Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Regulatory Sources

Secondary Sources

Statement of Issues on Appeal

I. Does substantial evidence support Judge Anderson's finding that the bulkhead/revetment structure requested by KDP complies with the specific project standards of section 30-12(C)(1) of the Administrative Law Code governing bulkheads and revetments that are not on the oceanfront?

II. Does substantial evidence support Judge Anderson's finding that the bulkhead/revetment structure requested by KDP complies with the statutory policy considerations referenced in section 48-39-150(A) of the South Carolina Code and section 30-11(b) of the Administrative Law Code?

III. Does substantial evidence support Judge Anderson's findings that the bulkhead/revetment structure requested by KDP complies with the other general considerations referenced in section 48-39-150(A) of the South Carolina Code and section 30-11(b) of the Administrative Law Code?

IV. Since Judge Anderson fully considered the potential impacts of the possible development on the highland outside the critical area and made findings based on the evidence before him, would his interpretation of section 30-11(c)(1) of the Administrative Law Code, i.e., to require consideration only of the probable impacts on the *critical area*, constitute harmless error were this Court to disagree with his construction of the applicable regulation?

V. Does substantial evidence support Judge Anderson's findings that the bulkhead/revetment structure requested by KDP and the potential residential development on the highland of Captain Sam's Spit comply with the policies in the Coastal Zone Management Plan?

VI. Does substantial evidence support Judge Anderson's finding that the bulkhead/revetment structure requested by KDP does not substantially impair the public interest in the public trust lands and waters?

VII. Did Judge Anderson provide a sufficient predicate for his findings and conclusions?

VIII. Did Judge Anderson, charged with the authority to render a de novo determination on this permit application, have jurisdiction to reduce the size of the proposed structure based on the evidence presented in the hearing before him?

IX. Is the federal government's inclusion of the highland adjacent to the project site in the John H. Chaffee Coastal Barrier Resources System a pertinent consideration in evaluating this critical area permit application where the governing statutes and regulations make no reference to the legislation?

Statement of the Case

This is an appeal from a final determination of the Administrative Law Court ("ALC") granting, with conditions, the permit application of Respondent, Kiawah Development Partners, II ("KDP"), to construct an erosion control structure in the critical area of a tidal river. On February 29, 2008, pursuant to section 48-39-150(C) of the South Carolina Code, KDP applied to the South Carolina Department of Health and Environmental Control's ("DHEC's") Office of Ocean and Coastal Resource Management ("OCRM") for a critical area permit to construct an erosion control structure comprising a combination of a bulkhead with a revetment, 2,783' long and 40' wide, to protect its highland property from continuing to erode and slough off into the Kiawah River. **R. pp.295:4-295:12; R. pp.2095-2122.**

On December 18, 2008, OCRM staff issued a permit authorizing KDP to construct a 270' by 40' bulkhead and revetment in lieu of the full-length structure for which KDP applied. **R. pp.340:2-341:13; R. pp.2231-2241.** Pursuant to section 44-1-60(E) of the South Carolina Code, KDP sought a final review conference by the DHEC Board. **R. pp.83-87.** The DHEC Board declined to schedule a review conference. **R. pp.79-82.**

As a result, KDP proceeded to request a contested case hearing before the ALC pursuant to sections 1-23-600(A) and 44-1-60(F) of the South Carolina Code. **R. pp.92-106.** Appellant South Carolina Coastal Conservation League ("CCL") also requested a contested case hearing to challenge OCRM staff's decision to authorize the 270' by 40' reduced structure. **R. pp.107-111.**

From August 24 to August 28, 2009, the Honorable Ralph King Anderson, III, Chief Judge of the ALC, presided over a consolidated contested case hearing. **R. pp.74-48; R. p.267.** On January 22, 2010, Judge Anderson issued an order granting KDP a permit to construct the bulkhead/revetment structure, subject to conditions that reduced its size. **R. pp.41-71.** OCRM and CCL (collectively, "Appellants") separately moved to reconsider Judge Anderson's order. **R. pp.220-261.** As part of its motion to reconsider, CCL also requested that the ALC ope n the record to consider a final decision of the DHEC Board in December 2008, on a separate application by KDP for approval of a storm-water management plan for a separate structure on KDP's highland. **R. pp.220-225.**

On February 26, 2010, Judge Anderson issued an Amended Final Order and Decision, reiterating the findings and conclusions from his previous order. **R. pp.1-31.** On the same day, Judge Anderson entered a separate order denying Appellants' motions to reconsider and CCL's motion to open the record and admit new evidence. **R. pp.32-39.** OCRM and CCL served separate Notices of Appeal of Judge Anderson's orders on March 26, 2010 and March 29, 2010, respectively. On June 10, 2010, Appellants' appeal was certified to this Court pursuant to a motion filed by CCL.

Statement of Facts

I. The Property

Captain Sam's Spit (the "Property" or the "Spit") consists of a peninsula of approximately 150 acres of highland located on the southwest end of Kiawah Island, a barrier island with over ten miles of beachfront along the Atlantic Ocean. **R. p274MM:2-4, pp.275:17-276:6.** The Property is one and one-third miles long, ranges in width from

approximately 500 feet to 1400 feet, and is surrounded on three sides by water—the Atlantic Ocean, Captain Sam's Inlet, and the Kiawah River. **R. p.274TT:10-19, pp.370:19-371:21, p.456:4-17, p.2040.**

Captain Sam's Inlet separates Kiawah Island from Seabrook Island and connects the Kiawah River to the Atlantic Ocean. **R. p.703:9-704:16, p.2040.** The narrowest portion of the Property, referred to as the "neck", connects the Property to the remainder of Kiawah Island. For ease of reference, the aerial photograph labeled KDP 0338, incorporated within KDP's Exhibit 4 and included in the Record on Appeal at Page 2040, provides an overview of the Property. **R. p.2040.**

The Property is now owned by KDP, one of the "sister" entities comprising the current master developer of Kiawah Island, which acquired title to the undeveloped property and amenities on Kiawah Island in 1988. **R. pp.274II:24-274JJ:4; p.419:24-25.**

A. Accretion on Kiawah Island and the Property

The Property has consistently and significantly accreted since at least 1949, a fact acknowledged by Appellants in their briefs. **R. p.888:12-23.** OCRM also recognized the ongoing "stability" of this end of Kiawah Island in the official "State of the Beaches" reports issued for years 2008 and 2009:

> Kiawah Island is one of the most stable barrier islands in the state, although the eastern and western ends of the island are more dynamic due to their proximity to inlets . . . . Stations 2615 through 2645 are located at the western end of Kiawah, where land use consists of undeveloped property, a beach park, single-family homes, and some multi-family structures. This is usually one of the most stable sections of Kiawah Island.

R. p.1451:15-25, pp.1452:17-1453:12, pp.2245-2246, pp.2250-2251.

Judge Anderson received the testimony of two coastal geologists, Tim Kana, Ph.D., and Robert Young, Ph.D., who corroborated the growth of the Property over the last 60 years. Dr. Kana, who holds a doctorate in coastal processes and erosion, has been studying Kiawah Island since around 1978. **R. pp.700:16-701:16, p.706:1-18, p.709:16-19, pp.2257-65.** In his Amended Final Order and Decision, Judge Anderson found Dr. Kana "eminently qualified to explain the coastal processes affecting Captain Sam's Spit." **R. p.4, note 6.**

Dr. Kana explained that Kiawah Island contains one of the healthiest beaches on the east coast in terms of its stability or tendency to accrete. **R. p.708:14-20.** According to Dr. Kana, unlike many other beaches in South Carolina or on the east coast, the beach along Kiawah Island has accreted "for at least 150 years." **R. pp.708:14-709:8, p.715:6-8.** He testified that maps of Kiawah Island and the vicinity prior to this time "were kind of sketch maps and not very reliable, in my opinion." **R. p.715:8-15.**

At the contested case hearing, Dr. Kana discussed the causes of the accretion on Kiawah Island and the Property. Periodically, huge volumes of sand release from enormous shoals in the Stono Inlet at the east end of Kiawah Island. **R. pp.706:23-707:3, p.758:3-22.** This sand migrates along the shore and spreads laterally from east to west. **R. p.707:3-14, p.758:3-22.** The cyclical tidal flows through Captain Sam's Inlet create an ebb-tidal delta seaward of the inlet that acts as a "trap or barrier" for the sand drifting southwesterly, directing it towards the Property and Kiawah Island. **R. p.712:20-714:4.** This ebb-tidal delta "will hold in place the immediate updrift shoreline in this

vicinity," i.e. the ocean shoreline of the Spit. **R. p.713:4-8.** This "trapped" sand accretes and gradually builds up the beach of the Spit. **R. p.707:15-21.**

Dr. Kana explained that the Property has built out toward the Atlantic Ocean hundreds of feet, forming rows of high, vegetated dune ridges that run parallel to the beach. **R. p.709:5-8, pp.721:18-723:5.** He testified that the average rate of accretion ranges from four to ten feet per year all along the oceanfront portion of the Property during any period of time over the last forty years. **R. p.891:14-19.** Dr. Kana conservatively opined that this accretion would continue for the next twenty years and confirmed that the source of this sand at the Stono Inlet would "last for many, many decades, centuries, literally." **R. p.717:2-11, p.772:12-16.** He further opined that "you'll still have the integrity of those [dune ridges on the Spit] in place, in my opinion, over the next several decades." **R. p.907:21-25.** Dr. Kana stressed: "I would say unequivocally that the condition of the [Property] today is probably as healthy as it's ever been in historic times." **R. p.769:8-11.**

Dr. Kana gave several reasons why the recommendations as to the Property in the chapter titled "Coastal Processes and Geomorphology" in a 1975 environmental inventory of Kiawah Island extensively relied upon by Appellants, are long outdated. **R. pp.747:1-749:2, pp.753:10-759:9, p.822:11-24, pp.888:12-893:5, pp.894:19-895:4, pp.897:15-899:17, pp.1751-1935.** Although Dr. Kana references the 1975 environmental inventory in his subsequent publications about Kiawah Island, he explained that the references were "just a review of previous research that had been done in the area." **R. p.834:16-20.** The 1975 report made an advisory recommendation that, at the time, certain areas likely were too geologically unstable for development,

including the Property, the entire eastern end of Kiawah Island, and the entirety of the beachfront of Seabrook Island (the latter two are now locations of extensive and successful beachfront residential development). **R. pp.1832, 1887.**

Judge Anderson relied on Dr. Kana's explanation for doubting the veracity of the 35 year-old report in finding "that the coastal geological chapter of the 1975 Environmental Inventory is of little or no probative value, and the testimony of Dr. Kana is more credible." **R. p.4, note 6**. Dr. Kana explained that much more is known today about the accretion and stability of the Property than was known almost four decades ago, when the study was compiled. **R. pp.754:17-755:13.** For instance, Dr. Kana referenced a portion of the study which noted over-wash at the neck of the Spit within the last decade, i.e., the decade prior to 1975. **R. p.755:3-13, p.1886.** He explained that "in the last 30 years, since 1975, there have not been washovers anywhere along that portion of the neck of the spit and there's much more that we know about the spit growth today than this group knew back in 1974, in my opinion." **R. p.755:3-13.** Dr. Kana emphasized that there had not even been overwash of any dune on the Spit as a result of Hurricane Hugo in 1989 or any other hurricane since 1975. **R. p.889:9-13.**

In addition, Dr. Kana stressed that the source of the sand accreting on the Spit had changed since 1975:

> The other thing that I would clarify here is that the source of sand that's referred to by Hayes, et al, is the erosion of Folly Beach and Morris Island, the updrift islands immediately to the east and north; however, much of the sand that we're seeing coming onto Kiawah Island originates in the present Stono Inlet ebb-tidal delta.
> Studies after, subsequent to this report . . . have shown that Stono Inlet holds and traps upwards of 100 million cubic meters of sand or about 120,000 cubic yards of sand in its ebb-tidal delta complex . . . .

> . . .
> So that is a subtle change that I think we've learned since this report was done. Remember, this was one of the earliest reports of the coastal geology of the South Carolina Coast. It was done in—fieldwork in 1974, two years after Miles Hayes moved to South Carolina.

