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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Docket No. 09-ALJ-07-00029-CC

Kiawah Development Partners, II, Respondent,

v.

South Carolina Department of Health and Environmental Control, Appellant.

Docket No. 09-ALJ-07-00039-CC

South Carolina Coastal Conservation League, Appellant,

v.

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

Of Whom

South Carolina Department of Health and Environmental Control is, Appellant,

and Kiawah Development Partners, II, is, Respondent.

**FINAL BRIEF OF APPELLANT
SOUTH CAROLINA COASTAL CONSERVATION LEAGUE**

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TABLE OF CONTENTS

	<u>Page</u>
Table of Cases, Statutes and Other Authorities	ii
Statement of the Issues on Appeal	vii
Statement of the Case	1
ARGUMENT	3
Summary of Argument	3
Overview of the ALC Hearing	5
I. The ALJ Erred in Failing to Adhere to the Plain Language of the Critical Area Regulations	9
A. The Bulkhead/Revetment Violates the Plain Language of Regulation 30-12(C)(1) ..	9
1. Regulation 30-12(C)(1)(c) & (d) Prohibit Bulkheads and Revetments that Adversely Affect Public Access	10
2. Regulation 30-12(C)(1)(b) Requires Bulkheads and Revetments to be Constructed Within Eighteen (18) Inches from the Escarpment	21
3. Regulation 30-12(C)(1)(a) Prohibits Bulkheads and Revetments that Destroy Stable Marine Bottoms	22
B. The Bulkhead/Revetment Violates Regulation 30-11.C.(1) and CMP Policy III.C.3.I(7)	25
II. The Bulkhead/Revetment Violates the Plain Language of the Coastal Zone Management Act	31
A. The Project Violates § 48-39-30 in Failing to Insure the Maximum Benefit to the People	31
B. The ALC Erred in Concluding that the Bulkhead/Revetment is Consistent With the General Considerations of § 48-39-150	33
1. The Revetment/Bulkhead Would Adversely Affect the Production of Marine Life	34

2. The Bulkhead/Revetment Will Exacerbate Erosion 38

3. The Bulkhead/Revetment Will Have Negative Effects on Endangered Species
and a Geographic Area of Particular Concern 38

4. The Revetment/Bulkhead Will Have Adverse Impacts on Public Access and
Will Affect the Value and Enjoyment of the Public as an Adjacent Owner ... 41

III. The Bulkhead/Revetment Violates the Public Trust Doctrine by Failing to Protect
Public Recreational Uses of the Banks Along the Kiawah River 42

IV. The ALC Erred by Finding and Concluding that the DHEC Board’s Interpretation
of Its Rules was Not Entitled to Any Deference 44

CONCLUSION 48

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES CITED

Page

CASES:

<i>Able Communications, Inc. v. S.C. Pub. Serv. Comm'n</i> , 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986)	18, 19
<i>Altman v. Griffith</i> , 372 S.C. 388, 642 S.E.2d 619 (Ct. App. 2007)	33
<i>Bass v. Isochem</i> , 365 S.C. 454, 459, 617 S.E.2d 369, 377 (Ct. App.2005)	9
<i>Brown v. Bi-Lo, Inc.</i> , 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003)	45, 46, 47, 48
<i>Brown v. DHEC</i> , 348 S.C. 507, 560 S.E.2d 410 (2002)	45
<i>Cain v. Nationwide Prop. & Cas. Ins. Co.</i> , 378 S.C. 25, 30, 661 S.E.2d 349, 352 (2008)	9
<i>Carlyle v. Tuomey Hosp.</i> , 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991)	33
<i>City of Spartanburg v. Leonard</i> , 180 S.C. 491, 186 S.E. 395 (1936)	25
<i>Converse Power Corp. v. DHEC</i> , 350 S.C. 39, 48, 564 S.E.2d 341, 346 (Ct. App. 2002)	45
<i>Fontaine v. Peitz</i> , 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987)	33
<i>Foothills Brewing Concern, Inc. v. City of Greenville</i> , 377 S.C. 355, 363, 660 S.E.2d 264, 268 (2008)	25
<i>Grinnell Corp. v. Wood</i> , 378 S.C. 458, 467, 663 S.E.2d 61, 66 (Ct. App.2008)	9
<i>Howell v. United States Fid. & Guar. Ins. Co.</i> , 370 S.C. 505, 509, 636 S.E.2d 626, 628 (2006)	9
<i>Illinois Central R. Co. v. State of Illinois</i> 146 U.S. 387, 453, 13 S. Ct. 110, 118 (1892)	20
<i>Independent Stave Co. v. Fulton</i> , 251 Ark. 1086, 476 S.W.2d 792, 793 (1972)	33

<i>In re Campbell</i> , 379 S.C. 593, 599-600, 666 S.E.2d 908, 911 (2008)	9
<i>Kiawah Prop. Owners Group v. Pub. Serv. Comm'n of S.C.</i> , 338 S.C. 92, 96, 525 S.E.2d 863, 865 (1999)	19
<i>Lark v. Bi-Lo, Inc.</i> , 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)	33
<i>Martin v. Waddell</i> , 41 U.S. 367 (1842)	42
<i>McQueen v. South Carolina Coastal Council</i> , 354 S.C. 142, 149, 580 S.E.2d 116, 119 (2003)	42
<i>Original Blue Ribbon Taxi Corp. v. South Carolina Dept. of Motor Vehicles</i> , 380 S.C. 600, 608, 670 S.E.2d 674, 678 (S.C. App.,2008)	25
<i>Peake v. S.C. Dep't of Motor Vehicles</i> , 375 S.C. 589, 597-598, 654 S.E.2d 284, 289 (Ct.App.2007)	9
<i>Pressley v. REA Const. Co., Inc.</i> , 374 S.C. 283, 288, 648 S.E.2d 301, 303 (Ct. App.2007)	45
<i>Rorrer v. P.J. Club, Inc.</i> , 347 S.C. 560, 568, 556 S.E.2d 726, 730 (Ct.App.2001)	25
<i>Sierra Club v. Kiawah Resort Associates</i> , 318 S.C. 119, 456 S.E.2d 397 (1995)	41, 42
<i>Spartanburg Regional Medical Center v. Oncology and Hematology Associates of South Carolina, LLC</i> , 387 S.C. 79, 91-92, 690 S.E.2d 783, 789 (2010)	18
<i>Spectre v. DHEC, et al.</i> 386 S.C. 357, 688 S.E.2d 844 (2010)	24, 44
<i>TNS Mills, Inc. v. S.C. Dep't of Revenue</i> , 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998)	25
<i>US v. Kane</i> , 461 F.Supp. 554 (EDNY 1978)	42
<i>Wayne Hill v. DHEC & Coastal Conservation League</i> , 389 S.C. 1, 698 S.E.2d 612 (2010)	21
STATUTES:	
16 U.S.C. 1531, <i>et seq</i>	38
S. C. Code Ann. § 44-1-60	44

S. C. Code Ann. § 48-39-10.J. & G.	5
S. C. Code Ann. § 48-39-20.B.	26
S. C. Code Ann. § 48-39-20.D.	26
S. C. Code Ann. § 48-39-30.A.	26
S. C. Code Ann. § 48-39-30.B.(1)	26, 27, 46, 47, 48
S. C. Code Ann. § 48-39-30.D.	30, 31
S. C. Code Ann. § 48-39-80	24, 44
S. C. Code Ann. § 48-39-90	24
S. C. Code Ann. § 48-39-130	24
S. C. Code Ann. § 48-39-150	32
S. C. Code Ann. § 48-39-150.A.(3)	34
S. C. Code Ann. § 48-39-150.A.(4)	37
S. C. Code Ann. § 48-39-150.A.(5) & (10)	40
S. C. Code Ann. § 48-39-150.A.(6)	38
S. C. Code Ann. § 48-39-150.A.(7)	31
REGULATIONS:	
23 A S. C. Code Ann. Reg. § 30-11.B.(3)	34
23 A S. C. Code Ann. Reg. § 30-11.B.(4)	37
23 A S. C. Code Ann. Regs. § 30-11.B.(5) & (10)	40
23 A S. C. Code Ann. Reg. § 30-11.B.(6)	38
23 A S. C. Code Ann. Reg. § 30-11.C.(1)	23, 24, 25, 45, 46
23 A S. C. Code Ann. Reg. § 30-11.C.(3)	38

23 A S. C. Code Ann. Reg. § 30-12.C	10, 17
23 A S. C. Code Ann. Reg. § 30-12.C.(1)	9, 10, 12, 17, 18
23 A S. C. Code Ann. Reg. § 30-12.C.(1)(a)	21
23 A S. C. Code Ann. Regs. § 30-12.C.(1)(c) & (d)	3, 10, 13
23 A S. C. Code Ann. Reg. § 30-12.C.(1)(b)	20, 21
23 A S. C. Code Ann. Reg. § 30-12.G.(2)(a)	46
OTHER AUTHORITIES:	
S. C. Opinion Attorney General 329 (Dec. 10, 1970)	41, 42
S. C. Coastal Management Program:	
Chapter IV-57	4, 14
Chapter IV, A(2)(a)(8)	38
Chapter IV(C)(4)(c)(1)-(8)	4, 13, 14
Chapter XII.D.	4, 13
Policy I.7	48
Policy III.C.3.I(7)	23, 24, 25
The American Heritage Dictionary 10 (4th Ed., Houghton Mifflin 2000)	12

STATEMENT OF ISSUES ON APPEAL

- I. **Did the Administrative Law Judge Err in Concluding that Public Access Would Not Be Adversely Affected If 2.63 Acres of Sandy Banks of the Kiawah River Below the Mean High Water Mark Are Covered in Concrete Blocks, Despite the Coastal Zone Management Act, Critical Area Regulations, the Coastal Management Program, and the Public Trust Doctrine, Which Provide Protection for Public Access to and Use of These Public Trust Critical Areas?**

- II. **Did the ALJ Err In Concluding That The Proposed 2,783 Foot Long Bulkhead/Revetment Structure That Would Extend 40 feet Into Critical Area Tidelands Complies With the Regulations Requiring Such Structures to be Constructed Only 18 Inches Into the Critical Area?**

- III. **Did the ALJ Err in Concluding that the Proposed Bulkhead/Revetment Is Consistent With §§ 48-39-20, 30 & 150, Which Are Designed to Protect Sensitive and Fragile Areas, to Protect Marine Life and Endangered Wildlife, and Which Mandate That Critical Areas Shall be Used to Provide the Combination of Uses That Insure the Maximum Benefit to the People?**

- IV. **Did the ALJ Err in Concluding That the Department's Regulatory Authority In Reviewing Long-Range, Cumulative Impacts Is Limited To Only Impacts Within the Critical Area, and in Failing to Give Deference to the DHEC Board's Interpretation That the Agency Can Look At Impacts Outside the Critical Area?**

STATEMENT OF THE CASE

This appeal arises from two consolidated contested case hearings challenging a critical area permit issued on December 18, 2008, by the S.C. Department of Health and Environmental Control to Kiawah Development Partners, II, Inc. The permit authorized the construction of 270' long and 40' wide articulated concrete block revetment and vertical bulkhead system along the banks of the Kiawah River at Captain Sam's Spit, Kiawah Island, Charleston County. On December 31, 2008, both the S.C. Coastal Conservation League ("League") and Kiawah Development Partners, II, Inc. ("KDP") filed requests for a Final Review Conference before the DHEC board in connection with the DHEC staff proposed decision. (R. pp. 83-87 & 88-91). Kiawah Development Partners, II, challenged the denial of the 2,513' feet of the revetment/bulkhead system. (R. pp. 83-87). The South Carolina Coastal Conservation League challenged the issuance of the 270' of revetment/bulkhead system and sought to uphold the denial of the 2,513' of structure. (R. pp. 88-91). During a DHEC Board meeting conducted on January 8, 2009, the Board decided not to conduct a Final Review Conference and notified the parties in writing of its decision on January 14, 2009. (R. pp. 79-82).

