHOLTZ V. SC DHEC

64

1 and they just call it a total station.

2 Q: Okay. Now, with this, do you have knowledge as
3 to whether your two employees or assistants
4 shot from a purely horizontal plane?

5 A: Yes, I know that the -- our instruments, the
6 programs, they automatically calculate and
7 compensate for vertical angle, so all of these
8 measurements, when we inverse point to point,
9 is a horizontal straight line distance because
10 the instrument knows that. It measures -- if
11 you measured -- if the prism was higher than
12 the instrument or lower than the instrument at
13 the point of the shot, that would be
14 compensated for and corrected for when I
15 inverse the data on the computer.

16 Q: When you went out to Mr. Weatherholtz's house
17 to collect the data, do you recall what the
18 temperature was like outside?

19 A: No.

20 Q: Do you know what time of year it was?

21 A: I think it was March.

22 Q: Do you remember if it was a sunny day?

23 A: No.

24 Q: I'd like to hand you Respondent's Exhibit 2.

25 **THE COURT:** Mr. Churdar, would you mind, could we



JAMES WEATHERHOLTZ V. SC DHEC

65

1 take about a ten-minute break?

2 MR. CHURDAR: Sure.

3 THE COURT: Okay. I've got 11:20. Be back at
4 11:30. Be in recess for just a few minutes.

5 (Break from 11:17 a.m. until 11:27 a.m.)

6 THE COURT: You may resume your cross-examination,
7 Mr. Churdar.

8 MR. CHURDAR: All right.

9 Q: All right. Mr. Bessent, I want to hand you
10 Respondent's Exhibit 2 and ask you to please
11 take a look at that. Do you recognize that
12 email?

13 A: Yes.

14 Q: Okay. And the last page of Exhibit 2 is also
15 the last page of Petitioner's Exhibit 5; you
16 recognize that?

17 A: Yes, I do.

18 Q: And that is a sketch of, would you say, a
19 cross-sectional view of this tributary?

20 A: A hypothetical sketch done in my office just
21 for the basis of discussion, but yeah, I would
22 think this tributary is probably pretty close.

23 Q: Okay. And you prepared that?

24 A: I drew this.

25 Q: Okay. Now, at the bottom, towards the bottom



JAMES WEATHERHOLTZ V. SC DHEC

66

1 of this drawing you have arrows and then it
2 says seven feet to nine feet question mark.

3 A: Yeah.

4 Q: Okay. That's seven feet to nine feet from the
5 point that you refer to as sprigs?

6 A: Right.

7 Q: Sprig to sprig is what you're saying?

8 A: Yeah, and -- yes.

9 Q: Okay. Now, then at the top you have a line
10 with -- on either side of the creek with -- it
11 says ten feet, question mark as well.

12 A: Yes.

13 Q: You wrote that?

14 A: Yes.

15 Q: Okay. Now, you have brought in the assistance
16 of OCRM on projects that you're working on in
17 the past; isn't that correct?

18 A: Yes.

19 Q: Okay. In fact, just before trial started I
20 heard you talking to Mr. Thompson and you said
21 something to the effect of I will be calling
22 you about something?

23 A: Yes, I survey a lot of critical lines and Jeff
24 works in the area where I do a lot of my work
25 and we cross paths ---

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JAMES WEATHERHOLTZ V. SC DHEC

67

1 Q: Okay.

2 A: --- fairly frequently.

3 Q: So getting the assistance of the Department for
4 helping -- helping you with a project would not
5 be a foreign thing to do?

6 A: Right.

7 Q: But in this instance, you did not call OCRM to
8 assist you in calculating the width of this
9 creek; isn't that correct?

10 A: I did not call them, no.

11 Q: Okay. And as you testified before, it was Mr.
12 Ferguson who was in the kayak in the creek on
13 the day that the data collection was done?

14 A: That's right.

15 Q: Okay. So you were not out there ---

16 **MR. WEATHERHOLTZ:** Objection.

17 A: Right.

18 Q: --- in the creek? And whether or not Mr.
19 Ferguson had the prism on the edge of the lower
20 line that says seven to nine feet question
21 mark, or whether Mr. Ferguson had the prism at
22 the point on the upper line that says ten feet
23 question mark, you have no personal knowledge
24 about whether he put the prism at the lower
25 line or the upper line, correct?



JAMES WEATHERHOLTZ V. SC DHEC

68

1 **MR. WEATHERHOLTZ:** Your Honor, I object to that
2 question to the extent it assumes that the last
3 page of Petitioner's Exhibit 5 represents any
4 actual conditions in the creek. I believe he's
5 testified that it's a hypothetical condition,
6 not that there are in actuality sprigs that are
7 seven to nine feet apart that Mr. Ferguson
8 could have measured from. And I'm not sure
9 whether that is what the question intended, but
10 I just want to clarify that I think the
11 question is confusing if it assumes that this
12 drawing actually reflects any conditions in the
13 actual creek.

14 **MR. CHURDAR:** Your Honor, Mr. Bessant's email, which
15 has been marked as Respondent's Exhibit 2 and
16 admitted, says to Mr. Weatherholtz, Attached is
17 my field work on this job. That's the first
18 sentence of this email, and then Mr.
19 Weatherholtz simply forwarded it to me, so
20 along with this email were three documents, the
21 three documents that Mr. Weatherholtz has
22 included in his exhibits, but I've included the
23 email itself and this is the third page.

24 **THE COURT:** What is the issue? Tell me, Mr.
25 Weatherholtz.



JAMES WEATHERHOLTZ V. SC DHEC

69

1 **MR. WEATHERHOLTZ:** And that's fine. I mean, these
2 are his field notes, but the question that Mr.
3 Churdar is asking Mr. Bessent is did Mr.
4 Ferguson, when he was out in the creek, take
5 any measurements with the prism at the point
6 where the sprig is where it shows seven to nine
7 feet on this -- on this sketch, and my
8 objection is that that's misleading because Mr.
9 Bessent has already testified that this is a
10 hypothetical situation that he used to discuss
11 with the people in his office, not that he was
12 attempting to actually sketch the conditions
13 that truly exist out there.

14 **THE COURT:** I think that's clear.

15 **MR. CHURDAR:** Your Honor, that was not my question.

16 **THE COURT:** Okay. What is the question?

17 **MR. WEATHERHOLTZ:** If it's not, then I apologize.

18 **THE COURT:** What is the question?

19 **MR. CHURDAR:** My question was -- just as background
20 before I re-ask the question, Mr. Bessent has
21 testified that he did this sketch, in his words
22 -- and we can have the court reporter go back
23 if there's a question about this -- based on my
24 conversation with the crew. That's my
25 interpretation based on my conversation with



JAMES WEATHERHOLTZ V. SC DHEC

70

1 the crew. And my question is whether the prism
2 was at the point -- whether the prism was at
3 that point ---

4 **THE COURT:** Where the little sprigs are ---

5 **MR. CHURDAR:** Where it says sprigs ---

6 **THE COURT:** --- really begin but the main line ---

7 **MR. CHURDAR:** --- and it says seven to nine feet
8 question mark.

9 **THE COURT:** Okay.

10 **MR. CHURDAR:** Whether the prism was at that point
11 when the data was collected or whether the
12 prism was at the line that says ten feet.
13 Whichever one it was, my question to Mr.
14 Bessent is he has no personal knowledge as to
15 where Mr. Ferguson put the prism, whether it
16 was at the seven to nine foot line or the ten
17 foot line.

18 **THE COURT:** Mr. Bessent, can you answer that one?

19 **MR. BESSENT:** Yes.

20 **THE COURT:** Okay.

21 A: Be glad to. First of all this -- this -- I
22 said attached is my field work and yes, the
23 first two pages are plots of my field work, and
24 I say the third page is a hand sketch from my
25 file that I made, meaning that's not field work



JAMES WEATHERHOLTZ V. SC DHEC

71

1 because we've already shown here that I did not
2 do the field work. So I'm explaining to Mr.
3 Weatherholtz the third page is a hand sketch
4 that I made during my discussion with my field
5 crew, so I -- I'm just a sketcher. This is the
6 way I talk. So when I'm talking with my crew,
7 explaining to them what we need to measure, I
8 found it very helpful to draw a little sketch.
9 So I do know what Mr. Ferguson shot because we
10 discussed it in detail.

11 **MR. CHURDAR:** Okay. Your Honor, my question -- I
12 mean, first of all this is -- this is not just
13 doodling sketch. I mean, this is something
14 that he said this was based on his conversation
15 with his crew, and I think this is very simple.
16 He still hasn't answered the question. The
17 question is he -- he does not have any personal
18 knowledge as to whether or not Mr. Ferguson had
19 the prism at the seven to nine foot line or at
20 the ten foot line. He has no personal
21 knowledge ---

22 **THE COURT:** Well I ---

23 **MR. BESSENT:** Yeah, I do. You can ask me and I'll
24 tell you.

25 **THE COURT:** Okay. Do you have any personal

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72

1 knowledge of ---

2 **MR. BESSENT:** Yes.

3 **THE COURT:** --- whether those people placed ---

4 Q: Then let me ask -- then let me ask you this
5 question ---

6 **MR. WEATHERHOLTZ:** Your Honor, if they ---

7 **THE COURT:** Let him get an answer.

8 **MR. CHURDAR:** I'd like an answer.

9 **THE COURT:** Yeah, let's -- I didn't get an answer on
10 that one.

11 **MR. CHURDAR:** He said yes, he has personal
12 knowledge, so I'm following up.

13 **THE COURT:** Okay. What is that personal knowledge?

14 **MR. CHURDAR:** Well, if I could ask the question.
15 Excuse me. I'm sorry, Your Honor.

16 **THE COURT:** Mr. Churdar, you go ahead. I know
17 you're in the middle of this. Go ahead.

18 **MR. CHURDAR:** I meant no disrespect.

19 **THE COURT:** I completely understand. Advocates are
20 supposed to be zealous. Not jealous. I almost
21 said that. You ask.

22 Q: When Mr. Ferguson was holding up the prism,
23 whether he was holding it up at the seven to
24 nine foot line or at the ten foot line, you
25 were not in the kayak to see that, were you?



JAMES WEATHERHOLTZ V. SC DHEC

73

1 A: I was not in the kayak, correct.

2 Q: That's my question.

3 THE COURT: Okay.

4 MR. CHURDAR: One moment.

5 THE COURT: Take your time.

6 MR. CHURDAR: That's all my cross.

7 THE COURT: Thank you very much. Anything on
8 redirect, Mr. Weatherholtz?

9 MR. WEATHERHOLTZ: Very briefly, Your Honor.

10 MR. BESSENT - REDIRECT EXAMINATION BY MR.

11 WEATHERHOLTZ:

12 Q: Mr. Bessent, can you offer testimony here today
13 about where Mr. Ferguson held the prism when he
14 took the measurements?

15 A: Yes.

16 Q: Please tell us that.

17 A: Generally ---

18 MR. CHURDAR: I object. There's no foundation
19 because this right now is based on -- anything
20 would be based on hearsay.

21 THE COURT: Wait a minute. There's been a good deal
22 of questioning, has there not, as to exactly
23 where he was when he took these measurements?

24 MR. CHURDAR: Mr. Ferguson.

25 THE COURT: Yes.



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JAMES WEATHERHOLTZ V. SC DHEC

74

1 **MR. CHURDAR:** That's my point, Your Honor.

2 **THE COURT:** Yes.

3 **MR. CHURDAR:** Mr. Ferguson's not here. He should be
4 here testifying, this is where I held the
5 prism. He's not here. Anything that he
6 testifies to about where the prism was held,
7 how he quote/unquote knows this, is based on
8 hearsay.

9 **THE COURT:** Well, let's see if it is and if it is
10 and it's not within a hearsay objection, we'll
11 exclude it, and if it is within any sort of
12 recognized exception then we'll admit it. So
13 you may proceed, Mr. Weatherholtz.

14 **MR. WEATHERHOLTZ:** Okay.

15 Q: So the question is -- I think you answered the
16 question do you know where the prism was held
17 when the measurement was taken -- held by Mr.
18 Ferguson.

19 A: Yes.

20 Q: How do you know that?

21 A: As a result of our discussions before and after
22 ---

23 **MR. CHURDAR:** Objection. That's hearsay. He ---

24 **MR. BESSANT:** But it's my work. I do this all the
25 time. I testify to my work.



JAMES WEATHERHOLTZ V. SC DHEC

75

1 MR. WEATHERHOLTZ: Your Honor.

2 THE COURT: Yes.

3 MR. WEATHERHOLTZ: It's standard in the industry for
4 surveyors to have field crews who go out and
5 gather data, who perform measurements like
6 this. It's standard for a registered land
7 surveyor to gather all that data and put it on
8 a survey with his stamp, just as Mr. Bessant
9 has done here. Mr. Bessant has been admitted
10 in this case as an expert witness. Rule 703
11 allows expert witnesses to rely on information
12 that may not otherwise be admissible into
13 evidence, including hearsay. The bases of his
14 opinions need not be admissible in evidence.
15 I mean, that's Rule 703 of evidence.

16 THE COURT: I will concur with you on that and
17 insofar as those -- the statements are where he
18 stood at the time he took the measurements are
19 reflected in the final work product here, I
20 certainly think he can testify to that.

21 MR. WEATHERHOLTZ: Yes, ma'am. And I think he can
22 testify to conversations he had with his field
23 crew to establish where those measurements were
24 taken. I mean, that's critical here. That was
25 the purpose of the sketch. That reflects their



JAMES WEATHERHOLTZ V. SC DHEC

76

1 conversation about where the measurements are
2 supposed to be taken, where the prism is
3 supposed to be held by the field crew, and his
4 conversations with them about where they held
5 the prism are relevant and in support of his
6 opinion testimony in this case.

7 **MR. CHURDAR:** And, Your Honor ---

8 **THE COURT:** Yes.

9 **MR. CHURDAR:** --- my objection is he was not here.
10 This opinion is make or break for their case,
11 and they should have brought Mr. Ferguson here,
12 and the fact that they didn't -- well, I mean,
13 plenty of inferences can be drawn that I will
14 argue about, but nonetheless, the key -- one of
15 the key pieces of data is something that only
16 Mr. Ferguson can testify to. He can offer
17 opinions based on the data that he's gotten,
18 certainly, but that doesn't mean that the data
19 is accurate and for him to say yes, I know when
20 I wasn't out there on the water is relying on
21 hearsay because he just said it's based on
22 conversations I had with my crew. That's
23 hearsay.

24 **THE COURT:** And as Mr. Weatherholtz said, experts
25 may rely upon some data which may not



JAMES WEATHERHOLTZ V. SC DHEC

77

1 ordinarily be admissible into evidence. It
2 sounds to me, from my very limited knowledge of
3 land surveying, which is basically what Mr.
4 Bessent has testified to today and various
5 other things I've looked at in the course of
6 being a judge for 15 years, that where they
7 would stand or be in the kayak to take these
8 measurements is pretty much an industry
9 standard and is dictated by how this
10 laser/prism/system works, so again, it's some
11 evidence. I'm not saying it's outcome
12 determinative evidence, although Mr. Bessent
13 has given his opinion that there are several
14 places in this creek where it is ten feet wide,
15 and I don't think there's any way we can, you
16 know, dispute that evidence that there is some
17 evidence. I'm not saying it's dispositive.
18 And so you may continue, Mr. Weatherholtz.

19 **MR. WEATHERHOLTZ:** Thank you, Your Honor.

20 **MR. CHURDAR:** So the objection about him testifying
21 to hearsay is overruled?

22 **THE COURT:** Yes. You may continue, Mr.
23 Weatherholtz.

24 **Q:** Mr. Bessent, I believe you testified earlier
25 that you do have knowledge about where the



JAMES WEATHERHOLTZ V. SC DHEC

78

1 prism was held by Mr. Ferguson when the
2 measurements were taken, correct?

3 A: Yes.

4 Q: How do you know that?

5 A: From discussions with him before and after this
6 job, and also on many similar jobs in the past.

7 Q: Tell me about your discussion with him on this
8 job about where the measurement was taken.

9 A: Well, this was a little sketch just to say all
10 right, look, we're measuring marsh grass ---

11 **MR. CHURDAR:** Just a continuing objection. I don't
12 want to keep jumping ---

13 **THE COURT:** Yes, sir, I agree with you. Your
14 continuing objection is noted.

15 A: To me when the regulations say edge of
16 vegetation or edge of marsh grass, I didn't
17 want my guys out there trying to pick every
18 little hair, every little thing of marsh that
19 may show through the water because that would
20 be a nightmare of points trying to apply all
21 that. So I was trying to explain to them kind
22 of with this sketch is that you may see a marsh
23 grass popping up out here but what I want is
24 the line is what you -- what most people would
25 normally call the edge of the creek, the main

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JAMES WEATHERHOLTZ V. SC DHEC

79

1 edge of the marsh grass, and that's what I
2 instructed Billy to locate.

3 Q: And is that line reflected on the last page of
4 Exhibit 5 with the two lines that show the main
5 line of heavy growth?

6 A: Yes. I mean, again we had a pretty good
7 discussion about this. I said don't push into
8 the heavy grass. I'm not trying to stretch the
9 measurements, but I'm not trying to pick up
10 every little hair that may be two feet further
11 out in the creek either. I tried to generalize
12 and say I want what you would consider the main
13 growth, the edge of the marsh grass as it
14 borders this creek. And I believe he
15 understood that completely, and I believe
16 that's what he gave me with the data points.

17 Q: I think you testified earlier that your company
18 has performed some number of surveys in marsh
19 like this one?

20 A: Yes.

21 Q: Do you have a policy or a procedure for where
22 you define the edge of the marsh grass?

23 A: Yes, and again I know that it's tricky. I know
24 it's, kind of vague so I kind of go over it
25 with my guys every time, even though they've



JAMES WEATHERHOLTZ V. SC DHEC

80

1 just done three of them. I still say all
2 right, look, guys, this is another one of
3 those. You've got to use your head, use your
4 eyeballs, tell me what you -- what is the main
5 line, the edge of the marsh. Now, if you're in
6 a wide creek it doesn't make much difference.
7 If the creek's 200 feet wide this is not nearly
8 as crucial as it is today. As I said earlier,
9 we're splitting hairs here. I admit that.

10 Q: Exhibit 5, first page.

11 A: Yes.

12 Q: On the top half of that sheet starting just
13 behind where the pierhead is shown in the creek
14 you've got a bold dark line that goes down the
15 edge of the creek and turns, and then you've
16 got another one across the creek from that.

17 A: Right.

18 Q: What does that line reflect?

19 A: Yeah, again this was -- this is strictly what
20 I call a raw data plot. It's not intended to
21 be fancy or to be presented to anybody. It's
22 kind of our in-house working drawing, and we
23 are analyzing these points. And on the dark
24 line that you're asking about, we connected
25 one, two, three edge of creek shots on the far



1 side of the creek and one, two, three edge of
2 creek shots on the near side of the creek. And
3 on those particular set of six shots, that area
4 is ten feet. And I don't have the exact
5 inverse dimension in my head, but I know that
6 it's 10.1, 10.2. It's ten feet.

7 Q: Can you estimate the length of that distance?

8 A: The length of those bold lines, judging by --
9 again, this is not plotted to scale, but I'm
10 looking at the pierhead dimension which was
11 drawn at ten feet, so that would probably be at
12 least about 30 feet of the creek. And that's
13 not necessarily the only place that had ten
14 feet of width, but that's where we were trying
15 to put the dock, so that's where we just drew
16 those bold lines on there for our own purposes.
17 I'd say about 30 linear feet of creek or a
18 little more.

19 Q: Thank you, Mr. Bessent, that's all I have.

20 **THE COURT:** Anything else, Mr. Churdar?

21 **MR. BESSENT - RECROSS-EXAMINATION BY MR. CHURDAR:**

22 Q: Mr. Bessent, you said that you talk to your
23 crew and you tell them when they go out there
24 use their head, correct?

25 A: Correct.



JAMES WEATHERHOLTZ V. SC DHEC

82

1 Q: And you don't -- testified earlier you have no
2 knowledge about whether Mr. Ferguson's head is
3 filled with any education regarding identifying
4 various stages of marsh growth vegetation,
5 correct?

6 **MR. WEATHERHOLTZ:** Objection, Your Honor. I think
7 he's answered that question earlier.

8 **THE COURT:** Pardon me. I'm not really sure what
9 you're asking. You're just saying that Mr.
10 Ferguson may not have known what he was doing;
11 is that the implication?

12 **MR. CHURDAR:** Well, he said he tells his crew to use
13 their head when they go out there.

14 **THE COURT:** Well, Mr. Churdar, isn't that -- I can
15 almost take judicial notice of the fact that
16 just means say use your good common sense,
17 doesn't it? Isn't that what that ---

18 **MR. CHURDAR:** Your Honor, when we're talking about
19 what is a stand of sufficient Spartina
20 vegetation to be the edge of the creek or not
21 ...

22 **THE COURT:** That's a question for me then, right,
23 Mr. Churdar? Okay. Well, ask him what you
24 want to ask him about the specific measurements
25 then, or what he meant by saying use your head.



JAMES WEATHERHOLTZ V. SC DHEC

83

1 MR. CHURDAR: I think I've -- I think I've -- I'll
2 withdraw the question.

3 THE COURT: All right.

4 MR. CHURDAR: And I have nothing further.

5 THE COURT: All right. Thank you very much. Well,
6 this looks like a good place to break then and
7 because you're going to be the next witness,
8 right?

9 MR. WEATHERHOLTZ: Yes, ma'am.

10 THE COURT: Okay. Why don't we go ahead and break
11 for lunch and does everybody have right around
12 five until 12 or so right now?

13 MR. WEATHERHOLTZ: Yes, ma'am.

14 THE COURT: All right. Well, we'll come back then
15 at 1:15.

16 MR. WEATHERHOLTZ: Your Honor, with your permission
17 I'd like to ask for Mr. Bessent to have
18 permission to leave.

19 THE COURT: Oh, absolutely. Thank you, Mr. Bessent,
20 and be careful going back to Charleston or
21 wherever you're heading back to. Mr. Churdar,
22 were you okay with that, Mr. Bessent being ---

23 MR. CHURDAR: With -- oh, just one moment.

24 THE COURT: Okay.

25 MR. CHURDAR: That's fine, Your Honor.



JAMES WEATHERHOLTZ V. SC DHEC

84

1 **THE COURT:** Okay. Thank you, Mr. Churdar.

2 (Lunch break from 11:49 a.m. until 1:18 p.m.)

3 **THE COURT:** And I believe at this point, Mr.
4 Weatherholtz, you wanted to come forward and be
5 sworn to testify.

6 **MR. WEATHERHOLTZ:** Yes, ma'am.

7 **THE COURT:** So please come forward and raise your
8 right hand.

9 **JAMES E. WEATHERHOLTZ,** having been duly sworn,
10 testifies as follows:

11 **THE COURT:** Please have a seat and you may testify.