R. pp.758:3-759:9.

As a result, in the over thirty years Dr. Kana has been studying Kiawah Island, four or five rows of dunes have formed on the oceanfront portion of the Property. **R. p.722:12-18.** These dunes appear to be healthy, with significant vegetative growth and no signs of any wash over of the front dune even in the hurricanes since then. **R. pp.722:20-723:5, p.889:9-13.** In this respect, he explained that Litchfield Beach, Pawley's Island, Central DeBordieu Island, Folly Beach, Edisto Beach, and portions of Hilton Head Island have far less dune protection than the Property. **R. pp.732:24-733:6.** These distinct, well-formed dune rows Dr. Kana described and emphasized are clearly visible in the aerial photographs of the Spit. **R. pp.274XX:4-20, pp.733:15-734:19, p.887:6-12, pp.2042-2044, pp.2056-2063.**

Dr. Kana explained that one of the principal reasons the beachfront of the Property is so healthy is the two man-made relocations of the inlet overseen by him after the 1975 report. **R. p.710:5-711:14.** Because of the southwesterly drift of sand along the coast, sand builds up on the Spit and the inlet migrates to the southwest towards Seabrook Island, eroding Seabrook's beach. **R. pp.703:25-705:22, pp.706:19-709:8.** To help nourish the Seabrook beach, he engineered the relocation on the inlet back to a location closer to Kiawah Island two times, in 1983 and 1996, with KDP's support. **R. pp.709:20-711:14.** These relocations have resulted in moving the inlet's

ebb tidal delta back towards the Property where it also continues to direct sand eastward towards the Spit and Kiawah. **R. pp.712:11-714:4.**

The Property is narrowest in a location described as the "neck," where the peninsula is approximately 500 feet wide and connects to the rest of Kiawah Island; it becomes progressively wider moving towards Captain Sam's Inlet, reaching a width of approximately 1400 feet. **R. pp. 370:23-371:3.** Dr. Kana opined that the chance that the Property might breach at its neck in a major hurricane is "very small" as "it hasn't breached and because the oceanfront is accreting at a rapid rate and because there is such a large sand supply along the front beach of Kiawah Island that continues to feed this area." **R. p.728:1-15, pp.873:20-874:6.** Dr. Kana further explained that the storm and surge conditions of a magnitude to possibly breach the neck would likewise devastate the remainder of Kiawah Island, including existing development. **R. pp.729:23-730:15.** Dr. Kana disagreed with the Appellants' suggestion that the Property was "fragile" or "unstable" in the sense that it could not support the limited residential development KDP proposes. **R. p.898:1-9, p.899:12-16, p.906:13-19, pp.908:25-909:6, pp.909:18-910:2.**

Dr. Young, who testified as an expert witness on behalf of Appellant CCL, concurred in many of Dr. Kana's findings. In comparison to Dr. Kana, who had studied Kiawah Island for over thirty years, Dr. Young had been to the Property only six times. **R. p.709:6-19, p.1019:6-11.** After extensive analysis of their respective qualifications, Judge Anderson expressly found that Dr. Kana's expert testimony "was simply more persuasive than that of CCL's expert, Dr. Young." **R. p.4, note 6.**

Nevertheless, like Dr. Kana, Dr. Young characterized the Property as "robust," with several dune ridges. **R. pp.1026:19-1027:10.** He explained the Property was well-vegetated, with a fairly high elevation. **R. p.1026:25-1027:2.** He opined the area was "certainly . . . growing on the ocean side or accreting." **R. p.1027:6-10.** He further took note of the "fact that this entire dune field is vegetated indicates a certain degree of stability." **R. p.1027:8-10.** He described a photograph of the Spit as "a classic photograph of a growing or accreting oceanfront," even suggesting that he would like to use the photograph as an example for the classes he teaches. **R. p.1027:14-1028:1.**

In conformity with Dr. Kana's testimony, Dr. Young projected that the risk of the Property breaching is diminished by the "very healthy dune system there with a substantial volume of sand, a pretty decent elevation . . . ." **R. pp.1031:6-1032:21.** On this point, he explained:

> In the last 20 years, I've been to every major storm that's hit those areas [the southeastern United States], including Hurricane Hugo in South Carolina. And in my experience in that period of time—and this may be good news for KDP—I have not seen an area with that volume of sand and that elevation breach.
>
> . . .
>
> Now, of course if we had a Category V storm that was the mother of all storms, that's the most likely place that you would breach on Kiawah. But, you know, in my professional experience, certainly the risk of that breaching from anything less than that right now is pretty low.

R. pp.1031:6-1032:21.

Bill Eiser, OCRM's project manager with respect to KDP's application, and Mark Permar, the long-term planner for the developers of Kiawah Island since 1979, also agreed the Spit was building up on the ocean side and towards the inlet between Kiawah and Seabrook, noting the dunes which had developed on the Property in recent

years. **R. p.436:4-20, p.457:8-13, p.1258:5-8, p.1368:12-21, p.1450:8-10, p.1454:6-9, pp.2042-2045, pp.2056-2063.** Permar confirmed that other areas identified in the 1975 inventory of Kiawah Island as unsuited for development at the time had, in fact, been successfully developed since that time, including Osprey Beach subdivision on the eastern end of the island, which is now Kiawah Island's highest-end collection of homes. **R. pp.461:20-462:24.** In addition, Doug DeWolff, a surveyor qualified by the ALC, quantified the total accretion on the oceanfront side of the Property above the mean high water line from 1974 to 2009 at 63.24 acres. **R. p.527:8-13, p.529:6-14, pp.564:18-565:4, pp.579:22-580:3, p.2242.**

Based on the testimony of Dr. Kana, Dr. Young, Eiser, Permar, and DeWolff, Judge Anderson found, in pertinent part: "Captain Sam's peninsula is thus stable and growing. It will most probably continue to grow for many decades to come, given the enormous remaining sand supply from the shoals of the Stono Inlet and the east end of Kiawah Island." **R. p.5**.

B. Limited Residential Development on the Property

Under section 48-39-280(A)(2) of the South Carolina Code, adopted in 1988 as part of the Beachfront Management Act ("BMA"), OCRM is required to establish a "baseline" for an inlet zone at "the most landward point of erosion at any time during the past forty years." Prior to 1999, the OCRM-designated "baseline" for the Property ran essentially across the neck from the oceanfront to the Kiawah River beside the location of Beachwalker Park,[1] effectively cutting off the accreting Property from any

[1] Beachwalker Park, a public beach access park with changing rooms and a 150-space parking lot, lies upon land owned by KDP and is immediately adjacent to the Property. It is operated by the Charleston County Parks and Recreation Commission ("PRC")

development. **R. pp274ZZ:11-91:3.** In 1999, based on "the best available scientific and historical data of the inlet and adjacent beaches,"[2] and as a result of the significant and stable accretion on the ocean side of the Property, OCRM moved the baseline "approximately 4600 feet past the Park [located near the neck], down the oceanfront shoreline toward the southwest." S.C. Code Ann. § 48-39-280 (A)(2) and (B). **R. p.274BBB:2-15, p.1968** OCRM's setback line, which is the seaward limit of most construction, was established 20 feet landward of the baseline, the minimum distance of separation.[3] **R. p.278:4-16.**

Leonard L. Long, Jr., the Executive Vice President of KDP, explained that, prior to 1999, with no building setback line on the Spit, "[t]here was no authorization, therefore, by the State to develop behind or landward of the setback line." **R. pp. 274II:24-274JJ:4; pp.274ZZ:11-274AAA:3.** OCRM's delineation of the new location of the setback line in 1999 meant that the BMA no longer prohibited construction on the Property landward of the setback line. **R. p.274BBB:2-15.**

In 2005, KDP entered into a development agreement (the "2005 DA") with the Town of Kiawah Island (the "Town"), the governmental entity charged with sole authority

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pursuant to a 99-year lease. **R. p.274AAA:7-15, p.1207:4-8, p.1207:17-20, 1215:22-1216:3.**

[2] Section 48-39-280(A) also requires that OCRM "must utilize the best available scientific and historical data in the implementation" of the forty-year retreat policy that is carried out, in part, through the designation of baselines and setback lines.

[3] Section 48-39-280(B) provides as follows: "To implement the retreat policy provided for in subsection (A), a setback line must be established landward of the baseline a distance which is forty times the average annual erosion rate or not less than twenty feet from the baseline for each erosion zone based upon the best historical and scientific data adopted by the department as a part of the State Comprehensive Beach Management Plan." (emphasis added).

over the zoning of the highland portion of the Property.[4] **R. p.274CCC:13-18, p.274EEE:3-7, pp.1996-2039.** The 2005 DA granted KDP the vested right to develop up to fifty new home sites on no more than twenty of the thirty-one acres on the Property between the critical line and setback line. **R. p.274FFF:3-17, pp.275:17-276:6, p.2016.**

In exchange for this right to develop the highland portion of the Property and at the Town's request, KDP gave up its vested right to build a 325-room oceanfront hotel just east of the Property under a previous development agreement. **R. pp.489:18-491:1.** The 2005 DA also requires that the remainder of the Property—roughly 130 acres, or 80%, of the highland—be preserved in its natural state through a conservation easement in favor of the Kiawah Island Conservancy and through dedication to the Kiawah Island Community Association. **R. p.323:2-12, p.2018.**

Long and Permar both testified to the nature of the possible future limited residential development on the Property. **R. pp.275:17-281:15, pp.437:24-480:8, pp.2016-2018, pp.2255-2256.** Their testimony, which was uncontroverted, was to the effect that any future residential development will be environmentally sensitive and take into account the preservation of the Property's natural features. **R. pp.275:17-281:15, p.405:2-11, pp.437:24-480:8, pp.2016-2018, pp.2255-2256.** The potential new home sites would be slowly released into the market over the next twenty to thirty years. **R. p.332:3-17.** Most of the homes constructed on the Property will be second homes,

[4] The South Carolina Local Government Development Agreement Act, codified at sections 6-31-10 to 160 of the South Carolina Code and adopted in 1993, enables local governments to enter into binding development agreements with property owners conferring vested rights for development subject to the procedures and requirements of that chapter, which were strictly followed in this instance.

occupied for only six to eight weeks per year. **R. p.329:4-14, pp.332:18-333:2.** To the extent the individual residents and their guests who occupy these homes would have any impact on the Property or the surrounding area, such impact will be insignificant compared to the estimated 50,000 persons per year who visit the immediately adjacent Beachwalker Park, not to mention the persons associated with the other approximately 3,500 homes currently located on Kiawah Island. **R. pp.332:18-333:2.**

The restrictive covenants that KDP intends to impose on this limited residential development will be enforced through the Kiawah Island Architectural Review Board. **R. pp.274NN:24-274OO:6, pp.437:24-440:19.** As Permar testified, these covenants will include height restrictions limiting homes to 1.5 stories, requirements for natural building materials such as wood siding, and strict limitations on color. **R. pp.443:9-444:15.** They will reduce or eliminate the visual impact of the homes. **R. pp.443:9-444:15.** These covenants and the future development plan will require the footprint of buildings to avoid, to the maximum extent feasible, grand trees and other significant trees on the Property, limit beach access walkways, implement shared driveways, and preserve much of the native vegetation. **R. pp.274PP:1-274:QQ:10, pp.276:14-277:18, p.464:10-17, p.473:1-21.** The home sites would be behind the setback line with more than four to five high dune rows between them and the beach. **R. pp.275:17-276:8.**

C. The Access Corridor

The area on the peninsula where this limited residential development may occur is just west of the neck, towards Captain Sam's Inlet. Both vehicular access and underground utility access to this residential area must be behind the setback line and must traverse the neck to connect the potential future residential development with the

planned development and utilities on the rest of the island. **R. pp.279:23-280:20.** As Long testified, the access corridor will need to be 50 feet in width to satisfy the Town's road code. **R. pp.374:12-19, pp.409:19-410:10.** Likewise, Mitchell Bohannon, whose engineering firm of Thomas & Hutton has worked for KDP and many other coastal developers for more than thirty years, testified that the minimum allowed width of the right of way, and the minimum workable from an engineering perspective, is 50 feet. **R. pp.591:11-592:3.** Based on this and other proof, Judge Anderson found that "it is unlikely KDP could satisfy the Town of Kiawah Island's ordinances governing subdivision and road construction without stabilization of the river bank and a protected right of way." **R. p.8.**

D. Erosion on the Riverside of the Property

Even though the beachfront is accreting, the Kiawah River has significantly eroded the riverbank of the Property, on the opposite side, along and in the vicinity of the neck. **R. pp.550:17-551:22, pp.717:22-719:13, p.1029:2-5, p.1070:11-16, p.1092:2-1093:9, pp.1213:13-1216:3, p.1232:21-25.** This erosion moves the critical line southerly (or seaward) on the riverside of the Property at the neck. **R. pp.550:17-551:22, p.2242.** At the same time, the oceanfront setback line is virtually static—despite continuous accretion—because of the statutory method for determining its location every ten years. **R. pp.550:17-551:22, p.2242.** As a result, the riverside erosion has decreased significantly the distance between the critical line of the Kiawah River and the OCRM setback line since 1999. **R. p.280:9-20, pp.550:17-551:22, p.734:6-19.**

DeWolff, KDP's expert surveyor, testified that, at the narrowest part of the neck, the distance *between the OCRM setback line*, measured from the baseline on the ocean side of the Property, *and the critical line* on the river bank of the Property was 104 feet in September 2002, 90 feet in April 2005, and only 66 feet in August 2009. **R. pp.550:17-551:22, p.2242.** DeWolff explained that, from September 2002 to October 2008, the erosion on the riverside of the Property took 49,856 square feet of KDP's highland, about 1.1 acres. **R. pp.550:17-551:22, pp.2242.** Appellants put up no proof to contradict this evidence.