On January 20, 2008, Kiawah Development Partners, II, filed a request for contested case hearing challenging the denial of 2,513' feet of the requested 2,783' revetment/bulkhead system. (R. pp. 92-106). On January 29, 2009, the South Carolina Coastal Conservation League filed a request for contested case hearing challenging the issuance of the 270' of revetment/bulkhead system and seeking to uphold the denial of the 2,513' of structure. (R. pp.107-111).

On February 23, 2009, the Administrative Law Court issued a Consent Order of Consolidation, consolidating the two contested cases for hearing and decision. (R. pp. 74-78).

The Honorable Ralph King Anderson, III, conducted a hearing August 24 – 28, 2009. On January 22, 2010, Judge Anderson issued a Final Order and Decision authorizing the structure for the entire length of 2,783' requested by KDP with some minor limitations in specific areas. (R. pp. 41-71). On February 2, 2010, the Coastal Conservation League filed a Motion to Reconsider, To Open the Record and Admit New Evidence and For Stay. (R. pp. 220-250). On February 2, 2010, the Department filed a Motion to Reconsider. (R. pp. 251-261). On February 26, 2010, the ALC issued an Order on Motions for Reconsideration, denying the motions. (R. pp. 32-39). Also on February 26, 2010, the ALC issued an Amended Final Order and Decision. (R. pp. 1-31).

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

On April 22, 2010, the Coastal Conservation League filed a Motion to Transfer in this Court. This Court issued an Order of Transfer on June 10, 2010. This Court issued an Order Granting Supersedeas on July 22, 2010.

ARGUMENT

Summary of Argument

The key issue in this case is whether the ALJ erred in ordering DHEC to issue a permit that eliminates public access by encroaching forty feet into critical areas below the mean high water line.

This case also presents the issue of whether the State is required to look not only at the direct impacts of a structure itself, but also at the cumulative impacts to humans, wildlife and coastal resources that flow directly from the permitted activity. And this case presents the issues of whether the proposed concrete revetment and vertical bulkhead meet the specific regulatory criteria, including a prohibition on structures that extend more than 18 inches into the critical area, and the States policies of protecting fragile and sensitive coastal resources and insuring maximum benefit of critical areas to the people.

DHEC issued the critical area permit with special condition No. 1 limiting the request to 270' bulkhead/revetment in front of the parking lot at Beachwalker Park. The ALC ordered that the permit be issued deleting special condition No. 1 limiting the structure to 270 feet and authorizing the structure to be constructed for the entire 2,783' length with some minor limitations. The Order allows that KDP may get approval from DHEC for the entire structure.

DHEC erred in issuing the 270' of bulkhead/revetment, and the Administrative Law Judge compounded that error in directing issuance of an expanded critical area permit that violates the plain language of the S.C. Coastal Zone Management Act, the Critical Area Regulations and the Coastal Management Program ("CMP"). The rules are clear that bulkheads and revetments "will be prohibited where public access is affected." S.C. Code

Ann. Regs. 30-12(C)(1)(c) & (d); *see also* CMP Policies Chapters XII.D and IV(C)(4) at pp. III-73 & IV-57.

Yet the Administrative Law Judge authorized a structure that effectively eliminates existing public access to and use of the sandy beach-like banks of the Kiawah River in violation of the statutory and regulatory criteria and the Public Trust Doctrine, which are designed to protect public access to critical areas. The ALJ erred by failing to apply the plain language of the applicable rules. The ALJ erred in ruling that the agency does not have regulatory authority outside the critical area and that the agency's review of the long-range, cumulative impacts in the context of possible future development and the general character of the area is limited to only critical area impacts. He erred by failing to assess and give deference to DHEC's interpretation of the long-term, cumulative impacts analysis of the project in the context of future development. He erred by concluding, without any supporting evidence, that the project would not have significant adverse impacts on the marine species the Diamondback Terrapin or dolphins. And he erred by concluding that a structure extending forty (40) feet into the critical area from the escarpment complies with the bulkhead and revetment regulations, which require structures to be constructed with 18 inches of the escarpment.

It is undisputed that the revetment would extend forty (40) feet from the critical area line or escarpment into the Kiawah River below the mean low water line.

It is undisputed that 2.63 acres of sandy shoreline below the mean high water mark would be covered in concrete blocks. It is undisputed that the public fishes, crabs and swims from the sandy banks of the River, and that the public pulls up kayaks and boats, sits on and lays out on the sandy banks of the River. And it is undisputed that the existing public access to

the sandy banks would be impaired or eliminated by the bulkhead/revetment structure.

The ALJ's Order should be vacated because it fails to apply the plain language of the Act, regulations and CMP, which are designed to protect public access to critical areas, and authorizes a significant infringement on a half-mile of sandy shoreline that is presently open and available for access by the public.

Overview of the Administrative Law Court Hearing

Kiawah Development Partners, II, Inc., ("KDP") sought permission to build a 2,783' long, 40' wide articulated concrete block revetment and a 2,783' long vertical bulkhead along the bank of the Kiawah River at Captain Sam's Inlet at Kiawah Island. The revetment/bulkhead structure would be constructed entirely on lands below the mean high water mark, which are designated as critical area under the Coastal Zone Management Act. *See* S.C. Code Ann. 48-39-10(J) & (G). The critical area bank of the Kiawah River where KDP wants to build this revetment/bulkhead structure consists of a 20' – 37' wide sandy, beach-like shoreline. (R. p. 361). The concrete block revetment would cover 111,320 square feet of the sandy beach-like banks of the River, or 2.63 acres of public trust critical area tidelands. (R. p. 662).

Captain Sam's Spit is adjacent to Captain Sam's Inlet at the Southwest end of Kiawah. The Spit is a sandy land formation and is surrounded on three sides by water – the Atlantic Ocean, the inlet and the Kiawah River. It is connected to the main body of Kiawah Island by a narrow strip of land, often referred to as the "neck" of the Spit.

Photographs and surveys of the location of the proposed revetment depict an expanse of white sand and indicate that this sandy beach ranges from 21' – 37' in width along the location of the proposed revetment/bulkhead structure. (R. pp. 1939-1941, 2277 & 2278-2379).

Greg VanDerwerker, Sophia McAllister and Sidi Limehouse are regular users of the area where the revetment is proposed to be constructed. Dr. VanDerwerker and Ms. McAllister testified that they access the shoreline along the bank of the Kiawah River regularly – between twice a month for Dr. VanDerwerker and several times a week for Ms. McAllister. Both individuals pull up their kayaks, sit on the sand, eat lunch, view wildlife and otherwise recreate on the bank. Dr. VanDerwerker said that he would not be able to pull his kayak up on a concrete block structure because it would damage his boat. He said that he would not walk on the concrete block structure because it would be unsafe to walk on, and it would not be enjoyable to lay out on. Even Leonard Long, the developer, acknowledged that people can pull up boats and kayaks on this soft sandy surface without damaging their boats. (R. p. 361). And Long said that right now kids can run around barefoot on the sandy area below mean high water. (R. p. 361).

Leonard Long said that the revetment would “change the nature” of the public’s use of the area, but that he thought it would improve the habitat. (R. p. 362). By “improve the habitat,” Long said that he meant that oysters could grow on the articulated concrete blocks and that the revetment would be “helping the oysters but it might not help the kid who wants to run around barefoot everywhere.” (R. p. 363, lines 16-18).

The revetment/bulkhead would begin at Beachwalker Park, and continue around the bend of the river, along the neck of the Captain Sam’s Spit for 2,783 feet. (R. pp. 2095-2122). The bulkhead portion of the structure would be a vertical wall constructed at the mean high water or critical area line and would extend above the revetment. (R. pp. 2095-2122). The revetment portion of the structure would be 40' wide and follow the bulkhead, beginning at the mean high water or critical area line and extending below the mean low water line and into the channel of

the Kiawah River. (R. pp. 661 & 2095-2122).

Kiawah Development Partners, II, Inc., and its companion entity, Kiawah Resort Associates (“KRA”), own of most of Kiawah Island, including Captain Sam’s Spit. When KRA purchased Kiawah Island, the Spit was used for passive recreation and as open space. This use was officially recognized in 1994 when KRA entered into a development agreement with the Town of Kiawah, which designated the Spit as protected recreational open space and park space. Captain Sam’s Spit is still entirely undeveloped, with no man-made structures. The fact that it is undeveloped can be traced to the recommendations of a 1975 Environmental Inventory of Kiawah Island, authored by Dr. John Mark Dean, in which he and other prominent scientists concluded that because the Spit had been completely eroded and redeposited at least twice in the past 200 years it is unstable and is not suitable for development. (R. pp. 1751-1935). Dr. Dean said that none of the conclusions of the 1975 Environmental Inventory have been invalidated, and the data and conclusions that the Spit is unstable and not suitable for development are still applicable today. (R. p. 1243).

The last time the Spit had been completely eroded and redeposited was either in 1948 or 1949. Aerial photographs show that today’s Spit was non-existent at that time. (R. p. 1937). Similarly, SCCCL Exhibit 2-A, shows that the spit was not there in 1921, either. (R. p. 1936).

The purpose of the bulkhead/revetment is to fix the shoreline permanently in its current location so that KDP can construct a road and utilities corridor for a residential development to be located on Captain Sam’s Spit. KRA/KDP has stated its intent to pursue residential development on the spit. But KDP’s marketing people have told KDP that they would have to build a revetment on Captain Sam’s Spit for home sites to be marketable. (R. p. 417). Leonard

Long, a partner in KDP, explained that while there were no legal prohibitions on constructing home sites on the Spit without a revetment, there would be “reticence of buyers who look at ... eroding shoreline for 20 to 40, 50 years and say that’d probably be a good place for me to buy a homesite.” (R. p. 417, lines 16-19). Long said that it would be “almost impossible” to sell homesites without the revetment because “people would think you were a shyster ... and they wouldn’t be stupid enough to buy it from you if they were worried about that erosion which is so dramatic ...” (R. p. 346, lines 14-19). KDP’s planner Mark Permar said the revetment would give a sense of security to people who would be purchasing home sites on the Spit. (R. p. 503).