12 **MR. WEATHERHOLTZ:** Thank you, Your Honor.

13 **DIRECT TESTIMONY BY MR. WEATHERHOLTZ:**

14 **MR. WEATHERHOLTZ:** As you know, I'm James
15 Weatherholtz, the Petitioner in this matter.
16 And I've already given a little bit of
17 background information about this project in
18 the opening statement, so I won't belabor those
19 points, but for the record, we bought the lot
20 in 2012, decided to pursue a dock permit. We
21 hired Tom Bessent to prepare the survey for us
22 and to do whatever other paperwork was required
23 for the permit application. He helped us
24 through that. We submitted the application.
25 Once the application was submitted, we received



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JAMES WEATHERHOLTZ V. SC DHEC

85

1 notice that by a certain date there would be a
2 public notice period and that people would have
3 an opportunity to comment. As that date came
4 closer, and I think it was just after that date
5 passed, I sent an email to the DHEC
6 representative who had been assigned this case
7 and just asked him what the status of the
8 application was and whether he had received any
9 comments. If you look at Exhibit 6, that is a
10 series of emails between me and Mr. Jeff
11 Thompson with the Department of Health and
12 Environmental Control. He's the DHEC
13 representative who was handling this permit
14 application. My email to him is on page 2. It
15 starts out July 5th where I'm asking him for
16 information about the status. He responded to
17 me on July 8th that -- in the third sentence of
18 that email, he says, Your application states
19 the creek is ten feet wide, but my measurement
20 using aerial photography is about eight feet.
21 So he states in that email that he's going to
22 come to the site and measure the creek. I
23 responded on August 1st in an email back to him
24 that said in paragraph two -- and this is
25 really to just set the stage for the

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JAMES WEATHERHOLTZ V. SC DHEC

86

1 photographs and the things I'm going to show
2 you next. In the second paragraph, first
3 sentence, it says, As to creek width, I paddled
4 out in a canoe this evening and took some
5 measurements. So that's me on August 1st
6 saying that in response to his email that said
7 he took some aerial measurements that showed
8 eight feet, that I had gone out and done some
9 of my own measurements. When I received the
10 email from him that said it didn't look ten
11 feet wide, that didn't seem right to me. I had
12 a survey from a registered land surveyor that
13 showed ten feet at least in the location where
14 the -- where the proposed dock was going to be.
15 So I wanted to see for myself, number one,
16 exactly what the conditions were out there and,
17 number two, it just wasn't consistent with my
18 experience. I mean, I had been out in that
19 creek in a canoe as well as on a paddle board.
20 I've got an 11-foot Yolo paddle board that I
21 had been out on the creek in that I had turned
22 around inside the creek and, according to my
23 recollection, that creek was -- was ten feet
24 wide, maybe not quite 11, but anyway, that's
25 what prompted me to do what I did next. Before



JAMES WEATHERHOLTZ V. SC DHEC

87

1 we get to the photographs, I'll call your
2 attention to the last email which is at the top
3 of the first page where he says, Hello, Mr.
4 Weatherholtz, I did visit this site by boat on
5 July 11. My measurements were all 7.5 to eight
6 feet in width, depending on the location, with
7 the mouth of the creek being less than seven
8 feet in width. So if you look at next Exhibit
9 7, following that series of emails, this is the
10 denial letter that I received from Mr. Thompson
11 on August 7, 2013. The letter describes the
12 permit and it cites three sections that DHEC
13 took into consideration in evaluating the
14 permit and gave two specific citations for the
15 basis for the denial. The first talks about
16 the creek width, which is (c)(1) that we talked
17 about earlier.

18 **THE COURT:** Right.

19 **MR. WEATHERHOLTZ:** In the middle of that page there
20 is a reference to Section R30-12(A)(2)(c)(1)
21 that states what the reg is, and then the DHEC
22 -- this is the official DHEC position about the
23 width of the creek -- says this creek was
24 measured by DHEC staff from a boat on July 11,
25 2013, and determined to be 7.5 feet in width



JAMES WEATHERHOLTZ V. SC DHEC

88

1 when measured from marsh vegetation to marsh
2 vegetation. So, I mean, the email said seven
3 and a half to eight feet. This official
4 position is now that this creek measures 7.5
5 feet. I don't know whether that means that's
6 the narrowest point, that that is an average,
7 that that's his overall impression, but that's
8 the statement that is made in the denial
9 letter. I included as Exhibit 8 my request for
10 final review. That was dated August 20th and
11 I submitted that in accordance with the
12 requirements for requesting a final review. If
13 you look at page 2 of that letter, I address
14 both sections (c)(1) and (c)(2) and I lay out
15 my position based on the information I had at
16 the time about what the creek widths were and
17 what the situation was in terms of potential
18 for dock access from the opposite side of the
19 creek. My position here today is consistent
20 with the position I took in the request for
21 final review. I state in paragraph two on page
22 2 of Exhibit 8 that the creek does widen and
23 narrow along the section that lies within my
24 extended lot lines, and I acknowledge that it
25 is not all ten feet wide. I could find



JAMES WEATHERHOLTZ V. SC DHEC

89

1 locations where it is less than ten feet wide.
2 Nonetheless the creek width does measure ten
3 feet in certain places, and I was telling DHEC
4 at the time that I'm willing to locate the
5 pierhead precisely at a section within the
6 creek that has a width of ten feet and confirm
7 that placement to DHEC if that was important.
8 In the third paragraph in terms of mitigation,
9 I also offered that if creek access was an
10 issue, the (c)(2) requirement, that if there's
11 potential dock access from the other side, I
12 think that the rationale for that is that you
13 don't want two competing pierheads ---

14 **THE COURT:** Right.

15 **MR. WEATHERHOLTZ:** --- or two competing docks
16 directly opposite one another in the same
17 creek. So in terms of mitigation, I offered
18 that I was willing to adjust the size and
19 placement of the proposed pierhead or even the
20 existence of the pierhead so that there would
21 be no possibility of encroachment, even though
22 later in that letter I took the position that
23 -- that we satisfy that special geographic
24 circumstance because there is no potential dock
25 access from the other side of the creek.



JAMES WEATHERHOLTZ V. SC DHEC

90

1 Earlier today during Mr. Churdar's opening
2 statement that was the first time that I ever
3 realized the point DHEC is making about the one
4 dock that is west of me that could -- that
5 could be torn down basically and extended all
6 the way across to a different section of the
7 creek, and I'll address that in a few minutes
8 with some aerial photographs and explain what
9 I mean. But the point is that that issue
10 wasn't even in play at this point in the
11 process. All I knew was that they had denied
12 it based on (c)(2) as an additional ground.
13 Exhibit 9 is the DHEC staff response to my
14 request for review. Once again, this is a
15 document that was prepared by Mr. Thompson as
16 set out at the top of page 1 of Exhibit 9, and
17 essentially what he did was go through my
18 request for final review, break out the
19 paragraphs where I stated my position and he
20 gave a response to that. And I really just
21 want to talk about one on page 1, paragraph
22 one. I was making some statements about the
23 fact that my permit application was accompanied
24 by a stamped survey. In response to that, he
25 says that the creek was measured by DHEC staff



JAMES WEATHERHOLTZ V. SC DHEC

91

1 on July 11th and determined to be 7.5 feet in
2 width when measured from vegetation to
3 vegetation. He talks about photographic
4 documentation. Four or five lines down in that
5 response paragraph, he begins, No portion of
6 the creek was ten feet or greater in width
7 along any portion of the creek from the mouth
8 up to and beyond the proposed dock. I knew
9 that that was not true at the time when I
10 received that. This was dated September 5th,
11 2013, so after I received this, I went out and
12 did another series of measurements and those
13 were reflected in the photographs in -- and
14 I'll explain those next. This Exhibit 9 is the
15 copy of the staff response to the request for
16 review that I received. The next sentence,
17 picking up where I just left off, it says,
18 Although Mr. Weatherholtz's survey accurately
19 illustrates his lot and critical area line, the
20 survey depicts no points of reference in the
21 creek. So that was one of the grounds that
22 DHEC was using to challenge the ten-foot
23 measurement, was that the survey didn't show
24 any reference points. So I would call the
25 Court's attention to the documents that were



JAMES WEATHERHOLTZ V. SC DHEC

92

1 submitted as Exhibit 5, which are the field
2 notes from Mr. Bessent which shows the "X"
3 marks which reflect the reference points and
4 the places where he took those measurements.

5 **MR. CHURDAR:** Your Honor, I would object to that
6 reference. These documents that are in Exhibit
7 5 were not submitted until last Friday. I
8 mean, they certainly weren't available with --
9 at the time that Exhibit 9 was prepared.

10 **THE COURT:** So noted.

11 **MR. WEATHERHOLTZ:** Well, and I can explain.

12 **THE COURT:** Yeah, so noted that DHEC didn't have
13 those at ---

14 **MR. CHURDAR:** I'm not sure how you object with -- in
15 this situation so ...

16 **THE COURT:** Yes, sir. Well, you certainly may
17 cross-examine with respect to that also. So
18 would you like to explain that ---

19 **MR. WEATHERHOLTZ:** Yes, ma'am.

20 **THE COURT:** --- Mr. Weatherholtz?

21 **MR. WEATHERHOLTZ:** I'll go ahead and address that.
22 I mean, Tom Bessent has been a known entity
23 from the very beginning of this case. He was
24 -- personally prepared the survey. From the
25 very first case information report that I

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JAMES WEATHERHOLTZ V. SC DHEC

93

1 submitted to Your Honor, I listed Tom Bessent
2 as a proposed witness. Mr. Churdar had every
3 opportunity to depose him or request his file
4 or whatever other documentation he wanted. At
5 some point in this litigation, he did request
6 his deposition and I said I'll get some dates
7 from Tom as long as you'll pay -- if he asks
8 for an hourly rate or a witness fee, if you're
9 -- will agree to pay for that, in accordance
10 with the rules we'll set it up. He elected not
11 to do that, but a couple of days before my
12 deposition last week, he asked if I had any
13 field notes from Mr. Bessent. And I said I
14 don't have any, all I have is the drawings.
15 The five pieces of paper that were submitted
16 with the application is all I had. But I
17 agreed at that time to request the field notes
18 if those would help him, which I did. And the
19 day that Mr. Bessent sent me those field notes
20 I forwarded the email and the documents to Mr.
21 Churdar. So he's had those in his possession
22 almost within days of when he requested them.
23 The last sentence I want to reference in
24 Exhibit 9, which is the DHEC staff response, is
25 picking up where I left off, without this



JAMES WEATHERHOLTZ V. SC DHEC

94

1 information the survey's representation that
2 the creek is ten feet wide is unreliable. So
3 DHEC was using the lack of reference points to
4 say that the survey was unreliable, and I'll
5 submit for the Court's consideration Exhibit 5
6 which includes the reference points. Moving on
7 to Exhibit 10. Exhibit 10 is a series of
8 aerial photographs that show the critical area
9 behind my house and the general location of
10 where the proposed dock placement is. The
11 first photograph is the farthest away, that's
12 10-A. 10-B is drilling down a little bit
13 closer. 10-C is drilling down even closer, and
14 then 10-D is as close as you can get using the
15 Google Maps website, and then 10-E is a pull-
16 out from one of those earlier pictures, and 10-
17 E is also the demonstrative exhibit that I have
18 posted on the foam board here. And the reason
19 I did that is because I'm going to show you
20 some locations in the creek where I took
21 measurements and where I was actually in the
22 canoe, and I want to be able to show you by
23 reference to the aerial where those things
24 occurred. So I'll come back to that in a few
25 minutes. Picking up at Exhibit 11. If it's



JAMES WEATHERHOLTZ V. SC DHEC

95

1 okay, I'm going to grab a pointer.

2 **THE COURT:** Help yourself.

3 **MR. WEATHERHOLTZ:** Exhibit A -- I'm sorry Exhibit
4 11-A through C is a series of three
5 photographs. These are the ones that I took on
6 August 1st when I first realized that there was
7 some question about the creek width. I paddled
8 out in my canoe by myself with a tape measure.
9 I located the canoe closer to one side of the
10 creek than the other. I attempted to extend
11 the blade of the tape measure across the creek
12 and to stop the end of the tape measure at the
13 grass line. The first photograph is the end of
14 the blade where I stopped it at the grass line
15 as best I could. B is the first photograph I
16 took of the measurement at the opposite side of
17 the creek, and this is me holding the camera in
18 one hand and holding the tape measure in the
19 other, extending the blade across the creek and
20 across the bow of my canoe, holding it as
21 steady as I can and taking the picture.
22 Exhibit 11-B shows clearly that the grass line
23 is outside of the ten-foot marker, and it's
24 some number of inches outside the ten-foot
25 marker in that photograph. In the same



JAMES WEATHERHOLTZ V. SC DHEC

96

1 vicinity I took another photograph where the
2 grass line is right at or just beyond ten feet;
3 not quite as long as 11-B, but very close. As
4 I said earlier, I did the best I could with
5 those photographs. That's holding a tape
6 measure trying to steady the canoe and trying
7 to be fair and honest about the end of the
8 blade and whether that is on the grass line or
9 not and where my measuring point is on the
10 other end. I was satisfied that, through these
11 measurements, I was showing that the creek was
12 more than ten feet, but I wondered whether
13 there wasn't a more objective way to show that,
14 in fact, the creek is more than ten feet wide
15 along those sections. So 12-A is a photograph
16 of a receipt. I went to Lowes and I bought a
17 ten-foot long PVC pipe. I brought it home and
18 I measured it and the exact measurement is
19 shown on Exhibit 12-B. It's ten feet and five-
20 sixteenths of an inch long, so it's just over
21 ten feet long. Exhibit 17, which I brought
22 with me to Court today, is that actual PVC pipe
23 that I used to make the measurements and the
24 one that you will see in these photographs. As
25 you can see on Exhibit 12-A, the day I



JAMES WEATHERHOLTZ V. SC DHEC

97

1 purchased the PVC pipe was September 21st, and
2 I testified in my deposition that I can't
3 remember the exact date I took the pictures,
4 but I think it was late September or October of
5 last year.

6 **THE COURT:** All right.

7 **MR. WEATHERHOLTZ:** Exhibit 13-A through E is a
8 series of photographs that I took, and I'm
9 going to sort of break this up into zones
10 because there are three or four zones that are
11 -- that are relevant to these measurements. If
12 you can picture, my house is right here
13 basically in the center at the bottom, and on
14 Exhibit 1, the proposed dock placement, that
15 shows the dock coming out like this, turning a
16 little bit and really landing somewhere right
17 in here. So -- and I think it would help to
18 look at this together real quick. If you would
19 look at Exhibit 1, that shows a plat of my lot
20 lines and the critical line that Mr. Bessent
21 re-established and got approved by OCRM, and it
22 also shows the extended lot lines. So if you
23 look at the extended property lines on the
24 right side, you will see that the extended
25 property line on this side goes outside of this



JAMES WEATHERHOLTZ V. SC DHEC

98

1 leg of the creek, so this section of the creek
2 is within my extended lot lines. This section
3 of the creek is where I propose to put the
4 dock, and then you can look at Exhibit 1 to see
5 where the extended property lines are on this
6 side. They go through here somewhere. Right
7 there at the bend, I think, is where -- is
8 where the dotted line showing the extended lot
9 line goes. But again, I mean, it is set forth
10 exactly on Exhibit 1. So the first thing I did
11 with that piece of PVC pipe is take
12 measurements in this section right here, which
13 is the proposed location of the dock. That is
14 Exhibit 13, and it's this section right in
15 here. The best thing I could figure to do was
16 to mount the PVC pipe so that it's stationary
17 on the front of the canoe. You can see how I
18 did that. My father was in the canoe with me.
19 He was sitting in the canoe taking photographs.
20 I am actually outside the canoe at the bow
21 standing in the creek, and I am positioning the
22 canoe in the center of the creek so that we can
23 take photographs of the full length of the PVC
24 pipe within the grass line, and that's what
25 these photographs are intended to show. In all



JAMES WEATHERHOLTZ V. SC DHEC

99

1 of these photographs, with the exception of
2 one, and I'll call that one out to you, the PVC
3 pipe is fully within the grass line on both
4 sides, so the creek width in all of these
5 photographs is ten feet or more. Exhibit B is
6 the same thing. And what I did here was I just
7 sort of walked the canoe down the creek in this
8 section, this short section right here, which
9 is again the proposed location of the dock, and
10 once we would get to a place where I could
11 steady the canoe and position it directly in
12 the center, my dad would take a photograph of
13 what you see in these pictures as best he
14 could. Photo 13-C, you can see my hands
15 actually on the bow of the canoe steadying it
16 in that photograph. C is also the one where
17 you can see a couple of wisps of grass that are
18 inside the end of the pipe.

19 **THE COURT:** Yeah, I would note for the record that
20 with respect to Exhibit 13, all the
21 photographs, A, B and D, appear to show that
22 the pipe is not even touching any of the grass,
23 whereas on C it's just touching minimal a
24 couple of inches, I don't know how many of
25 them.



JAMES WEATHERHOLTZ V. SC DHEC

100

1 MR. WEATHERHOLTZ: Yes, ma'am.

2 THE COURT: But on the others it just appears to be
3 fully extended and to have some space possibly
4 on either side.

5 MR. WEATHERHOLTZ: Yes, ma'am. And I can't testify
6 to how much space is there but it is inside the
7 grass. I'll move along then to Exhibit 14.
8 This is another section of the creek that I
9 measured and I'll show it to you. It's right
10 here. Exhibit 14 photographs are taken in this
11 section of the creek right here. All you'd
12 have to do is look at Exhibit 10-E, which is
13 this blow-up photograph, and it's the same
14 photograph as also in the exhibit book. All
15 you have to do is look at this photograph and
16 see that that section is clearly wider than the
17 section that we were just in. I did
18 measurements in this section a couple of
19 different ways. I did the same method I just
20 described where I positioned the boat in the
21 center. It's hard to tell from these
22 photographs, but there is a full two feet of
23 width on either end of the PVC pipe before you
24 get to the grass in this section of the creek.

25 THE COURT: That's 15?



JAMES WEATHERHOLTZ V. SC DHEC

101

1 MR. WEATHERHOLTZ: I'm sorry. 14.

2 THE COURT: 14, all right.

3 MR. WEATHERHOLTZ: And 14 again is this section in
4 here. And admittedly, this section is outside
5 my extended property lines. I mean, I want to
6 be clear about that. I'm not trying to
7 represent that this is within my extended lot
8 lines. It's just a representation about the
9 width of this creek overall. So there is a
10 series of photographs. I wish that the camera
11 angle lens could have been wider because it
12 doesn't capture where the grass line begins,
13 but I can testify based on being in that creek
14 holding the canoe that we had a couple of feet
15 of clearance on either side of the ends of that
16 pipe. 14-C is a photograph of that same
17 section but with the creek turned around 180
18 degrees facing back the other direction.
19 Moving on to Exhibit 15, and I'll show you on
20 this demonstrative, or I guess a blow-up of
21 Exhibit 10-E, the section where these pictures
22 were taken. It's beyond the dock adjacent to
23 my house in this section right here, and again,
24 as you can see from Exhibit 1, which is the
25 certified plat, I'm sorry, the stamped plat,



JAMES WEATHERHOLTZ V. SC DHEC

102

1 this section of the creek is within my extended
2 lot lines. It's outside of the neighbor's dock
3 next to me, so not dockable arguably, but it is
4 within my extended lot lines. The same
5 situation exists here, and you can make your
6 own approximation of the relative width of this
7 section, and the relative width of this section
8 just based on the photograph, and I'll leave
9 that to you, but my testimony about the width
10 of this section is the same as the other. I
11 had about two feet of clearance on each end of
12 the PVC pipe, and based on that, I believe that
13 section of the creek is up to 14 feet wide
14 right there. I won't go through those pictures
15 individually, but there are three photographs
16 showing those measurements, and then 15-D is
17 actually a picture of the canoe with my dad in
18 it and I just wanted to show the canoe itself
19 and how I attached the PVC pipe so that you
20 could get a full understanding of how we did
21 that.

22 **THE COURT:** Okay.

23 **MR. WEATHERHOLTZ:** Those are all the measurements
24 that I took in August and September/October of
25 last year. This past Friday in this case I



JAMES WEATHERHOLTZ V. SC DHEC

103

1 gave a deposition and Mr. Churdar asked me some
2 questions about the case and what my position
3 was and all very reasonable, and a couple of
4 the questions prompted me to go back to the
5 creek Saturday morning. I woke up. There was
6 a 6.2-foot high tide at about 7:40 on Saturday
7 morning, so I woke up. I got in the canoe and
8 I went back out to the creek. In the
9 deposition I testified that this is an 11-foot
10 canoe and that I could spin the canoe around
11 easily in these two sections: this section
12 right here and this section right here, which
13 we haven't talked about yet. I was thinking
14 about the 11-foot paddle board when I said
15 that's an 11-foot canoe. This is actually a
16 15-foot canoe. If you look at Exhibit 16-A, B
17 and C, those are photographs of me measuring
18 the canoe. I show the full length of the blade
19 on the measuring tape, and then the exact
20 measurement in Exhibit 16-C is 15 feet, three
21 inches. And let me pause here for a moment
22 because now that I'm talking this through I
23 recall that there was some issue about
24 potential objection to Exhibit 16, so I want to
25 lay the foundation for these photographs and



JAMES WEATHERHOLTZ V. SC DHEC

104

1 get them admitted into evidence if there's
2 still an objection before I start talking about
3 the rest of them.

4 **THE COURT:** All right. You may proceed, Mr.
5 Weatherholtz.

6 **MR. WEATHERHOLTZ:** So I personally took these
7 photographs. This is me by myself in the
8 canoe. This is a fair and accurate
9 representation of the conditions of the
10 critical area behind my house on the day that
11 I took these photographs, and I would move that
12 these photographs be admitted into evidence as
13 Exhibit 16.

14 **THE COURT:** And the date you said was last Saturday
15 which would be what?

16 **MR. WEATHERHOLTZ:** Which would be March 1, 2014.

17 **THE COURT:** March 1. Okay. And Mr. Churdar, do you
18 still have an objection to those photographs?

19 **MR. CHURDAR:** Well, Your Honor, I do, and this is in
20 no way casting aspersion on Mr. Weatherholtz's
21 character for honesty. I mean, I believe he
22 said he remembered something differently, but
23 he has testified that as he was thinking back
24 on his deposition testimony he talked about a
25 paddle board. He actually meant a canoe. This



JAMES WEATHERHOLTZ V. SC DHEC

105

1 is the first I've heard of this is just now.
2 I haven't had a chance to explore that with
3 him. I have taken his deposition, but in the
4 middle of trial doing discovery by trial is not
5 the best way to represent a client. And so, I
6 mean, I am put in a -- in a position of having
7 no knowledge of that change until the middle of
8 his testimony. And to the extent also, Your
9 Honor, that Mr. Weatherholtz has testified that
10 the -- I believe he was making reference to
11 right there, which would be the far western
12 portion of the creek that is south of that very
13 short dock, this is all outside of his extended
14 property line, and so whether or not he can
15 spin a 15-foot canoe at what appears to be the
16 highest of high tide right there I don't
17 believe is relevant as to whether or not he has
18 ten feet within his property lines. So I would
19 still make the relevance objection.