The loss of its land and the narrowing of the width of this essential access corridor across the peninsula is what led KDP to seek the permit to stop the erosion of its high ground. By the same token, Appellants have taken every step possible to deny the permit and delay its issuance so that the erosion may continue unabated.

Almost every witness who had visited the Property, including those called by Appellants, testified that they noticed the erosion of the highland portion of the Property in or around the neck area, sometimes referring to the resultant vertical face of the remaining high land as an "escarpment." **R. pp.550:17-551:22, pp.615:22-616:5, pp.717:22-719:13, p.1029:2-5, p.1070:11-16, pp.1072:2-1073:9, pp.1213:13-1216:3, p.1232:21-25, pp.1263:15-1264:19, p.1356:17-23.** Tom O'Rourke, the Executive Director of PRC, testified that the erosion of the riverbank was a chronic problem, causing PRC to lose a portion of the public's asphalt parking lot within Beachwalker Park, adjoining the neck. **R. p.274AAA:7-15, p.1207:4-8, p.1207:17-20, pp.1215:22-1216:3.**

On this point, permit administrator Eiser concurred: "I think there's a significant erosion problem that's jeopardizing the park infrastructure." **R. pp.1263:22-1264:5.** Although Eiser explained that this erosion decreased as you progress further away from the park towards Captain Sam's Inlet, he confirmed erosion continued down this portion of the riverbank to the narrowest portion of the neck. **R. pp.1263:22-1264:5.** He also confirmed that highland property was being lost due to the erosion. **R. p.1356:18-23.** Moreover, pictures of the eroding bank show high vertical escarpments in many locations where the high ground of former riverside dunes has been washed away. **R. pp.2064-2089.** These pictures also show where the erosion has undercut trees and a fence that have fallen into the river. **R. pp.2064-2089.**

If this erosion continues unabated, it will effectively cut off all vehicular and utility access to the Property. **R. pp.279:23-280:20.** As a result, KDP would be unable to develop the Property. **R. pp.373:24-374:22.** The purpose of the erosion control structure KDP seeks to build is thus to stabilize the bank of the Kiawah River, to prevent the continued erosion of KDP's land, and to prevent the movement of the riverside critical line towards the OCRM setback line at the neck. **R. pp.373:24-374:11.** Mitchell Bohannon, KDP's expert engineer, and Dr. Tim Kana, KDP's expert in geomorphology, both testified the requested bulkhead/revetment structure would stop this erosion. **R. p.623:10-15, pp.903:15-904:3.**

As a result of the foregoing testimony, Judge Anderson found: "The bulkhead/revetment will prevent [KDP's] high land from being lost *and assure that there is sufficient distance between the critical line and setback line in the neck of the peninsula to install a road, underground utilities, landscaping, and improvements*." **R.**

pp.7-8 (double emphasis added). Judge Anderson additionally found: "[T]he denial of the permit would likely result in the loss of more upland [to KDP and PRC] and the access corridor at the neck." **R. p. 6.**

II. The Proposed Bulkhead/Revetment

In an effort to stop the long term erosion of the river bank, protect its upland, and preserve the access corridor above the OCRM setback line, KDP submitted an application to OCRM on February 29, 2008, for a permit to construct a combination bulkhead/revetment within the critical area adjacent to the Property. **R. pp.295:4-296:12, pp.2095-2122.**

The erosion control structure consists of two distinct components—a vertical bulkhead and a revetment comprised of a flexible mat of articulated concrete blocks ("ACBs") extending from the base of the bulkhead over the bank towards the Kiawah River. **R. pp.288:3-290:7.** KDP's application sought to construct the bulkhead/revetment for 2,783 feet along the shoreline of the Kiawah River. **R. p.2095.** The height of the bulkhead will vary to conform to the elevations of the adjacent highland escarpments. **R. p.616:6-17.**

The flexible ACB mat revetment would extend 40 feet from the bottom of the bulkhead toward the river to a point just below the river's low tide waterline. **R. pp.616:20-617:8.** At high tide, the mat would be almost completely covered by water. **R. p.644:13-16.** The ACB mat will be colored to blend in with the color of the riverbank, and the multiple holes and openings within the concrete mat would fill with sand and would allow the growth of vegetation in the intertidal zone; the system then serves as habitat for various marine life, including oysters. **R. p.293:4-7, p.609:14-18, p.671:8-**

21, p.741:3-22, pp.2090-2094. For these reasons Judge Anderson found that the mat would not significantly imperil the marine habitat or marine life and "will probably provide new habitat for oysters and other organisms." **R. p.9.**

OCRM has issued permits to install ACB mat revetments in many other locations, including on Daniel Island and indeed other locations on Kiawah Island. **R. p.290:8-15, p.594:13-25, pp.647:24-648:3.** Pictures of ACB mats permitted by OCRM in another location were admitted into evidence. **R. pp.290:16-292:12, pp.2090-2094.** The use of ACB revetments is an erosion control system often approved by OCRM in the past, something not mentioned in the disparaging descriptions of the system by OCRM and CCL in their briefs. **R. pp.290:16-292:12, pp.2090-2094.** As Judge Anderson noted, OCRM "has routinely granted permits for other revetments on Kiawah Island for the protection of roads including revetments such as this with an ACB mat." **R. p.8, note 9.** Ironically, given Appellants' misplaced criticisms, OCRM's initial decision for this very permit allowed the combination ACB system for 270 feet of the shoreline adjacent to Beachwalker Park. **R. pp.2231-2241.**

A. The Selection of the Bulkhead/Revetment System

The civil engineering firm of Thomas & Hutton evaluated alternative erosion control methods for KDP. **R. p.593:3-12.** Bohannon, the company's CEO and a professional engineer licensed in South Carolina, North Carolina, and Georgia, has partaken in the design of bulkheads, revetments, and other shoreline erosion control structures for 34 years. **R. p.585:3-18, pp.586:22-587:2.** Thomas & Hutton has designed virtually all the major infrastructure on Kiawah Island since 1976. **R. p.586:3-21.**

Bohannon and his company looked at several alternative systems, including bulkheads, riprap, and geo-tubes. **R. p.593:3-12.** Ultimately, they recommended the combination bulkhead/revetment structure due to its compatibility with the surrounding environment:

> Well, from all the systems that we were aware of, it seemed like that is the softest, most compatible system out there. We can lay it on the existing ground, follow the existing slope. There's the opportunity, we believe, it could fill in with sand. Once we put it down, could fill in with sand. We've seen them used in other locations where they've become completely naturalized. They might get filled in with sediments and marsh grass start growing through them or other vegetation. So this articulated concrete block we felt like was the best solution. It's kind of in keeping the whole essence of Kiawah where, you know, we need engineering solutions to problems, but we also need engineering solutions that blend with the environment that we're creating.

R. pp.593:16-594:8.

B. Diminished Impact on Tidelands

Bohannon gave his opinion of the almost non-existent environmental impact of similar structures they had designed: "In fact, one is on Kiawah itself at Cinder Creek where it's completely vegetated. You can't even see – can't even tell it's there. One on Daniel Island, it's becoming totally propagated with Spartina and other native grasses." **R. p.594:19-25.** Bohannon opined that the combination bulkhead/revetment was a comprehensive solution, protecting the area from Beachwalker Park through the neck area where the erosion was occurring. **R. pp.597:24-598:5.**

C. Conformity to the Critical Line, Reflective Wave Action, Proximity to Existing Escarpment, and Natural Protection

Bohannon testified that his firm designed the bulkhead component to conform to the critical line of the Kiawah River to the maximum extent feasible. **R. p.605:14-20.** It will be constructed immediately in front of the escarpment, never more than 18 inches away. **R. p.607:8-12.** He explained the revetment ACB mat was designed to prevent reflective wave energy from causing erosion at the bottom or toe of the structure and to prevent such energy from constituting a safety hazard. **R. pp.605:21-607:1.** Bohannon also testified the adjacent marshes, which are only next to Beachwalker Park, do not sufficiently serve to protect the bank from erosion. **R. p.607:13-24.**

D. Public Access

According to Bohannon, as designed, the structure would not significantly impact or eliminate public access to the area. **R. pp. 607:25-608:7.** Bohannon testified the public could still use the area. **R. pp.607:25-608:7.** Boaters can still pull their kayaks or canoes onto the concrete mat at low tide, just as boaters pull all manner of watercraft onto our state's hundreds of concrete boat landings. **R. p.362:5-18.** While Appellants apparently contend that the sandy bank of the Kiawah River would be completely eliminated by the revetment, Bohannon explained that this river sandy bank now continues for another 1000 to 1500 feet beyond the far end of the revetment. **R. pp.619:24-620:12.** The aerial photographs also show that this sandy bank area would continue well past the end of the proposed revetment and confirm Bohannon's testimony. **R. p.2040, pp.2056-2057.** Additionally, the permit granted by Judge Anderson provides that for westernmost 900 feet there will be no bulkhead and the ACB

mat will extend only eight feet from the low escarpment there, leaving plenty of sandy shoreline for this last third of the structure. **R. p.31.**

III. The Permit Application

The applicable statute and regulation classify the proposed erosion control structure as "minor development activity." See S.C. Code Ann. §48-39-10(N) ("'Minor development activities' means the construction, maintenance, repair or alteration of any private piers or erosion control structure, the construction of which does not involve dredge activities."); see also S.C. Code Ann. Regs. §30-1(D)(34). "[I]n the case of minor developments, as defined in Section 48-39-10, the department shall have the authority to approve such permits and shall act within thirty days." S.C. Code Ann. §48-39-150(C).

After KDP submitted the critical area permit application on February 29, 2008, KDP and its agents wrote and contacted OCRM staff a number of times over the ensuing more than nine months to check on the status of the application and determine what, if any, other information was needed by OCRM staff. **R. pp.305:16-312:1, pp.2095-2154, pp.2159-2230.** OCRM was generally unresponsive to these requests, and, after approximately four months, without prior warning, purported to cancel the application by letter dated June 25, 2008. **R. p.400:3-401:5, pp.1278:20-1279:4, p.1281:20-21, p.1971.** KDP immediately (the following day) cured the purported deficiency, but OCRM staff then waited still another month to reinstate the application. **R. p.400:3-401:5, pp.1278:20-1279:4, p.1281:20-21, p.1972.**

On December 18, 2008, almost ten months after the application was originally filed, OCRM issued a conditional permit approving the construction of the proposed

structure for a distance of 270 feet adjacent to Beachwalker Park. **R. pp.2231-2241.** The grounds for OCRM's staff decision are contained in its Technical Summary of Review. **R. pp.1963-1969.**

At the contested case hearing, OCRM explained its motivation for the decision denying all but 270 feet of the erosion control structure. OCRM staff testified to denying most of the permit to ensure that KDP's private, highland property would be preserved forever in its undeveloped, natural state. **R. p.1361:6-18.** OCRM's Eiser testified that, if there was no possibility of development on the Property, OCRM most likely would have issued the permit for the entire length of the revetment: "I think that if we knew that it was impossible for houses to be built on Captain Sam's Spit, it would have been more likely that we would have issued the permit for the entire revetment." **R. pp.1434:23-1435:2.** Eiser went over his rationale that the Property was one of only three tracts of oceanfront land in the entire state where the public had good access and where they could see "what a pristine undeveloped piece of oceanfront property looks like, and I think there is an extraordinary value to the people of South Carolina in preserving that." **R. p.1361:9-18.**

Eiser reiterated: "I think the maximum value to the people is to try to preserve the Kiawah Spit in as unaltered a state as we can." **R. p.1371:13-15.** He further specified: "[W]e should not facilitate the development of the Kiawah Spit by issuing the permit for that half-mile-long revetment." **R. p.1375:15-20.** When asked what he considered to be the possible long-range, cumulative effects of the project (which he conceded to be the erosion control structure), he answered: "The construction of 50 houses on the Kiawah Spit." **R. p.1387:19-23.** Even though possible future residential development was the

primary impact OCRM sought to eliminate, Eiser admitted he was unsure what the specific development plans were at the time he considered the application; thus, he had no ability to assess the purported impacts. **R. pp.1392:6-1393:9.**

OCRM's admitted motivation is to condemn KDP's highland property to preserve a public view without paying just compensation and without establishing any significant adverse impacts from the project under consideration—the erosion control structure. Under any reading of the Coastal Zone Management Act ("CZMA"), the regulations promulgated under the CZMA, the Public Trust Doctrine, or the Coastal Zone Management Plan ("CZMP"), this is an unintended, grossly unjust extension of OCRM's jurisdiction over private property rights and should not be allowed to stand, as Judge Anderson recognized in his Amended Final Order and Decision.