DHEC’s Bill Eiser said that this was the longest revetment/bulkhead permit application he had ever reviewed. (R. pp. 1396-97). Prior to this revetment, the longest one he had reviewed was around 250-300’ long. (R. p. 1397). The proposed bulkhead/revetment is about ten times larger than most revetment permits processed by the Department. (R. p. 1537). KDP’s engineering consultant, Mitchell Bohannon, said that the longest revetment/bulkhead permit his company has ever applied for was 700-800’ long. The proposed structure is well over three times that length. (R. p. 377).

Eiser explained that the proposed project is not a typical revetment permit. A typical revetment would be on a piece of high ground that is bordered on all three sides by high ground and the water side is eroding. (R. p. 1521). In this case, there is water on three sides and two of those sides are growing – the ocean and inlet sides – while the river side has experienced some erosion. In other words, a typical revetment permit would be experiencing net decrease in high ground whereas Captain Sam’s Spit is experiencing a net increase in high ground. (R. p. 1521). Since 1974, the Spit has grown by 64 acres. (R. pp. 564-565; oversized KDP Ex. 48(c)). If the

shoreline is fixed, KDP will experience an even greater increase in net rate of growth of its upland property.

I. The ALJ Erred in Failing to Adhere to the Plain Language of the Critical Area Regulations

“The cardinal rule of statutory interpretation is to ascertain and effectuate the legislature’s intent. *In re Campbell*, 379 S.C. 593, 599-600, 666 S.E.2d 908, 911 (2008); *Howell v. United States Fid. & Guar. Ins. Co.*, 370 S.C. 505, 509, 636 S.E.2d 626, 628 (2006); *Bass v. Isochem*, 365 S.C. 454, 459, 617 S.E.2d 369, 377 (Ct.App.2005). The plain language of the statute is the principal guidepost in discerning the General Assembly’s intent. *Cain v. Nationwide Prop. & Cas. Ins. Co.*, 378 S.C. 25, 30, 661 S.E.2d 349, 352 (2008); *Grinnell Corp. v. Wood*, 378 S.C. 458, 467, 663 S.E.2d 61, 66 (Ct. App.2008); *see also Peake v. S.C. Dep’t of Motor Vehicles*, 375 S.C. 589, 597-598, 654 S.E.2d 284, 289 (Ct. App.2007) (“With any question regarding statutory construction and application, the court must always look to legislative intent as determined from the plain language of the statute.”)

The ALC committed reversible error by authorizing a permit that eliminates public access and allows a significant incursion into public trust tidelands in violation of the plain language of the critical area regulations.

A. The Bulkhead/Revetment Violates the Plain Language of Regulation 30-12.C.(1)

Regulation 30-12.C.(1) sets forth specific standards for evaluating bulkheads and revetments. These regulations state that:

- (1) In an attempt to mitigate certain environmental losses that can be caused by these structures, the following standards are adopted:
 - (a) Structures must be designed to conform to the critical area line (upland boundary), to the maximum extent feasible, and constructed so that the

reflective wave energy does not destroy stable marine bottoms or constitute a safety hazard;

- (b) Structures may be constructed up to 18 inches from the existing escarpment. In situations where this is not feasible, Department staff will determine the location of the bulkhead or revetment on a site by site basis;
- (c) Bulkheads and revetments will be prohibited where marshlands are adequately serving as an erosion buffer, where adjacent property could be detrimentally affected by erosion, sedimentation, or where public access is adversely affected unless upland is being lost due to tidally induced erosion;
- (d) Bulkheads and revetments will be prohibited where public access is adversely affected unless no feasible alternative exists.

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

The ALJ found that the bulkhead/revetment structure “would cover 111,320 square feet of the banks of the River, or 2.63 acres” and would extend below the low water line. (R. p. 9). He found that the bulkhead portion of the structure is designed to be installed on the critical line or no more than eighteen inches beyond the critical line. (R. p. 9). And he found that the revetment portion of the structure would extend forty (40) feet beyond the bulkhead and into lands below the mean high water mark. (R. pp. 8-9). The ALJ made an error of law in concluding that this structure and its incursion into public trust critical areas are authorized under the bulkhead and revetment regulations.

1. Regulation 30-12.C.(1)(c) & (d) Prohibit Bulkheads and Revetments that Adversely Affect Public Access

Regulation 30-12.C.(1)(c) and (d) prohibit bulkheads and revetments where public access is “adversely affected.” Specifically the regulations state that “bulkheads and revetments will be prohibited . . . where public access is adversely affected unless upland is being lost due to tidally induced erosion” and “[b]ulkheads and revetments will be prohibited where public access is

adversely affected unless no feasible alternative exists.” S.C. Code Ann. Regs. 30-12.C.(1)(c) & (d). Thus, bulkheads and revetments that adversely affect public access are prohibited unless 1) upland is being lost due to tidally induced erosion and 2) no feasible alternative exists. Reading this regulation as a whole, both the loss of upland and lack of feasible alternative standards must be met. Even if an applicant could show that either upland would be lost or there is a lack of alternatives, the other standard would still need to be met in order to meet to entirety of this regulation.

Public Access Would Be Adversely Affected

There is no dispute that the revetment/bulkhead project would be constructed entirely on public trust critical areas below the mean high water mark. There is no dispute that these public trust critical areas consist of 20-37 foot wide sandy banks of the Kiawah River. There is no dispute that those 2.63 acres of sandy beach-like public trust tidelands would be covered with concrete blocks extending well below the mean low water line. And there is no disputed that the revetment would extend 40 feet from the critical area line into public trust tidelands.

There is no dispute that members of the public currently use that public trust sandy bank of the Kiawah River in the location of the proposed revetment/bulkhead structure to pull up their kayaks, to picnic, to sit on and watch the dolphins, to swim from and to lay out on. And there is no dispute that those uses would be adversely affected, impaired and eliminated.

In fact, the Final Order finds and concludes that the articulated concrete block mattress will effect “public access to tidelands because it covers a sandy river shoreline.” (R. p. 19). The Order found that kayakers and other boaters pull up on and use the 2.63 acres of bank where the proposed revetment would be constructed, but found that the revetment will not

“unreasonably eliminate” public access and use. (R. p. 15). The Order finds that the mat will convert 2.63 acres of sandy shoreline into hard concrete block, affecting public access, but brushes this aside by concluding that “that impairment is not substantial” and thus does not violate R. 30-12(C)(1) or the Public Trust Doctrine. (R. pp. 19, 21 & 28). The ALJ concludes that the impairment of public access is acceptable because “although the ACB mat degrades the public uses of the shoreline where the mat is approved, it does not eliminate all public access.”¹ (R. p. 27).

The ALJ’s conclusion that impairment of public access is not significant or substantial and that some elimination of public access is acceptable ignores the standard plainly set forth in the bulkhead and revetment regulations. The standard is whether public access is affected period. “Access” is defined in The American Heritage Dictionary as “1. A means of approaching, entering, exiting, communicating with, or making use of . . . 3. The ability or right to approach, enter, exit, communicate with, or make use of . . . 4. Public access.” The American Heritage Dictionary 10 (4th Ed., Houghton Mifflin 2000). Regulation 30-12(C)(1) goes beyond looking at uses, to ensuring that the public’s ability to “make use of” this sandy bank is protected. Thus the question in this case is whether the bulkhead/revetment interferes with the public’s ability to make use of the sandy banks along the Kiawah River.

¹The ALJ makes the unsupported statement that “there are other sandy landing spots at low tide in the immediate vicinity in general and specifically as a result of the reduction in the mat as ordered below.” (R.p. 27). Whether there are other areas that the public can land boats is not the question and is not the standard under R. 30-12.C.(1). The question is whether public access to the critical areas where the proposed structure will go will be adversely affected and all of the evidence indicates that it will be severely affected, if not eliminated. Taking the ALJ’s standard that there are other places to go to its logical extreme would result in wholesale and continued loss of access to public trust shorelines until we are whittled down to one small strip of sandy bank on the entire coast.

All of the testimony and evidence establish that public access to the shoreline of the Kiawah River below the mean high water mark as it currently exists would be eliminated where the bulkhead/revetment is proposed.

The testimony and evidence uniformly establish that 2.63 acres of sandy bank would be covered with concrete blocks. The uncontroverted testimony demonstrates that the site of the proposed revetment is not only available for the public to enter and make use of it, but also that the public actually does use the site for recreation and access. This testimony also established that the site is a unique sandy river shoreline that has no match anywhere in the vicinity. (R. pp. 1077-1078 & 1102-1103).

Plainly, the authorization of a concrete block structure that covers 2.63 acres of sandy banks that are currently open and available for the public to access – to make use of – will be adversely affected and thus the ALJ erred in concluding that the project complies with Regulation 30-12(C)(1)(c) and (d).

The ALJ's conclusion that if the impairment is not substantial or significant and that if access is not completely eliminated, then the project does not violate Regulation 30-12(C)(1)(c) and (d), ignores the plain language of the regulation and is reversible error.

In addition to the critical area regulations that provide protection for public access, the Coastal Management Program ("CMP") contains policies specifically designed to ensure that public access to coastal resources and open spaces is protected. The CMP states that "project proposals which would restrict or limit the continued use of recreational open area or disrupt the character of such a natural area (aesthetically or environmentally) will not be certified where other alternatives exist." CMP, Chapter XII.D at p. III-73. CMP IV.C.(4)(c)(2) & (3) require

that “**structures must not interfere with existing or planned public access unless other adequate access can be provided**” and that “structures shall not impede public use of beaches below the mean high water line.” (Emphasis added).

Thus the CMP requires the Department to consider whether an erosion control structure, like this revetment or bulkhead, would impede the public use of and access to lands below the mean high water line. CMP, Chapter IV(C)(4)(c)(2) & (3) at p. IV-57. The applicable policy includes (1) a requirement that such structures will only be considered as part of a comprehensive erosion control program; (2) a requirement that the structures not interfere with existing or planned public access unless no adequate access can be provided; and (3) a requirement that the structure not impede public use of beaches below mean high water. Collectively, these policies prohibit this revetment/bulkhead because the structure would impede public use and access of nearly a half-mile of sandy beach shoreline below the mean high water mark – a clear prohibition.

Notwithstanding the ALJ’s error of law in applying a new *de minimus* standard that insubstantial or limited incursions that eliminate access are acceptable, there is no evidentiary support for the finding that impairment is not substantial. The uncontested evidence by members of the public that regularly access the banks of the Kiawah River, as well as DHEC’s Bill Eiser, is that the public would lose access if the structure is constructed.

Dr. VanDerwerker, who kayaks on the Kiawah River out to Captain Sam’s Inlet at least a couple times a month, described the area where the half mile long revetment would go as “a really nice beach. . . . at low tide, it’s a wide, gorgeous sandy beach.” (R. p. 1076, lines 20-25). He said that the sandy bank where the revetment is proposed is “unique” because there is no nice

stretch of sand anywhere else along the Kiawah River. (R. pp. 1077-1078 & 1102-1103). He said that every time he paddles out to the inlet he pulls his kayak up on the sandy beach. (R. p. 1077, lines 8-9).