20 **THE COURT:** Mr. Weatherholtz?

21 **MR. WEATHERHOLTZ:** Yes, ma'am. So I'll say two
22 things in response to that. One is I took
23 these photographs Saturday morning. I took the
24 canoe measurement photos on Sunday morning.
25 The next morning I went back out and just



JAMES WEATHERHOLTZ V. SC DHEC

106

1 measured the canoe. I emailed every single one
2 of these photographs to Mr. Churdar on Sunday
3 afternoon with an email that said here are some
4 additional photographs I took this weekend; I
5 am available all day tomorrow, which was
6 Monday, to answer any questions you may have
7 about these photographs in the same way that I
8 did my deposition on Friday. I submitted that
9 email to Your Honor with my proposed
10 supplemental exhibits, and so I believe you
11 have that. The testimony I'm going to offer
12 about the canoe versus the paddle board is
13 really no different than I gave on Friday
14 except that I'm talking about what is a 15-foot
15 canoe as I've proven in these photographs and
16 not an 11-foot canoe. I can obviously spin a
17 paddle board that's 11 feet in the same
18 location. But the other thing I want to say
19 is, and this will just get back into my
20 testimony, once Mr. Churdar was assigned this
21 case for DHEC, he and I had a couple of
22 conversations about the creek width, and I
23 offered for us to meet at my house and go to
24 the creek together and look at the creek as a
25 group, me, Mr. Churdar, and Mr. Thompson, and



JAMES WEATHERHOLTZ V. SC DHEC

107

1 -- and take measurements and talk about it as
2 a group, because I genuinely believe that I
3 could prove that there are sections that are
4 ten feet. So we did that on November 20th and
5 we met at a local boat landing. The three of
6 us rode my boat across the harbor. We came
7 into Kushiwah Creek and we came into this
8 section. We passed through these sections and
9 just talking generally and pleasantly about the
10 case and other things. When we got into --
11 around this section right here, Mr. Thompson
12 took a measurement. He had a measuring stick
13 that's extendable. It's demarcated with
14 measuring lines just like a measuring tape
15 except it's a rigid rod. He took a measurement
16 in this section down here, and it was less than
17 ten feet. I observed the way he took the
18 measurement. We'll hear his testimony about
19 where he measures from, you know, whether it's
20 the sprig or the grass line, and we'll let him
21 talk about where he was intending to measure
22 from. Regardless, this measurement was less
23 than ten feet. We got into this section right
24 here where the proposed dock is going to be,
25 and I said here right here is a section that I



JAMES WEATHERHOLTZ V. SC DHEC

108

1 measured as ten feet. Let's measure here. And
2 he said no, I can't just pick a single spot and
3 do a measurement; I've got to take the creek as
4 a whole. And I said okay, if we're not going
5 to measure this particular spot right here,
6 then come over here. This is outside my
7 extended lot line, but here's a section where
8 I can show you it's easily more than ten feet.
9 We went over to that section in the boat. He
10 pulled the measuring stick in this section and
11 it showed more than ten feet. As shown in my
12 photographs it's, based on my testimony, up to
13 14 feet wide in this section. So I think that
14 addresses any relevance objection to taking
15 measurements in the creek outside of my
16 extended lot lines because it was made relevant
17 by DHEC's response to how they have evaluated
18 this creek width and whether it's limited to
19 the section within the extended lot lines or
20 not.

21 **THE COURT:** Well, I am trying to figure out the --
22 in the reg does it say within your extended lot
23 lines; is that an absolute? I mean ---

24 **MR. WEATHERHOLTZ:** I'll pull the reg.

25 **THE COURT:** I mean, I didn't realize that was an



JAMES WEATHERHOLTZ V. SC DHEC

109

1 issue ---

2 **MR. CHURDAR:** Your Honor ---

3 **THE COURT:** --- for that -- I mean, I guess I
4 thought if you had three things jammed up
5 against each other and you would potentially
6 have docks and it narrowed to ten feet it was
7 -- I don't know. Anyway, sorry. I'm just
8 thinking out loud. I'm trying to figure out if
9 it is a requirement of the reg that the creek
10 must measure ten feet within the extended lot
11 lines of the property owner applying for the
12 permit.

13 **MR. WEATHERHOLTZ:** It doesn't say that, Your Honor.

14 **THE COURT:** Okay.

15 **MR. WEATHERHOLTZ:** The reg section says ---

16 **THE COURT:** I know we had it up on the Elmo or
17 something a little earlier and I can -- we can
18 go pull it.

19 **MR. WEATHERHOLTZ:** Right. Yeah, I've got a copy of
20 it. I can place it on the Elmo to you and I've
21 actually got the actual reg book if we want to
22 look at that.

23 **THE COURT:** Yeah.

24 **MR. CHURDAR:** Your Honor, if I could ---

25 **THE COURT:** Clarify that for us, Mr. Churdar.



JAMES WEATHERHOLTZ V. SC DHEC

110

1 **MR. CHURDAR:** Yes. Yes, ma'am. In the definition
2 section of the regulation under -- let's see --
3 what is it -- D.

4 **THE COURT:** I'm looking at DHEC's ---

5 **MR. CHURDAR:** --- 30-1(d), it is 56 -- excuse me --
6 53. Waterfront property. It says 30-1(d)
7 subsection 53 and I'll read that. It says,
8 "For purposes of these regulations, waterfront
9 property will generally be defined as upland
10 sides where a straight-line extension of both
11 generally short perpendicular upland property
12 lines reaches a navigable water portion within
13 1,000 feet of the marsh critical line.
14 Waterfront property may also be identified via
15 an approved dock master plan where designated
16 corners differ from upland property line
17 extensions are delineated."

18 **MR. WEATHERHOLTZ:** That's the definition ---

19 **THE COURT:** That is the definition of waterfront
20 property, right?

21 **MR. WEATHERHOLTZ:** That's the definition of
22 waterfront property ---

23 **THE COURT:** Yeah.

24 **MR. WEATHERHOLTZ:** --- but the reg doesn't say a
25 ten-foot width must occur ---



JAMES WEATHERHOLTZ V. SC DHEC

111

1 **THE COURT:** Has to be measured within the existing -

2 --

3 **MR. WEATHERHOLTZ:** --- your extended property lines.

4 It just says ---

5 **THE COURT:** I mean, theoretically you could have --

6 I mean, I guess, two lots that are kind of

7 where the property line splits the middle of

8 the creek and, you know, that could still --

9 maybe, I mean, there could even be two docks

10 there. I don't know.

11 **MR. CHURDAR:** Your Honor, my point is just when

12 you're looking at what is or is not waterfront

13 property, you're looking within the extended

14 property lines.

15 **THE COURT:** Right.

16 **MR. CHURDAR:** That's how a determination is made.

17 **THE COURT:** But, I mean, we wouldn't even be here if

18 he didn't have waterfront property, right?

19 **MR. CHURDAR:** True.

20 **THE COURT:** So, I mean, I didn't realize that was

21 even an issue. Okay. Well, I'm just trying to

22 get it straight in my head and maybe I'm making

23 an issue where none exists, so let's move on.

24 You may proceed, Mr. Weatherholtz.

25 **MR. WEATHERHOLTZ:** Yes, ma'am. So I think I moved



JAMES WEATHERHOLTZ V. SC DHEC

112

1 to admit Exhibit 16.

2 **THE COURT:** Yes.

3 **MR. WEATHERHOLTZ:** Is that in? I wasn't sure.

4 **THE COURT:** You did and I cannot imagine, Mr.
5 Churdar, there being any prejudice. It seems
6 that you've already talked about the 11-foot
7 width or the length that you thought it was,
8 which was, you said the -- what did you say the
9 11-foot was?

10 **MR. WEATHERHOLTZ:** That's the length of my paddle
11 board.

12 **THE COURT:** The paddle board rather than the canoe
13 itself. I don't see there's any prejudice,
14 but, Mr. Churdar, I'll sustain you since you
15 haven't seen these in advance and had a chance
16 to evaluate the validity of that or take
17 deposition or anything on it. We'll exclude
18 those.

19 **MR. CHURDAR:** Just so we're clear, I have seen them.
20 I mean, he was correct. He said ---

21 **THE COURT:** Yes.

22 **MR. CHURDAR:** --- he sent them, but the change that
23 he made as to what he was and ---

24 **THE COURT:** Right.

25 **MR. CHURDAR:** --- no need to reiterate my objection



JAMES WEATHERHOLTZ V. SC DHEC

113

1 if you're sustaining it, so.

2 **THE COURT:** Yeah, I --- yeah, Mr. Weatherholtz?

3 **MR. WEATHERHOLTZ:** If I could just clarify. I mean,
4 I think his objection is to the lack of an
5 opportunity to talk to me about the fact that
6 it was the canoe -- it was the paddle board
7 that's 11 feet long ---

8 **THE COURT:** And the canoe ---

9 **MR. WEATHERHOLTZ:** --- and not the canoe ---

10 **THE COURT:** --- is 15. Yeah.

11 **MR. WEATHERHOLTZ:** --- which is 15 feet long.

12 **THE COURT:** Right.

13 **MR. WEATHERHOLTZ:** If we want to talk about
14 potentially -- I don't know how you exclude
15 that because it's just a fact that I'm
16 explaining, but that doesn't affect the
17 relevance of and the admissibility of these
18 photographs in Exhibit 16. They are a fair and
19 accurate depiction of the creek and they were
20 provided days in advance of today with the
21 express indication for me to answer questions
22 about it if you wanted to.

23 **MR. CHURDAR:** Your Honor, I understand that he
24 provided them. I don't want to argue if you've
25 already sustained the objection. I'll just ---



JAMES WEATHERHOLTZ V. SC DHEC

114

1 **THE COURT:** Well, it appears to me that Mr.
2 Weatherholtz has been permitted to explain that
3 he erroneously talked about an 11-foot width at
4 the deposition and it was actually a 15-foot
5 width, and I think these photographs would be
6 merely cumulative to that explanation, so I
7 don't think they really hurt him or benefit
8 you, but I will sustain because you did not
9 have a chance to look at them and not -- and
10 take a deposition or anything with respect to
11 them in advance, and I'll exclude those
12 photographs.

13 **MR. WEATHERHOLTZ:** Okay. Thank you, Your Honor.
14 Those are all the photographs then that I had
15 to talk about and I think that's all the
16 testimony I have to offer on the ten-foot width
17 issue.

18 **THE COURT:** Okay.

19 **MR. WEATHERHOLTZ:** If we could go back quickly to
20 Exhibit 10.

21 **THE COURT:** All right.

22 **MR. WEATHERHOLTZ:** These are a series of aerial
23 photographs showing the houses around the creek
24 in the same area, same critical area, where the
25 proposed dock would go.



JAMES WEATHERHOLTZ V. SC DHEC

115

1 **THE COURT:** Uh-huh.

2 **MR. WEATHERHOLTZ:** And because it's important, I
3 will reference directly to the S.C. Code of
4 Regulations (c)(2) that says docks will not be
5 permitted on creeks less than 20 feet wide as
6 measured from marsh vegetation on each side
7 unless one of the following two special
8 geographic circumstances exist. The first we
9 don't have to talk about because it ---

10 **THE COURT:** Right.

11 **MR. WEATHERHOLTZ:** --- has to do with 500 feet
12 frontage. The second is, "No potential access
13 by a dockage from the opposite side of the
14 creek." So that's the question DHEC is
15 answering, is there potential dock access from
16 the opposite side of the creek. You can see in
17 Exhibit 10-B, at the bottom edge of that
18 photograph about a third of the way, 25 percent
19 of the way across is a silver-roof house.
20 That's my house.

21 **THE COURT:** Okay.

22 **MR. WEATHERHOLTZ:** The dock would come straight out
23 from there to the creek directly behind my
24 house. There are only two houses on the other
25 side of that creek that could have any



JAMES WEATHERHOLTZ V. SC DHEC

116

1 potential dock access whatsoever, because this
2 marsh extends all the way to the Charleston
3 Harbor past this little peninsula that you see
4 on the left side of that page. There are two
5 houses at the top. You see one has a white
6 roof, and the other has a brown roof, and they
7 have a joint dock that goes to the main artery
8 of Kushiwah Creek. The house that Mr. Churdar
9 talked about this morning in his opening
10 statement is the one with the gray roof and the
11 short dock that goes to the same creek that I
12 am proposing to put a dock on. What they have
13 now is, and this is an estimate, but about a
14 50-foot dock that goes directly from the edge
15 of their lot to the closest point in the creek.
16 In order for that house to have potential
17 access, potential dock access from the opposite
18 side of the creek, they would have to tear that
19 dock down, submit an application to DHEC to ---
20 **MR. CHURDAR:** Your Honor, I would object that we are
21 getting into opinion testimony right here.
22 This is his opinion.
23 **MR. WEATHERHOLTZ:** Your Honor ---
24 **THE COURT:** Is it your opinion or assessment of what
25 would be required to have a dock from the



JAMES WEATHERHOLTZ V. SC DHEC

117

1 opposite side there from that little peninsula
2 as you said that extends out into the creek
3 there?

4 **MR. WEATHERHOLTZ:** Right. Well, what I am doing is -
5 --

6 **THE COURT:** Yeah, I'm trying to figure out why it
7 matters what they would have to do.

8 **MR. WEATHERHOLTZ:** Because the argument from DHEC is
9 that it's possible for someone to have a dock
10 within my extended lot lines on the opposite
11 side of the creek, and my point is, what I was
12 about to describe in terms of what would
13 actually have to happen ---

14 **THE COURT:** Right.

15 **MR. WEATHERHOLTZ:** --- for that to occur, that house
16 already has a dock. It has a dock in place the
17 nearest location on the creek, and it is
18 outside of my extended lot lines. That dock is
19 outside. So here's a situation where DHEC is
20 considering or not -- it's not clear to me --
21 creek widths outside of my extended lot lines
22 ---

23 **THE COURT:** For that purpose.

24 **MR. WEATHERHOLTZ:** --- for that purpose. Here there
25 is an existing dock outside of my extended lot

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JAMES WEATHERHOLTZ V. SC DHEC

118

1 lines. That dock cannot be opposite me. It's
2 already in place, and it would never encroach
3 on the proposed location of my dock. What DHEC
4 is saying is that well, it's possible for that
5 dock to be torn out and for that dock owner to
6 request a new dock that is four times as long
7 or more that extends across a whole lot more
8 marsh.

9 **MR. CHURDAR:** Your Honor ---

10 **THE COURT:** Yeah.

11 **MR. CHURDAR:** --- I would object. I think, I mean,
12 this is sort of a blurry line with Mr.
13 Weatherholtz representing himself, but this
14 feels more like closing argument frankly to me,
15 I mean, in terms of, you know, offering opinion
16 about or offering testimony about what DHEC is
17 saying when we haven't even presented our case
18 yet.

19 **THE COURT:** Well, perhaps that testimony might be
20 better saved for reply then, Mr. Weatherholtz,
21 if they are indeed proposing that, but that was
22 one of the things which was suggested to you by
23 DHEC that there might be?

24 **MR. WEATHERHOLTZ:** It's the explanation that I have
25 been given. And I understand that this is an



JAMES WEATHERHOLTZ V. SC DHEC

119

1 akward situation that it's difficult for Mr.
2 Churdar to oppose the objections because I'm
3 not asking questions of myself, and I'm
4 sensitive to that. So I'm happy to slow it
5 down or give opportunities. I don't believe
6 that what I'm offering now is opinion
7 testimony. I mean, I am stating my position on
8 appeal to the Court. I'm explaining to the
9 Court why I believe this reg doesn't apply, why
10 I believe there is truly no potential dock
11 access on the opposite ---

12 **MR. CHURDAR:** And what I'm saying is in order to say
13 this is -- you know, doesn't apply because this
14 is the only way or whatever, I don't want to
15 misquote him, but I mean that really is not a
16 fact. It's not factual testimony to say this
17 is the only way that, you know, that DHEC could
18 come to this conclusion. That's not a fact.
19 That's an opinion.

20 **THE COURT:** Yeah, but -- okay. Well, I'll sustain
21 that and let's wait then with any further
22 testimony with respect to that and see what
23 DHEC presents in their case in chief if you
24 would, Mr. Weatherholtz, and I will permit you
25 to come back to that if it's justified by what



JAMES WEATHERHOLTZ V. SC DHEC

120

1 they address.

2 **MR. WEATHERHOLTZ:** Yes, ma'am.

3 **THE COURT:** Okay. What else?

4 **MR. WEATHERHOLTZ:** So for now I think I conclude
5 with that. I mean, you have the photographs
6 that show the aerials; you have the exhibit
7 from DHEC that shows the extended lot lines for
8 this other dock, and you have the regulations
9 that you can interpret for yourself. Before I
10 conclude, I would like to address Exhibit 18.

11 **THE COURT:** Okay.

12 **MR. WEATHERHOLTZ:** 18-A is my FOIA request to DHEC.
13 18-B -- I'm sorry. Exhibit A is the email,
14 cover email and B is the formal request.

15 **THE COURT:** Right.

16 **MR. WEATHERHOLTZ:** C through the end is the response
17 I got from DHEC, which is the dock permit file
18 in 2001 that was submitted by the prior owner
19 of this lot, the one I own now. It's a public
20 business record that's kept in the ordinary
21 course. It was produced to me pursuant to a
22 FOIA request. It's a record of regularly
23 conducted business activity, and if admissible,
24 I would use it to show what I described
25 earlier, that there was a DHEC staff member who



JAMES WEATHERHOLTZ V. SC DHEC

121

1 evaluated that request and who made some
2 determination that Kushiwah Creek was ten feet,
3 at least back in 2001 when this permit was
4 submitted.

5 **THE COURT:** And I know Mr. Churdar objected on
6 grounds of relevance and on grounds that the
7 creek may not be the same, I believe, as it was
8 in 2001 and relevant.

9 **MR. CHURDAR:** Well, Your Honor, the fact that a
10 couple of things. The regulations have
11 changed.

12 **THE COURT:** Have changed and ten feet was not an
13 issue then.

14 **MR. WEATHERHOLTZ:** I acknowledge that.

15 **THE COURT:** Yeah.

16 **MR. CHURDAR:** And the other thing is, I mean, I
17 think Mr. Weatherholtz needs expert testimony
18 to get into the issue of whether or not, you
19 know, the fact that the staff made -- for him
20 to offer any opinions about that permitting
21 file from 2001 I believe goes beyond anything
22 that he's qualified to offer to this Court as
23 far as an opinion as to the relevance of a
24 determination from 2001 without the aid of an
25 expert.



JAMES WEATHERHOLTZ V. SC DHEC

122

1 **THE COURT:** Well, it appears to me that a layman,
2 and I'm certainly a layman in this area, could
3 look at this and say at some point this agency
4 determined that this creek with the same --
5 exactly the same lot, as I understand it, was
6 ten-feet wide. I don't know how much weight
7 that has because, as I said, because it was 15
8 years ago and it could have narrowed
9 significantly since then, but I do think that
10 it is relevant, and I'll admit it.

11 (Petitioner's Exhibit Number 18 was admitted into
12 evidence.)

13 **MR. WEATHERHOLTZ:** Thank you, Your Honor. In
14 particular, it's page WW, two W's.

15 **THE COURT:** Okay.

16 **MR. WEATHERHOLTZ:** Exhibit 18. It is a signed field
17 report from Megan Gordon with DHEC. I'm not
18 offering any opinion or commentary on it. I'm
19 just saying this is her signed report based on
20 her investigation, and it says what it says.

21 **THE COURT:** At some point, someone determined that
22 it was at least ten feet wide. Okay.

23 **MR. WEATHERHOLTZ:** And that's it.

24 **THE COURT:** Would you please answer any questions
25 Mr. Churdar would have, or would you like a



JAMES WEATHERHOLTZ V. SC DHEC

123

1 break before we begin?

2 **MR. WEATHERHOLTZ:** No, ma'am. I'm okay.

3 **THE COURT:** All right. Your witness, Mr. Churdar.

4 **MR. WEATHERHOLTZ - CROSS-EXAMINATION BY MR. CHURDAR:**

5 Q: Mr. Weatherholtz, you heard Mr. Bessent testify
6 earlier this morning about the first page on
7 Exhibit 5, if I could invite your attention to
8 that.

9 A: Yes, sir, I'm there.

10 Q: And his estimation was that that section --
11 just for the Court's benefit, can you point to
12 the corridor that is shown in dark lines
13 roughly on the picture; can you do that?

14 A: I would rely on Mr. Bessent to do that. I
15 mean, if you wanted him to plot his field
16 drawings on a photograph, he's really in a
17 better position to do that than I am.

18 Q: All right. Well, Mr. Bessent was testifying
19 that that is within your extended property
20 lines?

21 A: That what is?

22 Q: Well, the page 1 one of your Exhibit 5, if I
23 could invite your attention there.

24 A: I see it.

25 Q: Okay.



JAMES WEATHERHOLTZ V. SC DHEC

124

1 A: Yeah. Well, I'll say two things. One, his
2 testimony is what it is. I think I heard him
3 say that that bold section outlining the edge
4 of the creek on both sides is within my
5 extended property line, yes.

6 Q: Okay. And he testified that that is a swath of
7 about 30 feet long, right?

8 A: Okay. I guess so.

9 Q: Do you recall that?

10 A: Yeah.

11 Q: Well, you would not concur that that section of
12 the creek that is at least ten feet wide is a
13 section that's 30 feet long; you would not
14 agree with that would you?

15 A: I would say I don't know, and this goes back to
16 the deposition testimony that I gave on Friday.
17 All I measured was a limited section in the
18 area where I thought the proposed dock was
19 going to go, and I estimated and said at the
20 time that this is a speculative estimate, that
21 the two sections that I measured I thought were
22 approximately two to four feet in length each.
23 There may be other sections that were measured
24 with surveying equipment by Mr. Bessent that I
25 didn't go to and measure. I didn't go up and



JAMES WEATHERHOLTZ V. SC DHEC

125

1 down the entire creek within my extended lot
2 lines. You see the photographs. You can tell
3 the locations where I took pictures with the
4 PVC pipe.

5 Q: Well, I -- if I can invite your attention to
6 the question and answer back and forth. Do you
7 have a copy of that deposition by chance?

8 A: I don't know. Do you?

9 Q: I do. I just -- I can either read it to you or
10 you could read along with me. I just -- what
11 I wanted to do is go to the section where we
12 discussed on page 37 of your deposition. I'll
13 tell you what, what don't I just give that to
14 you?