Summary of Argument

Judge Anderson presided over a 5-day contested case hearing involving extensive lay and expert testimony addressing a plethora of extremely fact-intensive issues. After the hearing, Judge Anderson went to great lengths to provide an exhaustive recitation of the hearing testimony and explain why he was persuaded, with respect to these issues, by certain witnesses over others. In his 31-page Amended Final Order and Decision, Judge Anderson carefully considered and weighed the competing interests involved and, when appropriate, referenced, more or less verbatim, the testimony of pertinent witnesses he found persuasive. KDP has chosen to refer primarily to the underlying proof rather than repeating all of Judge Anderson's detailed findings to illustrate just a portion of the extensive evidentiary underpinnings of those findings.

Along with the specific and general considerations established in the regulations for this permit, Judge Anderson took into account the potential impacts of both the proposed bulkhead/revetment and the potential for future development on KDP's highland property on piping plovers, diamondback terrapins, and public access to the sandy shoreline of the Kiawah River. Alt hough deciding the applicable regulation required that he only consider the impacts of the erosion control structure, Judge Anderson went on to weigh the impacts from the potential limited residential development in the future.

Essentially every one of the Appellants' grounds for appeal, even when characterized by them as a legal error, is controlled by Judge Anderson's specific factual findings. Based on its standard of review, this Court need go no further than to recognize that substantial evidence supports these fact-intensive findings.

Judge Anderson went to painstaking lengths in his orders to set forth the basis for his factual findings and legal conclusions. Substantial evidence and the applicable law fully support Judge Anderson's determination that KDP met the legal standards for issuance of the permit, as modified by him, and that the bulkhead/revetment structure will not have a significant negative impact on public access, marine species, or other environmental factors. Consequently, as further explained herein, KDP respectfully requests that this Court AFFIRM Judge Anderson's order.

Standard of Review

"In permitting cases, the ALC serves as the finder of fact." Neal v. Brown, 383 S.C. 619, 623, 682 S.E.2d 268, 269 (2009). "The proceeding before the ALJ was a de novo hearing, which included the presentation of evidence and testimony." Hill v. S.C.

Dep't of Health & Envtl. Control, 389 S.C. 1, 9, 698 S.E.2d 612, 616 (2010). This Court's review is limited to determining whether the findings were supported by substantial evidence or were controlled by an error of law. Id. at 9, 698 S.E.2d at 617. "In determining whether the ALJ's decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALJ reached." Id. at 9-10, 698 S.E.2d at 617.

"The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." DuRant v. S.C. Dep't of Health & Envtl. Control, 361 S.C. 416, 420, 604 S.E.2d 704, 707 (Ct. App. 2004). The final determination of witness credibility and the weight to be accorded evidence is reserved to the finder of fact. Gadson v. Mikasa Corp., 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006). The trier of fact determines the probative value of expert testimony, and the appellate court may not judge the credibility or weight of the testimony on appeal. Small v. Pioneer Mach., Inc., 329 S.C. 448, 470, 494 S.E.2d 835, 846 (Ct. App. 1997).

I. Substantial evidence supports Judge Anderson's finding that the bulkhead/revetment structure requested by KDP complies with the specific project standards in section 30-12(C)(1) of the Administrative Law Code governing bulkheads and revetments that are not on the oceanfront.

Section 48-39-120(F) of the South Carolina Code sets forth the general statutory authorization for erosion control structures in the critical area pertinent to this case:

> (F) The department, for and on behalf of the State, may issue permits not otherwise provided by state law, for erosion and water drainage structure in or upon the tidelands, submerged lands and waters of this State below the mean high-water mark ... for the purpose of promoting

> ... the protection of ... private property from beach and shore destruction ....

The prohibitions in the later BMA apply to erosion control structures on the beach, not those like this one that are landward of the setback line. See, e.g. S.C. Code Ann. §48-39-290(B)(2)(a) ("No new erosion control structures or devices are allowed seaward of the setback line except to protect a public highway which existed on the effective date of this act.").

Section 30-12(C)(1) of the Administrative Law Code, applicable to critical area permit applications for bulkheads and revetments that are not on the oceanfront, provides as follows:

> C. Bulkheads and Revetments (Rip-rap) (Other than ocean front, as covered under R.30-13(N)):
>
> (1) In an attempt to mitigate certain environmental losses that can be caused by these structures, the following standards are adopted:
>
> (a) Structures must be designed to conform to the critical area line (upland boundary), to the maximum extent feasible, and constructed so that reflective wave energy does not destroy stable marine bottoms or constitute a safety hazard;
>
> (b) Structures may be constructed up to 18 inches from the existing escarpment. In situations where this is not feasible, Department staff will determine the location of the bulkhead or revetment on a site by site basis;
>
> (c) Bulkheads and revetments will be prohibited where marshlands are adequately serving as an erosion buffer, where adjacent property could be detrimentally affected by erosion or sedimentation, or where public access is adversely affected unless upland is being lost due to tidally induced erosion.

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

As a preliminary matter, it should be recognized that Bill Eiser, OCRM's project manager with respect to the bulkhead/revetment application, testified that nothing in this regulation compelled OCRM to deny KDP's permit request. **R. pp.1354:20-1357:22.** OCRM's Technical Summary of Review (i.e., OCRM staff's final written determination), prepared by Eiser indicated just that:

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

R p.1966.

In his Amended Final Decision and Order, Judge Anderson addressed and made findings as to each specific standard in this regulation. **R. pp.8-11, pp.26-27.** As set forth below, substantial evidence supports Judge Anderson's decision, which should therefore be affirmed.

A. The bulkhead/revetment structure would conform to the critical area line to the maximum extent feasible and would be constructed so that reflective wave energy does not destroy stable marine bottoms or constitute a safety hazard.

Thomas & Hutton Engineering Company ("T&H") designed the bulkhead/revetment structure. Mitchell Bohannon, T&H's president and a licensed professional engineer in South Carolina who has had extensive experience designing erosion control devices on Kiawah Island and throughout the coast, testified that the

design of the bulkhead and revetment structure would conform to the critical line to the maximum extent feasible. **R. p.605:14-20.**

Bohannon further explained that T&H designed the bulkhead and revetment structure to take into account reflective wave energy. **R. p.605:21-23.** With respect to reflective wave energy, Bohannon testified:

> Well, clearly, whenever you put a vertical face against--on a shoreline in any kind of waterway, you're going to get some kind of wave action up against that. And if you don't do something to protect that toe against that reflective energy, it's going to cause even more exacerbated erosion.

R. p.606:1-7. To account for the reflective wave action from the bulkhead, T&H designed the revetment part, which "prevents that reflected wave from causing erosion on the bottom." **R. p.606:16-23.** The revetment would also stabilize the bottom. **R. pp.606:24-607:1.** Further, Bohannon opined that the reflective wave action would not create a safety hazard. **R. p.607:2-6**.

Based on Bohannon's testimony, Judge Anderson found and concluded, in pertinent part:

> The combination bulkhead and ACB mat over the sloping river shoreline, covered by water at high tide, will diffuse wave action more than a structure comprised solely of a vertical bulkhead. The proposed structure is sufficiently engineered to stabilize the riverbank and prevent erosion from the ongoing movement of the channel caused by the advance over time of the marsh point bar on the opposite side. To the contrary, the evidence did not establish that the ACB mat or the bulkhead will destroy a stable marine river bottom or constitute a safety hazard.

R. p.9. This finding cannot be set aside because it is supported by substantial evidence. See Jones v. S.C. Dep't. of Health & Envtl. Control, 384 S.C. 295, 304, 682 S.E.2d 282, 287 (Ct. App. 2009) ("In determining whether the ALC's decision was

supported by substantial evidence, this court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached.").

B. The bulkhead would be constructed up to 18 inches from the existing escarpment. Since this is not feasible with respect to the revetment, its location may be determined on a site by site basis.

Judge Anderson also found that the proposed erosion control structure satisfied the criterion in section 30-12(C)(1)(b) of the Administrative Law Code. **R. p.9.**

Appellant CCL, for the first time in all briefs to date, now argues that this regulatory standard prohibits any portion of the erosion control structure from extending more than 18 inches from the existing escarpment, therefore prohibiting the revetment on the river bank extending from the base of the bulkhead. CCL's contention is not only based on a mistaken interpretation of the regulation but is one that it never raised to the ALC and that the ALC did not rule on.

Although Appellants filed separate motions to reconsider, neither motion advanced this interpretation of the regulation, much less requested that Judge Anderson consider and rule on this novel interpretation. Accordingly, the issue is not preserved for appellate review. See Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) ("[I]ssues not raised to and ruled on by the ALJ are not preserved for appellate consideration.").

Moreover, the plain language of this regulation does not, as Appellant CCL contends, prohibit the extension of a revetment more than 18 inches from the existing escarpment. Instead, the two sentences of this regulatory criterion merely state that if it is not feasible to locate the vertical portion of the structure within 18 inches, the

structure may be located on a site by site basis. There is no absolute prohibition. See Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.").

In Hill v. S.C. Dep't of Health & Envtl. Control, 389 S.C. 1, 698 S.E.2d 612 (2010), this Court recognized that a 1.5' distance limitation imposed in a critical area permit requires simply that the structure be constructed within 18 inches of the existing escarpment to prevent the adjacent highland property owner from filling in any gap between the bulkhead and the escarpment and, thus, gaining highland property. In Hill, Respondent Hill was granted a critical area permit to construct a 110' long bulkhead, provided the bulkhead "'is located within 1.5' from [the] escarpment.'" Id. at 6, 698 S.E.2d at 615 (quoting the permit). During the construction, DHEC inspected the site and determined that the bulkhead was not being constructed within 1.5' of the escarpment. Id. Nevertheless, Hill continued the construction and proceeded to backfill the area between the bulkhead and the escarpment. Id.

Hill was found by an ALJ to have violated the critical area permit and ordered to re-install the bulkhead in accordance with the permit. Id. at 7, 698 S.E.2d at 615-17. This Court reversed the circuit court's decision reversing the ALJ. Id. at 11, 698 S.E.2d at 617. This Court cited favorably to the ALJ's interpretation of the distance limitation: "The ALJ stated Hill's violation is based on the measurements of *the distance between the bulkhead and the escarpment*, as set forth in the permit, and these measurements

were documented by a DHEC employee during construction." Id. (emphasis added). In a footnote, this Court quoted the ALJ's final order and decision as follows:

> The regulatory and permitting violation committed by [Hill] *involved the distance between his bulkhead and the escarpment on his property*, not the critical line, and, while that escarpment cannot now be located, *it was readily apparent at the time Ms. Fitzgerald took her measurements of the distance between the bulkhead and the escarpment and determined that the bulkhead was being constructed too far from the escarpment.*

Id., note 4 (emphasis added). This Court ultimately held that substantial evidence supported the ALJ's finding that Hill's bulkhead structure exceeded the permitted distance between the bulkhead and the escarpment. Id. at 13, 698 S.E.2d at 618. Based on Hill, the clear import of the 18" limitation in section 30-12(C)(1)(b) is to limit the distance between the bulkhead and the escarpment to prevent the applicant from unnecessarily converting a portion of the critical area by backfilling the gap between the structure and the escarpment.

Moreover, the plain language of section 30-12(C)(1)(b) is intended to apply to the vertical bulkhead portion of the structure, not the sloping revetment portion. Section 48-39-290(1)(c) of the South Carolina Code and section 30-1(D)(22)(c) of the Administrative Law Code both define a "revetment" as "a sloping structure built along an escarpment *or in front of a bulkhead to protect the shoreline or bulkhead from erosion.*" (emphasis added). Under CCL's interpretation, which also ignores the second sentence of section 30-12(C)(1)(b), revetments would be prohibited in all instances since they necessarily extend more than 18 inches from the escarpment. This interpretation would effectively render meaningless the authorization of revetments in section 30-12(C) and the inclusion of them as an approved erosion control device. See Home Health Servs.,

Inc. v. S.C. Dep't of Health & Envtl. Control, 298 S.C. 258, 263, 379 S.E.2d 734, 737 (Ct. App. 1989) (recognizing that statutes which deal with the same subject matter "are in *pari materia* and, therefore, must be construed together, if possible, to produce a single, harmonious system governing judicial review."); TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998) ("The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something.").

The only reasonable construction of the first sentence of section 30-12(C)(1)(b) is that it is referring to the location of bulkheads and is not a limitation on the width of a revetment that extends from the foot of the bulkhead. In other words, section 30-12(C)(1)(b) is a limitation on the distance a bulkhead structure may be constructed from the escarpment—the vertical face of land created by erosion. See Hill, supra. Bulkheads, not revetments, are constructed vertically in front of escarpments.[5]

In the CZMA, the General Assembly expressed the same concerns expressed by the ALJ and this Court in Hill—concerns about landowners "reclaiming" tideland by building bulkheads into the critical area and backfilling. See S.C. Code § 48-39-120(B) ("The department for and on behalf of the State may issue permits for erosion control structures .... Provided, however, that no property rebuilt or accreted as a result of natural forces or as a result of a permitted structure shall exceed the original property line or boundary.") The regulation's prohibition on the maximum distance a vertical

[5] Section 48-39-270(1)(b) of the South Carolina Code and section 30-1(D)(22)(c) of the Administrative Law Code both define a "bulkhead" as "a retaining wall designed to retain fill material but not to withstand wave forces on an exposed shoreline . . . ."

bulkhead may be constructed from a vertical escarpment guards against this appropriation.