The sandy bank starts at the parking lot of Beachwalker Park and extends around the bend and down towards the spit. (R. pp. 1096 & 1939-1959). He sees kids fishing along the banks because you can stand there, as opposed to other areas where there is marsh grass growing. (R. p. 1079). KDP Exhibit 77 shows the presence of marsh grass begins around the area where the proposed revetment ends. (R. p. 2277). Dr. VanDerwerker said you can't easily stand where there is marsh grass growing. (R.p. 1079).

A 40 foot wide revetment would extend the whole width of the sandy shoreline and extend down into the river. (R. p. 1079). Even if it didn't damage a boat, the revetment would make the banks of the river unusable. Concrete blocks instead of fine sand beach would make recreation a different world, and Dr. VanDerwerker said that it would be like "partying on a parking lot, which I don't get much pleasure from." (R. p. 1082, line 10-11). He said that algae grows on concrete materials on other boat landings that he's been to and causes the concrete to be "slippery and nothing you want to lay out and be on." (R. p. 1081, lines 23-24).

Dr. VanDerwerker said that if the revetment looked anything like the images of the revetment in KDP's Exhibit 6,² showing another site utilizing a concrete block mattress, the banks of the Kiawah River would be "unusable for my purposes and any kind of boating purposes." (R. p. 1082, lines 14-15). He said that it would not be safe to walk on and that it

²KDP admitted Exhibit 6 to demonstrate the appearance of the proposed structure.

would tear up a boat if you tried to pull it up onto the concrete blocks.³ (R. p. 1082).

Sophia McAllister kayaks several times a week in the Kiawah River. She uses the banks of the river to pull up her kayak and go swimming. (R. p. 1141). Even at high tide there is sandy beach for her to pull up her kayak and sit in the sand. (R. p. 1143). If the revetment is constructed as proposed by KDP, Ms. McAllister would not be able to pull her kayak up on the banks of the River. (R. p. 1146).

Sidi Limehouse is a farmer who was born on John's Island on the Kiawah River. (R. pp. 1113-1114). The first time he remembers going to Captain Sam's Spit he was about seven or eight years old and he went out in a boat to go seining along the spit because it was a good sandy place. (R. pp. 1114-1115). Mr. Limehouse described the spit as "a beach, but it's not on the ocean. It's the only beach on the Kiawah on the river side. And it's pure-tee white beach sand" (R. p. 1119, lines 1-4).

Mr. Limehouse seeks to educate people about the values of the spit by taking them to the spit to experience it for themselves. (R. p. 1127). If there was a revetment along the banks of the Kiawah River, he would not be able to take people there and give them the experience of setting foot on the sandy shoreline. (R. p. 1127). His "biggest concern – is the fact that that area, which is a half mile long and however wide it is, will be denied the general public. The general public . . . couldn't use it." (R. p. 1128, lines 10-12).

³There was no testimony that kayaks or boats could be pulled up on an articulated concrete block mattress. Yet the ALJ found that Dr. VanDerwerker, Ms. McAllister and other members of the public could pull up their kayaks onto the concrete blocks. This finding is without any evidentiary support.

During his site visits, DHEC's Bill Eiser saw people walking along the banks of the river in the area of the proposed revetment and he saw kayaks pulled up on the banks and people fishing or crabbing. (R. pp. 1353-1354). Eiser said that the banks of the Kiawah River provide public access to the resources of the river, and that access would be eliminated if a 40 foot wide, half a mile long concrete block structure were placed on the banks. (R. p. 1407). He said that "it's certainly true that if this articulated concrete block structure were built, that it would effectively remove the public's ability to use that half-mile-long shoreline." (R. p. 1354, lines 6-10).

The testimony was consistent that if the sandy shoreline is converted to 2.63 acres of concrete block, the public would not be able to walk on, swim from, picnic on or lay out on the shoreline. The ALJ's finding that these impacts to public access are insignificant is without evidentiary support and constitutes an error of law that compounds the error by failing to apply the "adversely affected" standard in Regulation 30-12(C)(1).

Despite the ALC's finding that adverse affects on public access were insignificant, the regulatory standard does not allow an adverse affects on public access at all, whether they are significant or not. The regulations clearly establish prohibitions on revetments and bulkheads that adversely affect public access, except in very specific and limited circumstances – when both upland is being lost due to erosion and when no feasible alternative exists.

Upland Property is Not Being Lost

The ALJ said that "although public access to the riverbank at low tide may be affected on a very limited basis, Regulation 30-12(C) specifically allows some adverse effect where 'upland is being lost due to tidally induced erosion.'" (R. p. 27).

The ALJ made two errors in concluding that upland is being lost. While it is true that the Spit has experienced some erosion along the Kiawah River, the testimony is consistent that the Spit is in an accretional stage and it is growing both towards the Ocean and Seabrook Island. (R. p. 274O). The spit is accreting faster on the ocean side than any erosion on the river side. (R. pp. 1522 & 2242). The result is that by all accounts the neck of the spit is actually widening, and this widening would occur whether or not a revetment were constructed. (R. pp. 274O, 912 & 1522).

Thus, rather than resulting in a loss of upland, Captain Sam's Spit has actually increased 63.24 acres between 1974 and 2009. Even KDP's expert, Tim Kana, predicts that the Spit will continue to grow for 20-25 more years. (Tr. pp. 717; 757-58).

The Spit is simply moving and shifting as it has done since recorded time.

OCRM's Bill Eiser explained that "this is not a typical revetment permit" because most revetment permits involve a piece of high ground that is bordered on three sides by other high ground "so the erosion on the water side is causing a net decrease of the high ground property." (R. p. 1521, lines 15-18). That is not what is happening with the spit, which is growing on two sides for an overall net increase of upland property. The ALJ erred in concluding that upland is being lost and in concluding that the project did not violate Regulation 30-12.C.(1)(c).

There Are Feasible Alternatives

This Court has made clear that the "findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." *Able Communications, Inc. v. S.C. Pub. Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986); *Spartanburg Regional Medical Center v. Oncology and Hematology Associates of South*

Carolina, LLC, 387 S.C. 79, 91-92, 690 S.E.2d 783, 789 (2010). The Court in *Abel* held that conclusory findings of the Public Service Commission did not provide the Court with sufficient explanation to allow it proper review because it could only speculate as to “the reasons underlying the decision.” *Id.* “This Court will not accept an administrative agency’s decision at face value without requiring the agency to explain its reasoning.” *Kiawah Prop. Owners Group v. Pub. Serv. Comm’n of S.C.*, 338 S.C. 92, 96, 525 S.E.2d 863, 865 (1999).

The ALJ made a conclusory finding that there are no feasible alternatives without providing any evidentiary support or explaining his finding. In the four sentences addressing feasible alternatives, the ALJ said that because there is erosion, there is a “need” to stop this erosion. Then he concluded that there are no feasible alternatives to stabilizing the bank. The ALJ erred in this finding and conclusion.

A feasible alternatives analysis must necessarily look at the purpose of the project, not take a limited look at stopping erosion or stabilizing the bank. No erosion control structure would ever be denied for lack of feasible alternatives if the question was whether there are alternatives to stabilizing the bank. Instead, the feasible alternatives analysis must be conducted in the context of the purpose of the project.

KDP concedes that the purpose of the bulkhead/revetment structure is for the construction of an access corridor for a road and utilities to be used to facilitate residential development on Captain Sam’s Spit. (Resp. Brief pp. 15-17). If there were no development proposed for the Spit, then KDP would not be seeking the proposed bulkhead/revetment structure. Thus, the feasible alternatives analysis must necessarily be viewed in the context of the overall purpose of the proposed project, which is to construct a residential development on the Spit.

In this case, the ALJ did nothing to explain his reasoning and simply made a conclusory finding regarding the availability of feasible alternatives based on his opinion that there was a “need” for the structure. The ALJ’s finding and conclusion are contrary to the uncontroverted evidence that there are feasible alternatives. KDP testified that park and open space are still viable uses for the Spit. And the ALJ’s finding is contrary to the uncontradicted testimony that there are barrier islands like Daufuskie and Dewees have been developed without road access and thus areas like the Spit can be developed using boat access rather than vehicular access requiring an access corridor. (R. p. 1618).

KDP’s only response was Mr. Long’s statement that there would be “reticence of buyers” to purchase land on the Spit without the bulkhead/revetment. Essentially KDP is asking the state to allow it to freeze the location of the critical area line, taking away the public’s right to access public trust areas, and converting these public trust areas to private use in order to give purchasers a sense of security. Such a conversion from public to private is contrary to the U.S. Supreme Court’s decision in *Illinois Central R. Co. v. State of Illinois*, which held that “the control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.” 146 U.S. 387, 453, 13 S. Ct. 110, 118 (1892).

The ALJ made an error of law in concluding that there were no feasible alternatives by basing his conclusion on a conclusory finding without any evidentiary support, and by misapplying the feasible alternative requirement.

2. Regulation 30-12.C.(1)(b) Requires Bulkheads and Revetments to be Constructed Within Eighteen (18) Inches from the Escarpment.

Regulation 30-12.C.(1)(b) states that bulkheads and revetments “may be constructed up to 18 inches from the existing escarpment. In situations where this is not feasible, the Department staff will determine the location of the bulkhead or revetment on a site by site basis.” This provision allows a very limited interference with public access and incursion into public trust critical areas for revetment and bulkhead structures. Yet the proposed structure goes well beyond this limited interference – 38.5' beyond what is allowed. Recently this Court upheld an enforcement action for a violation of the bulkhead and revetment regulations when a bulkhead was constructed more than 18" into the critical areas. *Wayne Hill v. DHEC & Coastal Conservation League*, 389 S.C. 1, 698 S.E.2d 612 (2010).

The uncontested testimony is that the vertical bulkhead structure will be constructed on the escarpment. The uncontested testimony is that the revetment will be constructed seaward of the bulkhead and will extend a full forty (40) feet beyond the escarpment into the critical area.

The ALJ found that the bulkhead would not extend more than eighteen (18) inches into the critical area from the escarpment and he found that the revetment would be forty (40) feet wide and extend below the low water line into the Kiawah River. Yet the ALC concluded that the revetment and bulkhead comply with Regulation 30-12.C.(1)(b).

Because the proposed revetment would extend into the critical area thirty-eight and a half (38.5) feet beyond what is authorized under the specific regulatory criteria for bulkheads and revetments, the ALJ made an error of law in concluding that the revetment complies with Regulation 30-12.C.(1)(b). DHEC likewise erred in authorizing a 270' structure that extends

40' beyond the escarpment or critical area line.