15 A: That would be great. That way I could see it.

16 Q: Okay. Starting on 10.

17 A: Okay.

18 Q: And what I asked -- I said in order to make
19 this even make sense, if I could Your Honor,
20 put up on the Elmo one page out of Respondent's
21 Exhibit 3 that's marked Defendant's Exhibit 17.
22 I don't know if that makes sense or not.

23 **THE COURT:** Sure, whatever works.

24 Q: And I asked -- I said, Just under section two,
25 How many feet of the creek does this ten foot



JAMES WEATHERHOLTZ V. SC DHEC

126

1 or greater length go; do you understand my
2 question? And you said, I do understand the
3 question and I'm pausing because I didn't
4 measure the length of those sections that are
5 greater than ten feet. I can estimate it, but
6 I want to be careful because I don't want to
7 overestimate or underestimate the length.
8 Without having measured it, I think those two
9 sections that are greater than ten feet. And
10 I said, That you marked as Exhibit Two and
11 Three, and that would be these sections right
12 there, correct?

13 A: Right.

14 Q: Okay. That you marked as Exhibit Two and
15 Three, you say numbers two and three, and then
16 I say are -- you say are about two to four feet
17 long. And then I ask each one? Right. Or
18 together? Each one, and they're really close
19 together. I mean, they're right in the same
20 vicinity. And then I go on -- I'm on page 38
21 now. And I said, Okay, so we've -- I think
22 that is clear on the record. So both of them,
23 your guess or estimation is between two to four
24 feet long sections. Okay. That are greater
25 than ten feet wide. Okay. And then I say,

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JAMES WEATHERHOLTZ V. SC DHEC

127

1 Okay. Now, if you would also take the blue
2 Sharpie again and indicate if there is any
3 other section within your extended property
4 lines that are measured that is greater than
5 ten feet, and please identify that in the same
6 manner that you have with spot one, spot two,
7 and spot three. Now, I am making reference to
8 this section here, which is the section within
9 your extended property line to the east of the
10 dock that is to the east of you, correct?

11 A: I see that, yes.

12 Q: Okay. So we're talking about this section and
13 this section and this section?

14 A: Okay.

15 Q: And you said, So first let me say I rely
16 primarily on photographs. I mean, they show
17 exactly where the measurements were taken in
18 the sections of the creek and the greater than
19 ten foot width. I'm not saying that there
20 aren't other locations that are more than ten
21 feet, but these are the three places primarily
22 that I measured. So I read through that
23 correctly?

24 A: You did. So I just have an objection and a
25 question. I mean ...

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JAMES WEATHERHOLTZ V. SC DHEC

128

1 Q: Well, I didn't, I didn't ask my question yet.

2 A: I have an objection to this line of questioning
3 and the reading of the transcript into the
4 record unless it's for impeachment purposes.
5 I mean, my testimony today is the same as what
6 I gave on Friday. So if it's impeachment and
7 you want to use the transcript to impeach me,
8 that's certainly allowed within the rules. But
9 if my testimony is consistent with what I gave
10 on Friday, then I think under the rules you're
11 required to cross-examine me to get the
12 evidence into the record that you want as
13 opposed to reading the transcript. So that's
14 my objection.

15 **THE COURT:** Okay. I don't quite -- tell me again.
16 Yeah, right, impeachment is the only reason it
17 can be used, right?

18 **MR. WEATHERHOLTZ:** Right.

19 Q: Well, let me ask you this. Is it reasonable,
20 in your opinion, that if there was a 30-foot
21 swath of your property along your creek that
22 was the creek's width of ten feet or greater
23 that you would have mentioned that in your
24 deposition? Don't you think so?

25 A: I'll answer the question this way. I measured



JAMES WEATHERHOLTZ V. SC DHEC

129

1 the sections that I measured. Just like I said
2 in the deposition, I didn't measure all the way
3 up and down the creek width. You're asking me
4 to compare what I did with field drawings that
5 Mr. Bessent prepared. I didn't do the field
6 drawings; I didn't take those measurements.
7 His testimony is what it is and mine is
8 reflective of what I did in the places I
9 measured.

10 Q: But you do want the Court to believe and rely
11 on what your measurements were, don't you?

12 A: I do.

13 Q: Okay. So do you have an opinion about that?
14 Do you think that would have been reasonable
15 that you would have -- that you would have
16 mentioned a 30-foot length of the creek that
17 was ten feet wider or longer at that -- at the
18 deposition?

19 A: Not if I didn't measure it, and that was why I
20 was trying to be careful in the deposition to
21 tell you I measured in a couple of places, and
22 that's what's reflected in the photograph.
23 Sitting here now, do I wish I had gone and
24 measured the full 30-foot section? Yes, that
25 would be great to have done as much work as Mr.



JAMES WEATHERHOLTZ V. SC DHEC

130

1 Bessent did. My measurements were more
2 limited.

3 Q: Can I ask you on Exhibit 9, you made reference
4 to the email correspondence back and forth
5 between you and Mr. Thompson.

6 A: That's Exhibit 6.

7 Q: I'm sorry. I was reading it upside down. And
8 you in your correspondence back to him dated
9 August 1, 2013, in the second paragraph, you
10 make reference to the creek measures ten feet
11 in at least two sections. Would that be this
12 section here that's marked as Exhibit 1 and
13 this area here that you've marked as Exhibit 2
14 and 3? I mean, excuse me, section one here and
15 section two and three here?

16 A: No. On August 1st, when I went out and took
17 measurements, it was the tape measure photos
18 that are Exhibit 11, and the only two places
19 where I took those measurements were shown on
20 deposition Exhibit 17 as two and three. I did
21 not go over to number one.

22 Q: Okay. All right.

23 A: Later I did, but on that day, I did not.

24 Q: And I believe we went over this as well in your
25 deposition, but with regard to the Department's



JAMES WEATHERHOLTZ V. SC DHEC

131

1 past history of interpreting South Carolina
2 Regulation 30-12(A)2(c)(1) and (2), you just
3 simply don't have any knowledge of how the
4 Department has historically interpreted these
5 two sections of the regulation?

6 A: I don't. All I know is my experience.

7 Q: Okay. Now, you have introduced some pictures
8 that are -- let's see A, B, and C or -- yeah,
9 A, B and C as Exhibit 11, A, B, and C and these
10 are pictures of a tape measure in water.

11 A: Yes.

12 Q: And you would concur that you don't have any
13 recollection as to whether you stabilized your
14 canoe in the water?

15 A: Right. I got it as still as I could, and I may
16 have used a paddle to try to stabilize it, but
17 I don't specifically remember that. I just
18 tried to land the end of the blade at the grass
19 line and measure on the other side.

20 Q: Okay. So you can't say with certainty that the
21 boat was not moving as you were measuring the
22 creek width with the tape measure?

23 A: I did everything I could to take the
24 measurement and the photograph at the point
25 when I felt like the boat was not moving, but



JAMES WEATHERHOLTZ V. SC DHEC

132

1 it's imperfect.

2 Q: Right. I mean, so you would concur with what
3 I said, you can't say with certainty that the
4 boat was not moving as you were measuring the
5 creek width?

6 A: I don't remember the boat moving. I tried hard
7 to make sure the boat wasn't moving. I took
8 the photograph when I felt like it was the
9 fairest reflection of the creek width.

10 Q: Okay. Can I invite your attention to just that
11 one back and forth colloquy on page 44 starting
12 at line 15 of your deposition.

13 A: Okay.

14 Q: And I said, Can you say with certainty that the
15 boat was not moving as you were measuring the
16 creek width? And you answer, I can't say for
17 certainty that it was not moving.

18 A: And I don't want to say, but my intention in
19 taking that photograph was to be as fair and
20 accurate with the measurement as I could.
21 Sure, I got the boat as stable as I possibly
22 could. I did the best job I could with the end
23 of the tape measure to make sure that it was
24 right on the grass line on the other side, and
25 I took the photograph at the time where I



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JAMES WEATHERHOLTZ V. SC DHEC

133

1 thought this is a fair -- as fair and accurate
2 a measurement as I can do with a tape measure,
3 and frankly, that's why I went to the PVC
4 method next. I mean, this is not perfect.

5 Q: Oh, I'm not impugning that you're trying your
6 best, but I'm just saying -- I mean, when it
7 comes down to the bottom line, you couldn't say
8 for certain that the boat was not moving?

9 A: Right.

10 Q: Okay. All right. Now, I would like to ask you
11 about the -- some of the pictures, and I'm not
12 quite sure the best way to do this, but since
13 defendant's exhibit from the deposition Number
14 17 was sort of a basis of a lot of what we were
15 talking about, what I would like to do is hand
16 you Exhibit 3, Respondent's Exhibit 3 today and
17 when we talk about it, can you match these up
18 with the pictures that you have in the
19 petitioner's exhibits?

20 A: I can try.

21 Q: Okay. Thanks.

22 **THE COURT:** Mr. Churdar, before we get started on
23 that, could we take a ten-minute break. Let's
24 see. We've been going about an hour and 15.
25 Yes, I've got 2:25. Let's come back at 2:35.



JAMES WEATHERHOLTZ V. SC DHEC

134

1 (Break from 2:21 p.m. until 2:31 p.m.)

2 THE COURT: You may continue, Mr. Churdar.

3 Q: All right. Now, I think where we stopped is I
4 had handed you the exhibits, and I wanted to
5 talk about -- these are all connected with
6 Respondent's Exhibit 3. I wanted to talk to you
7 about those as they relate to the deposition
8 Exhibit 17, which was your part of Exhibit 3.

9 A: Right.

10 Q: Okay. Now, can you identify deposition Exhibit
11 pictures 14, 15, and 16 and match those up and
12 please tell me what each one of those is
13 matched up with yours so that the judge can
14 have some sense of what we're talking about and
15 it's not confusing.

16 A: Fourteen, 15, and 16 are the photographs that
17 I took in this section right here, and those
18 would be the same photographs that I put
19 together as Exhibit 14-A, B, and C.

20 Q: Okay. So 14-A, B, and C match 14, 15, and 16
21 depo exhibits, and those three pictures are
22 outside of your extended property line?

23 A: Yes.

24 Q: Okay. And if you could please find what is
25 marked as deposition Exhibits 18, 19, 20 and 4



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JAMES WEATHERHOLTZ V. SC DHEC

135

1 and identify those in your exhibit book so that
2 Judge Matthews can match those pictures up.

3 A: Okay. Deposition Exhibits 18, 19, and 20 and
4 deposition Exhibit 4 are photographs that I
5 took in this section here, and those are trial
6 exhibits 15-A, B, C, and D.

7 Q: Okay. So those pictures that are in trial
8 exhibit, Petitioner's Exhibit 15-A, B, C, and
9 D, those pictures are all of the creek width
10 that is east of this dock in this section right
11 here?

12 A: Yes.

13 Q: Is it your intention to build a dock in that
14 section?

15 A: No, I don't think I could.

16 Q: That is marked as Defendant's Exhibit 15? I'm
17 sorry, you said no, you don't think you could?

18 A: Right.

19 Q: Okay. Is it your intention to build a dock in
20 the section of the Petitioner's Exhibit 14,
21 there were A, B, C pictures, those three
22 pictures? Is it your intention to build a dock
23 on that section of the creek?

24 A: No.

25 Q: That's because it's outside your extended

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JAMES WEATHERHOLTZ V. SC DHEC

136

1 property lines?

2 A: Exactly.

3 Q: So I mean, you couldn't.

4 A: The way I understand the regs, I could not.

5 Q: Okay.

6 A: Now if you could take, Mr. Weatherholtz, take
7 photos 9 through 13 deposition photos and match
8 those up with and correlate those with the
9 Petitioner's photos, which numbers match up.

10 **MR. CHURDAR:** And if I could jump in and say, Your
11 Honor, is this confusing to you, or do you
12 understand with me trying to match up
13 deposition photos?

14 **THE COURT:** No, oh no, no. I see where you're going
15 and have a decent form of reference here. It's
16 a nice notebook. That's the pictures.

17 A: Deposition Exhibits 9, 10, 11, 12 and 13 appear
18 to be the same as trial Exhibits 13 A through
19 E. So I organized the trial exhibits by the
20 location where I took the photographs.

21 Q: Okay. And these five photographs that are now
22 marked and entered as Exhibit 13 A through E,
23 those photographs were taken in the section of
24 the creek that you described earlier that's
25 right here where you said there were two



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JAMES WEATHERHOLTZ V. SC DHEC

137

1 sections of the creek, the length of which was
2 two to four feet long that were a ten foot wide
3 swath of the creek; is that correct?

4 A: Right, that's my estimate. And so just to be
5 specific, referring back to Exhibit 17, I
6 actually circled those two sections I think as
7 number two and three where I said more than ten
8 feet and drew arrows to the bottom, and then
9 for the photographs 9, 10, 11, 12 and 13, I
10 drew lines to show you the general area where
11 I took the PVC pipe photographs.

12 Q: Right. Right, but what I'm trying to establish
13 for the Court is you have established three
14 sections on your creek marked as section in
15 blue at the bottom of Defendant's Deposition
16 Exhibit 17, which is part of Respondent's
17 Exhibit 3, three sections of the creek that you
18 measured that are more than ten feet. One was
19 section one, which is above and east of the
20 dock that is adjacent to your property, and
21 then sections two and three. So what I'm
22 trying to just be clear about is photos 9, 10,
23 11, 12 and 13 which are now marked in your
24 exhibit as 13 A through E are the photos of
25 those two sections that you have said is about

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JAMES WEATHERHOLTZ V. SC DHEC

138

1 two to four feet long where the creek width is
2 ten feet.

3 A: Right, but as I said in my deposition, I refer
4 to the photographs as the best evidence of
5 where in the creek I was when the photograph
6 was taken. So the PVC pipe photographs that
7 show the width of the creek and those five
8 photographs that are within my extended lot
9 lines, Exhibit 13 A through E, I rely on those
10 to show where in the creek those were taken.

11 Q: Mr. Weatherholtz, in your direct testimony I
12 guess is what I'd call it, I will do my best to
13 summarize it, and you tell me if you agree or
14 not and I'll ask the question. You seem to
15 draw a distinction between the Department's
16 application of 30-12(A)(2)(c)(1) and
17 (A)(2)(c)(2) in this regard. You said with
18 regard to special geographic circumstances, the
19 Department is willing to consider a dock that's
20 outside my extended property lines, yet they
21 won't consider the width of the creek that's
22 outside my property lines.

23 A: Right.

24 Q: Okay. When you look at the special geographic
25 circumstances provision of the regulation, I'd

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JAMES WEATHERHOLTZ V. SC DHEC

139

1 like to ask you, do you have any basis upon
2 which it is your belief that this property
3 owner right here that you had circled in your
4 deposition on Defendant's deposition Exhibit
5 17, you circled the dock with the blue Sharpie
6 and put the blue X out to the left, do you have
7 any basis for the opinion that this property
8 owner could not have potential access via
9 dockage directly across from where you want
10 your dock?

11 A: Yes, and so okay -- I'll answer that question.
12 As I read the regs, there are certain
13 requirements for docks in addition to ten foot
14 widths and special geographic circumstances.
15 Docks that don't cross extended lot lines. Reg
16 section 30-11 asks the Department to take into
17 consideration the extent of the economic
18 benefits as compared with the benefits from
19 preservation of an area in its unaltered state.
20 Reg section 30-12(A)(1)(c) says that the
21 following standards are applicable for
22 construction of all docks and piers. The size
23 and extension of a dock or pier must be limited
24 to that which is reasonable for intended use.
25 Subsection N says that docks must extend to the



JAMES WEATHERHOLTZ V. SC DHEC

140

1 first navigable creek within extensions of
2 upland property lines or corridor lines.

3 Q: Let me jump in and ask you that about ---

4 A: And so if I could just finish that question,
5 and then you can follow up if that's okay. My
6 reading of those regs is that there are a
7 number of ways that DHEC could deny that
8 property owner's request to tear down an
9 existing 50-foot dock, extend it across my
10 extended property lines and my neighbor's
11 extended property lines to a location 200 or
12 more feet away on the same creek. That dock is
13 in place. It's not rational or reasonable to
14 say that that is a potential dock access on the
15 opposite side of where my dock would be
16 located, not given the current regulations.

17 Q: Well, with -- let's put aside what is
18 reasonable. I'm not saying the regulations are
19 unreasonable. I'm saying let's look at the
20 plain language of the regs, and you made
21 reference to section N in 30-12(A)1. It says
22 docks must extend to the first navigable creek
23 within extensions of upland property lines or
24 corridor lines, and I would like to put
25 Respondent's Exhibit Number 5 up on the Elmo

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JAMES WEATHERHOLTZ V. SC DHEC

141

1 and ask would you concur that that is the
2 property lines, or at least would you say
3 that's what it appears to be the property lines
4 of this property owner?

5 A: It does appear to be, yes.

6 Q: Okay. And if in keeping with 30-12, the
7 (A)(1)(n), if you extend the property line as
8 I am drawing, extended property lines would
9 come like that, correct?

10 A: That looks about right, yes.

11 Q: Okay. So that would be, would you not concur,
12 a dock within the extension of upland property
13 lines or corridor lines? Anything within those
14 two lines?

15 A: That dock -- I mean, okay, so assuming all
16 those things happened and that dock was torn
17 out and they got approval for a new dock like
18 you described, that dock would be within their
19 extended property lines, would cross over my
20 extended property lines and my site lines
21 whereas now it does not.

22 Q: Do you understand that these are -- extended
23 property lines are fictional? I mean ---

24 A: I do.

25 Q: I mean, so an extended property line is not

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JAMES WEATHERHOLTZ V. SC DHEC

142

1 actual property ownership.

2 A: Right, it's an extended -- an extension of your
3 actual property line.

4 Q: Right. Okay. So to say that their extended
5 property lines cross my extended property
6 lines, it's not a matter of their infringing on
7 your property?

8 A: That is true. But there are cases that talk
9 about the rights of waterfront property owners
10 to not have docks that impinge on or cross over
11 their property lines or their site lines, and
12 that is a consideration that DHEC is supposed
13 to take into account, and that's the point I'm
14 making.

15 Q: Well, let me ask you on -- Mr. Weatherholtz,
16 with regard to 30-12(A)(2)(c)(2), the dock that
17 is -- the dock that is right there is not just
18 potential access via dockage, but that property
19 owner would have actual access via dockage on
20 the opposite side of the creek.

21 A: I disagree.

22 Q: Okay. Is this dock approaching the water on
23 the same side of the creek as yours?

24 A: No, it's on the other side of the creek, but
25 it's not anywhere near opposite or immediately



JAMES WEATHERHOLTZ V. SC DHEC

143

1 across from where my proposed dock would be.
2 There's no encroachment or competing dock
3 situation there.

4 Q: Okay. And is it your testimony that your
5 interpretation of the regulation is what the
6 Department's historical interpretation is?

7 A: My testimony is that that provision, that
8 regulation should be interpreted rationally and
9 reasonably, and in this case, it has not been
10 applied that way. I am not giving testimony
11 that I know how they've done it in the past.
12 I just don't.

13 Q: Mr. Weatherholtz, in your RFR, which was then
14 incorporated into your request for contested
15 case hearing, you made reference to the
16 challenging based on the language in Section C
17 that says, For purposes of determining creek
18 width, if marsh vegetation does not exist, the
19 Department will utilize other indicators of
20 channel width such as changes in grade and
21 critical area boundary. Lots in subdivisions
22 with approved dock master plans as of May 24,
23 2002, are exempt from Reg 30-12(A)(2)(c)(1) and
24 (2) as amended on May 24, 2002. You made
25 reference to that in your request for final

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144

1 review conference, and the only reason I bring
2 that up is because you incorporated that
3 document in your request for contested case
4 here, and you made no argument about that
5 either through you or through Mr. Bessent, and
6 my question is are you challenging the permit
7 decision based on the fact that there is in
8 fact a dock master plan?

9 A: No, that was an additional ground that I raised
10 in August of last year. I saw the staff
11 response where Mr. Thompson indicated that he
12 looked into it and there wasn't one. So I'm
13 accepting that, and I'm not pursuing that
14 ground.

15 Q: Okay.

16 MR. CHURDAR: Just a moment, Your Honor.

17 THE COURT: Certainly.

18 MR. CHURDAR: Your Honor, I don't have any -- I
19 don't have any further cross-examination.

20 THE COURT: All right. Anything else you'd like to
21 say on redirect?

22 MR. WEATHERHOLTZ: Just one thing, Your Honor.

23 REDIRECT TESTIMONY BY MR. WEATHERHOLTZ:

24 MR. WEATHERHOLTZ: On cross-examination, there were
25 some points made about why I took measurements



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JAMES WEATHERHOLTZ V. SC DHEC

145

1 in this section, which is outside my extended
2 lot lines and this section which is within my
3 extended lot lines but on the other side of
4 this dock, and the reason I did that is
5 twofold. One, because when the three of us
6 were in the creek together, the question was
7 raised about taking the measurement here, which
8 is where the proposed dock location was going
9 to be, and the response was I can't just take
10 one spot; I've got to take the creek as a
11 whole. So to me, it seemed relevant to go take
12 measurements of the creek as a whole, and
13 that's why I'm pointing out that this creek as
14 a whole certainly has substantial locations
15 that are more than ten feet. As I testified
16 earlier and showed evidence of, this is 14 feet
17 or greater. So is this right here. So is this
18 right here. Just because I couldn't dock to
19 this area because it's on the other side of my
20 neighbor's dock, agreed, doesn't mean that the
21 creek width in this location within my extended
22 property lines doesn't need to be taken into
23 consideration for determining whether this is a
24 ten-foot creek.

25 **THE COURT:** Okay. Thank you, sir. All right. You



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JAMES WEATHERHOLTZ V. SC DHEC

146

1 have something?

2 **MR. CHURDAR:** I have no recross.

3 **THE COURT:** Okay. Thank you, sir. Did you want to
4 -- anything else that you would like to
5 introduce or present or any testimony?

6 **MR. WEATHERHOLTZ:** Your Honor, I rest. That's all I
7 have. Thank you.

8 **THE COURT:** All right. Mr. Churdar, I'll be glad to
9 hear from your first witness.

10 **MR. CHURDAR:** Can I retrieve the Respondent's 3?

11 **MR. WEATHERHOLTZ:** I'll give you this transcript and
12 I had to pull it apart to answer all those
13 questions, but ---

14 **MR. CHURDAR:** Okay.

15 **MR. WEATHERHOLTZ:** --- I'll help you get it back
16 together if you need. Five, six, seven, eight,
17 nine, ten, eleven.. Well, I did okay, didn't I?
18 17, 18, 19.

19 **MR. CHURDAR:** And there's 20.

20 **MR. WEATHERHOLTZ:** Twenty, so this is the first
21 piece? Okay.

22 **MR. CHURDAR:** Thank you. All right. Your Honor, I
23 would like to call Mr. Jeff Thompson.

24 **THE COURT:** Mr. Thompson, if you'd come around here
25 to our witness chair, please sir and raise your



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JAMES WEATHERHOLTZ V. SC DHEC

147

1 right hand. Now, I'll ask our court reporter
2 to administer the oath or affirmation.