If the General Assembly had intended the first sentence of section 30-12(C)(1)(b) to also regulate the width of a revetment, the General Assembly could have inserted language limiting the width of revetments. It did not. Instead, it inserted the second sentence, anticipating that revetments (and sometimes bulkheads) may need to extend more than 18 inches from the base of the escarpment.

It should also be noted that Eiser agreed that KDP's application complied with this portion of the regulation:

> Q: Okay. What about the second number, B?
> A: That's the one that actually says within 18 inches of the existing escarpment or, if that's not feasible, wherever Department staff feels it's appropriate.
> Q: Okay.
> A: So there's no contravention there.

R. pp.1355:23-1356:4. Once more, CCL asked no questions regarding this issue. OCRM's Technical Summary of Review, OCRM staff's final review document, is to the same effect. **R. p.1966.**

Based on the foregoing, Judge Anderson held the structure complied with section 30-12(C)(1)(b). **R. p.9.** Bohannon's testimony supports the finding that the structure would be constructed within 18 inches of the escarpment. **R. p.607:8-12.** Further, Judge Anderson's finding, and Bohannon and Eiser's testimony, is consistent with the only reasonable interpretation of this regulatory section—that it applies to the bulkhead and does not constitute a prohibition on revetments or structures extending more than 18" from the escarpment. The regulation authorizes OCRM to approve erosion control structures on a "site by site" basis in those instances where the structure lies more than

18" from the escarpment. Accordingly, Judge Anderson's findings are supported by substantial evidence and should be affirmed.

C. Marshlands are not adequately serving as an erosion buffer.

Mitchell Bohannon testified that the existing marshlands adjacent to the Property were not adequately buffering the Property from erosion. **R. p.607:13-24.** Judge Anderson found accordingly, and Appellants take no issue with this finding.

D. The bulkhead/revetment structure will not detrimentally affect adjacent property through erosion or sedimentation.

Dr. Kana testified that the bulkhead/revetment structure would not adversely affect adjacent marshlands, Captain Sam's Inlet, Seabrook Island, or other adjacent highland property. **R. pp.723:6-724:8, pp.734:20-735:23, p.876:10-15, p.901:7-17, pp.903:15-904:3.** In addition, Bohannon testified that, if the bulkhead/revetment structure were designed to only protect the adjacent Beachwalker Park, then the structure would cause an increase to the erosion westerly at the neck of the Property. **R. pp.590:18-592:3.** As a result, Bohannon testified his firm designed the structure as a comprehensive solution to highland erosion on the Property and the adjacent Beachwalker Park. **R. pp.597:22-598:5.** Judge Anderson accepted Kana's and Bohannon's testimony on this issue. His factual finding that the structure would not detrimentally affect adjacent property through erosion or sedimentation is therefore supported by substantial evidence.

E. Public access is not adversely affected; upland property is being lost due to tidally induced erosion; and there are no feasible alternatives to the proposed structure to stabilize the shore, nor have Appellants suggested any.

1. Public Access

Judge Anderson did not, as Appellants contend, fail to consider whether public access would be adversely affected by the bulkhead/revetment structure, but rather considered it and ruled this standard did not warrant a denial of the application:

> The Court . . . finds that construction of the revetment will not unreasonably eliminate public access and use. In fact, kayaks and small boats can still be pulled up on the ACB mat, the same as what might occur on concrete boat ramps or landings in South Carolina's waters. Furthermore, if a boater or kayaker does not desire to land on the ACB mat (regardless of whether it is exposed concrete or covered by sand, spartina, or other vegetation), then the remaining riverbank shoreline in the immediate and general vicinity will remain available.

R. p.15.

Judge Anderson's finding is supported by substantial evidence. Bohannon testified that the structure would not significantly impact or eliminate public access. **R. pp.607:25-608:7.** A boater or kayaker can land her craft on the ACB mat the same as on one of the hundreds of concrete boat landings in this state. **R. pp.607:25-608:7.** Moreover, Bohannon confirmed that the sandy bank of the Kiawah River will continue for 1000-1500 feet beyond the end of the revetment, which pictures of the area confirm. **R. pp.619:24-620:12, pp.2040, 2042, 2044-2045.** As previously mentioned, Judge Anderson's reduction of the width of the ACB mat to eight feet for the westernmost 900 feet also means that there will be an uncovered bank at low tide in that location too. **R. p.31.**

In addition, O'Rourke testified the existing steep escarpments already constitute a detrimental effect on public access to the riverbank. **R. pp.1215:22-1216:3.** Dr. Kana confirmed O'Rourke's testimony: "The worst erosion along Beachwalker Park at present is along the parking lot in the area where canoes are sometimes launched, i.e., upstream before the bend at the neck." **R. p.873:5-8.** Dr. Kana further explained: "[F]rom my experience, along those cut banks, there's not much of a beach there, certainly at high tide, because there's an escarpment right there." **R. p.740:3-7.**

Appellants argue at length that access is adversely affected, relying on the testimony of two persons who kayak in the river and stated that they would not be inclined to pull their boats up on the ACB mattress. Their use of the waters of the river, however, remains unaffected. The revetment does nothing to impede navigability. The ACB mat would be laid over the river bank and would not be a navigation obstruction. If they prefer a sandy bank, there will still be an extensive sandy bank beginning 900 feet prior to the western end of the revetment and continuing at least 1000-1500 feet beyond the end of the revetment.

Eiser testified that in his estimation "there might be some minimal adverse effect on public access that was not strong enough to bar the permit from being issued." **R. p. 1357**. The pictures that were introduced into evidence by Appellant CCL showing multiple kayaks pulled up on the bank do not reflect typical usage but were taken as part of a fundraiser seeking donations to pay for litigation costs to oppose the project. **R. p. 15, note 18; pp.1104:11-1105:7.**

Appellants appear to equate the public's ability to access the area subject to the revetment to the public's ability to use that area. Black's Law Dictionary p.14 (8th ed.

2004) defines "access" as "[a]n opportunity or ability to enter, approach, pass to and from, or communicate with . . . ." On the other hand, "public use" is defined as "[t]he public's beneficial right to use property or facilities . . . ." Black's Law Dictionary p.1578 (8th ed. 2004). There is no contention that the public could not enter upon this area, even if the public's recreational use of the area would be slightly modified.

Based on these facts, there was substantial evidence to support Judge Anderson's finding that the erosion control structure would not "unreasonably eliminate public access and use." **R p.15.**

2. Loss of Upland Due to Tidally-Induced Erosion

Moreover, section 30-12(C)(1)(c) of the Administrative Law Code states that an adverse effect on public access will not prohibit an erosion control structure if "upland is being lost due to tidally induced erosion." It is undisputed that KDP's upland property is being lost due to tidally-induced erosion, which Judge Anderson recognized. **R. pp.550:17-551:22, pp.615:22-616:5, pp.717:22-719:13, p.1029:2-5, p.1070:11-16, pp.1092:2-1093:9, pp.1213:13-1216:3, p.1232:21-25, pp.1263:15-1264:19, p.1356:17-23; R. p.27.**

3. Feasible Alternatives

Section 30-12(C)(1)(d) of the Administrative Law Code sets forth another circumstance in which public access may be adversely affected in addition to the circumstance in which upland is being lost. Section 30-12(C)(1)(d) allows an adverse effect on public access when there are "no feasible alternatives" for controlling the

erosion.[6] Judge Anderson found that "the evidence did not establish that there was a feasible alternative to the bulkhead/revetment that would stabilize the river shoreline and prevent the continued erosion of KDP's upland." **R. p.9.** He specifically rejected CCL's "do nothing" alternative because it would not stabilize the river shoreline and prevent the continued erosion of KDP's upland. **R. p.9.** Judge Anderson held that some impact on public access would be permissible since he found that there were no feasible alternatives to stabilize the shoreline. **R. pp.9, 27.** His finding is supported by Bohannon, who t estified extensively on alternative methods of erosion control and opined that the bulkhead/revetment structure being proposed was the only environmentally-sensitive solution. **R. p.593:3-594:8.**

As a result, substantial evidence supports Judge Anderson's finding that any adverse effect on public access would be minimal and, in any event, the permit would still be warranted due to the erosion of KDP's highland property and the lack of any feasible alternatives to the bulkhead/revetment.

II. Substantial evidence supports Judge Anderson's finding that the bulkhead/revetment structure requested by KDP complies with the statutory policy considerations referenced in section 48-39-150(A) of the South Carolina Code and section 30-11(b) of the Administrative Law Code.

Both section 48-39-150 of the South Carolina Code and its companion regulation, section 30-11 of the Administrative Law Code, set forth general

[6] Section 30-1(D)(23) of the Administrative Law Code defines, "Feasible (feasibility)," in relevant part, as follows: "As used within these rules and regulations (e.g., 'unless no feasible alternative exists'), feasibility is determined by the Department with respect to individual project proposals. Feasibility in each case is based on the best available information . . . . Use of this word includes, but is not limited to, the concept of reasonableness and likelihood of success in achieving the project goal or purpose. 'Feasible alternatives' applies both to locations or sites and to methods of design or construction, and includes a 'no action' alternative."

considerations that OCRM is to take into account when reviewing any permit for activity in the critical area. They each state that the "the Department will be guided by the policy statements in Sections 48-39-20 and 48-39-30," along with the ten other listed considerations. Judge Anderson listed all the various relevant policies listed in these statutes and found that the proposed bulkhead/revetment was in keeping with them:

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

R. p.21.

With respect to Appellants' stated issues on appeal, the pertinent policies in sections 48-39-20 and 48-39-30 of the South Carolina Code include the following:

> (E) *Important* ecological, cultural, natural, geological and scenic characteristics, industrial, *economic* and historical *values* in the coastal zone are being irretrievably damaged or lost *by ill-planned development* that threatens to destroy these values.
>
> (F) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone *while balancing economic interests*, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate.

S.C. Code Ann. §48-39-20(E) and (F)(emphasis added).

> (B) Specific state policies to be followed in the implementation of this chapter are:
>
> (1) To promote economic and social improvement of the citizens of this State and *to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment* and within the

> framework of a coastal planning program that is designed to protect the sensitive and fragile areas *from inappropriate development* and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone.
>
> * * *
>
> D. Critical areas shall be used to provide *the combination of uses* which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

S.C. Code §48-39-30(B)(1)and (D)(emphasis added).

In applying these policies to the proposed erosion control structure, Judge Anderson found and concluded, in pertinent part:

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

R. p.21.

As to the economic benefit, Appellants argue that there was no proof of this element because KDP did not offer a specific monetary figure as to alleged financial benefit from stabilizing the riverbank. However, neither these policy statements nor other applicable regulations require that the applicant assign a specific dollar value. The economic benefit is manifest. Without the stabilization of the river shoreline, KDP

will continue to lose valuable high ground from erosion and likely will lose the minimum width developable corridor necessary to access and support the limited residential development for which it possesses a vested zoning right. **R. pp.279:23-281:20, pp.373:24-374:11.**

Appellants do not argue in favor of a combination of uses either as to the critical area or the highland. They contend the Property and adjoining critical area should not be altered in any manner, but should be preserved as one large, undeveloped space. Appellants' calculus of the policies in the two statutes reads out both the economic benefit to the owner and the balancing of interests they require.

In accordance with these policies, Judge Anderson made fully supported findings with respect to these considerations that took into account the benefit to the applicant and balanced the competing interests:

> The Court thus finds KDP has a legitimate need for the bulkhead/revetment. The bulkhead/revetment will prevent its high land from being lost and assure that there is significant distance between the critical line and setback line in the neck of the peninsula to install a road, underground utilities, landscaping, and improvements. In fact, it is unlikely that KDP could satisfy the Town of Kiawah Island's ordinances governing subdivision and road construction without stabilization of the river bank and a protected right of way.

R. pp.7-8.

Both statutory sections warn against "ill-planned" and inappropriate development. Putting aside that the revetment is not development of the critical area, Judge Anderson specifically found that the potential future residential development, that would incorporate the features previously discussed, would not be ill-planned on inappropriate:

> [E]ven though the suitability of the upland for residential development is not one of the stated regulatory

> considerations for determining whether to issue a permit for a bulkhead/revetment, OCRM and CCL have raised it as an issue. I nonetheless find that Captain Sam's is suitable for the limited, low-density residential development described in the 2005 Development Agreement with the Town of Kiawah Island.