3. Regulation 30-12.C.(1)(a) Prohibits Bulkheads and Revetments that Destroy Stable Marine Bottoms

Regulation 30-12.C.(1)(a) requires bulkhead and revetment structures to “be designed to conform to the critical area line (upland boundary), to the maximum extent feasible, and constructed so that reflective wave energy does not destroy stable marine bottoms or constitute a safety hazard.” The ALC concluded that the project complied with this specific standard.

In this case, the revetment starts at the critical area line and extends forty feet beyond that line into the critical area and below the mean water line into the Kiawah River.

All the evidence indicates that the structure as proposed would destroy the marine bottom by increasing erosion at the “toe,” or lower edge, of the revetment. It is uncontested that by hardening the river with a revetment, the river channel will be constricted, resulting in increased water velocity. (R. pp. 1036-1037). As a result of the proposed structure, all witnesses agreed that there would be reflective wave energy hitting the shore. KDP’s Mitchell Bohannon said that “if you don’t do something to protect that toe [the base of the revetment] against that reflective energy, it’s going to cause even more exacerbated erosion.” (R. p. 606, lines 4-7). The toe of the revetment is the bottom edge, which is located in lands below the mean low water line – the marine bottoms of the river. The exacerbated erosion at the toe is a disruption of the marine bottoms of the river. (R. p. 606).

In order to offset this adverse impact, KDP’s experts recommended that the bulkhead/revetment structure be extended an additional 20 feet in width into the Kiawah River. (R. pp. 655-56; 1977-89). KDP’s experts also recommended the installation of two training

jetties that would extend 125 feet and 150 feet out into the channel of the river. (R. pp. 1977-1989). The training jetties would act to reduce the reflective wave action that would erode and disrupt the marine bottom at the toe of the revetment. The training jetties were not requested as part of this permit, though KDP's experts agreed that without the training jetties or a sixty foot wide revetment, the marine bottom would be disrupted by erosion. (R.pp.655; 1977-89).

The ALJ's conclusion that marine bottoms would not be disrupted is unsupported by any evidence and constitutes an error of law.

B. The Bulkhead/Revetment Violates Regulation 30-11.C.(1) and CMP Policy III.C.3.I(7)

Regulation 30-11.C.(1) requires the Department's decision to be guided by the "extent to which the long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area." S.C. Code Ann. Regs. 30- 11(C)(1); *See also* CMP Policy III.C.3.I.(7) at p. III-14. This rule requires an analysis of 1) the general character of the area and 2) the effects of the project that will result when development comes.

The ALJ misinterpreted R. 30-11(C)(1) by concluding that "the pertinent inquiry is the cumulative impacts of the project **within** the critical area, not the cumulative impacts of future development on the high ground **outside** the critical area. In other words, the area for which the Department has regulatory authority is the critical area, not the high ground **outside** the critical area." (R. p. 22). As discussed below, there is nothing in the statute or regulations that limits the Department's authority to critical areas.

The ALC erred in concluding that in evaluating the effects on the "general character of

the area,” the Department could only look at the change in character of critical areas and cannot look at the change in character of upland areas. The ALJ also erred in ruling that DHEC improperly looked at the stability of the Spit and that the fact that the development that would flow from the construction of the revetment/bulkhead would change the pristine nature of the Spit because it could not consider those impacts that were outside of the critical area.

(R. p. 22).

The language of R. 30-11(C)(1) is identical to the language of Coastal Management Program Policy III.C.3.I(7), requiring an assessment of the long-range, cumulative impacts of the project.⁴ By design the CMP policies apply to areas outside the critical area, thus this

⁴The CZMA establishes two regulatory programs: (1) a permitting program applicable to all uses and alterations of the coastal zone’s “critical areas,” S.C. Code Ann. § 48-39-130; and (2) a certification program, applicable throughout all of the coastal zone, and implemented through review of all state and federal permits for activities in the coastal zone. S.C. Code Ann. §§ 48-39-80 & 48-39-90; see *Spectre v. DHEC, et al.* 386 S.C. 357, 688 S.E.2d 844 (2010).

In a footnote on page 22 of the Order, the ALC goes to great pains to attempt to distinguish this case from *Spectre v. DHEC, et al.* 386 S.C. 357, 688 S.E.2d 844 (2010). While it is true that this case involves a critical area permit pursuant to § 48-39-130 and *Spectre* involved a stormwater permit and coastal zone consistency certification pursuant to § 48-39-80 the language of the applicable critical area regulations and coastal management program policies is identical – the “extent to which the long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area.” S.C. Code Ann. Reg. 30-11(C)(1); CMP policy III.C.3.I(7). The Order says that the “adverse effects in *Spectre* arose from the immediate impact of the project itself, not from some later development which might have arisen if the permit had been granted.” (R. p. 22, fn. 19). This is a misapplication of the *Spectre* case. Though they involved different permits – one a stormwater permit and the other a critical area permit – the requirement to assess the long-range, cumulative effects of the project are the same. There is nothing in this Court’s decision in *Spectre* indicating what the Department’s findings and conclusions on compliance with CMP policy III.C.3.I(7) were, yet it is clear from the decision that this policy does apply, despite the fact that there were no critical areas on the *Spectre* property.

In the *Spectre* case, this Court clearly recognized that the Department does have regulatory authority outside of critical areas. The ALC erred in attempting to limit the Department’s jurisdiction to critical areas.

language necessarily authorizes DHEC to look at impacts on areas outside the critical area. Nothing in Regulation 30-11(C)(1) or the CMP limits the assessment of impacts to only critical area. Nothing in Regulation 30-11(C)(1) or the CMP limits the assessment of change in the “general character of the area” only to changes in critical area. This regulation, and the CMP Policy, set forth an overarching framework within which the Department must consider not only direct impacts to critical areas, but those indirect, long-range and cumulative effects that will flow directly from critical area impacts.

The ALC Order in this case errs in attempting to limit the language of R. 30-11(C)(1) and identical language of CMP policy III.C.3.I(7) to apply only to impacts within the critical areas, not to impacts on areas outside of the critical area. (R. p. 22). To restrict the Department’s authority to only critical areas would essentially render Policy III.C.3.I(7) meaningless.

The ALJ fails to evaluate the intent of Regulation 30-11.C.(1) and CMP Policy III.C.3.I(7) within the context of the Coastal Zone Management Act.

A “statute should not be construed by concentrating on an isolated phrase.” *Foothills Brewing Concern, Inc. v. City of Greenville*, 377 S.C. 355, 363, 660 S.E.2d 264, 268 (2008); *Original Blue Ribbon Taxi Corp. v. South Carolina Dept. of Motor Vehicles*, 380 S.C. 600, 608, 670 S.E.2d 674, 678 (Ct. App. 2008). Rather, “statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers.” *TNS Mills, Inc. v. S.C. Dep’t of Revenue*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998); *see also Rorrer v. P.J. Club, Inc.*, 347 S.C. 560, 568, 556 S.E.2d 726, 730 (Ct. App. 2001) (“[The Court] should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statutes

and the policy of the law”). In ascertaining Legislature's intent, the court is not governed by apparent meaning of words in one clause, sentence, or part of statute, but by consideration of whole act, read in light of conditions and circumstances as they appeared to Legislature and purpose sought to be accomplished. *City of Spartanburg v. Leonard*, 180 S.C. 491, 186 S.E. 395 (1936).

This broader authority to consider the character of the area, its biological and recreational uses and to give consideration to fragile coastal resources is echoed throughout the Coastal Zone Management Act. For example, the General Assembly found that:

- (B) The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development” which “have resulted in the decline or loss of living marine resources, wildlife, nutrient rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use and shoreline erosion. S.C. Code Ann. §48-39-20(B);
- (D) The coastal zone and the fish, shellfish, other living marine resources and wildlife therein, may be ecologically fragile and consequently extremely vulnerable to destruction by man’s alterations.” S.C. Code Ann. §48-39-20(D);
- (E) Important ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values;

S.C. Code Ann. §48-39-20.

Likewise, the State’s policies emphasize the importance of protecting not just critical areas, but the “quality of the coastal environment.” S.C. Code Ann. §48-39-30(A).

The Order erred in concluding that nothing in the statute or regulations allows the department to consider the stability of adjacent highland in action on a critical area permit. (R. pp. 23-24). That interpretation ignores testimony explaining how the instability of the Spit informed the Department’s determination that the Spit is a sensitive and fragile area that the

Act requires to be protected from inappropriate development. S.C. Code Ann. §48-39-30(B)(1). The DHEC decision to eliminate 2,513' of the structure because of the long-range, cumulative impacts is supported by the uncontested evidence, and the ALJ erred in ruling that DHEC could not consider the impacts outside of the critical area.

The evidence demonstrates that the general character of Captain Sam's is a dynamic system. It is an unstabilized inlet erosion zone subject to rapid and dynamic changes. A comprehensive scientific study entitled the Environmental Inventory of Kiawah Island was conducted using historical data back as far as it is available. Dr. John Mark Dean was a principal author of the study and was involved in editing and reviewing the study. (R.pp.1198-1206B). The primary author of the study's Geology and Coastal Processes section was Dr. Miles Hayes, who Dr. Kana describes as "the father of coastal geology in this state." (R. p. 747, lines 22-23).

After reviewing the historical charts and photographs Kana agreed with Hayes' conclusions in the Environmental Inventory and described Captain Sam's Spit as a dynamic area and said that the bank in the inlet zone is unstable.⁵ (R. p. 720). He has not "paid much attention

⁵In the same footnote in which the ALJ went to great lengths to explain why Tim Kana was "eminently qualified," he dismissed a study entitled "Environmental Inventory of Kiawah Island" (R. pp. 1751-1935) that concluded that Captain Sam's Spit was geologically to unstable to develop and recommended that the Spit remain undeveloped. That Environmental Inventory contained numerous sketches and diagrams depicting the significant geologic changes that the Spit has endured, with multiple inlet relocations in support of its conclusions and recommendations to leave the Spit undeveloped because of its dynamic and unstable nature. The ALC Order conveniently overlooks the fact that Dr. Kana utilized the sketches and diagrams taken directly from the Environmental Inventory in numerous published reports and studies that he conducted, adopting the conclusions in the study. (R.pp. 819-842). Dr. Kana's testimony on the Environmental Inventory was contradictory. On one hand, the Order said that we know much more about coastal processes affecting Kiawah Island and that the conclusions and assumptions in the Environmental Inventory have not withstood the test of time. But the ALJ seemed to overlook the fact that Dr. Kana cited the geology section of the Environmental Inventory in scientific reports that he prepared. (R.pp. 819-842).

to the back side of the spit because it's pretty much – it goes where the river goes.” (R. pp. 723-724, lines 24-2). Dr. Young also agreed that the spit itself is very dynamic and subject to immediate and rapid changes. (R. p. 720).

The Spit goes through cycles of breaching, migrating and then accreting every 40 to 80 years. (R. pp. 846-865). In the scientific study, Hayes concluded that Kiawah would continue to accrete for approximately the next 50 years. Kana said that he expects the accretion to continue for the next couple of decades. (R. pp. 715 & 1933). Dr. Kana agreed that we are still within that 50 year accretional period that Dr. Hayes predicted. (R. p. 757). His opinion is consistent with Dr. Hayes' conclusion that we can expect approximately another 25 years of accretion. (R. p. 757).