3 **JEFF THOMPSON**, being duly sworn, testifies as
4 follows:

5 **THE COURT:** Please have a seat and answer question
6 Mr. Churdar has for you.

7 **MR. CHURDAR:** Just one moment, please.

8 **THE COURT:** Certainly, take your time.

9 **MR. THOMPSON - DIRECT EXAMINATION BY MR. CHURDAR:**

10 Q: Mr. Thompson, can you please tell the Court
11 where you work?

12 A: I am employed by DHEC's Ocean and Coastal
13 Resource Management Division.

14 Q: And how long have you worked for OCRM?

15 A: Going on 27 years.

16 Q: That includes the time when OCRM was formally
17 known as Coastal Council?

18 A: Yes, sir.

19 Q: Okay. And could you please tell the Court what
20 it is that you have done as an employee of
21 Coastal Council and OCRM?

22 A: I spent my first two years at the South
23 Carolina Coastal Council as an enforcement
24 biologist. I was responsible for doing mostly
25 compliance inspections of permitted activities

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JAMES WEATHERHOLTZ V. SC DHEC

148

1 within critical areas and investigation of un-
2 permitted activities within the critical areas.
3 After the first two years, I began as a
4 freshwater wetland coordinator where I became
5 the chief wetland ecologist there with the
6 agency. I worked with permits and
7 certifications, predominantly certifications of
8 projects which impact wetlands within all the
9 coastal counties of South Carolina from Jasper
10 all the way up to Horry County. I did that for
11 quite a few years. I also worked in
12 conjunction with the critical area with
13 delineation of critical area wetlands and did
14 assist with some investigations of some impacts
15 because of my expertise in wetlands. About the
16 last 12 years, I have done a combination of
17 certification reviews and critical area
18 permitting. I have been the wetland project
19 manager for critical area permits from projects
20 as small as minor docks to things like Nucor
21 Steel and the Boeing Corporation sometimes
22 involving hundreds of acres of wetlands impact.
23 Today, my involvement in this case was the
24 project manager for a critical area permit to
25 construct the dock on Kushiwah Creek, a finger



JAMES WEATHERHOLTZ V. SC DHEC

149

1 of Kushiwah Creek.

2 Q: Okay. And, Mr. Thompson, what is your
3 educational background?

4 A: I have a bachelor of science degree in biology
5 from Presbyterian College in 1989. I took
6 additional training classes, and I was invited
7 to attend with the US Army Corp of Engineers
8 classes taught by Clemson University on ecology
9 and taxonomy of hydric soils. I've taken other
10 classes at the University of North Carolina in
11 wetlands ecology, attended numerous technical
12 symposia around the country in various aspects
13 of wetland science, as well as I have about
14 eight or nine years as a licensed general
15 contractor in the state of South Carolina.

16 Q: And how many times since you've been employed
17 by Coastal Council and now OCRM, how many times
18 have you testified in court?

19 A: Thirty, forty over the years.

20 Q: Okay. And have you ever been qualified as an
21 expert witness?

22 A: Yes, sir, many times.

23 Q: Okay. And in what areas have you been
24 qualified as an expert witness?

25 A: Wetland ecology.



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JAMES WEATHERHOLTZ V. SC DHEC

150

1 Q: Okay.

2 **MR. CHURDAR:** Your Honor, at this time, I would like
3 to offer Mr. Jeff Thompson as an expert in the
4 area of wetland ecology.

5 **THE COURT:** Mr. Weatherholtz?

6 **MR. WEATHERHOLTZ:** Your Honor, I don't have any
7 objection to that qualification. I guess I
8 have some questions about the relevance of that
9 expertise to this case, but I'll let the
10 questions unfold and we can take it up.

11 **THE COURT:** All right. Then without an objection,
12 I'll qualify him as an expert in wetlands
13 ecology.

14 **MR. CHURDAR:** Okay.

15 Q: Now, Mr. Thompson, there was -- before I get
16 into the substance of your testimony, there was
17 back and forth between Mr. Weatherholtz and me,
18 and we were talking about -- I have up on the
19 Elmo Respondent's Exhibit 5, and there was some
20 question or a comment made about the extended
21 property lines crossing of the neighbor
22 crossing over Mr. Weatherholtz's extended
23 property lines, and I would just ask you if you
24 would please address that matter. Where do
25 extended property lines end?



JAMES WEATHERHOLTZ V. SC DHEC

151

1 A: Extended property lines end at the water body
2 which a person is trying to access. Of course
3 they're imaginary lines and they do not cross
4 that water body.

5 Q: Okay. So in this case, when we are looking at
6 the extended property lines of this property
7 owner to the west of Mr. Weatherholtz's
8 property that has the -- he had testified about
9 a 50-foot wide dock right there. It is your
10 testimony that the extended property lines
11 would terminate there and there?

12 A: On the edge of the water body, which it --
13 yeah, it's not on the other side of the water
14 body.

15 Q: Right, but I'm saying it would terminate on the
16 edge of the water body closest to his property
17 right at that point ---

18 A: That's correct.

19 Q: --- and then it would terminate at the edge of
20 the water body closest to his property at that
21 point?

22 A: That is correct.

23 Q: Okay. All right. So there's no conflict
24 between his extended property lines and Mr.
25 Weatherholtz?

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JAMES WEATHERHOLTZ V. SC DHEC

152

1 A: No, sir.

2 Q: Okay. Mr. Thompson, you have -- you are the
3 project manager for Mr. Weatherholtz's dock
4 permit application?

5 A: Yes, sir.

6 Q: Okay. And if I could invite your attention,
7 please. Mr. Weatherholtz has put that trial
8 exhibit notebook right there, if I could invite
9 your attention to his Exhibit Number 7.

10 A: Yes, sir.

11 Q: And first of all, do you recognize this
12 document?

13 A: Yes, sir, I do.

14 Q: Okay. What is that?

15 A: This was the final reply from the agency for
16 Mr. Weatherholtz for his application. This was
17 a denial of his dock permit application.

18 Q: Okay. Now, have you had opportunity in the
19 past to make permitting decisions based on
20 these same sections, and specifically for the
21 record, I'm talking about Regulation 30-
22 11(c)(1). I'll just do it one at the time.
23 Have you had opportunity in the past to make
24 permitting decisions based on 30-11(c)(1)?

25 A: Yes, sir.



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JAMES WEATHERHOLTZ V. SC DHEC

153

1 Q: And have you applied taking into account and
2 making a permitting decision based on this
3 section countless times? I don't even know how
4 to ask the question. A couple times? Many
5 times?

6 A: Based on creeks less than ten feet in width?

7 Q: No, I'm just talking about each section that
8 you've listed on Exhibit 7. So I'm just
9 starting with each one. You've applied 30-
10 11(c)1 to other permit applications in the
11 past, correct?

12 A: Yes, sir.

13 Q: Okay. And has that been something you've
14 applied many times?

15 A: No, sir.

16 Q: Okay. How about 30-12(A)(2)(c)(1), is that
17 something that you have had opportunity to
18 apply that regulation to other permit
19 applications in the past?

20 A: Yes, sir.

21 Q: Okay. Now, how about 30-12(A)(2)(c)(2). Have
22 you had opportunity to apply that particular
23 section of the regulations to permit
24 application -- permitting decisions in the
25 past?



JAMES WEATHERHOLTZ V. SC DHEC

154

1 A: Yes, sir.

2 Q: Okay. And are you aware of what the
3 Department's position is historically in
4 applying 30-12(A)(2)(c)(1) and 30-
5 12(A)(2)(c)(2)?

6 A: Yes, sir.

7 Q: Okay. And we will get into more details, but
8 just in order to establish this up front, is
9 your interpretation of these two regulations
10 (A)(2)(c)(1) and (A)(2)(c)(2) in accordance
11 with the historical interpretation that the
12 Department has made of these two regulations in
13 the past?

14 A: Yes, sir.

15 Q: Now, Mr. Thompson, I think before we get into
16 the details of the permitting decision itself,
17 it would be helpful for you to provide some
18 insight based on your understanding of the
19 regulations and applicability as to the ten
20 foot minimum on creek width.

21 A: The application -- the regulation on creeks
22 that are ten feet wide or less is something
23 that's come about over the years. It's partly
24 a result of just the multitude of docks that
25 have been developed all -- up and down the



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JAMES WEATHERHOLTZ V. SC DHEC

155

1 coastal zone of South Carolina there's been a
2 tremendous amount of pressure put on our
3 coastal resources. Back prior to 2003 under
4 the regulations that existed at the time, it
5 was stated that docks could be permitted up to
6 50 square feet on creeks less than 20 feet
7 wide, and there was no minimum listed there,
8 and that went back to using best judgment from
9 a project manager. That was in 1999, 2000,
10 2001. That law was changed in 2003 to address
11 these creeks because it was noted as it stated
12 in that R.30-11(c)1 that there was a potential
13 very significant long range cumulative impact
14 of allowing docks on creeks that were less than
15 ten feet in width, creeks such as what we look
16 at here. Other creeks that are less than ten
17 feet are usually in the very upper reaches of
18 a tidal system. Those creeks are very small.
19 They're very susceptible to ecologic damage
20 from boat traffic. They're very important
21 areas ecologically for the production of fish
22 and shellfish. In the state of South Carolina,
23 juvenile shrimp and juvenile fish and other
24 things use those areas very far up these
25 creeks. It's extremely important as a nursery



JAMES WEATHERHOLTZ V. SC DHEC

156

1 area for many of our important commercial and
2 recreational species here in South Carolina.
3 That was one of the issues that it involved.
4 The other is that since there are small shrimp
5 and small finger mullet and things like that up
6 in these creeks that some local boaters and
7 fisherman like to go up these creek to throw a
8 cast net to catch bait sometimes, and it might
9 -- constructing docks on creeks that are less
10 than ten feet wide and even if you go to five
11 foot by ten foot pierhead, we don't normally
12 allow pierheads to be constructed over
13 vegetative marsh due to the shading impacts of
14 those docks on those marshes and that by the
15 time that you construct that dock out across
16 that waterway, if the creek is ten feet wide
17 and you've build a five foot wide dock, you're
18 halfway across the creek, and you've pretty
19 much greatly restricted the ability of the
20 public to navigate and use areas of that creek
21 above that point, particularly if you're
22 looking at lower water conditions here. If
23 you're out on spring tide, you can go all
24 across the marsh sometimes, you know, there's
25 enough water out there. But if you're in a mid



JAMES WEATHERHOLTZ V. SC DHEC

157

1 tide and maybe there's two feet, two and a half
2 feet of water in the creek and it's limited to
3 the middle part of the creek, it's completely
4 inaccessible to a boat to get around a dock.
5 So part of it, number one, was for ecologic
6 reasons; and number two. for navigational
7 reasons as the main purpose in promulgating
8 this regulation, to protect those small creek
9 areas for juvenile fishes or the nursery
10 benefits that you get and for navigation.

11 Q: Okay. And you mentioned a fixed pierhead of
12 five -- extending five feet, a depth of five
13 feet into the creek. What is the smallest
14 pierhead that is permissible?

15 A: Well, you can permit one as small as you want,
16 but the largest ---

17 Q: I mean, I'm sorry.

18 A: --- the largest pierhead that can be permitted
19 in a creek that meets these requirements that's
20 less than 20 feet and width is 50 square feet.
21 That's the largest pierhead that you can get.

22 Q: Okay. Now, you had made reference to the
23 change in the regulations in 2003, and I'd like
24 to hand you Respondent's Exhibit 4, and if you
25 could -- Mr. Thompson, in fact, let me give you

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JAMES WEATHERHOLTZ V. SC DHEC

158

1 this pink highlighter, and if you could just
2 highlight the section on page 23 of that
3 exhibit what in 1999 was the regulation that
4 governed these types of small creeks.

5 A: 1999, I guess it's 30-12(A)(2)(Q)(i), so a
6 different set up there. It says, Creeks
7 smaller than 20 feet wide as measured from
8 marsh vegetation on both sides should normally
9 be restricted to a walkway with a structure of
10 50 square feet. In some circumstances, lots on
11 creeks of this size may not qualify for docks.

12 Q: Okay. If you could just highlight that
13 language, please. And Mr. Thompson, was this
14 the regulation that was in effect at the time
15 that Bruce Canton and Daniel Nixon applied for
16 a dock permit back, I believe it's in 2001?

17 A: Yes, sir. That was a joint use dock permit
18 application.

19 Q: Okay. Can I invite your attention to Exhibit
20 18, Petitioner's Exhibit 18 in that notebook.

21 A: Yes, sir.

22 Q: Okay. Now, in Petitioner's Exhibit 18, that's
23 the permitting file that I am making reference
24 to. So Petitioner's Exhibit 18, this
25 permitting decision was made at a time when the



JAMES WEATHERHOLTZ V. SC DHEC

159

1 1999 regulation was in effect?

2 A: Yes, sir, that's correct.

3 Q: So if I'm understanding it correctly, at the
4 time that this permit was issued that is in
5 Exhibit 18, the Department had discretion in
6 permitting decisions up to a creek width of 20
7 feet; is that correct?

8 A: Yes, sir, from creeks below 20 feet and under.

9 Q: Right. So if I could just address something
10 that Mr. Weatherholtz said in his direct
11 testimony, and in particular, he said that this
12 is some evidence that the Department accepted
13 or the Department determined the creek width
14 was ten feet back in 2001 or whenever this
15 permit application was submitted. Now, if you
16 could address that, how was a permit
17 application processed with regard to creek
18 width if it's under 20 feet?

19 A: Well, back at this time, I believe it was Megan
20 Gordon I think was her name at the time.

21 Q: Was Megan Gordon employed by OCRM?

22 A: She was a project manager with our office at
23 that time. She's no longer employed with DHEC.
24 She was the project manager for this 2001
25 permit. I assume she went by the information



JAMES WEATHERHOLTZ V. SC DHEC

160

1 that was provided to her from the applicant
2 that showed a creek width of 11 feet. It does
3 not incorporate survey. These are hand
4 drawings. These are not survey drawings. The
5 drawings were not prepared by a professional
6 engineer, surveyor, landscape architect.
7 They're hand drawings that were prepared by the
8 applicant, and that 11 foot is a number they
9 put there, and I'm just assuming she just
10 accepted that was reasonably accurate. It was
11 close enough.

12 Q: Did the -- do you have any knowledge of what
13 the permit -- the permit process was like
14 during this period of time, particularly with
15 regard to this issue? If you had a dock permit
16 application that was less than -- creek width
17 that was less than 20 feet, was there sort of
18 a standard operating procedure in terms of the
19 Department going out behind the permit
20 applicant and confirming that in this case the
21 creek width of the Canton/Nixon dock permit
22 application?

23 A: Part of our procedure is to do what's called a
24 GIS review of project, which includes reviewing
25 aerial imagery, and if as part of that review



JAMES WEATHERHOLTZ V. SC DHEC

161

1 it appears that those numbers are reasonably
2 accurate, at that time, Megan would not have
3 gone out there and measured the width of this
4 creek physically in the field. I feel
5 confident she accepted this 11 foot as a
6 reasonably accurate measurement.

7 Q: Okay.

8 A: Not to say that it was 11 foot. It's just
9 shown on a hand drawing from somebody in 2001
10 that it was 11 feet, not by a surveyor.

11 Q: Okay. Is there any -- do creek widths change?

12 A: Yes, sir. Most definitely, they can.

13 Q: Okay. Would someone's opinion as to the width
14 of a creek in 2001 be relevant to what the
15 creek's width is today?

16 A: No, sir.

17 **MR. WEATHERHOLTZ:** Objection, Your Honor. He's
18 asking the witness to testify about the
19 relevance of what somebody else, an opinion
20 somebody else may have. It calls for
21 speculation and it invades the province of the
22 Court if he's ---

23 **THE COURT:** Sustained.

24 **MR. CHURDAR:** If I could, Your Honor, Mr. Thompson
25 has been qualified as an expert in wetlands



JAMES WEATHERHOLTZ V. SC DHEC

162

1 ecology.

2 **THE COURT:** Sure.

3 **MR. CHURDAR:** And to the extent that he is talking
4 about systems and wetlands changes, my question
5 is -- goes to whether or not -- when I say
6 relevant, I'm not talking about evidentiary
7 relevance in a court. I'm talking about him as
8 an expert in wetlands ecology, is it relevant
9 to his opinion about the width of the creek
10 today. Do you understand what I'm saying?

11 **THE COURT:** I think so. If you can rephrase that a
12 little bit, yeah.

13 **MR. CHURDAR:** Well ---

14 **MR. WEATHERHOLTZ:** My continuing objection would be
15 that he's already testified that creek widths
16 can change ---

17 **THE COURT:** Yes.

18 **MR. WEATHERHOLTZ:** --- Mr. Churdar later wants to
19 argue that because they can change, this is not
20 relevant, he can but I don't think it's
21 appropriate for this witness to offer that type
22 of testimony.

23 **THE COURT:** Certainly not if it's invading the
24 province of the fact finder, but if you want to
25 ask him as -- I'll permit the use of the word



JAMES WEATHERHOLTZ V. SC DHEC

163

1 relevant if you want to ask him the question.

2 That's fine. Go ahead.

3 **MR. CHURDAR:** Okay. I'll ask it in the context.

4 **THE COURT:** Okay.

5 Q: Mr. Thompson, in making a determination or an
6 evaluation of a creek width today, would it be
7 relevant or important to your determination to
8 know what a creek width was in 2001?

9 A: No, sir.

10 Q: Okay.

11 **THE COURT:** Thank you, sir.

12 Q: And why not?

13 A: Creek widths tend to change. You know, creeks
14 migrate. Sometimes creeks silt in over time.
15 Sometimes they can get larger. You've had a
16 dam blow out on a lake upstream of from that
17 creek and caused a huge amount of water wash
18 down and it washed some of the creek out and
19 widened it, you know. Those things can change
20 due to normal processes that occur over time.

21 Q: All right. I'd like to hand you Respondent's
22 Exhibit Number 1. If you would please, take a
23 look at that. Do you recognize that?

24 A: Yes, sir.

25 Q: Can you tell the Court what that is?



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JAMES WEATHERHOLTZ V. SC DHEC

164

1 A: This is some information -- it's an
2 administrative summary review page that was
3 normally one of the top pages in our permitting
4 files, gives things like, you know, when fees
5 are received and public notices are run, who
6 adjoining joint property owners that may need
7 to be notified, project event logs. There's a
8 memo to the file in here from the site visit
9 from July 11th that was performed by myself,
10 Jeff Thompson, and Fred Mallett, another senior
11 project manager in our office, where we
12 actually visited the site by boat. There are
13 a variety of photographs, and I guess on back
14 here was Mr. Weatherholtz's permit application,
15 quite a number of things, a lot of information
16 in here.

17 Q: Okay. You collectively call that the
18 permitting file?

19 A: Oh, yes, sir.

20 Q: Okay. If you could please, just for the
21 Court's benefit, go through the details. I
22 mean, I've asked you specifically where your
23 permitting decisions in accord with the
24 Department's interpretation in the past
25 regarding 30-12(A)(2)(c)(1) and (2), but now

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JAMES WEATHERHOLTZ V. SC DHEC

165

1 I'm asking you if you'd go specifically through
2 your process of how you made your permitting
3 decision as you apply these three regulatory
4 sections. If I can invite your attention to
5 Petitioner's Exhibit 7, that's the denial
6 letter, and just go through and explain to the
7 Court with those regulatory sections how you
8 came to your permitting decision.

9 A: Well, I guess I'd have to start out sort of in
10 the beginning and what the process is in order
11 to -- it takes a lot to get to -- this is the
12 end result of the process.

13 Q: Right.

14 A: Well, actually, this is the end result of the
15 process, but to begin with, we received an
16 application from Mr. Weatherholtz, I guess on
17 his behalf by Mr. Tom Bessent, and that comes
18 in our office and is reviewed by administrative
19 staff. It's basically made into a file and put
20 on public notice, and then that file is given
21 to the appropriate project manager, in this
22 case me. One of the first things I do when I
23 get these files and review them, I do that GIS
24 review where it's a big database. We can pull
25 up aerial imagery. We can pull up information



JAMES WEATHERHOLTZ V. SC DHEC

166

1 about endangered species, archeological sites
2 and a lot of different things. One of the
3 first things that I noted when I went through
4 the permit application was the proposed
5 drawings of the dock and the dock location back
6 in here, and I noticed in here, and this is
7 something I've run into a few times over the
8 years, that it showed a ten-foot creek in the
9 application. It was not 10.4. It was just ten
10 feet. I've run into this thing three times in
11 my years doing critical area permits and all
12 three times when I see ten feet, because we
13 have a regulation that 30-12(A)(2)(c)(i) which
14 says creeks cannot -- docks cannot be permitted
15 on creeks less than ten feet in width, that
16 immediately becomes a red flag.

17 Q: And why is that?

18 A: Because I can't permit a dock on a creek less
19 than ten feet in width and if it says ten feet
20 -- I did, like I say, construction for many
21 years and I never saw something a wall was ten
22 feet long. It was 10.0 feet ten feet zero
23 inches, 10.5 feet. Something was never ten
24 feet. The width of a hallway is three and a
25 half feet. It was never just three feet with

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JAMES WEATHERHOLTZ V. SC DHEC

167

1 nothing behind it because that's not giving you
2 a full picture of what we're looking at, and
3 ten feet can mean anywhere from 9.5 to 10.4
4 feet if you're averaging it out and rounding it
5 off. Well, our regulation doesn't round off
6 that number where if it's 9.5, we'll call that
7 ten. You know, we don't do that. It says
8 creeks that are less than ten feet in width, so
9 9.9 feet is less than ten feet in width. So
10 that immediately threw up something for me to
11 look at. Very shortly after receiving this, I
12 went onto Charleston County's GIS website.
13 Charleston County, you can also do -- that's a
14 Charleston County GIS photograph that we have
15 up there now. You can blow these photographs
16 up and it has on the top, if you'll notice up
17 there, some bars and one of those is a
18 measuring tool that I found to have a fairly
19 high accuracy. You know, it's not a survey or
20 anything but fairly accurate.

21 Q: Can you point to that on the Elmo on your
22 screen so the Judge can see what you're talking
23 about?

24 A: Do I just touch it with my finger?

25 **THE COURT:** You should be able to highlight it if



JAMES WEATHERHOLTZ V. SC DHEC

168

1 you want to. One of these tools up here. Is
2 that what you're talking about?

3 A: Yes, look over to your right. See that one
4 with the --like the ruler?

5 **THE COURT:** That one?