R. p.6; see R. pp.1996-2039, pp.2255-2256; R. pp.274NN:24-274OO:6, pp.274PP:1-274QQ:10, pp.275:17-281:15, p.329:4-14, pp.332:18-333:2, p.405:2-11, pp.437:24-480:8, p.464:10-17, p.473:1-21. Similarly, Judge Anderson found that the revetment would not unreasonably restrict public access. **R. pp.15, 27.**

In short, Judge Anderson weighed the statutory policies in these two code sections. These statutory policies contemplate a combination of uses serving the public and the adjacent private property owner. In addition to providing benefit to KDP, the erosion control structure will permit the adjacent public beach park to function without further loss of its parking lot. **R. p.623:10-15, pp.903:15-904:3.** The structure is not an impediment to navigation or access, and will allow those persons who want to stop in the vicinity plenty of sandy shoreline along the Kiawah River if they prefer it to the ACB mat. **R. pp.607:25-608:7, pp.619:24-620:12, pp.2040, p.2042, pp.2044-2045.** Ultimately, the development of the highland will lead to a conservation easement on roughly 130 of the 150 highland acres on the Property. **R. p.323:2-12, p.2018.** Judge Anderson's factual findings related to the statutory policies are thus fully supported and should be sustained.

III. Substantial evidence supports Judge Anderson's findings that the bulkhead/revetment structure requested by KDP complies with the other general considerations referenced in section 48-39-150(A) of the South Carolina Code.

A. The general considerations in section 48-39-150(A) of the South Carolina Code.

Section 48-39-150(A) of the South Carolina Code and section 30-11(B) of the Administrative Law Code both list ten general considerations that should "guide" the permit evaluation. Judge Anderson fully considered the pertinent ones and made findings as to them that are fully supported. **R. pp.18-21.**

B. Judge Anderson considered the extent to which the completed project would affect the production of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural resources in a particular area including but not limited to water and oxygen supply and the extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina's coastal zone.

Appellants contend that Judge Anderson failed to consider the impact of the bulkhead/revetment structure on piping plovers, diamondback terrapins, and other marine life. In this context, sections 48-39-150(A)(3) and (6) provide that the ALJ's decision with respect to an erosion control structure should be guided by the following:

> (3) The extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural resources in a particular area including but not limited to water and oxygen supply.
>
> . . .
>
> (6) The extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina's coastal zone.

1. Wintering Piping Plovers

Judge Anderson extensively considered the effect of both the bulkhead/revetment project *and* the proposed upland development on wintering piping

plovers, concluding: "[N]either the proposed bulkhead/revetment nor potential future residential development will have a material or adverse effect on the wintering piping plovers or their critical habitat." **R. p.14.**

Substantial evidence supports this finding. Lee Walton is a wildlife biologist who was qualified at the contested case hearing as an expert with respect to piping plovers. **R. p.932:19-25, pp.944:10-945:4.** Walton made recommendations for the delineation of the boundaries of critical habitat for wintering piping plovers that were accepted by the U.S. Fish and Wildlife Service and carried forward in the regulations designating the same. **R. pp.936:24-938:20.** After extensive analysis of his credentials, Judge Anderson found Walton "credible and persuasive." **R. p.11, note 14.**

Although piping plovers are a threatened species, Walton testified that the piping plovers that may appear on Kiawah Island, like those that appear at most other spots on the South Carolina coast, are "wintering," not "nesting." **R. p.948:10-25.** The wintering piping plovers spend all of their time foraging or resting. When they forage, they will be on mud flats and tide lines. **R. p.950:7-11.** When they rest, they will be on the seaward side of a dune, near the base. **R. p.950:7-11.**

Referring to the standards in the Code of Federal Regulations, 50 CFR Part 17, Vol. 66, No.132, "Endangered and Threatened Wildlife and Plants; Final Determination of Critical Habitat for Wintering Piping Plovers: Final Rule," Walton explained that the federally designated critical habitat of the wintering piping plover lies on the extreme west end of the Spit at or near the inlet. **R. pp.952:3-958:10.** According to the data, there has never been a sighting of even a single wintering piping plover either in the area in which the revetment will be constructed or on the upland portion of the Property

in which limited residential development may occur. **R. p.960:14-23.** The last annual official bird survey on Kiawah found only a single wintering piping plover at Captain Sam's Inlet, while locating 15 on the eastern end of Kiawah Island, roughly 10 miles away. **R. p.962:3-12.**

Walton pointed out that the location of the proposed revetment is not within a designated critical habitat for wintering piping plovers. **R. p.965:14-966:6.** The Code of Federal Regulations, which Judge Anderson judicially noticed, designates the boundaries for critical habit SC Unit-10 as extending the length of the entire beach on Seabrook Island and "just 0.16 km (.1 mi) north of Captain Sam's Inlet" on Kiawah Island. **Federal Register, Vol. 66, No, 132, P. 36069 (July 10, 2001); R. pp.953:10-954:25.** Walton confirmed that the revetment would have no impact on either the critical habitat of the wintering piping plovers or the plovers themselves. **R. p.965:14-966:6.** Similarly, Walton testified that the limited residential development on the Property would have no adverse affect on wintering piping plovers or their critical habitat. **R. pp.966:20-967:15.**

Appellants' bird experts argued that the few additional people added by future home sites might walk on the beach and harass the birds, especially if they were walking their dogs. However, Walton explained that other, similar development on Kiawah Island had no adverse impact on the wintering piping plovers. The wintering piping plovers generally have a foraging area of 13 kilometers. **R. p.959:14-960:7.** As a result, as confirmed by data compiled by the Town of Kiawah Island, wintering piping plovers forage throughout Kiawah Island from the east end to the west end. **R. pp.963:4-964:3.**

Walton confirmed that neither the public's use of the beach on Kiawah Island or the beach nourishment project on the east end of Kiawah Island disturbed the plovers or their habitats. **R. pp.969:23-970:11.** Moreover, the increase in human presence as a result of this development would be virtually nothing compared to the 50,000 people who visit the adjacent county park annually. **R. p.274AAA:7-15.** Appellants' experts had no information as to existing use of the beach along the Spit and the incremental increase, if any, of that use if home sites were constructed on the Property. In contrast, Walton had this information and considered it.

Based on this and other proof recited in his decision, Judge Anderson concluded as follows:

> I find the evidence supporting [OCRM's] and CCL's contention [of bird disturbance] conjectural.... There was no proof that any persons on the beach from the up-to-50 houses would engage in unreasonable behavior that would increase any theorized frequency or intensity of disturbance of these wintering piping plovers on Kiawah Island.... Furthermore, the evidence did not establish that wintering piping plovers shy away from the beach in front of the miles of developed areas on Kiawah Island beachfront where there may be suitable mudflats or beaches, not that Kiawah Island's beachgoers have ever been harmful to them.

R. p.13.

A fact finder is entitled to treat the testimony of an expert the same as any other witness, may determine what weight to give the expert's testimony, and is not required to accept the expert's testimony. See Hall v. United Rentals, Inc., 371 S.C. 69, 90, 636 S.E.2d 876, 887 (Ct. App. 2006) (holding that, once admitted, expert testimony is to be considered like any other testimony, expert testimony may be disregarded if there is other competent testimony in the record, and the finder of fact determines the weight

and credit to be given to the expert testimony). Judge Anderson's findings that neither the project nor the possible future residential development will most probably have a potential adverse effect on wintering piping plovers or their habitat is fully supported by substantial evidence.

2. Diamondback Terrapins

Similarly, Judge Anderson found that the project would not adversely affect the diamondback terrapin population in the area. **R. pp.14-15.** This terrapin is not an endangered, threatened, or protected species. **R. p.1576:7-9.** Section 50-5-2300 of the South Carolina Code permits people to possess up to two diamondback terrapins for a non-commercial purpose, even today.[7] As Sidi Limehouse, one of Appellants' witnesses, explained, diamondback terrapins have been possessed and eaten by the local population in terrapin soup for generations. **R. pp.1124:9-1125:5.**

Appellants point to a "study in the early nineties by a Master's student at College of Charleston" showed that the terrapins nested on the Property; appellants argue the terrapins not be able to do so if the erosion control structure were built. **R. 1564:18-23.** Appellants then jump to the conclusion that the bulkhead/revetment will lead to the extinction of the diamondback terrapin. Their contentions are not only speculative but are unsupported by the facts and CCL's expert, Michael Dorcas, Ph. D.

Even if the erosion control structure were built, there would still remain over a half mile of access to the shoreline of the Kiawah River without the structure. **R.**

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[7] Section 50-5-2300 of the South Carolina Code, titled "Taking and possessing diamond-backed terrapins; penalty," provides as follows: "(A) It is unlawful to take or possess diamond-backed terrapin for a commercial purpose. A person may possess no more than two diamond-backed terrapin for a noncommercial purpose. Nothing in this section prohibits the incidental catch of terrapin by persons engaged in a lawful fishery when the terrapin are returned immediately to the water."

pp.619:24-620:12, pp.2040, 2042, 2044-2045. The following finding of Judge Anderson to this effect is therefore supported by the evidence: "[t]o the extent that terrapins seek possible upland nesting sites on Captain Sam's peninsula, they will still have access for more than 3,000 feet of the peninsula's river shoreline between the western end of the proposed revetment area and Captain Sam's Inlet." **R. p.15.**

In response to a question from Judge Anderson, Dr. Dorcas did not know if a terrapin that was unable to breed in one location would simply go to another. **R. p.1581:1-8.** Furthermore, he said only that the project "could" detrimentally affect the terrapins. **R. 1571:1-13.** He did not say that it would most probably, to a reasonable degree of biological certainty, adversely affect them. In matters of causation of this nature, the expert is required to state his or her opinion to a reasonable degree of certainty that the action in question will most probably cause the result. See Clark v. Greenville County, 313 S.C. 205, 208, 437 S.E.2d 117, 119 (1993) ("[E]xpert testimony must state that the result 'most probably' came from the cause alleged."); Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 111, 410 S.E.2d 537, 543 (1991) ("'It is not sufficient for the expert . . . to testify merely that the ailment might or could have resulted from the alleged cause. He must go further and testify that taking into consideration all the data it is his professional opinion that the result in question most probably came from the cause alleged.'") (quoting Eubanks v. Piedmont Natural Gas Co., 198 F. Supp. 522, 526-27 (W.D.S.C. 1961)).

Finally, Dr. Dorcas conceded that the primary cause of terrapin mortality is crab traps. **R. p.1561:3-17.** They get in them, can't get out, and they drown. **R. p.1561:3-17.** Crab traps obviously are entirely unrelated to this erosion control structure.

As a result, Judge Anderson's finding that the revetment will not have an adverse effect on diamondback terrapins is supported by substantial evidence and should be sustained. **R. pp.14-15.**

3. Other Marine and Wildlife.

Regarding other marine and wildlife, Judge Anderson ruled: "[N]either the proposed bulkhead/revetment nor the possible future residential development will have a material adverse effect on . . . other marine life or wildlife." **R. p.39.** This finding, too, is supported by substantial evidence.

Long and Bohannon testified at trial that the ACB mattress comprising the revetment will provide additional habitat for oysters and other marine life, such as marsh grass. **R. pp.289:5-290:7, pp.593:16-594:8.** Moreover, in response to cross examination by the Appellants, Dr. Kana testified that in his opinion and experience the ACB mat and bulkhead would become habitat for an entire "suite" of marine organisms. **R. p.671:5-21.**

At this late date, Appellant CCL now argues that the project will adversely affect bottlenose dolphins, referring to the testimony of lay witnesses who stated that they had seen dolphins "beaching" or "stranding" fish on the riverbank. That was the sum total of the evidence as to dolphins. Appellants offered no expert testimony at all as to the effect, if any, the bulkhead/revetment structure or the potential residential development most probably would have on dolphins. There was no expert testimony that dolphins will not engage in this same feeding behavior in the same location if the revetment is in place. Further, as already stated, there will still remain abundant sandy shoreline along

the riverbank for the dolphins to use.[8] **R. pp.619:24-620:12, pp.2040, 2042, 2044-2045.**

Appellants did not assert injury to dolphins as a ground in their motion to reconsider and Judge Anderson did not expressly rule on it. Consequently, they have not preserved the issue for appellate review. See Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 511, 598 S.E.2d 712, 715 (2004) (recognizing that an unappealed ruling is the law of the case). However, even if this Court were to consider it, Judge Anderson's findings that there would be no harm to other marine life is supported by the evidence and there is utterly no evidence that the revetment would have a material adverse effect on dolphins.

C. Judge Anderson considered the extent to which the structure could cause erosion, shoaling of channels or creation of stagnant water.