Dr. Young also said that he would expect the beach to continue to accrete over the next few years, but he cautioned that “I have seen too many things change very rapidly in the coast due to fluctuation of one inlet shoal.” (R. p. 1058, lines 8-10). Dr. Young said that “there is absolutely no doubt from a coastal hazard's perspective that the most vulnerable places on this island . . . are the areas near the inlet.” (R. p. 1044, lines 12-16).

Dr. Kana admitted that Captain Sam's Inlet has relocated itself naturally in the past “a number of times.” (R. p. 742, line 12). Although he didn't have an exact number, he said that the data going back to 1661 shows that the inlet has breached about four times. (R. p. 742). The last breach or washover event occurred around 1948 or 1949.

In 1949 there are what Dr. Kana described as two inlets or small channels. (R. pp. 744 & 1937). If the 1949 aerial image were superimposed on a present-day image of the spit, there would be two inlets cutting across the spit in its present day location. (R. pp. 745-746). Dr.

Dean explained that if you compare the 1949 aerial photograph to a present day image, you would see that they are dramatically different. He said that 60 years is not a very long time in geologic terms to see such a dramatic difference. (R. p. 1228).

In 1922, the U.S. Geodetic Survey published a map showing Kiawah Island. (R. pp. 790 & 1936). Dr. Kana said that in 1922 the Spit would have been mostly all in the ocean, underwater, and he indicated with a marker on CCL Exhibit 2(a) approximately where the Spit would be located today. (R. p. 792).

Dr. Kana said that there was a chart around 1854 that depicted the Spit in close to the same area where it is today. (R. p. 794). He said that the kind of force it would have taken to change the spit from what it looked like in 1854 to 1922 could have been chronic erosion or a storm event. (R. pp. 795-796).

Dr. Kana said that he thinks the Spit is less susceptible to a breach now than it was 30 years ago. (R. p. 865). He said that the possibility of a breach has diminished because there has been "little change along the back side of the spit at the critical turn in Kiawah River adjacent to Beachwalker Park where channel meandering would be expected to cut into the spit. . . The worst erosion along Beachwalker Park at present is along the parking lot in the area where the canoes are sometimes launched, i.e., upstream before the bend of the neck." (R. pp. 872-73, lines 23-8). His conclusion is that the inlet relocations have decreased the erosion along the backside of the spit. (R. pp. 873-874).

As part of his review of the permit application, Bill Eiser provided an evaluation of the general character of the area. (R. p. 1263). He said that the erosion is the worst at the Park, but that it decreases the farther southwest you go until there is almost none at the terminus of the

proposed revetment. (R. p. 1264). He described the location of the proposed revetment as “completely pristine” and “unaltered by any manmade activities.” (R. p. 1265, lines 7-9). He described the upland portion of the spit as “a pristine, undeveloped barrier island spit.” (R. p. 1266). KDP’s Long agreed that it was pristine. (R. p. 425).

A revetment along the banks of the Kiawah River would represent a “rather significant manmade influence in an area that previously has not had any sort of development impacts or madmade impacts to it. So it would certainly change the character of that section of shoreline and . . . the overall character of Captain Sam’s Spit.” (R. p. 1272, lines 14-21). The revetment itself would change the character of the sandy beach along the banks of the river, transforming it from the nicest stretch of sandy beach along the Kiawah River to a hardened, concrete shoreline.

Limited development that the revetment would facilitate would also change the pristine, undeveloped character of the spit. (R. p. 1394). It will no longer be a natural, pristine environment where the land can respond to natural forces that you expect to see in an unstabilized inlet area. (R. p. 1394).

According to Eiser, Captain Sam’s Spit is “one of three tracts of oceanfront land in the entire state where the public has good access, where you can drive and park and walk out and see what a pristine undeveloped piece of oceanfront property looks like, and . . . there is an extraordinary value to the people of South Carolina in preserving that.” (R. p. 1361, lines 11-18). Eiser said that the “maximum benefit to the people is to try to preserve the Kiawah Spit in as unaltered a state as we can.” (R. p. 1371, lines 13-15).

II. The Bulkhead/Revetment Violates the Plain Language of the Coastal Zone Management Act

A. The Project Violates Section 48-39-30's Mandate that Critical Area be Used to Provide the Combination of Uses that Insures the Maximum Benefit to the People

The Coastal Zone Management Act mandates that "Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses that will generate measurable maximum dollar benefits."

S.C. Code Ann. § 48-39-30(D). McAllister, VanDerwerker and Limehouse attested to their uses of the sandy shoreline critical areas for fishing, swimming, pulling up their kayaks, watching dolphins and other wildlife. But rather than insuring continuation of these uses that benefit the people of this State, the Order narrowly looks only at the dollar benefit that would inure to KDP if it developed the Spit, concluding that stopping the erosion will "provide an economic benefit to KDP." (R. p. 19).

Though economic benefit to the permit applicant may have some relevance in considering a permit application, the regulations clearly recognize that maximum dollar benefit does not trump public uses. The critical issue in evaluation of this project is that it will result in the elimination of recreational and aesthetic uses currently enjoyed by members of the public. The Coastal Zone Management Act requires the Department to consider "the extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state." S.C. Code Ann. §48-39-150(A)(7).

But rather than applying this requirement, the Order gives only cursory treatment to public uses that the Act is designed to protect in concluding that there will be no "significant

harm to the public resources or marine or other plant or animal life,” nor will it “significantly impair public access to critical areas.” These conclusions were made without any evidentiary support and contrary to the uncontradicted testimony on public use of and access to the shoreline, as well as harm to marine life. The ALC made an error of law in concluding that economic benefits to KDP override the public benefits to leaving these 2.63 acres of sandy shoreline in their unaltered state.

The ALC’s failure to implement the CZMA Policy mandating that critical areas shall be used to insure the maximum benefit to the people, not necessarily a use that generates the maximum dollar benefit, and brushing aside the benefits to the public is an error of law. S.C. Code Ann. § 48-39-30(D).

The Order summarily concludes that the benefit of constructing the bulkhead/revetment structure “is considerable when compared to leaving the riverbank in its unaltered state” without any support. The only evidence regarding the benefits from preservation of the riverbank in its unaltered state was presented by CCL witnesses Sophia McAllister, Greg VanDerwerker and Sidi Limehouse and DHEC witness Bill Eiser. McAllister and VanDerwerker testified that they used the sandy shoreline often and regularly for a variety of recreational uses, including pulling up their kayaks, swimming from the banks, eating lunch on the sandy banks, watching dolphins strand feed, and a variety of other uses of that sandy shoreline. They testified that if the structure is constructed as proposed, they would be unable to use that shoreline for those purposes. None of this testimony was contradicted.

The revetment/bulkhead structure itself will take 2.63 acres of publicly-used, sandy beach along the Kiawah River – area between the mean high water and mean low waters marks – and

convert it into a concrete shoreline that is inaccessible and unusable for the existing recreational uses. And that conversion of public trust property will be a permanent impact. As the population of South Carolina and the coast grows, there will be more demand for accessible attractive coastal resources like the sandy banks of the Kiawah River and Captain Sam's Spit, yet rather than protecting these resources for future generations, this public resource and the public uses that the Act protects will be gone forever

B. The ALC Erred in Concluding that the Bulkhead/Revetment is Consistent with the General Considerations of § 48-39-150

The Coastal Zone Management Act sets forth general consideration that DHEC must apply in evaluating permits and certifications in the coastal zone. S.C. Code Ann. §48-39-150.

An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. *Altman v. Griffith*, 372 S.C. 388, 642 S.E.2d 619 (Ct. App. 2007); *Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991); *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987). Under the substantial evidence rule, a reviewing court overturns a finding of fact made by an administrative agency if “there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.” *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981) (citing *Independent Stave Co. v. Fulton*, 251 Ark. 1086, 476 S.W.2d 792, 793 (1972) (internal quotations omitted)).

In this case, the ALC utterly failed to point to any evidence to support his findings and conclusions about compliance with the general considerations, despite the undisputed evidence that the project is inconsistent with these general considerations.

Without any evidence at all the Order finds that the revetment would not significantly

imperil the habitat of any marine animals, organisms or plants. The Order does not cite to any evidence or testimony – because there isn't any – that marine life would not be adversely affected.

Without any evidence at all the Order finds that the bulkhead will not destroy a stable marine bottom or constitute a safety hazard. Again, the ALJ fails to point to any evidence to support this finding.

And without any evidence at all the ALC concludes that public access will not be impaired, even though there was testimony to the contrary.

1. The Revetment/Bulkhead Would Adversely Affect the Production of Marine Life

DHEC must consider the “extent to which project would affect production of ... marine life or wildlife or other natural resources in a particular area ...” S.C. Code Ann. 48-39-150(A)(3); R. 30-11(B)(3). The ALC found and concluded that the project would not affect any marine or wildlife, and would likely create more habitats. (R. p. 9). There is simply no evidence in support of these findings and conclusions.

The ACB mattress is made of a series of blocks with large holes in between the blocks. (R. p. 289). The purpose of the holes is to allow spartina and other marsh grass to grow up through them. (R. pp. 289-290). But DHEC's Bill Eiser said that vegetation won't grow in the holes in the concrete blocks at this location because it is a high energy environment with strong currents that would sweep off any sediments or vegetation. (R. pp. 1273-1274). He has seen vegetation grow in these holes in low energy and low wave action environments that can trap sediment, but this is not one of those environments. (R. pp. 1273-1274). KDP's experts agreed

that this is a high-energy area, and recommended increasing the width of the revetment and installing training jetties to deflect that high wave energy. (R. pp. 530-31; 1977-1989).

It is undisputed that the only known nesting ground for the marine turtle, the Diamondback Terrapin, is above the bank of the Kiawah River in the location of the proposed bulkhead/revetment. And it is undisputed that the Terrapins would have difficulty climbing concrete blocks, and it would be impossible for them to scale the vertical bulkhead to access the only known nesting grounds, which would lead to their inability to reproduce.

The only person to testify about impacts to the marine species the Diamondback Terrapin was Dr. Michael Dorcas. The uncontroverted testimony shows that the proposed revetment would have adverse impacts on marine line, with potential dire impacts on Diamondback Terrapins.

Dr. Dorcas became involved in a long-term research project studying Diamondback Terrapins on Kiawah Island in 1995. (R. p. 1556). For the past fifteen years he has been working on that project, which involves capturing the Diamondback Terrapins, a turtle species, and marking their shells in an effort to monitor the terrapin population long-term. (R. pp. 1557-1560). These terrapins are the only species in the U.S. that live in salt marsh habitat. (R. p. 1560).