6 A: Over to your left, there's a -- right there,
7 right there. You can highlight that one, and
8 it lets you change the settings from miles to
9 feet or different categories of measurements,
10 and then the one just to the left of that, you
11 got it right there, that's where you can
12 actually measure it where you can come, you
13 know, highlight your miles and come to a point
14 on one side of the creek and you'll click on
15 that side of the creek, and you'll scroll over
16 to the other side of the creek and click on
17 that side of the creek, and it will give you
18 the distance between those two points, whatever
19 it is, whether it's the width of the lot or the
20 width of the creek. When I did that, I tried
21 it several different ways and I was coming out
22 to eight feet. And like I said, that's not a
23 survey quality measurement, so I saw ten feet
24 on the application. I saw eight feet when I
25 did a measurement based off the Charleston



JAMES WEATHERHOLTZ V. SC DHEC

169

1 County's GIS, which told me I needed to go to
2 the site. You know, I can't kick out on that
3 eight feet as being an accurate number of what
4 the width of that creek is. I did schedule the
5 visit with Fred Mallett. We went out by boat,
6 went out in the creek. Fred has been with the
7 agency for over 20, almost 29 years now as a
8 critical area project manager. Like I say,
9 I've been there going on 27 years, and we took
10 a -- this is a 14 or 15-foot john boat that we
11 put in at the Wahoo Cut at the boat ramp, rode
12 around through the harbor, came up the main
13 part of Kushiwah Creek, and we were looking for
14 the creek to turn off to go into the site,
15 actually rode past it the first time because
16 you couldn't see it. The mouth of it is almost
17 closed off, and coming back the other
18 direction, you know, I had my little GPS with
19 my aerial photograph and I said God, it's back
20 here. So Fred and I went back there and looked
21 and the creek was literally -- the mouth of it
22 was about this wide with marsh grass growing up
23 and the boat pushed marsh grass over to the
24 side when we went in the mouth of the creek.

25 Q: You're talking about right there?



JAMES WEATHERHOLTZ V. SC DHEC

170

1 A: Right there. This picture does not seem -- I
2 don't know what tide stage, how big a tide this
3 was. It's not a real clear picture here, but
4 the width of the creek at the mouth, we
5 actually missed going by the first time. We
6 came back in the opposite direction and saw it.
7 The creek was approximately five to six feet
8 wide at the mouth with marsh grass to marsh
9 grass. We came up the creek, you know, at an
10 idle because it's a very small creek, and it's
11 pretty shallow. We hit bottom a time or two.
12 We actually had the first dock that we come to,
13 when we passed that dock, we had to run up into
14 the marsh on the other side of the creek to get
15 around that dock.

16 Q: Are you talking about ---

17 A: The dock to the east side? That is -- yes,
18 sir, that is the dock that I'm talking about,
19 and this john boat is about 48 inches wide. We
20 did have to go into the marsh on the other side
21 of that dock slightly by about two feet in
22 order -- and still hit the side of the dock
23 with the boat trying to get around it. And
24 then from that point, once we got beyond that,
25 we began to take a few measurements. We took



JAMES WEATHERHOLTZ V. SC DHEC

171

1 measurements and we took photographs of the
2 creek, and we were measuring anywhere from
3 seven and a half to eight feet in width as
4 measured marsh grass to marsh grass using a
5 survey rod. This is an instrument used for
6 surveying. It's a fiberglass rod that can be
7 extended and locked into place. It's demarked
8 in feet and tenths of feet so that we can take
9 a measurement using that rod. It's stiff so
10 that -- I think as Mr. Bessent said earlier
11 using a chain, you know, they will -- for
12 longer distances, you have to get them pulled
13 tight, and in this case we're measuring
14 something that's relatively narrow, there is
15 no sag in this. It's a very straight rod, and
16 it's -- we've used it for survey purposes as
17 well as measuring the width of creeks because
18 it's a lot easier than trying to throw a rock
19 on the other side of the creek with a tape
20 measure and pull it across. You're just not
21 going to necessarily get a good measurement.
22 But we did take measurements along that section
23 of creek between -- once we got past the first
24 creek and before we got to the second creek, we
25 stopped because we were getting outside of the



JAMES WEATHERHOLTZ V. SC DHEC

172

1 extended property lines. I did not at that
2 time take measurements of the creek's width.

3 Q: Can you show what you're talking about?

4 **MR. CHURDAR:** Your Honor, can he -- I think he can
5 activate his where he ---

6 **THE COURT:** Yes, he can make drawings on there just
7 with his finger.

8 A: I touched it and nothing's happening.

9 **THE COURT:** Okay. Wait a minute. You should be
10 able to like touch it like that and draw a line
11 or if you wanted to. Let's see. You can clear
12 it down here. Color up there.

13 A: I went black over here.

14 **THE COURT:** You can change the color up here. Clear
15 it. Should be.

16 A: Okay. Let's see if this will work. I'm not
17 getting -- I'm touching it but nothing's
18 happening.

19 **THE COURT:** Well, would you like to use this one?

20 A: If there's something I need to ---

21 **THE COURT:** It let me just draw lines on there.

22 A: It made me draw all over it there.

23 **THE COURT:** Would you like to come draw on this one
24 maybe? I don't know. Maybe it just isn't
25 working.



JAMES WEATHERHOLTZ V. SC DHEC

173

1 Q: Or if you want to come up here you can do that.

2 **THE COURT:** Yes, indicate it on there. That would
3 be fine.

4 Q: And just use the -- use something like this
5 where you can just point to things as you're
6 describing.

7 A: All right. Again, we came in the mouth of the
8 creek here. We came down. This is the dock
9 that we had to run up into the marsh to get
10 past this dock in the john boat, and we started
11 taking measurements from approximately in this
12 position here and to about this position here,
13 which is within his extended property lines was
14 the area of his proposed dock. Is that good?

15 Q: Sure.

16 A: Okay.

17 **THE COURT:** Thank you, sir.

18 A: Yes, ma'am. When I'm measuring a creek width
19 for purposes of permitting, I don't measure the
20 creek outside of the area where a dock might
21 go. You know, I could, you know, I could run
22 downstream far enough and I've got Charleston
23 Harbor. I've got a thousand feet of water out
24 there. He could qualify for a 600-square foot
25 dock in here, but he doesn't. I can only do it



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JAMES WEATHERHOLTZ V. SC DHEC

174

1 within the area where some dock would
2 potentially be built.

3 Q: And let me jump in there and ask you, has that
4 historically been OCRM's interpretation of the
5 application of this regulation?

6 A: Yes, sir.

7 Q: Okay.

8 A: So we did our measurements between the areas,
9 you know, between the dock to the east, the
10 first dock, and approximately where that
11 extended property line comes out, and using a
12 survey rod with myself and Fred Mallett, you
13 know, we determined there was no portion of
14 that creek that was ten feet wide within those
15 parameters.

16 Q: Those parameters being within what?

17 A: The dock to the east and approximately the
18 westward extended property line.

19 Q: So what you're saying is from this point right
20 there over to this point right here ---

21 A: Approximately there, yes.

22 Q: --- you took measurements in this section and
23 it is your testimony there was no part of that
24 creek that was ten feet wide?

25 A: There may have been a place where the grass was



JAMES WEATHERHOLTZ V. SC DHEC

175

1 separated by this much where if you stuck it
2 through there you might could've gotten ten
3 feet maybe, but any place where the grass line
4 was, marsh vegetation to marsh vegetation, all
5 of it was under nine feet.

6 Q: Okay. And with regard to that because that's
7 come up in the direct testimony that Mr.
8 Weatherholtz had testified to a couple sections
9 of the creek width, length-wise about two to
10 four feet long where he found a ten foot wide
11 creek for about, you know, a section of say two
12 to four feet long and a couple, I think he said
13 two spots. I'm not intending to
14 mischaracterize it, but I think that's what he
15 said his testimony was. How has the Department
16 historically interpreted this regulation in a
17 situation like this, like where there are
18 little pockets of ten feet wide?

19 A: If it's just small pockets two feet to four
20 feet, that's normally just where grass isn't
21 growing. Maybe the grass died there or
22 something or something knocked it over or
23 something, you know. That's not -- it's just
24 a spot where it doesn't happen to be a few
25 blades of grass. It's not representative of



JAMES WEATHERHOLTZ V. SC DHEC

176

1 the creek.

2 Q: And that's been the way the Department has
3 interpreted the application of this ten foot
4 wide creek width regulation?

5 A: Yes, sir.

6 Q: Okay. Could you please show Judge Matthews the
7 pictures that you took in Exhibit 1?

8 A: She doesn't have these already?

9 Q: Well I just, I mean, yes, she does but what I
10 thought might be helpful in providing your
11 testimony if you are able to is to point to a
12 particular picture and say I took this picture
13 about here or I took this picture about here.
14 Maybe what you could do ---

15 **THE COURT:** And you're welcome to come up too if you
16 would like, Mr. Weatherholtz, and look at
17 these.

18 A: All of these pictures were taken I believe
19 between the dock and the area where I did my
20 measurements, between the dock to the east and
21 approximately where that extended property
22 boundary is to the west.

23 **THE COURT:** Okay.

24 A: And again, I'm in an approximately a 48-foot
25 wide john boat. The marsh vegetation ---



JAMES WEATHERHOLTZ V. SC DHEC

177

1 **THE COURT:** You mean 48 inch?

2 A: Forty-eight inch wide.

3 **THE COURT:** Okay. That's quite a john boat.

4 A: Yes, ma'am.

5 **THE COURT:** I did have a case one time, in fact, I
6 tried it on 9-11 down in Charleston when they
7 wanted to go ahead with the trial even though
8 there was a thunder storm and things were
9 blowing up in New York, but anyway, yeah
10 someone was basically driving what looked like
11 an ocean liner down the creek to show that it
12 was navigable and it was quite impressive. It
13 was quite impressive.

14 A: That's the other showing the bow of the boat.
15 This photograph does depict the boat I've got.
16 This is the survey rod I'm talking about. This
17 pole is actually beyond the edge of the grass
18 slightly. Now, the grass line is out here.
19 Okay? That's the grass line. That's marsh
20 vegetation.

21 **THE COURT:** Okay.

22 A: That's marsh vegetation to marsh vegetation is
23 the way it's defined and we have to do this
24 measurement.

25 Q: And can I jump in and ask because that's



JAMES WEATHERHOLTZ V. SC DHEC

178

1 important, Mr. Thompson. When you say that's
2 marsh vegetation right there, is that
3 interpretation of what -- where the marsh
4 vegetation starts in keeping with the
5 Department's determination on that issue?

6 A: Yes, sir.

7 Q: Okay.

8 A: But any rate, this shows one end of it, and
9 then the picture of it laying across the bow of
10 the boat is still in one position, pulled up in
11 the edge of the marsh so it wouldn't move.
12 That's the other end sticking here on the boat
13 is actually into the marsh vegetation here.

14 Q: If I could have you stop right there. So it
15 would be your testimony that this is -- this is
16 too far into this Spartina grass?

17 A: Oh, yes, yes, yes. I'm well into the grass
18 there. The boat's actually into the grass.

19 **THE COURT:** And tell me again what date these photos
20 were taken.

21 A: These were taken, I guess that was June -- July
22 11th of last year, 2013.

23 **THE COURT:** Okay. Thank you.

24 A: These are all dated, date stamped on the
25 bottom.

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JAMES WEATHERHOLTZ V. SC DHEC

179

1 **THE COURT:** Okay.

2 A: Well, this is another picture. This is the
3 same series. Click, click, click. The boat is
4 still. I've got it pulled up into the marsh on
5 the side. The other side is into the edge of
6 the marsh grass this side. This is laying
7 across the boat. And then this shows the
8 dimensions. Now, the boat is in the marsh
9 grass. That's eight feet. This creek is
10 approximately seven and a half, 7.5 feet. It
11 would be here. That's eight feet. It's a good
12 foot into the grass. The creek may only be
13 seven feet at this point. You know ten feet --
14 see here's nine feet. Ten feet is over three
15 feet into the marsh grass, and this is a survey
16 rod. It's set up properly. It's survey
17 quality. It's set up in tenths of feet and
18 tenths of feet. But those are pictures I think
19 from my first visit there.

20 **THE COURT:** All right. Thank you, sir.

21 Q: And I believe that there are -- is that -- did
22 you discuss with her ---

23 A: Yeah, these are other pictures. These are all
24 in the same vicinity, all of these photos.
25 We've just got one other photograph there.



JAMES WEATHERHOLTZ V. SC DHEC

180

1 Somehow we missed that one.

2 Q: Okay.

3 A: But these are all in that same vicinity of the
4 creek. Now, I'd like to point out one thing.
5 Let me see here. You see a little spot like
6 this? There's a little tiny place there
7 probably this long where the marsh grass goes
8 in maybe this much, and if you have another one
9 just like it on the opposite side, you might
10 could come out to ten feet, but I can't call
11 this creek a ten-foot wide creek by measuring
12 -- see what I'm talking about here -- by
13 measuring into points like that. I can't use
14 that, you know, I mean that's -- that's what
15 I'm talking about. I can't just go to one
16 little point and say oh, it's ten feet and for
17 purposes of applying this regulation say I'm in
18 a ten-foot wide creek.

19 Q: And ---

20 **THE COURT:** But is there anything in the regulation
21 that says it must be ten feet wide for the
22 entire width of the proposed dock?

23 **MR. CHURDAR:** Well, the regulation is fairly short.
24 I mean, this particular language, and that's
25 why I keep going to, you know, Mr. Thompson, is



JAMES WEATHERHOLTZ V. SC DHEC

181

1 this in keeping with how the Department has
2 interpreted it, because I mean we are dealing
3 with the regulation ---

4 **THE COURT:** Everything is not spelled out. I
5 understand.

6 **MR. CHURDAR:** --- so the Department's historical
7 interpretation of something becomes crucial and
8 along that line ---

9 **MR. WEATHERHOLTZ:** Well, if I could respond to that.

10 **THE COURT:** Yes.

11 **MR. WEATHERHOLTZ:** I mean, it's important to
12 understand what the Department has historically
13 done and how they have interpreted it, but what
14 I'm challenging in this case is that
15 interpretation, how that part of the regulation
16 has been applied in this case, and it's up to
17 the Court to determine whether based on the
18 language of the regulation -- so I think that's
19 a fair question.

20 **THE COURT:** Yes.

21 **MR. WEATHERHOLTZ:** What does the reg say? Does it
22 say that?

23 **THE COURT:** And it doesn't specifically say that,
24 but that's why the historical interpretation
25 Mr. Churdar is very important.



JAMES WEATHERHOLTZ V. SC DHEC

182

1 **MR. CHURDAR:** The Court -- I mean the -- you know,
2 agency deference is really what that's getting
3 at, but on the ...

4 **Q:** Mr. Thompson, on this issue of the actual
5 measurement of this creek, the process that you
6 went through with this creek, how many times do
7 you think you've done that?

8 **A:** Measuring a creek?

9 **Q:** Right.

10 **A:** Not a lot. It's probably only been half a
11 dozen times or less that I've actually needed
12 to go out and measure a creek.

13 **Q:** Okay. And when you -- in determining how you
14 will measure, what is marsh grass and where the
15 beginning of that measurement begins or ends,
16 are you aware of -- I think I've asked this
17 question, so let me just withdraw that. I
18 don't want to beat a dead horse. But the
19 calculation -- let me see Exhibit 1, please.
20 Okay. This may have been a different picture
21 that you were making reference to, and Mr.
22 Weatherholtz if you want to come up just so I
23 can talk. I've pulled out specifically this
24 picture of the -- of the creek, and I'm not
25 sure if it was this one or another one but you



JAMES WEATHERHOLTZ V. SC DHEC

183

1 pointed to the sparser vegetation. Where would
2 you say in that picture the vegetation on the
3 left-hand side of the creek would start?

4 A: Left-hand side of the creek would start right
5 where you see this marsh grass that's coming
6 out here.

7 Q: Okay. So, and that's what I'm trying to get
8 at. Is that -- that is the historic
9 interpretation of OCRM when making a
10 determination about marsh grass to marsh grass
11 vegetation would take something that Mr.
12 Weatherholtz may contend is too thin to
13 actually be vegetation. I mean, that's been
14 the historic position of the Department?

15 A: Yes, sir. That is marsh vegetation.

16 Q: Okay. So it is your -- I feel like I
17 interrupted the flow of your testimony. So
18 where you were when I jumped in was going
19 through the process. You and Mr. Mallett were
20 out there. You were taking pictures. It is
21 your interpretation that the little segments or
22 spots where you might find ten feet would not
23 qualify?

24 A: Yes, they were very, very small areas where
25 there just happened to not be marsh grass for



JAMES WEATHERHOLTZ V. SC DHEC

184

1 some reason.

2 Q: Okay.

3 A: You know, that area could be just little tiny
4 spots and that wasn't really representation of
5 actually where the line of marsh vegetation
6 was.

7 Q: Okay. And would that have been were you saying
8 in this section over here?

9 A: It was all in that section between that western
10 extended property boundary and a little bit
11 west of that dock that's to the east, the first
12 dock.

13 Q: So you're even talking about ---

14 A: No, sir. I was not talking about that area.
15 I did not measure that area that day.

16 Q: Okay.

17 A: Because that was outside of his extended
18 property boundaries.

19 Q: Okay. And I'm not -- I want to make sure that
20 I've asked this question. Is it the
21 Department's historic interpretation and
22 application of the regulation that in making
23 the determination of the application, the ten
24 foot rule, that you would not take into account
25 in the decision anything outside the extended



JAMES WEATHERHOLTZ V. SC DHEC

185

1 property lines?

2 A: No, sir. I wouldn't be looking outside the
3 extended property boundaries for looking at the
4 width of a creek where somebody wants to build
5 a dock.

6 Q: Okay. And that has been the Department's
7 historical interpretation and application of
8 this regulation?

9 A: Yes, sir.

10 Q: Okay. So you and Mr. Mallett took pictures.
11 And then was there anything more that happened
12 on that field visit, site visit?

13 A: That field visit, that was -- we were in there
14 for about 30 minutes. It was a little bit
15 before high tide, I think maybe four or five
16 minutes or so before high tide when we finished
17 up, which may have benefitted us a little bit.
18 Sometimes if you go in on a big spring tide,
19 all the grass is underwater and you can't see
20 it, you know. The tides are really, really big
21 and high and we were there at an appropriate
22 time where we could, you know, determine the
23 edges of the marsh grass very clearly, but we
24 took photographs. We took measurements on
25 about four or so different locations, and they



JAMES WEATHERHOLTZ V. SC DHEC

186

1 were all roughly at seven and a half to eight
2 feet and then we left. You know, after that
3 time, I guess is when I have to review through
4 my supervisor. You know, we went ahead and
5 wrote up this letter that denied the permit.

6 Q: Okay. Well, I would like to also hand you
7 Respondent's Exhibit Number 2, and I'll
8 represent to you this is the email from Tom
9 Bessent to Mr. Weatherholtz, and he identifies
10 these attachments as his field work on this
11 job, and in particular, I'd like to ask you
12 about the last page, the yellow page with blue
13 writing on it.

14 **THE COURT:** Yes, sir. Let me get that.

15 Q: And I think it might be helpful if you could
16 again just hold this up for the Judge to see,
17 but point -- now I believe that I'm
18 representing this correctly. This was not
19 represented as a survey, but it was represented
20 as a drawing based on his, Mr. Bessent's
21 conversations with staff, and my question for
22 you is when you are making a determination such
23 as what you see right there, where would you
24 start the calculation in terms of where marsh
25 vegetation starts?



JAMES WEATHERHOLTZ V. SC DHEC

187

1 A: Where would I use to do my measurements?

2 Q: Correct.

3 **MR. WEATHERHOLTZ:** And before you answer, I object
4 to the form of that question because it
5 mischaracterizes what that exhibit is. Mr.
6 Bessent testified that that is a purely
7 hypothetical sketch that he used with the
8 people in his office to frame a conversation
9 about where are we taking measurements from.
10 That does not represent any actual conditions
11 in the creek.

12 **THE COURT:** And this was done prior their going to
13 do the fieldwork, right?

14 **MR. WEATHERHOLTZ:** He testified he couldn't remember
15 whether it was before or after, but he said it
16 was part of a conversation he had with them
17 about where the measurements were supposed to
18 be taken.

19 **MR. CHURDAR:** Your Honor, I wrote this down. He
20 said that that sketch was based on his
21 conversations with the crew.

22 **MR. WEATHERHOLTZ:** Right, his conversations with the
23 crew based on hypothetical example of a creek,
24 not this creek, and you keep asking questions
25 about this drawing as if it represents some



JAMES WEATHERHOLTZ V. SC DHEC

188

1 conditions in the creek and where measurements
2 were taken on blades of grass that exist in
3 that creek, and it just wasn't intended to be
4 that.

5 **MR. CHURDAR:** Your Honor, he represented these as
6 his field notes. In his email, he represented
7 these as his field notes. They were produced
8 in response to Mr. Weatherholtz asking him for
9 his field notes, and he testified that this
10 sketch was based on his conversation with his
11 crew.

12 **THE COURT:** Well, I seem to remember him testifying
13 also that's the way he thinks and sketches and
14 that these sketches may have been again trying
15 to clarify what these people -- where exactly
16 they place things or did they place the -- take
17 the measurement from a certain -- I don't mean
18 to make a pun, but it seems to me the whole
19 thing right here is a little sketchy anyway as
20 far as how much validity it has. So we'll look
21 back and see exactly what he testified.

22 **MR. WEATHERHOLTZ:** My point is that it's just a
23 hypothetical sketch for purposes of referencing
24 the conversation.

25 **THE COURT:** And I think you know with the fact --



JAMES WEATHERHOLTZ V. SC DHEC

189

1 you know it seems to be common sense that these
2 question marks after it, are these the
3 measurements or did you take them from the
4 right place? You know, he's not sure. So you
5 know, that's why the question marks by them.
6 Could be or did you measure from that?

7 **MR. WEATHERHOLTZ:** I think what he said is the
8 question mark represents is this distance ten
9 feet.

10 **THE COURT:** Yes.

11 **MR. CHURDAR:** That's what you have to answer, and
12 when he's talking to his guys about when you go
13 to the creek, I want you to measure from this
14 reference ---

15 **THE COURT:** That's the first reference I would take.

16 **MR. WEATHERHOLTZ:** --- and he's trying to show them.
17 I want you to measure where these lines are and
18 the question we're trying to answer is is that
19 distance ten feet.

20 **THE COURT:** Yes.

21 **MR. WEATHERHOLTZ:** We're not measuring sprig to
22 sprig.

23 **THE COURT:** That's all.

24 Q: And Mr. Thompson, what I would like you for you
25 to do is take that and apply the Department's



JAMES WEATHERHOLTZ V. SC DHEC

190

1 historic interpretation of the ten foot rule
2 and say looking at that picture, would that
3 qualify as ten feet?

4 A: Okay. In a situation if this did represent a
5 creek in a real situation, how would I measure
6 the creek width?

7 Q: Right.

8 A: I would measure is from the sprigs here to the
9 sprigs on this side. That's how I would
10 measure the creek. It says marsh vegetation to
11 marsh vegetation and that represents -- this
12 represents marsh vegetation on the drawing or
13 what the drawings were.