Section 48-39-150(A)(4) of the South Carolina Code required Judge Anderson to consider "The extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water." On this issue, Judge Anderson specifically concluded: "[T]he project will clearly reduce and likely stop erosion rather than precipitate any erosion." **R. p.19.** Almost every witness at the contested case hearing remarked on the erosion near the neck of the Property and the adjacent county park, again including OCRM's project manager, Bill Eiser. **R. pp.550:17-551:22, pp.615:22-616:5, pp.717:22-719:13, p.1029:2-5, p.1070:11-16, pp.1092:2-1093:9, pp.1213:13-1216:3, p.1232:21-25, pp.1263:15-1264:19, p.1356:17-23.** Moreover, Bohannon, an engineer, and Dr. Kana, a coastal geologist, both confirmed that the project would eliminate

[8] Even if the dolphins would not use the revetment surface the same way they use the sandy shoreline at low tide, there is no correlation with adverse impact. We do not conclude that people starve because a single McDonald's restaurant may close.

erosion at the neck, with Dr. Kana testifying that the neck would get wider after the project. **R. p.623:10-15, p.863:18-23, pp.903:15-904:3.**

Dr. Kana opined that the structure would not adversely affect adjacent highland property, Seabrook Island, or adjacent marshland. **R. pp.723:6-724:8, pp.734:20-735:23, p.876:10-15, p.901:7-17, pp.903:15-904:3.** Bohannon confirmed that, if the structure were designed only to serve the adjacent county park, the structure would cause increased erosion at the neck. **R. pp.590:18-592:3.** Accordingly, T&H designed a structure providing a comprehensive solution to erosion in the area. **R. pp.597:22-598:5.** Substantial evidence therefore supports Judge Anderson's finding on this issue.

D. Judge Anderson evaluated the extent to which the structure could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources.

Section 48-39-150(A)(5) of the South Carolina required Judge Anderson to 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." As previously explained, Judge Anderson extensively evaluated whether and to what extent the bulkhead/revetment structure would affect public access to the area. **R. p.15.** He relied on testimony and exhibits admitted at the hearing and found that there would be no significant adverse effect. **R. p.15, pp.619:24-620:12, p.2040, p.2042, pp.2044-2045.** Moreover, the specific project standards for bulkheads and revetments, sections 30-12(C)(1)(c) and (d) of the Administrative Law Code, allow some adverse effect on public access if there is loss of upland or no feasible alternatives, both of which are present in this case.

Throughout their briefs, Appellants use the term "beach" to describe the river shoreline. It is not a beach as defined under the BMA and regulations. Section 48-38-270(5) of the South Carolina Code established definitions for the BMA providing that "[t]he beach/dune system includes all land from the mean highwater mark of the Atlantic Ocean landward to the setback line described in Section 48-39-280." See also S.C. Code Ann. Regs. §30-1(D)(5) ("Beach/Dune System [means] all land from the mean high-water mark of the Atlantic Ocean landward to the 40 year setback line described in §48-39-280."). Neither the revetment or the future residential development will occur in the beach/dune system, and there is no proof of any negative effect on the beach. Moreover, the structure would have no effect on navigation. **R. p.1359:11-16.** As shown, substantial evidence supports Judge Anderson's findings with respect to this subsection.

E. The proposed project is not located within a Geographic Area of Particular Concern ("GAPC").

Appellant CCL also contends the ALC failed to consider "the extent and significance of negative impacts on GAPCS . . . ." as set forth in section 30-11(c)(3) of the Administrative Law Code. Geographic Areas of Particular Concern, or GAPCs, are defined in the CZMP, Chapter IV(A)(2)(a)(8). This assertion goes back to the discussion of whether the project negatively impacts wintering piping plovers, which CCL correlates to a supposed impact on a GAPC.

The boundaries of a GAPC are co-terminus with the boundaries of designated critical habitat. **R. p.1491:10-24.** B ecause, as previously explained, the federally designated critical habitat for wintering piping plovers does not intersect the location of

the revetment nor extend above the setback line to any area near the potential future development, no GAPC is involved. **R. p.965:14-966:6, pp.966:20-967:15.**

Eiser recognized that the project will not be constructed in a GAPC. **R. p.1379:2-6.** Although the far tip of the Spit is included within a GAPC, this portion does not include the area in which the revetment or the upland development will be constructed. **R. p.965:14-966:6, pp.966:20-967:15, p.1379:2-6.** As Judge Anderson recognized: "[T]he developable area of Captain Sam's peninsula is well outside [the federally designated] boundaries of the critical habitat for winter piper plovers. It is thus not a Geographic Area of Particular Concern under the CZMP." **R. pp.30-31.** His ruling is supported by substantial evidence.

F. Judge Anderson's conclusion that the general considerations do not include consideration of the suitability of the upland for residential use in light of the migration of the inlet over historical times was not legal error.

Judge Anderson's determination that the cumulative impacts analysis does not include consideration of the suitability of the upland for residential use in light of the historical migration of the inlet was not legal error, and, even if it were, it was harmless.

The wording of the general considerations recited in the statute and regulation supports Judge Anderson's conclusion since it makes no mention of a factor requiring assessment of the suitability of upland uses based on historical inlet migration.

Even if historical inlet and beach shoreline migration were to be taken into account despite not being listed as a consideration, Appellants are mistaken as to the "look back." They urge consideration of changes of location over two hundred years. That is not the law of this state.

Section 48-39-280(A) of the South Carolina Code conclusively decreed that forty years is the applicable period for consideration of oceanfront shoreline migration: "A forty-year policy of retreat from the shoreline is established. The department must implement this policy and must utilize the best available scientific and historical data in the implementation." It is undisputed the beachfront of the spit has accreted over the last 40 years.

Finally, even though Judge Anderson determined that he was not required to consider oceanfront shoreline and inlet migration for purposes of this permit, he did anyway and made a finding it did not weigh against issuance of this permit. **R. p.6.**

IV. Judge Anderson's findings as to the extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area are supported by substantial evidence.

Appellants contend that Judge Anderson committed a legal error in his interpretation of the cumulative impacts analysis set forth in section 30-11(C)(1) of the Administrative Law Code in ruling that it looks to impacts in the critical area. This regulation provides as follows:

> C. Further Guidelines: In the fulfilling of its responsibility under Section 48-39-150, the Department must in part base its decisions regarding permit applications on the policies specified in Sections 48-39-20 and 48-39-30, and thus, be guided by the following:
> (1) The extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area.

Judge Anderson weighed the evidence as to the cumulative impacts of both the bulkhead/revetment *and the potential future residential development,* and concluded that there would not be significant adverse impacts. **R. pp.11-15.** Even though he considered the impacts of the potential future development, which will be subject to its

own permitting regimen when it moves ahead, Judge Anderson construed the section as limiting the analysis to the effects in the critical area for this critical area project. Appellants argue this was legal error. Not only was Judge Anderson's interpretation supported by the wording of the section itself but any alleged error would be harmless since he considered the impacts of the future highland development.

A. The wording of section 30-11(C)(1) limits OCRM's authority to a consideration of only the direct impact of the specific regulatory activity for which a permit is required.

Section 30-11(C)(1) states that this consideration involves the "long-range, cumulative effects *of the project* [which] may result within the context of other possible development and the general character of the area." (double emphasis added). As Eiser testified, the "project" for purposes of this application is the bulkhead/revetment, not the potential future residential development. **R. p.1501:8-12.**

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). "In numerous cases a strict interpretation has been adopted in regard to statutes which authorize administrative agencies to exercise powers that tend to interfere with established or traditional property rights." 3 Sutherland Statutory Construction § 65:2 (7th ed.).

Judge Anderson recognized: "It is this provision which constitutes the underlying objection to this permit by CCL and, in particular, [OCRM] . . . . [T]he 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." **R. p.22** (emphasis in original). Pursuant to the plain language of section 30-11(C)(1), OCRM is required to consider the long-range and cumulative effects of the *project which is subject to the critical area permit*, i.e. the development activities expressly regulated by OCRM and requested through the permit application, not the effects of potential highland development on Property adjacent to the critical area. **R. p.1501:8-12.**

The application in this case is for a *critical area* permit, not an upland permit issued by OCRM, such as one for a stormwater plan or stormwater discharge. The specific criteria set forth in the ten general considerations in Section 48-39-150 all deal with physical impacts in the *critical area* except for the consideration of economic benefits (7) and the extent to which the use of the project could affect the value and enjoyment of adjacent owners (10).

As Judge Anderson pointed out in his questions during closing argument, if Appellants' interpretation were to prevail, OCRM could deny a critical area permit in Myrtle Beach if it believed the upland development of Myrtle Beach was too intense. **R. p.1672:1-14.** Judge Anderson also expressed his concerns about the reaches of Appellants' argument in his final decision: "Construing this provision otherwise would lead to a substantial expansion of the Department's authority to regulate the development of entire communities. Conceivably, the Department would deny critical area permits near towns or cities simply because it believes the permits would facilitate upland sprawl and general over-development." **R. p.22.**

Under Appellants' interpretation, could OCRM deny a dock permit for an empty lot because it thinks the house planned on the lot is too big and will injure the waterfront view? That is what Appellants contend should happen here. Appellants' interpretation has no bounds and would lead to an absurd result where critical area permits could be withheld because they may facilitate in some fashion possible future development of the upland that is subject to its own separate permitting gauntlet.

The interpretation in this case is answered by the project itself. The bulkhead/revetment does not cause the future upland development. In fact there was no proof it will have any direct physical effect on the upland at all, other than to stabilize the river shoreline. The regulation requires consideration of the effects of the *project* when taking into account "other possible development and the general character of the area." The regulation does not say, as Appellants argue, that the effects of the possible development are to be taken into account. Only the effects of the *project* are considered.

In this respect, it is undisputed in this case that this critical area permit application does not seek permission for activity outside the critical area, unlike the cases and decisions cited by OCRM in support of its contention. Cf., e.g., Spectre, LLC v. S.C. Dep't of Health & Envtl. Control, 386 S.C. 357, 361, 688 S.E.2d 844, 846 (2010) (addressing OCRM's decision on permit to fill wetlands in the context of a provision of the CMP which specifically required OCRM to review and certify permit application for commercial buildings when the proposal requires the filling of wetlands). Further, it is undisputed in this case that the highland development on the Property has no direct effect on the critical area, unlike the cases and decisions cited by OCRM in support of

its contention. Cf., e.g., Opinion of the Attorney General Re: The Honorable Paul Agnew, 2006 WL 1207263 (Apr. 3, 2006) ("The power to regulate and protect the "critical areas" must necessarily include the authority to regulate activities outside these "critical areas" *where such activities are deemed to adversely affect these areas.*") (emphasis added); Opinion of the Attorney General Re: The Honorable Dwight A. Loftis, 2006 WL 1207276 (Apr. 18, 2006) ("In our view, as we stressed in the April 3, 2006 Opinion, the General Assembly intended that DHEC possess the authority 'to regulate development in areas outside the 'critical area' which are deemed to adversely impact or affect the 'critical area.'").

Moreover, even the cases cited by Appellants expressly limited consideration of the impacts of the "project" to the impacts of the development activity within the critical area itself, i.e. the development activity which is expressly regulated by OCRM. See, e.g. Young v. S.C. Dep't of Health & Envtl. Control, 383 S.C. 452, 462, 680 S.E.2d 784, 789 (Ct. App. 2009) ("There is no evidence that any negative impact *of the proposed boatlift* would be any greater than that of other boat storage structures.") (emphasis added).

This Court's recent decision in Spectre, LLC v. S.C. Dep't of Health & Envtl. Control, 386 S.C. 357, 360, 688 S.E.2d 844, 845 (2010), cited by Appellants, strongly supports Judge Anderson's interpretation of the CZMA. As Judge Anderson pointed out in footnote 19 of his Amended Final Order and Decision, the Spectre decision did not involve a critical area permit, but rather a permit to fill isolated freshwater wetlands for a commercial purpose. Id. Unlike the residential development at issue in the present case, this specific activity was expressly addressed and discouraged within the CZMP.

Id. Moreover, the alleged adverse impacts in Spectre arose, not from the potential development of the highland property, but from the filling of the wetlands—the very activity expressly required to be regulated by OCRM in the CZMP. Id. Thus, the adverse impacts of the "project" in Spectre were limited to the regulated activity itself—not the highland development which could result from such activity. Id. **R. p.22, n.19.**

In this case, Appellants request this Court to confirm a non-existent purported authority for OCRM to directly regulate, in the context of a critical area permitting decision, activities which may occur on the adjacent highland portion of KDP's private property. As Judge Anderson recognized: "Nowhere in Spectre did the Supreme Court rule that the CZMP authorizes [OCRM] to deny critical area permits because of the effects of later foreseeable development on upland." **R. p.22, note 19.**

B. Even if Judge Anderson's legal construction of section 30-11(C)(1) was incorrect, which it was not, such error would be harmless since he fully considered the impacts of the possible future residential development and determined that reasonable safeguards would be implemented and there was no proof of adverse impacts.