Dr. Dorcas said that terrapins nest in open sandy habitats above high tide and exhibit extreme site fidelity in terms of where they spend the nonreproductive part of the season, as well as where they nest. (R. pp. 1563-1564). The turtles can be found in the same tidal creeks year after year and nest in the same area year after year. (R. pp. 1563-1564). Dr. Dorcas said that the majority of Diamondback Terrapins on Kiawah Island nest in the "dune area on the

river side of Captain Sam's Spit" just above the area where the proposed revetment would be constructed. (R. p. 1565, lines 22-23). He has also personally observed evidence of terrapins nesting in the dunes above the mean high water in the area of the proposed revetment. (R. p. 1560).

Dr. Dorcas said that it would be difficult for the terrapins to scale a concrete block structure like those seen in KDP Exhibit 6 because it would be difficult for them to dig their claws into the rocks to climb up and gain access to the nesting areas.⁶ (R. p. 1568). He said they could get tilted or stuck in the openings. (R. p. 1568). And he said the mere fact that the structure is manmade could certainly prevent the terrapins from getting to their nesting grounds because if a terrapin has encountered the same sandy habitat over a series of decades and then the habitat is different he doubts that the terrapins would nest there. (R. pp. 1568-1569).

Dr. Dorcas said that if there is a vertical retaining wall that extends above the revetment, as depicted in KDP's permit application, it would eliminate the possibility of terrapins gaining access to the nesting area because they could not climb a vertical structure. (R. pp. 1570 & 2095-2122).

Dr. Dorcas said that even if the terrapins somehow managed to scale the structure and nest, it would be "treacherous" for baby turtles because they would likely become trapped within the openings in the concrete blocks. (R. p. 1569).

Dr. Dorcas said that if the terrapins could not access their nesting area above the banks of the Kiawah River, the Kiawah Island population of Diamondback Terrapins "could

⁶KDP Exhibit 6 was presented by KDP to demonstrate the appearance of the proposed revetment on Captain Sam's Spit. (R.p. 291).

eventually go extinct” because there would be no reproduction to replace the current population. (R. p. 1570, line 7).

The proposed revement/bulkhead would have adverse impacts on the production of this marine species. The structure will reduce or prevent terrapins from scaling the banks to reach their only known nesting grounds. Accessing the nesting grounds is essential for the terrapins to reproduce. If the terrapins cannot access their nesting grounds, the long-term impact could be extinction of the Kiawah Island population of Terrapins. (R. p. 1570).

None of this testimony was controverted.

In addition to the Diamondback Terrapin, living marine organisms live within the sediments between the mean high water and mean low water marks. (R. pp. 1420-1421). These organisms include polychete worms and other benthic organisms that form part of the food chain and are eaten by other animals, like shorebirds. (R. pp. 1421-1422). If the shoreline between the mean high and mean low water lines were covered with a concrete revetment structure, these benthic organisms could not survive and would no longer be providing a food source, thereby reducing the productivity of marine life.

And finally, the ALJ ignored the only evidence on impacts to dolphins. Sophia McAllister said that she has witnessed dolphins “strand feeding” along the sandy banks of the Kiawah River at the “neck” in the precise location where the revetment is proposed. (R. p. 1135-36). She explained that pods of dolphin gather together to find fish and herd them close to the shore. They band together and use their tails and bodies to splash and push the fish onto the sandy banks of the river. (R. pp. 1136-1137). Then they throw themselves onto the sandy shore and eat the fish. (R. pp. 1136-1137). Ms. McAllister has seen the dolphins engaging in this

strand feeding at the bend in the river in the location of the proposed revetment. (R. p. 1138). If the revetment is constructed as proposed, the dolphins would be prohibited from strand feeding. None of this testimony was contradicted, thus the only conclusion to be reached is that the productivity of the dolphin will be adversely impacted because it will be unable to access a productive feeding areas.

There was no evidence presented contrary to that discussed above related to impacts on marine life, and the ALJ erred in concluding that there would be no adverse affects on marine life or wildlife.

2. The Bulkhead/Revetment Would Exacerbate Erosion

DHEC must consider the “extent to which the activity could cause erosion ...;” S.C. Code Ann. 48-39-150(A)(4); R. 30-11(B)(4). As discussed in I.A.1.c. above, because KDP’s own experts opined that the revetment/bulkhead structure would cause erosion at the toe of the structure and within the channel bed, this impact is grounds, in part, for denial of the revetment/bulkhead permit.

3. The Bulkhead/Revetment Will Have Negative Effects on Endangered Species and a Geographic Area of Particular Concern

DHEC must consider the “extent to which the development could affect the habitats for rare and endangered species of wildlife ...” 48-39-150(A)(6); R. 30-11(B)(6). And DHEC must consider “the extent and significance of negative impacts on GAPCs ...” R. 30-11(C)(3). CMP Chapter IV, A(2)(a)(8) defines GAPCs as “All designated endangered species habitats are Geographic Areas of Particular Concern.” The CMP identifies that the priority of uses of GAPC is to 1) protect designated critical habitat; 2) maintain natural functions of areas designated as critical habitat.

Piping Plovers are a species of bird that is listed as Endangered under the federal Endangered Species Act. There are two places on Kiawah Island where the U.S. Fish and Wildlife Service has designated critical habitat units for the Piping plovers pursuant to the Endangered Species Act, 16 U.S.C. 1531, *et seq.* (R. p. 952). One of the critical habitat units, SC-10, is on the west end of Kiawah Island and encompasses a large portion of Captain Sam's Spit below the mean high water mark. 50 C.F.R. Part 17 at 36065. The U.S. Fish and Wildlife Service found that the birds need "spits for feeding and roosting." (R. p. 999); 50 C.F.R. Part 17 at 36065.

Because Captain Sam's Spit contains designated critical habitat, it is considered a Geographic Area of Particular Concern ("GAPC") under the Coastal Management Program. (R. p. 1378). GAPC's are given the highest level of protection under the Coastal Management Program.

Piping plovers "winter" at the Spit. When birds winter, their goal is to fatten up and put on weight so that they can survive any overwintering events and to put on fuel for their migration back to their breeding area. (R. pp. 948 & 1315). They do two things to put on fuel while wintering: eating and resting. (R. pp. 950 & 1315). Dr. Hughes explained that putting on fat is not inconsequential because it is 20 - 40% of their body weight gets put on over the winter months. (R. pp. 1315-1316). They spend 76% of the daylight hours foraging. (R. pp. 1316 & 1695). Not putting on sufficient fat leads to higher mortality and they essentially die in migration. (R. p. 1317).

The birds forage on mud flats, sand flats, algal mats, and coastal lagoons in the dynamic intertidal zone that changes throughout the day. (R. pp. 950 & 1317-1318). They prefer inlets

because they have mud flats and sand flats. (R. pp. 951-952).

The uncontested testimony is that if the bulkhead/revetment is constructed, KDP will construct a residential development that will be inhabited by people that use the beach areas at Captain Sam's Spit which consist of designated critical habitats for the piping plover. All witnesses agreed that human activity, for example humans and pets walking on the beach, cause the endangered Piping plovers to "flush" or fly away to another place where there is no disturbance. (R. p. 975; 1322). Dr. Hughes, Mr. Walton and Mr. Mollenhauer all agreed that human disturbance occurs when beachgoers "flush" birds, making them fly away from the human activity to protect themselves from perceived predators. (R. pp. 975 & 1322). All witnesses agreed that flying is the most energy-intensive activity that a bird does. (R. p.992; 1697-98; 1321). And all witnesses agreed that while the birds are wintering on the Spit, the purpose is to reserve energy and build up fat reserves for their migration back north to their nesting grounds. (R. p. 948; 1315-1316).

Dr. Hughes said that the primary threat to piping plovers is chronic human disturbance. (R. p. 1319). She said that chronic disturbance is "really small individual disturbances happening repeatedly over the course of multiple days, multiple months, across the wintering period." (R. p. 1320, lines 8-11). Human disturbance includes dogs and cats and other animals that tend to follow humans and can be something as simple as walking by. (R. p. 1320).

Dr. Hughes, Mr. Walton and Mr. Mollenhauer all agreed that human disturbance occurs when beachgoers "flush" birds, making them fly away from the human activity to protect themselves from perceived predators. (R. pp. 975 & 1322).

Additionally, the U.S. Fish and Wildlife Service indicated that it is concerned that the

development of the spit that will be facilitated by the proposed revetement would have adverse impacts on the piping plovers. (R. pp. 1362 & 1499). For that reason, the Fish and Wildlife service recommended that the permit be denied. (R. pp. 1388-1389).

The ALJ erred by failing to consider the extent to which the development would impact the piping plovers and their habitat.

4. The Revetment/Bulkhead Will Have Adverse Impacts on Public Access and Will Affect the Value and Enjoyment of the Public as an Adjacent Owner

Finally, DHEC must consider the “extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources;” and “the extent to which the proposed use could affect the value and enjoyment of adjacent owners.” S.C. Code Ann. 48-39-150(A)(5) & (10); R. 30-11(B)(5) & (10).

The ALJ concluded that the public is not an adjoining owner because it does not have access to the banks of the river by way of KDP’s upland property at Beachwalker Park. (R. p. 19). The ALJ misinterpreted the League’s arguments regarding adverse effects on the value and enjoyment of adjacent owners, and in doing so failed to properly evaluate the project in accordance with this provision. The public’s access to the 2.63 acres of shoreline is by way of the Kiawah River, which is public property, not KDP’s upland property as the ALJ erroneously suggested. And the League asserts that under the Public Trust Doctrine the public is the adjoining owner of the 2.63 acres of critical area shoreline over which KDP wishes to construct a bulkhead/revetment system. As such, consideration of “the extent to which the proposed use could affect the value and enjoyment of adjacent owners” would be how the

project would affect the value and enjoyment of those 2.63 acres of sandy beach-like area below the mean high water mark. And the testimony from members of the public as adjacent owners and beneficiaries of these public trust resources was consistent that the value and enjoyment would be significantly decreased, and that access to the tidal and submerged lands would be eliminated for the half-mile area that the revetment is proposed.

For these reasons, the bulkhead/revetment is inconsistent with the above general considerations, which support reversal of the ALJ's conclusions.

III. The Permit Violates the Public Trust Doctrine Which Protects Public Recreational Uses of the Banks Along the Kiawah River

The Public Trust Doctrine is the foundation for the Coastal Zone Management Act, critical area regulations and the CMP. Under the Public Trust Doctrine, tidelands (areas between HWM and LWM), submerged lands and navigable waters are held in trust for and subject to public purposes and rights of navigation, boating, bathing, fishing, recreation and enjoyment. *Sierra Club v. Kiawah Resort Associates*, 318 S.C. 119, 456 S.E.2d 397 (1995); S.C. Opinion Attorney General 329 (Dec. 10, 1970). “[N]ot only does the State hold title to this land in *jus privatum*, it holds it in *jus publicum*, in trust for the benefit of all the citizens of this State.” *McQueen v. South Carolina Coastal Council*, 354 S.C. 142, 149, 580 S.E.2d 116, 119 (2003); *Sierra Club v. Kiawah Resort Associates*, 318 S.C. 119, 456 S.E.2d 397 (1995). The public has the right to use public trust lands and waters for recreational purposes, including fishing, bathing, swimming and other recreational uses. S.C. Opinion Attorney General 329 (Dec. 10, 1970); *US v. Kane*, 461 F.Supp. 554 (EDNY 1978); *Martin v. Waddell*, 41 U.S. 367 (1842).