14 Q: And it that interpretation in keeping with the
15 Department's interpretation historically and
16 application of this regulation?

17 A: Yes, sir.

18 Q: Okay. So you came back and prepared what has
19 been marked as Exhibit 7 after your site visit
20 with Mr. Mallett?

21 A: Yes, sir.

22 Q: Okay. Did you do any more fieldwork?

23 A: Not immediately. I think Mr. Weatherholtz
24 submitted an RFR for the DHEC board which they
25 elected not to hear, and then he submitted, you



JAMES WEATHERHOLTZ V. SC DHEC

191

1 know, his appeal request here to the ALC and,
2 in the meantime, we did have some discussions.
3 Mr. Weatherholtz has been a very nice gentleman
4 to work with. You know, he's really, really
5 wanting to get him some access to that creek so
6 he can kayak and canoe and paddle board or
7 whatever on it. I don't blame him for wanting
8 to have that out there. It's pretty secluded
9 back in there because nobody can have docks on
10 the creek there other than the two that got
11 permitted years ago, and also you don't have a
12 lot of traffic back in there, so it's pretty
13 relatively quiet in the middle of a place. So
14 we did agree to go out with Mr. Weatherholtz
15 and Mr. Churdar, and we set up a date to go.
16 We were already to go, and the weather forecast
17 was for 25 to 35 knot winds, and we were going
18 to take the john boat in Charleston Harbor so
19 we decided probably would not be a good day to
20 go.

21 **THE COURT:** Good judgment call.

22 A: We rescheduled that time and went back on -- I
23 don't remember the date we actually went the
24 second time, and we met at the Wahoo Creek boat
25 ramp, a much nicer day. When I went up the



JAMES WEATHERHOLTZ V. SC DHEC

192

1 creek, I had the survey rod with me. Of
2 course, we had a nice discussion on the way out
3 there and up the creek, and I measured a couple
4 of spots and I showed Mr. Weatherholtz and Mr.
5 Churdar where I was measuring from and to using
6 the survey rod, and again came up with
7 measurements of seven and a half to eight feet.
8 Mr. Weatherholtz did ask me, he said what about
9 measuring it right here. It was on one of
10 these little small spots, and I told him I
11 couldn't measure it. I can't consider a little
12 tiny place as being representative of the width
13 of the creek. Now if I had a 50 yard stretch,
14 most certainly. You know, that would
15 definitely meet that requirement of being large
16 enough, but not just a couple of feet. He
17 asked me to go up beyond his property line to
18 measure up just before you get to that upstream
19 dock, and right there it was slightly over ten
20 feet. I think it was about 10.2, 10.4 feet,
21 but it was over ten feet wide for a section in
22 there, 15, 20 feet but that was outside the
23 extended property boundaries. Then as we came
24 back out, he asked me to measure on the other
25 side of the dock downstream.

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JAMES WEATHERHOLTZ V. SC DHEC

193

1 Q: And you're talking about this right ---

2 A: Talking about that area there where we were
3 coming back out, and we measured there and
4 there was a place again that was maybe 20 feet
5 or so but it was slightly over ten feet, but
6 those were the only two places that had any
7 length to them that was over ten feet, and both
8 of those were still -- you know, they weren't
9 14 feet wide or anything. They were less than
10 11 feet, but they were slightly over ten feet
11 in width. And then I guess after that, we
12 headed back to the boat ramp, picked up a
13 little bit of trash out of the creek and ...

14 Q: Could Mr. Weatherholtz even get a boat --
15 excuse me a dock in this area right there?

16 A: No, sir. There wouldn't be any way to get one
17 there. That other dock was put in years ago.

18 Q: You're talking about this dock right there?

19 A: Yes, sir. It was permitted in what, around
20 '99, 2000 and ---

21 Q: So this dock right here was permitted under the
22 same regulations as the dock permit, the joint
23 use dock permit that expired from Nixon and
24 Canton?

25 A: Yes, sir.



JAMES WEATHERHOLTZ V. SC DHEC

194

1 Q: Okay.

2 A: I believe that dock is a joint use dock too, I
3 believe, if I remember correctly, but it's
4 limited to a five foot by ten foot fixed
5 pierhead.

6 Q: Now, is that interpretation -- well,
7 understanding that there is a section in here
8 where it is -- you said it's greater than ten
9 and less than 11 in here, correct?

10 A: Yes.

11 Q: Okay. In this section right here, are you
12 interpreting the ten foot limit on minimum
13 creek limit width, are you interpreting that
14 regulation under 30-12 with regard to this
15 section where you're saying it's a little --
16 there is a space where it's less than -- I mean
17 it's more than ten but less than 11, is that in
18 keeping with the Department's historic
19 interpretation of this regulation?

20 A: That's just the measurement of the creek.
21 You'd have to apply the rest of the regulations
22 to see if something qualifies for that
23 particular location, which it wouldn't.

24 Q: Okay. Now, you have also made your denial
25 based in part on 30-12(A)(2)(c)(2) and, in

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JAMES WEATHERHOLTZ V. SC DHEC

195

1 particular, the issue of potential access via
2 dockage from the opposite side of the creek.
3 And if I could have you come up to the Elmo and
4 just give some testimony for the Court. If you
5 could come around here. Now, if you could
6 please point out for the Court -- well, first
7 of all, what is this document, Exhibit 5?

8 A: This is a reproduction from Charleston County's
9 GIS, their tax website. It includes an aerial
10 photograph I believe from 2012.

11 **MR. CHURDAR:** Your Honor, is that clear to you?

12 **THE COURT:** Yes, I can see it. Thank you.

13 Q: And on that document, what are these black
14 lines along here and there and there and there?

15 A: Those are parcel boundaries as indicated by
16 Charleston County's GIS. There are, in my
17 experience they're reasonably accurate. They
18 aren't 100 percent accurate, but they are a
19 fair representation of the boundaries of
20 parcels in Charleston County, and of course
21 this is the boundaries here and here are the
22 boundaries for this lot or whatever it is and
23 then 017 parcel. I can't read the parcel
24 number on this other one, but each one of these
25 represents a parcel from Charleston County's

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196

1 tax purposes.

2 Q: Okay. Can you take that straight edge in your
3 hand and take that blue Sharpie and extend
4 those property lines out to the first water
5 body on that piece of -- yeah, there you go.

6 A: This is generally a parallel extension. These
7 lines don't come out to the first creek here,
8 because we don't typically extend these beyond
9 creek boundary. Of course, this is just
10 approximations here to about here.

11 Q: Okay. So using those extended property lines
12 on that ---

13 A: Well, I think it might be beneficial. There's
14 a third line over here which basically runs out
15 where this other dock is here.

16 Q: Okay. All right. Now, on that lot with the
17 dock that is on the other side of the creek
18 from the creek that Mr. Weatherholtz is seeking
19 a permit for, if you could just point out
20 potentially as far as water frontage where that
21 property owner could potentially get a dock.
22 I'm talking about this property owner right
23 there that already has a dock. Would that --
24 would it start there?

25 A: Yes, sir.



JAMES WEATHERHOLTZ V. SC DHEC

197

1 Q: Okay. Would it go all the way over to there?

2 A: Yes, sir.

3 Q: Okay. Now, if you could please, you have
4 listed Regulation 30-12(A)(2)(c)(2) as the
5 basis for denial. Could you please explain how
6 it is that you interpreted that regulation?
7 Would you like for me to read it or do you have
8 it?

9 A: Well, I'm familiar with it. It says that docks
10 will not be permitted on creeks less than 20
11 feet wide measured from marsh vegetation on
12 either side unless one or two special
13 geographic circumstances exist. One is more
14 than 500 feet of water frontage or, two, there
15 is no potential access via dockage from the
16 opposite shore. In this situation, first, I
17 would like to say there's no potential access
18 because none of those creeks are over ten feet
19 wide other than that one section down there,
20 and it doesn't meet special geographic
21 circumstances. So nobody technically, before I
22 get into it, qualifies for a dock but
23 potentially barring everything other than creek
24 widths. Say this creek were ten to twenty feet
25 in width, that is potential access, represents



JAMES WEATHERHOLTZ V. SC DHEC

198

- 1 potential access. It doesn't have to be real.
2 It can be an undeveloped piece of property. It
3 can be anything on the other side that there's
4 potential for a dock to be built from the
5 opposite side of the creek, not that a dock
6 will be built directly across from another dock
7 but that a dock can be built from the opposite
8 side of the creek, and the purpose of this gets
9 back to the ecological values and all. It's
10 intended to discourage docks from being
11 constructed in small creeks like this that are
12 not really suitable for that type of activity.
- 13 Q: Okay. So it's not just clogging the creeks
14 navigationally. I mean, there's an ecological
15 component to this regulation as well?
- 16 A: Yes, sir.
- 17 Q: Okay. And so if the -- there is -- there is
18 potential access, I believe you testified
19 earlier, from this northern extended property
20 line along the creek all the way to the
21 southern extended property line. Does the
22 property owner, in making your application of
23 the regulation, have to limit himself or
24 herself to where they currently have a dock?
- 25 A: No, sir. I see circumstances where people want



JAMES WEATHERHOLTZ V. SC DHEC

199

1 to extend docks out to another creek that's
2 larger, and they can extend without crossing
3 another navigable creek or obstructing
4 navigation, and in fact our regulations take
5 into account that if a dock can be built to a
6 significantly larger water body by, you know,
7 extending out, as long as they aren't
8 obstructing navigation, we can do that, or they
9 may be able to build a larger dock due to the
10 width of the water body. I have seen
11 situations quite a number of times where people
12 have chosen to do that provided they are not
13 crossing another navigable creek.

14 Q: Now, is it your -- is it your opinion when it
15 talks about potential access to the creek from
16 the opposite side of the creek via dockage,
17 what about this dock right here? I mean, is it
18 your opinion that they have potential access or
19 actual access?

20 A: They actually have access to the creek right
21 now from the opposite side.

22 Q: Now, the fact that this dock right there is
23 beyond the scope of Mr. Weatherholtz's extended
24 property lines, does that impact your decision
25 regarding potential access via dockage from the



JAMES WEATHERHOLTZ V. SC DHEC

200

1 opposite side of the creek?

2 A: No, sir.

3 Q: Okay. Is that answer that you gave consistent
4 with OCRM's interpretation of this regulation
5 historically?

6 A: Yes, sir.

7 Q: Now, if I could invite your attention to
8 Exhibit Number 9, Petitioner's Exhibit Number 9
9 in that notebook.

10 A: Yes, sir.

11 Q: Mr. Weatherholtz on direct testimony made
12 reference to your response on page one, and I'd
13 like to go through that. First of all, when
14 you wrote your -- prepared the staff summary,
15 did you have Respondent's Exhibit 2 as part of
16 that decision that you made? I don't know if
17 I've got that up there. I've got it right here
18 so you know what I'm talking about. No, that's
19 Petitioner's. Respondent's Exhibit 2, did you
20 have that information at the time you were
21 doing the staff summary?

22 A: No, sir.

23 Q: Okay. And when you put in the staff summary
24 that the creek was measured and determined, if
25 you can see on the first, second sentence on



JAMES WEATHERHOLTZ V. SC DHEC

201

1 the response of page one of Exhibit 9, it says
2 this creek was measured by DHEC staff from a
3 boat July 11th and determined to be seven and
4 a half feet in width measured from marsh
5 vegetation to marsh vegetation. Could you
6 respond to that? I mean, are you saying the
7 entire creek was seven and a half feet?

8 A: Oh, no, sir. No, sir. Now, there's some
9 variation in the width of the creek, you know.
10 Like I said there were two spots which I did
11 not measure the first time that I was out
12 there, the one that's slightly east of the
13 eastward dock, you know, the downstream dock
14 from the location of this proposed dock which
15 was slightly over ten feet, and then there was
16 an area that was upstream right around the bend
17 in a creek where you tend to have some washing
18 and erosion from currents and all where it was
19 slightly over ten feet, but none of those
20 measurements were within the -- well, from that
21 dock on the eastern end, the first dock to the
22 western extended property boundary.

23 Q: Okay. Now, the sentence below that, two
24 sentences below that says, No portion of the
25 creek was ten feet or greater in width along



JAMES WEATHERHOLTZ V. SC DHEC

202

1 any portion of the creek from the mouth up to
2 and beyond the proposed dock. And Mr.
3 Weatherholtz has pointed to that section right
4 there, and then he has pointed to another
5 section right there. How do you respond to his
6 comment about that section of the staff
7 summary?

8 A: Well, he's correct. There were two spots.
9 That's all that were over ten feet, but they
10 weren't within the area that he could build a
11 dock, and those are not areas I did a direct
12 measurement of. So that was an incorrect
13 statement in that no portion of the creek was
14 greater than ten feet, because there was a
15 place downstream from him on the other side of
16 that dock to the east that was over ten feet,
17 and there was one place to the west which I did
18 not measure all the way up to that other dock
19 that was slightly over ten feet.

20 Q: Okay.

21 A: So that was an incorrect statement in that
22 response.

23 Q: Okay.

24 A: Not intentional, but it was.

25 Q: Mr. Thompson, is there anything about this



JAMES WEATHERHOLTZ V. SC DHEC

203

1 permitting decision process that I have asked
2 you about that you have not provided any
3 further information for?

4 **MR. WEATHERHOLTZ:** Objection.

5 **MR. CHURDAR:** I withdraw the question.

6 **THE COURT:** Thank you, sir.

7 **MR. CHURDAR:** Just one moment please.

8 **THE COURT:** Take your time.

9 Q: And just so I'm clear, I had intended to go
10 into some questions about the first section of
11 30-12(A)(2)(c) that talks about dock master
12 plans, but that's off the table now, is that my
13 understanding?

14 **THE COURT:** That's my understanding. Is that
15 correct, Mr. Weatherholtz?

16 **MR. WEATHERHOLTZ:** That was my testimony I wouldn't
17 go into that.

18 **MR. CHURDAR:** Okay. So I won't go into any of those
19 questions. And what I would like to do in
20 conclusion is just publish Respondent's
21 Exhibits 1 through 5.

22 **THE COURT:** I believe we have admitted all of those,
23 correct?

24 **MR. WEATHERHOLTZ:** Yes, ma'am. I have no objection
25 to that.



1 **THE COURT:** Yes.

2 **MR. CHURDAR:** Okay. So I guess we don't need to
3 publish them. That's more of a jury trial
4 thing.

5 **THE COURT:** That's okay if you want to say
6 published. It sounds nice and antiquated and
7 nobody said oye, oye, oye, when it came on
8 either and that might have been fun, so we'll
9 be glad to publish them.

10 **MR. CHURDAR:** All right, then.

11 **THE COURT:** We'll be glad to publish them. Any
12 other questions, Mr. Churdar?

13 **MR. CHURDAR:** No, ma'am.

14 **THE COURT:** All right then. Your witness for cross-
15 examination, Mr. Weatherholtz.

16 **MR. WEATHERHOLTZ:** Thank you, Your Honor.

17 **MR. THOMPSON - CROSS-EXAMINATION BY MR. WEATHERHOLTZ:**

18 Q: Good afternoon, Mr. Thompson.

19 A: Good afternoon.

20 Q: You and I have met of course, but for the
21 record, I'm James Weatherholtz, and it's good
22 to see you again. I just have a few areas of
23 follow up where I would like to ask you some
24 questions. If you would please, turn to Exhibit
25 6 in the exhibit notebook, and that's a series



JAMES WEATHERHOLTZ V. SC DHEC

205

1 of emails back and forth between you and I
2 relating to this dock permit application,
3 correct?

4 A: Yes, sir.

5 Q: Your testimony here earlier today was that you
6 were in a boat trying to find that creek and
7 you went past it because the mouth was so
8 small, right?

9 A: That's correct, sir.

10 Q: And then you testified that it was so small
11 that it was really only five to six feet wide,
12 correct?

13 A: At the mouth, correct.

14 Q: Right. But your email, which is Exhibit 6
15 dated August 2, 2013, to me says that in the
16 second sentence starting in the first line.

17 A: Which page are we at?

18 Q: It's the first page, the very top email, first
19 paragraph.

20 A: Okay.

21 Q: Hello, Mr. Weatherholtz. Do you see that?

22 A: Yes, sir.

23 Q: The second sentence says, My measurements were
24 all seven and a half to eight feet in width
25 depending on the location with the mouth of the



JAMES WEATHERHOLTZ V. SC DHEC

206

1 creek being less than seven foot in width. Did
2 I read that correctly?

3 A: Yes, sir.

4 Q: Your statement to me on August 2, 2013, was
5 that the mouth was really less than seven feet
6 in width, right?

7 A: Yes, sir.

8 Q: Let's look quickly at Exhibit 9 which you and
9 Mr. Churdar just recently talked about.

10 A: Yes, sir.

11 Q: That same response paragraph to item number one
12 there in the bottom half of that page, I think
13 we've already established that your statement
14 at the time that no portion of the creek was
15 ten feet or greater in width along any portion
16 of the creek from the mouth up to and beyond
17 the proposed dock, I think you've testified
18 that that was incorrect?

19 A: There were two spots that were outside the area
20 where you could build a dock that were slightly
21 over ten feet, yes, sir. I did correct that.

22 Q: And the next sentence there in Exhibit 9, which
23 is the version of this that was sent to me
24 says, Although Mr. Weatherholtz's survey
25 accurately illustrates his lot and critical



JAMES WEATHERHOLTZ V. SC DHEC

207

1 area line, the survey depicts no points of
2 reference in the creek. Since you drafted this
3 and maybe today for the first time, you have
4 seen a copy of Petitioner's Exhibit 5, correct?
5 It's the document. -- it's part of the
6 Respondent's Exhibit 2 that Mr. Churdar showed
7 you earlier. So if you'll flip to maybe the
8 third page of that document.

9 A: All right, sir.

10 Q: Have you seen that document prior to today?

11 A: I think I saw it when you sent it to Brad.

12 Q: Okay. He forwarded it to you and you've seen
13 it?

14 A: Yeah, I saw it.

15 Q: And you saw it today as part of the testimony
16 that Mr. Bessent gave, right?

17 A: Yes, sir.

18 Q: And are these the types of reference points
19 that you are talking about in Exhibit 9 when
20 you say that his survey doesn't show those?

21 A: It's still not a survey. It's the edge of E
22 creek. There are no distances and bearings.
23 There's no line tables to go with it. There's
24 nothing that I would typically see involved
25 with a survey, and I verify critical area line

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JAMES WEATHERHOLTZ V. SC DHEC

208

1 surveys all the time. I do probably a hundred
2 or more of those a year, and there's no other
3 data to go with it to make that a recoverable
4 point.

5 Q: Right, but even though the raw data that shows
6 the actual measurements is not reflected on
7 that document, those are reference points that
8 reflect the fact that somebody was in the creek
9 taking measurements, right?

10 A: Somebody was in the creek taking measurements.

11 Q: Right, and those are the type of measured
12 reference points that you were talking about in
13 your Exhibit 9 that were missing from the
14 survey itself?

15 A: Well, again, I don't have reference points on
16 here. There are no distances and bearings.
17 You know, there are points that were shot that
18 were put on here, but I don't have any other
19 information that would go with that to make
20 this a recoverable point. At the same time, I
21 verify critical area lines all the time. I
22 don't always agree with them. Lines are wrong
23 sometimes. I've had some of Mr. Bessent's
24 lines I've had to have revised. I've had lines
25 revised by many surveyors because they weren't



JAMES WEATHERHOLTZ V. SC DHEC

209

1 right. They weren't put in the right place.
2 So I'm not verifying that this line is an
3 accurate representation of the edge of the
4 creek because I was never asked to go out and
5 verify that. Just like Mr. Bessent, I was not
6 in that kayak when that guy held his little
7 reflector up to shoot. I don't know where he
8 was holding it, just like Mr. Bessent didn't
9 know where he was holding it.

10 **MR. WEATHERHOLTZ:** Okay. Your Honor, I would ask to
11 strike a portion of his testimony that
12 referenced other work that Mr. Bessent has done
13 that had to be revised. That is not relevant.
14 There has been no foundation laid for that.
15 I've had no opportunity to investigate what
16 he's talking about there or pursue any cross-
17 examination on that. I'd ask that that portion
18 of the testimony be stricken and that the
19 witness perhaps be directed to respond to the
20 question as opposed to a narrative.

21 **THE COURT:** Mr. Churdar?

22 **MR. CHURDAR:** Your Honor, Mr. Weatherholtz has asked
23 Mr. Thompson if that -- those points on
24 Respondent's Exhibit 2 are the type of points
25 that would make this a reliable document --



JAMES WEATHERHOLTZ V. SC DHEC

210

1 MR. WEATHERHOLTZ: And ---

2 MR. CHURDAR: --- and if I could just finish my
3 response. What he has explained is no, this is
4 not reliable because I need these other things
5 that will tell me what these points mean, just
6 like, and then he spoke by analogy to what was
7 testified to earlier today. I think it's a
8 fair answer in that he is saying why it's not
9 reliable, just like, you know, Mr. Bessent's
10 testimony this morning.

11 THE COURT: Well, I think the points that were made
12 by Mr. Thompson regarding that he thought it
13 was inadequate because there weren't distances
14 and bearings on here for this survey are valid.
15 I don't think his testimony about other
16 instances and kind of general comments
17 regarding Mr. Bessent's work are relevant. So
18 I would grant the motion to strike those
19 portions.

20 MR. WEATHERHOLTZ: Thank you, Your Honor.

21 A: The only other thing that was stated is that I
22 did not verify these points because I would
23 typically -- for a surveyor, I did not verify
24 the points that he's showing s the edge of the
25 creek.



JAMES WEATHERHOLTZ V. SC DHEC

211

1 THE COURT: Okay.

2 A: These were done without verification from our
3 office.

4 Q: Right. And you make a good point. I'll go
5 ahead and follow up on that. DHEC never went
6 out and performed a competing survey in
7 response to Mr. Bessent's; is that correct?

8 A: No, sir. I'm not a surveyor.

9 Q: Right.

10 A: But I could establish the points where those
11 survey points should be taken.

12 Q: But you didn't hire a surveyor to go out there
13 and perform a survey?

14 A: No, sir. I did not hire a surveyor to go do
15 that.

16 Q: And you never went back out to the creek and
17 did any other measurements or take any other
18 pictures to objectively verify the few
19 photographs that you included in the original
20 field investigation file?

21 A: I went on the site once with another 28 year
22 employee critical area specialist to do the
23 initial measurements. I went out a second trip
24 with you and Mr. Churdar to look at those
25 measurements again, and nobody ever pointed out



JAMES WEATHERHOLTZ V. SC DHEC

212

1 anything to me at those times that was
2 incorrect or invalid ---

3 Q: Right.

4 A: --- in the way I did my measurements.

5 Q: But I guess the question is if you want to say
6 here today that you never validated any
7 reference points or checked any of those
8 reference points, you never took any steps to
9 challenge those or check to see whether they
10 were correct?