Specifically, in this case, the public has a right to pull up kayaks and boats on the sandy

banks of the Kiawah River, and to swim, fish and crab and sit on the banks of the river in the location of the proposed revetment. If the revetment/bulkhead structure are constructed as requested, these public rights will be eliminated, resulting in a violation of the Public Trust Doctrine.

The ALJ appeared to recognize this fundamental inconsistency of authorizing this structure and the public's rights to use public trust resources under the Public Trust Doctrine, but attempted to get around the fact that 2.63 acres of public trust land would be covered by a concrete structure by citing to this Court's decision in *Sierra Club v. Kiawah Resort Associates*, 318 S.C. 119, 456 S.E.2d 397 (1995). The Order cites *Sierra Club* and concludes that a project must "substantially impair the public interest in public trust lands and waters." As discussed above, the ALJ made an error in finding that the impairment is not substantial despite the substantial evidence in the record. And the ALJ misapplied the *Sierra Club* case.

In *Sierra Club*, the public trust doctrine was raised in connection with a dock permit. The public access issue was whether the public would still have access to oyster beds if the docks were constructed. The Court found that there was testimony the burden on public access to oyster beds was "no substantial," i.e., not unreasonable. And all the evidence in that case indicated that the public could still access oyster beds, which were the public trust resource in question.

In this case we are not talking about docks or access to oyster beds. We are talking about public access to shoreline and beaches and a half-mile long, 40' wide concrete block structure covering that shoreline. It is access to this public trust resource that will be eliminated. And in this case the evidence is that 2.63 acres of this sandy bank will be covered with concrete blocks,

completely eliminating public access.

The ALJ's conclusion that a structure which will cover 2.63 acres of sandy beach-like banks of the river, forever removing it from public use, is consistent with the Public Trust Doctrine is an error of law.

IV. The ALC Erred by Finding and Concluding that the DHEC Board's Interpretation of the Coastal Management Program was Not Entitled to Any Deference

While this case was pending in the Administrative Law Court and before a decision was issued by the ALC, Kiawah Development Partners, II, applied for a stormwater permit to construct a 340-foot long, interlocking, sheet pile wall system along the narrowest portion of Captain Sam's Spit (referred to as the "bite" or "neck" of the spit in the Order of January 22, 2010). The stated purpose of the project is to "protect KDP's land including a possible future road and possible utilities." (R.p. 229). The proposed sheetpile wall would thus "protect" the same area proposed to be protected by the bulkhead/revetment system in the case pending before this Court.

DHEC was required to review the stormwater permit for the sheetpile project for consistency with the Coastal Management Program ("CMP"), just as it had with the bulkhead/revetment critical area permit, pursuant to the S.C. Coastal Zone Management Act which requires all state and federal permit to be certified as consistent with the Coastal Management Program. S.C. Code Ann. § 48-39-80. The Act's requirement for certification that a project is consistent with the Coastal Management Program, and the validity and applicability of the CMP to stormwater permits, was recently affirmed by this Court in *Spectre v. DHEC, et al.*, 386 S.C. 357, 688 S.E.2d 844 (2010).

The CMP policies that apply in this case are the same as the policies that apply to the sheetpile stormwater project – the guidelines for all projects, policies applicable to Geographic Areas of Special Concern (GAPCs), and policies applicable to Areas of Special Resource Significance (barrier islands, dune areas).

On October 27, 2009, the DHEC staff issued the stormwater permit and coastal zone consistency certification. (R. 229-42).

The S.C. Coastal Conservation League (“League”) filed a Request for Final Review Conference with the DHEC Board pursuant to S.C. Code Ann. § 44-1-60. The Board granted the League’s request and conducted a final review conference on December 10, 2009. At the conclusion of the conference, the Board unanimously voted to overturn the staff decision to issue consistency determination. The Board issued a formal agency opinion setting forth the agency’s policy interpreting and applying the S.C. Coastal Zone Management Act and the CMP in its Final Agency Decision on January 7, 2010. (R. pp. 243-49).

In reversing staff’s decision, the Board did two things that are directly relevant to this case. First, it affirmatively adopted the staff’s decision in the case pending before this Court. Second, as the agency given the authority to implement the CZMA, it utilized this authority to set department policy in applying the Coastal Zone Management Act and Coastal Management Program.

This Court must give “deference to an administrative agency’s interpretation of an applicable statute or its own regulation.” *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) (citing *Brown v. DHEC*, 348 S.C. 507, 560 S.E.2d 410 (2002)). “The construction of a regulation by the agency charged with executing the regulations is entitled to

the most respectful consideration and should not be overruled without cogent reasons.” *Converse Power Corp. v. DHEC*, 350 S.C. 39, 48, 564 S.E.2d 341, 346 (Ct. App. 2002); *see also Pressley v. REA Const. Co., Inc.*, 374 S.C. 283, 288, 648 S.E.2d 301, 303 (Ct. App.2007).

In interpreting the CZMA in its Final Agency Decision, the Board concluded that the staff failed to adequately consider the “possible long-range, cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area.” (R.p. 246); CMP, Policy C.3.I.7 at p. III-14; *see also* S.C. Code Ann Regs. 30-11(C)(1). The Board noted that “the primary purpose [of the project] . . . is to protect land for an access corridor including a possible future road and utilities to facilitate a residential development on the Spit.” (R.p. 245). The Board said that the Department has an obligation under the CZMP to consider impacts flowing from that development in the consistency review. And the Board concluded that “given the pristine nature of the Spit and the Kiawah River in the vicinity, the lack of human improvements, the use of the area around the Spit as a public park, and the fact that much of the Spit is a GAPC (habitat to threatened or endangered species) and an area of special resource significant (barrier island, dune areas, and public open space),” the consistency determination must be denied because of the long-range cumulative effects of the project on this area.

The Board was clear that the agency’s policy in reviewing projects under the standard of CMP policy C.3.I.7, which is identical to R. 30-11(C)(1), is to consider impacts that would be a direct result from the proposed project on the nature and character of the area, whether those impacts are within the critical areas or outside the critical area.⁷ The long-range, cumulative

⁷The League notes that the consideration of “possible future development” presumes development on highground, outside of the critical area, as other portions of the Act and regulations prohibit filling in critical areas for residential development. S.C. Code Ann. Regs.

impacts of both the sheetpile wall and the bulkhead/revetment are the same: stabilization of a migratory inlet/spit system; residential development that will increase human and pet activity within areas designated as critical habitat under the Endangered Species Act; and residential development that will take a pristine, undeveloped natural area and change its character to one of development including houses, people, pets, cars, road, utilities and other infrastructure. The Board concluded that these long-range, cumulative impacts were inconsistent with CMP policy C.3.I.7, and therefore the consistency certification must be denied. *See* CMP at III-14. And those conclusions are entitled to deference under *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003).

In addressing the policies of the Coastal Zone Management Act, the Board affirmed that the agency must give heightened protection to the sensitive and fragile areas in accordance with the Act's policy at S.C. Code Ann. § 48-39-30(B)(1). Recognizing the Spit to be one of these sensitive and fragile areas, the Board affirmed the agency policy that these areas receive greater protection and thus more weight when balanced against social and economic growth in the coastal zone. The Board concluded that the sensitive and fragile nature of the Spit, along with the fact that it is currently unimproved and completely undeveloped, requires the agency to use extra caution and protect this area from inappropriately-sited development.

The Board also concluded that if the shoreline continues to erode, the sheetpile wall will be in critical area and exposed. If that occurs, the Board found that the wall would have significant impacts in critical areas by changing the shoreline "from one that is sandy and gently sloped and easily accessed by the public to one that is a vertical escarpment comprised of a sheet

30-12.G.(2)(a).

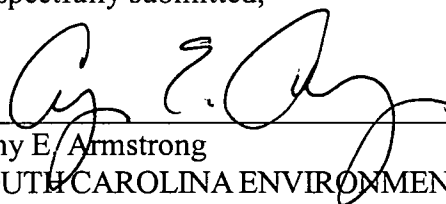
pile wall inaccessible by the public.” (R. p. 248). The Board ruled that the public’s use of the shoreline of the Kiawah River below mean high water would be impeded and the character of the River and sensitive and fragile Spit would be disrupted, all in violation of the policies of the Coastal Management Program and the policies of the Coastal Zone Management Act. CMP, Policy I.7 at p. III-14 & S.C. Code Ann. § 48-39-30(B)(1).

The staff’s permitting decision in this case became the final agency action when the DHEC Board failed to conduct a final review conference. Yet the Board took no affirmative action on the revetment/bulkhead project to set agency policy as it relates to evaluation of long-range, cumulative impacts in the context of possible future development or of protecting sensitive and fragile areas. But in the sheetpile stormwater project, the Board did take affirmative action and issued a formal written agency opinion. The Appellants assert that the ALC erred in failing to reconsider its decision in light of the formal written opinion from the governing body of the agency charged with implementing, applying and interpreting the Coastal Zone Management Act and Coastal Management Program, in accordance with *Brown v. BiLo*.

CONCLUSION

WHEREFORE, the Appellant the South Carolina Coastal Conservation League seeks an Order reversing the Amended Final Order and Decision of the Administrative Law Court, and reversing the issuance of the permit as authorized by that Order and the permit as authorized by DHEC.

Respectfully submitted,



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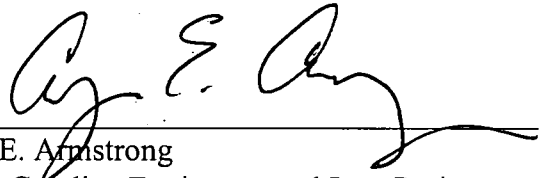
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The undersigned does hereby certify that this Final Brief complies with SCRAP Rule 211(b).



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November 3, 2010

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

S.C. Supreme Court

Docket No. 09-ALJ-07-00029-CC

Kiawah Development Partners, II, Respondent,

v.

South Carolina Department of Health and Environmental Control, Appellant.

Docket No. 09-ALJ-07-00039-CC

South Carolina Coastal Conservation League, Appellant,

v.

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

Of Whom

South Carolina Department of Health and Environmental Control is, , Appellant,

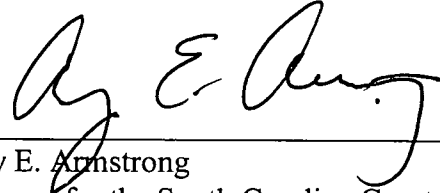
and Kiawah Development Partners, II, is, Respondent.

CERTIFICATE OF SERVICE

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

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A handwritten signature in black ink, appearing to read "Amy E. Armstrong". The signature is written in a cursive style with a horizontal line underneath it.

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November 4, 2010