11 A: That's not my job to take those steps. It's
12 his job to ask me to take those steps.

13 **THE COURT:** Yes, Mr. Churdar?

14 **MR. CHURDAR:** I object to the question. I mean, the
15 data was not even provided until last Friday.

16 **THE COURT:** Sustained. Sustained.

17 A: It's not my job to ask him to give me ---

18 **MR. WEATHERHOLTZ:** There's been no question.

19 **THE COURT:** Okay. We'll just leave it at that.

20 A: Just like when I do a critical area line, they
21 ask me to verify a line or they ask me to flag
22 a line, and then they survey it or they ask me
23 to verify a line that they've set. If they ask
24 me to verify a line, which might be, you know,
25 a line like this, I go out on the site and I



JAMES WEATHERHOLTZ V. SC DHEC

213

1 see where those points are. They will tie
2 flags. They will put some markers there where
3 I can tell where they shot those points. I was
4 not requested to do that in this case.

5 **THE COURT:** Okay.

6 A: It was afterwards that I did go take the
7 measurements to try to verify the information
8 that was provided to me in the application, and
9 I found that those -- the measurements that I
10 found were conflicted with the measurements
11 that were shown to be in the application.

12 Q: And you've had unfettered access to that creek
13 to go out there and flag lines and perform
14 measurements or hire a surveyor or do anything
15 else you wanted to do within that creek to
16 support the position you're taking here today?
17 Were you denied access to the creek in any way?

18 A: No, sir. And I took measurements and I made
19 notes of it.

20 Q: Let's look please back at Exhibit 9, and I want
21 to focus on the sentence that I just read where
22 it says, Although Mr. Weatherholtz's survey
23 accurately illustrates his lot and critical
24 area line, the survey depicts no points of
25 reference in the creek; you see that?



JAMES WEATHERHOLTZ V. SC DHEC

214

1 A: Yes, sir.

2 Q: Please turn to the Department's or Respondent's
3 Exhibit 1.

4 A: Where we were in that exhibit?

5 Q: It's about ten or 12 pages in. It's a copy of
6 your staff response, this same document. I
7 don't know if it's still in order. It looks
8 like it's upside down, but I can help you find
9 it.

10 **THE COURT:** It's number nine in the notebook.

11 Q: Right, it's nine in the notebook, and I want to
12 compare that to the same document in your DHEC
13 file.

14 **THE COURT:** Okay.

15 Q: I think it's a little past that. Keep going.
16 I think that's probably it right there. And
17 this is the copy of the staff response to a
18 request for review that was prepared by you
19 dated September 5, 2013?

20 A: I think that's the date that it was to go
21 before the board, September 5th. I don't think
22 it was prepared that day, and it was a draft.

23 Q: This is a draft?

24 A: Yes, sir.

25 Q: Okay. Did this draft precede or post date the



JAMES WEATHERHOLTZ V. SC DHEC

215

1 one that was sent to me, which is Exhibit 9?

2 A: It should have preceded, I think.

3 Q: Okay.

4 A: I don't know. You know, this should not have
5 been normally sent to you. It would've been
6 part of our record. We wouldn't send you a
7 draft written on ...

8 Q: Okay. So you keep the drafts in the file, but
9 you don't keep a final copy of that same
10 document in the file?

11 A: There should've been a final copy in there..

12 Q: Okay. I didn't see a copy of what was sent to
13 me and a copy within Exhibit 1, Respondent's
14 Exhibit 1 which is the DHEC file. Is there any
15 reason that the final version of that wouldn't
16 be in here?

17 A: I don't know why it wouldn't be in there. It
18 should be in there. If it wasn't, it was
19 probably an oversight. You know, admin staff
20 or something just pulled something out as the
21 draft other than the final version. But you
22 should've been sent the final version.
23 Everything is in the file.

24 Q: Prior to today, can you point to a time where
25 it was ever explained to me, the permit



JAMES WEATHERHOLTZ V. SC DHEC

216

1 applicant, that DHEC was denying based on
2 (c)(2), Reg Section (c)(2) because of the
3 possibility that that dock might be moved to
4 another location that is within the extended
5 lot lines?

6 A: I believe we sent you copies of the
7 regulations.

8 Q: Right.

9 A: You know, I don't interpret regulations for
10 attorneys. They usually try to interpret them
11 for me.

12 Q: But that explanation was never given until
13 today. I mean, did you ever give that
14 explanation to me or anyone else?

15 A: I think the regulation is very clear when you
16 read it.

17 Q: I read the regulation, but I just never
18 understood that DHEC's position was there is
19 potential for an existing dock to be torn out
20 and replaced with a much longer dock that would
21 be within the extended lot lines.

22 A: Well, again there's -- to me, there's no
23 potential because the creek doesn't qualify for
24 a dock.

25 Q: Yes, and I heard you say that before. We're



JAMES WEATHERHOLTZ V. SC DHEC

217

1 not talking about ---

2 A: It's not, you know, a potential access means
3 that a dock could be built. It doesn't mean
4 that there is one or there will be one. It
5 means there could be one, and if you meet the
6 other regulations for creek widths and all
7 that, a dock could be built out there if we met
8 the rest of the regulations.

9 Q: Right, and in order for a dock to potentially
10 be built within the extended lot lines and in
11 the circled area that you've shown, the
12 existing dock would have to be torn out?

13 A: Yes, sir.

14 Q: And that ---

15 A: You would only have one dock per parcel.

16 Q: And that property owner would have to submit an
17 application for a new dock, correct?

18 A: That's correct.

19 Q: And that's an application that you would
20 evaluate just like you evaluated this one?

21 A: That's correct, sir.

22 Q: All right. And setting aside (c)(1) and the
23 issues that you raised about the ten foot
24 width, I'm focused right now on (c)(2) only,
25 and any other regulations that might apply to

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JAMES WEATHERHOLTZ V. SC DHEC

218

1 that homeowner's application for a moved dock,
2 if that homeowner submitted an application for
3 a longer dock, would you take into
4 consideration ecological impact of a dock that
5 goes 200 feet or more as compared to that one
6 that looks about ---

7 A: I would take into consideration the regulations
8 which would allow someone to build a dock to
9 that point.

10 Q: But you would take into consideration
11 ecological impact to the marsh of a 200-foot
12 dock as opposed to whatever distance that is
13 right there to the creek immediately off the
14 property lines?

15 A: I would apply the regulations. I do not have
16 the judgment, you know, that maybe that part of
17 the creek is larger down there. He wants to
18 get to a larger, deeper part of the creek. You
19 know, that's his reasoning. He's less than
20 1000 feet. He's crossing marsh. He's not
21 crossing a creek to get there where he's
22 blocking navigation. I would apply the
23 regulations as they exist whether it's the
24 (c)(1)(i) or (ii), you know, those regulations
25 would be applied. I would not prohibit someone



JAMES' WEATHERHOLTZ V. SC DHEC

219

1 from building a longer dock to a potentially
2 larger portion of the creek -- it's all
3 hypothetical anyway -- and make them go to a
4 smaller creek that's closer if they weren't,
5 you know, crossing a navigable creek. We allow
6 people on a fairly regular basis if they avoid
7 smaller creeks to get to bigger creeks, they
8 can have bigger docks. They have more water at
9 low tide. They can -- they've got a larger
10 boat they want to keep. So we often allow
11 people to construct a walkway that's a longer
12 walkway than they might have to another creek
13 that's closer if they can do it within the
14 regulations.

15 Q: Right, and I think that's the sole example that
16 you gave earlier for an instance where this
17 might occur, which is a homeowner might want to
18 dock to another larger creek, and under certain
19 circumstances you might allow them to do that.
20 Do you have any evidence here that this creek
21 is any deeper or better for that homeowner than
22 the access they currently have?

23 A: No, sir, but he has potential access to that
24 point.

25 Q: Right, and that's not another creek. That's



JAMES WEATHERHOLTZ V. SC DHEC

220

1 just another spot on the same creek in this
2 instance.

3 A: That's correct.

4 Q: If that homeowner submitted an application for
5 a torn down old dock and building a new dock
6 that extends all the way across, would I and my
7 adjacent property owners potentially be able to
8 object to that dock because it crosses our site
9 line across the marsh as opposed to the current
10 placement of the dock which doesn't?

11 A: You can object to anything you want to.

12 Q: Right, and that is something that DHEC would
13 take into consideration if that permit
14 application to move that dock remains; is that
15 correct?

16 A: We might take it into consideration but if the
17 application met the regulations, we would still
18 issue it regardless of objections.

19 Q: All right. Do you have any indication or any
20 evidence that that homeowner has any intention
21 to tear that dock out and move it? Has that
22 application ever been submitted?

23 **MR. CHURDAR:** Objection.

24 A: I have no idea what they might intend to do.

25 **MR. CHURDAR:** Objection, irrelevant.



JAMES WEATHERHOLTZ V. SC DHEC

221

1 **THE COURT:** Well, we've talked an awful lot about
2 that dock and why it's there and what it stops
3 and what it doesn't, so I'm going to overrule
4 the objection and leave that in the record.

5 Q: You testified the measurements you took by boat
6 on July 11th were at close to high tide?

7 A: A little bit before.

8 Q: And do you recall what the projected height of
9 the high tide was that day?

10 A: I don't remember. I don't see where it makes
11 any difference. The marsh grass doesn't move
12 with the tide.

13 Q: I think you testified earlier that's a little
14 bit better for you to take the measurements on
15 a lower tide because some of the grass is
16 covered up, right?

17 A: You can see it a little bit better. If it was
18 a 7.4 foot tide, you probably wouldn't see any
19 markers.

20 Q: Right.

21 A: You're in about a 300 foot wide creek, so.

22 Q: Right. I think the file reflects that the high
23 tide on the day that you took your measurements
24 was a maximum of a 4.7 high tide.

25 A: Might've been. Might've been. I don't



JAMES WEATHERHOLTZ V. SC DHEC

222

1 remember for sure. We can go back through tide
2 records and find out, but it was enough water
3 to get in there, but it was also low enough
4 that the vegetation was well exposed that you
5 could see where you had to take the
6 measurements from and to.

7 Q: Right, and I think this has been established by
8 your earlier testimony, but your definition of
9 vegetation to vegetation is the first blade of
10 grass or what I might call a sprig of grass
11 inside the creek.

12 MR. CHURDAR: Your Honor, I would object to the
13 characterization that that is solely Mr.
14 Thompson's interpretations. He has testified
15 that this is interpreting this and applying
16 this regulation in accordance with what OCRM,
17 the Department interprets it.

18 THE COURT: Well, but there was a good deal of
19 testimony about where it started, and I think
20 if Mr. Thompson doesn't agree with Mr.
21 Weatherholtz's characterization, he can dispute
22 it. So I'll permit the question. Say it
23 again, Mr. Weatherholtz.

24 Q: The question has nothing to do with what the
25 Department's policy is. If he wants to ask



JAMES WEATHERHOLTZ V. SC DHEC

223

1 questions about that, he can. My question is
2 to Mr. Thompson and how he interprets the
3 regulation and how he applied it in this case,
4 and I think we established through your earlier
5 testimony that you take your measurements from
6 the first piece of vegetation in the creek that
7 you see, whether that is a single sprig or
8 blade of grass or two or three together or not,
9 that's where you measure from?

10 A: I never said I measured from a single blade of
11 grass.

12 Q: Okay.

13 A: I never made that statement. I said I measured
14 where the marsh vegetation starts. When I
15 start seeing *Spartina alterniflora*, that's a
16 vegetated area, I'm going to measure from that
17 until I get to *Spartina alterniflora* on the
18 other side unless I'm further up the river
19 where I measure from *juncus roemerianus* to
20 *juncus roemerianus*, but in this case it's
21 *Spartina* marsh and I measured from -- this
22 wasn't little springs. These were, you know,
23 full grown blades of *Spartina* and the main
24 shafts of the *Spartina alterniflora*. It's not
25 like there was a couple of blades came out



JAMES WEATHERHOLTZ V. SC DHEC

224

1 there, you know. This was regular marsh
2 vegetation that myself and Fred Mallett, who is
3 a 28 year veteran with our office both
4 considered it an appropriate place to measure
5 vegetation from and to. It was not sparse
6 vegetation. It was a relatively dense stand of
7 vegetation.

8 Q: Right, and I think -- I understood that answer
9 but I think maybe the best way to objectively
10 agree about where you measure from is to go
11 back to Exhibit 5, the third page.

12 MR. CHURDAR: Your Honor, I would object and say
13 that the best measurement is actually the
14 pictures that he took rather than a drawing.
15 I mean, Mr. Thompson pointed to pictures where
16 it's ---

17 THE COURT: Yes.

18 MR. CHURDAR: --- in actuality.

19 THE COURT: Yes, he did.

20 MR. CHURDAR: I believe that would be the best way
21 to determine where he measures the beginning of
22 marsh vegetation, not a sketch.

23 MR. WEATHERHOLTZ: This is the exact same line of
24 questioning that Mr. Churdar went through with
25 the witness with this very same exhibit to



JAMES WEATHERHOLTZ V. SC DHEC

225

1 establish where he begins his measurements and
2 ends them.

3 **THE COURT:** Sustained. I'll permit the question.
4 We've had a lot of questions about this sketch,
5 so I think any further illumination on it is
6 relevant.

7 Q: If you'll go to Exhibit 5, the third page. You
8 still have the sketch in front of you?

9 A: Yes, sir.

10 Q: And there's a ---

11 A: Came from Mr. Bessent.

12 Q: Correct. There's a line at the bottom that
13 says seven dash nine feet with a question mark,
14 do you see that?

15 A: Yes, sir.

16 Q: And it's pointing to the first piece of
17 vegetation across the creek to the other first
18 piece of vegetation, correct?

19 A: That's what he's -- it appears.

20 Q: That's what's reflected in that document,
21 right?

22 A: It appears so.

23 Q: And I believe your testimony earlier was those
24 were -- that is where you would take the
25 measurement, from the first piece of vegetation



JAMES WEATHERHOLTZ V. SC DHEC

226

1 across to the first piece of vegetation?

2 A: The first place I have marsh vegetation, yes,
3 sir. I would not call it sprigs though,
4 because you know, I don't see sprigs as
5 Spartina alterniflora. Most of the plants, you
6 know, I'm going to see mature plants, and the
7 plants that I saw at this particular site were
8 mature plants. They weren't what I would refer
9 to as a sprig.

10 Q: Yes, and I'm not asking you to accept that
11 characterization. I'm just trying to establish
12 where you take the measurements.

13 A: Yes, sir.

14 Q: All right. There was some discussion between
15 you and Mr. Churdar about Exhibit 18. If you
16 would please turn to that.

17 A: Exhibit 18, yes, sir..

18 Q: You referenced a handwritten sketch in your
19 direct testimony. I'd like to turn your
20 attention to page MM of Exhibit 18.

21 A: MM. Okay. I believe I have the correct page
22 here. This is the drawing that shows the
23 walkway of fixed pierhead and shows an 11-foot
24 width and a nine-foot passage from the edge of
25 the dock to the other side of the marsh grass.



JAMES WEATHERHOLTZ V. SC DHEC

227

1 Q: Right, is that handwritten ---

2 A: Correct. Yes, sir. This is hand drawn.

3 Q: Is that the handwritten sketch that you
4 referred to in your direct testimony?

5 A: Yes, sir, it's one of them I referred to.

6 Q: Okay. And I understand that you have questions
7 about whether or not this was measured
8 properly, and you have no way to verify how
9 these numbers were arrived at, but that
10 document does show a width from marsh grass
11 across to marsh grass of 11 feet?

12 A: Yes, sir, it does.

13 Q: And then if you move to the left from the where
14 the 11 foot measurements is shown, the marsh
15 grass actually dips away and shows some
16 distance greater than 11 feet in theory; do you
17 see that?

18 A: I see a hand drawing that someone did that has
19 no basis in science or surveying or anything,
20 yeah.

21 Q: Well, you say that but you don't really know,
22 right?

23 A: I know this is not a survey. I know it was not
24 done by a surveyor. I know it was prepared and
25 hand drawn by a representative of Affiliated



JAMES WEATHERHOLTZ V. SC DHEC

228

1 Marine Construction as way of trying to -- his
2 application to get a permit to build a dock for
3 somebody.

4 Q: Okay.

5 A: It was not done by a surveyor. It was done by
6 a marine contractor.

7 Q: Yes, but you don't know whether the
8 measurements taken in the creek to arrive at
9 those numbers?

10 A: I have no idea where those numbers came from
11 and don't really know that anybody else.

12 Q: Except the person who did it, right?

13 A: Yes, sir.

14 Q: Right.

15 A: And he's not here today.

16 Q: Exhibit WW.

17 A: All right, sir.

18 Q: This is a copy of a field report prepared by
19 Megan Gordon; is that correct?

20 A: I assume she did this.

21 Q: All right. Look at the last page, XX. That
22 signature above the name, Megan Gordon. XX,
23 sorry.

24 A: XX. I think that's her signature.

25 Q: Well, she was a DHEC employee at the time.



JAMES WEATHERHOLTZ V. SC DHEC

229

1 A: M. Gordon. It looks like it's right, yeah.

2 Q: Right. She was a DHEC employee at the time,
3 correct?

4 A: Yes, sir.

5 Q: And you testified that you can't imagine that
6 she would've gone out there and done any field
7 measurements to arrive at a statement that says
8 Kushiwah Creek at ten feet, but you don't know
9 one way or another whether she did that or not;
10 isn't that right?

11 A: That's correct.

12 **MR. CHURDAR:** Your Honor, I would object to that
13 question and answer. Mr. Thompson has
14 testified that the creek width from 11 years
15 ago does not have bearing on evaluating and
16 measuring the creek width today. My objection
17 is really just it's irrelevant whether Megan
18 Gordon did anything back then to confirm or
19 verify the creek width in 2001.

20 **THE COURT:** Well, we've had a lot of discussion
21 about DHEC policy and what would have been done
22 and etcetera. So if he knows of his own
23 knowledge whether she did anything or whether
24 it was DHEC policy to go out and verify based
25 on a hand sketch like that, he can certainly



JAMES WEATHERHOLTZ V. SC DHEC

230

1 answer that question.

2 A: Can I answer that?

3 **THE COURT:** Yes.

4 Q: I think you already did answer it.

5 **MR. WEATHERHOLTZ:** And if I could respond. This
6 arises because of a question Mr. Churdar asked
7 Mr. Thompson on direct examination to which Mr.
8 Thompson replied I can't imagine she would have
9 done that under the circumstances, and my
10 question is you don't know one way or another
11 whether she did or not.

12 **THE COURT:** Oh, yes. That's the question. Okay.
13 You may ask that question.

14 A: And I don't know for sure if she did or not.

15 **THE COURT:** Okay.

16 Q: Thank you. I think we established this
17 earlier. The only way that the lot owner -- is
18 that Exhibit -- is that Respondent's Exhibit 5?

19 **MR. CHURDAR:** Yes.

20 Q: Referring your attention to Respondent's
21 Exhibit 5. The only way that dock owner could
22 rebuild a dock on that lot would be to tear out
23 the existing one, right?

24 A: You can only have one dock per parcel.

25 Q: Okay. And in order for them to reach the point



JAMES WEATHERHOLTZ V. SC DHEC

231

1 that is circled, west of the dock adjacent to
2 my property, would be extend that dock four or
3 five times or six times its existing length; is
4 that correct?

5 A: Yeah, it looks to me like probably 250 feet or
6 so.

7 Q: And what do you estimate to be the length of
8 the existing dock?

9 A: I haven't measured it. I don't know.
10 Somewhere between 30 and 80 feet.

11 Q: Okay.

12 A: I don't know exactly. I would have to measure
13 it, and I have not done so.

14 Q: And looking quickly back at the photographs
15 that you submitted to the file after your field
16 measurements, I see one picture of one
17 measurement. Am I missing anything or are
18 there more?

19 A: No, sir. I only took pictures of the one. I
20 measured it about four or five times but I only
21 took one picture of the actual measurement.

22 Q: That's all I have. Thank you.

23 A: Yes, sir.

24 **THE COURT:** Thank you very much. Mr. Churdar,
25 anything further on redirect? Mr. Churdar, any



1 further questions?

2 **MR. CHURDAR:** Yes, ma'am. I'm just thinking.

3 **MR. THOMPSON - REDIRECT EXAMINATION BY MR. CHURDAR:**

4 Q: As a follow up very briefly on this question
5 Mr. Weatherholtz was asking about tearing this
6 dock out and then getting dock access right
7 there. As you look at that, do you consider
8 that potential and or actual dock access from
9 the other side of the creek?

10 A: That's actual dock access.

11 Q: Okay.

12 A: Potential means, you know, that someone could
13 build a dock. That's actual access.
14 Potentially, just based on extended property
15 lines again, not considering the rest of the
16 regulations about creek widths and all, a dock
17 could be built from the opposite side to almost
18 any point along that creek between those two
19 points, potentially.

20 Q: Okay. I have no further redirect.

21 **THE COURT:** All right. Anything else?

22 **MR. WEATHERHOLTZ:** No, ma'am.

23 **THE COURT:** All right. Then does that conclude your
24 case, Mr. Churdar?

25 **MR. CHURDAR:** Yes, ma'am.



JAMES WEATHERHOLTZ V. SC DHEC

233

1 **THE COURT:** All right. Anything further? Anything
2 in reply?

3 **MR. WEATHERHOLTZ:** Your Honor, I don't think I have
4 anything in reply.

5 **THE COURT:** All right. Then I will ask if you each
6 wish to do closing arguments or if you'd rather
7 submit proposed orders for the Court's
8 consideration?

9 **MR. CHURDAR:** I have no preference. I mean, I'm ---

10 **THE COURT:** Okay.

11 **MR. CHURDAR:** I don't want to bore you by repeating
12 myself.

13 **THE COURT:** It would not be boring I'm sure, Mr.
14 Churdar. Repetition is not always boring and
15 it does help me to learn and remember, but what
16 I would suggest is that we get a transcript
17 here which would take -- Madame Court Reporter,
18 how long are we talking about?

19 **MS. TAYLOR:** Two weeks.

20 **THE COURT:** Two weeks, three weeks, and then have 30
21 days after that in which to submit proposed
22 orders, if that works for you and I have what
23 I call my 30 day rule. I try to get all orders
24 out within 30 days after a hearing or 30 days
25 after I receive proposed orders, because I used



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JAMES WEATHERHOLTZ V. SC DHEC

234

1 to practice law and I know what it's like. So
2 anyway, I thank you both for being here. I
3 know how important it is to you, Mr.
4 Weatherholtz, and how much you would very much
5 like to have a dock, and I know Mr. Churdar's
6 situation that he's charged with imposing and
7 regulating all the docks in this critical area
8 for certain, and that he's charged with
9 implementing the laws of the state. So it's
10 important to both of you, and I'll get on it as
11 soon as possible when I get proposed orders
12 from you and everybody be safe driving back.

13 (There being nothing further, the hearing was
14 concluded at 4:47 p.m.)
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