An appellate court will not reverse an administrative decision due to harmless error. See Ross v. Med. Univ. of S. Carolina, 328 S.C. 51, 73, 492 S.E.2d 62, 74 (1997). KDP put up the only proof as to the environmentally sensitive techniques and safeguards that will be associated with the potential future development. **R. pp.1996-2039, pp.2255-2256; R. pp.274NN:24-274OO:6, pp.274PP:1-274QQ:10, pp.275:17-281:15, p.329:4-14, pp.332:18-333:2, p.405:2-11, pp.437:24-480:8, p.464:10-17, p.473:1-21.** As further explained below in the discussion of the project's consistency with the CZMP, Judge Anderson found that the future development would employ reasonable safeguards and be environmentally responsive and responsible. **R. pp.28-**

31. For this reason, any alleged legal error of Judge Anderson in interpreting section 30-11(C)(1) to require only consideration of the effects of the project on the critical area is harmless as a matter of law.

C. The CZMA also prohibits interpretations of its provisions which would result in a taking without just compensation.

Judge Anderson noted in his order that the CZMA specifically prohibits implementation of permitting decisions in a manner that takes property without just compensation. **R. p.23** (quoting S.C. Code Ann. § 48-39-30(c) ("In the implementation of the chapter, no government agency shall ... issue any order ... so as to constitute a taking of property without the payment of just compensation in violation of the Constitution of this State or of the United States.")). Judge Anderson's reference to this limitation was included in his discussion of OCRM's de facto effort to trump the local zoning through its cumulative impacts analysis that was guided by its desire that no development ever occur on the Property. **R. p.23.**

While the question of whether the permitting decision constituted an inverse condemnation of the Property was not before Judge Anderson, much less decided by him, this policy of section 48-39-30(c) indicates how askew OCRM's staff determination of cumulative impacts was.

V. Substantial evidence supports Judge Anderson's finding that the bulkhead/revetment structure requested by KDP and the adjacent potential highland development complies with the applicable policies in the CZMP.

Appellants' challenge to Judge Anderson's findings with respect to consistency with the CZMP focuses primarily on the possible future residential development on less than 20% of the Property, rather than the bulkhead/revetment itself. As to the structure, Appellants' argument under the CZMP focuses on their contentions about access to the

tidelands, previously discussed herein. Judge Anderson found that "neither the bulkhead/revetment nor the possible future residential development is contrary to the policies of the CZMP." **R. p.31.**

Judge Anderson addressed all the pertinent policies of the CZMP as to both the bulkhead/revetment and the potential future residential development. **R. pp.28-31**. All his findings are supported by substantial evidence.

A. Judge Anderson correctly addressed the consistency of the project with CZMP policies.

Once again, just as with the cumulative impacts assessment under section 30-11(C)(1) of the Administrative Law Code, the inquiry is whether the project, i.e., the erosion control structure, is inconsistent with the CZMP policies, not whether the future residential development that might occur is compatible. OCRM argues that the Erosion Control provisions of the CZMP are applicable, in particular its discussion of erosion control structures on the beach. CZMP Chapter IV (C), p. IV-51. However, a reading of those provisions indicates that they address structures on the *oceanfront* beach. The specific authorization and standards for erosion control structures that are not on the oceanfront beach are governed by section 48-39-120(F) of the South Carolina Code and section 30-12(C) of the Administrative Law Code.

At the instigation of Appellants, Judge Anderson nonetheless proceeded to assess whether the potential future residential development, not just the project, was consistent with the policies in the CZMP. In sum, Judge Anderson found that the CZMP allows residential development behind the primary dune on barrier islands provided that the owner uses reasonable precautions and the development is not ill-planned. **R. pp.28-31.** As to the CZMP, Judge Anderson's findings included the following:

> The development techniques and safeguards KDP intends to implement are consonant with the policies in the CZMP. More specifically, I find the low-density development described by Long and Permar that would be employed in the residential development of Captain Sam's entail reasonable precautions. No evidence was offered to alter this important point. The many rows of dunes seaward of the setback line would remain essentially intact on a permanent basis to enjoy for their beauty and protection, thereby preserving the strong natural protections deemed desirable by the policies in the CZMP. Accordingly, the proposed limited, residential development several rows of sand dunes behind the primary dune, will not violate the policies of the CZMP Chapter III (C)(3)(XIII)(A).
>
> * * *
>
> The potential residential development on private property will also not impair public open space at Beachwalker Park or along the beach. Finally, the developable area of Captain Sam's peninsula is well **outside** Unit-1's boundaries of designated critical habitat for wintering piping plovers. It is thus not a Geographic Area of Particular Concern under the CZMP.

R. pp. 30-31 (emphasis in original).

For the reasons outlined in his order, these findings regarding the proposed limited future residential development of the Property are supported by substantial evidence.[9]

As to Appellants' challenge that the erosion control structure and possible future residential development violate open space provisions of the CZMP, those provisions deal with *public* open space and access thereto. CZMP Chapter III (C), p. III-73 and

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[9] The substantial evidence supporting these findings has been previously outlined herein. As to the environmentally-friendly nature of the proposed residential development on the Spit, see **R. pp.274NN:24-274OO:6, pp.274PP:1-274QQ:10, pp.275:17-281:15, p.329:4-14, pp.332:18-333:2, p.405:2-11, pp.437:24-480:8, p.464:10-17, p.473:1-21, pp.2016-1018, pp.2255-2256.** As to the effect on public access, see **R. pp.619:24-620:12, p.2040, p.2042, pp. 2044-2045.** As to the location of the GAPC on the Spit, see **R. pp.965:14-966:6, pp.966:20-967:15. p.1379:2-6.**

Chapter IV (D). Judge Anderson made explicit findings, supported by substantial evidence that neither the public open space nor access to public open spaces will be impaired by the bulkhead/revetment or the possible future development. **R. pp.30-31.** There is no policy in the CZMP that private land must remain forever in an open state, a mistaken premise of OCRM's permitting decision and Appellants' argument on appeal.

As to the question of whether the provisions of the BMA displace the provisions in the earlier CZMP with respect to the development on barrier islands and beachfront erosion control, this issue raised by OCRM in its brief need not be decided because Judge Anderson determined that the proposed possible future residential development did not contravene the policies of the CZMP. **R. pp.28-31.**

As an additional sustaining ground, KDP points out that the statutes and regulations governing permits for bulkheads and revetments do not specify that there must be a determination of consistency with the CZMP. The CZMA instructs that permit decisions are to be based on the "rules and regulations" adopted by the General Assembly after the adoption of the CZMP. "The department shall develop a comprehensive coastal management program, and thereafter have the responsibility for enforcing and administering the program *in accordance with the provisions of this chapter and any rules and regulations promulgated under this chapter.*" S.C. Code Ann. §48-39-80 (emphasis added). By analogy, the CZMP is to the permitting regulations as a comprehensive plan is to zoning ordinances; the regulations govern the permitting determination.

Neither the applicable statutes nor the governing regulations require a determination of consistency with the CZMP, although the General Assembly could

have imposed this requirement. OCRM is prohibited in its permitting determinations from enforcing any alleged standard that is not embodied in the adopted regulations. Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991) ("As a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged.").

All Appellants' arguments based on compliance with the policies of the CZMP are unavailing for the additional reason that consideration of a project's consistency with the CZMP is not a legal requirement for obtaining a permit for this erosion control structure.

B. OCRM staff is not entitled to deference on this issue, DHEC's board never addressed the issue in the context of the present case, and, in any event, neither OCRM staff nor the DHEC board are entitled to ignore the plain language of the CZMA.

Appellant OCRM argues that OCRM staff's interpretation of the CZMA is entitled to deference. Alternatively, Appellants argue that the DHEC Board addressed a similar issue in a later separate permitting decision, and that its interpretation of the CZMA is entitled to deference. Neither of these arguments is supported by the applicable law. In addition, these arguments are procedurally barred in this appeal.

Judge Anderson denied CCL's motion to supplement the record with an unrelated DHEC Board opinion granting a storm-water and coastal zone consistency permit with respect to the Property. **R. pp.32-39.** Neither CCL nor OCRM directly challenged this ruling on appeal, so it is the law of this case. See Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 511, 598 S.E.2d 712, 715 (2004) (recogniz ing that an unappealed ruling is the law of the case).

Secondly, South Carolina appellate courts have been crystal clear that OCRM staff interpretations of a statute or regulation are not entitled to any deference. See Neal v. Brown, 383 S.C. 619, 624, 682 S.E.2d 268, 270 (2009) ("[A]n agency's Appellate Panel, not its staff, is typically entitled to deference in interpreting agency regulations."). Thirdly, even the agency is not entitled to deference in interpreting a statute or regulation if the legislative intent may be discerned from the provision's plain language. See Monroe v. Livingston, 251 S.C. 214, 217, 161 S.E.2d 243, 244 (1968) ("Such administrative construction however affords no basis for the perpetuation of a patently erroneous application of the statute."). Finally, the deference owed to an agency's interpretation of its statute applies only when the interpretation occurred in the same proceeding. See Neal, 383 S.C. at 625, 682 S.E.2d at 271 (2009) ("[T]he Panel is entitled to deference in interpreting its own regulation, and it found that the regulation prevented the granting of a permit *in this case*.") (emphasis added). As a result, the plain language of the CZMA should stand.

VI. Substantial evidence supports Judge Anderson's factual finding that the bulkhead/revetment structure requested by KDP does not substantially impair the public interest in the public trust lands and waters.

As Judge Anderson recognized: "Clearly, the above laws [the CZMA and regulations adopted pursuant to the CZMA] set forth the parameters of when coastal public trust land may be used for private purpose." **R. p.27.** Applying these laws, Judge Anderson held "the bulkhead/revetment will not substantially impair the recreational activities of boaters, kayakers, and others, nor will it substantially impair or unreasonably restrict their use of the public trust tidelands including a portion of the southerly bank of the Kiawah River." **R. p.28.**

This Court explained the public trust doctrine in the context of an environmental permitting decision in Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995), as follows:

> In South Carolina, the state owns the property below the high water mark of a navigable stream. *State v. Hardee,* 259 S.C. 535, 193 S.E.2d 497 (1972). This property is part of the Public Trust. *Id.* The legislation creating the Coastal Council and defining its duties, while not explicit, implicitly charges the Coastal Council with administering the Public Trust lands in connection with coastal waterways. *See* S.C.Code Ann. § 48-39-10, *et. seq.*
>
> The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. *Illinois Central R. Co. v. Illinois,* 146 U.S. 387, 453, 13 S.Ct. 110, 118, 36 L.Ed. 1018, 1042 (1892). Clearly, under the South Carolina Coastal Management Act, the State through the Coastal Council maintains *control* over the public trust lands. *See e.g. Caminiti v. Boyle,* 107 Wash.2d 662, 732 P.2d 989 (1987). Coastal Council's Regulations specifically state that "[n]o permit shall convey, nor be interpreted to convey, a property right in the land or water in which the permitted activity is located." 24A S.C.Code Ann.Regs.R. 30-4(E). Since no interest in the land or water within the public trust is conveyed by the permit, the relevant inquiry is whether the docks *substantially impair* the public interest in the public trust lands and waters. As there was testimony that the docks would not *substantially impair* marine life, water quality, or public access to the area, we hold that the permits at issue do not violate the public trust doctrine.

456 S.E.2d 402 (emphasis added)

As Judge Anderson concluded, the same holds true in the present case. In fact, this argument is simply yet another way of arguing that KDP's permitting application must be denied due to its alleged impact on public access and marine life. At the contested case hearing, there was extensive testimony that the bulkhead/revetment

would not substantially impair public access, see discussion in Argument I.E, or marine life, see discussion in Argument III.B, and there is no contention the bulkhead/revetment will affect water quality in any way. Accordingly, substantial evidence supports Judge Anderson's factual finding that the bulkhead/revetment will not substantially impair the public interest in public lands or waters.

VII. Judge Anderson's factual findings were more than sufficient.

Judge Anderson's factual findings are not, as argued by Appellants, insufficient. "The final order in an agency adjudication of a contested case must contain 'findings of fact and conclusions of law, separately stated.'" Able Communications, Inc. v. S.C. Pub. Serv. Comm'n, 290 S.C. 409, 410, 351 S.E.2d 151, 152 (1986) (quoting S.C. Code Ann. § 1-23-350 (1986)). "'Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.'" Id.

Judge Anderson spent roughly 16 pages of his 31-page Amended Final Order and Decision stating the underlying facts. **R. pp.2-17.** In this respect, Judge Anderson almost quoted to Dr. Kana's testimony regarding the erosion of the riverbank verbatim,[10] and extensively discussed DeWolff's opinions regarding the extent of the erosion at the neck. **R. pp.3-8.** He also cited Bohannon and Walter's testimony extensively, finding them both to be persuasive witnesses. **R. pp.8-14.** As a result, Appellants cannot reasonably contend Judge Anderson's Amended Final Order and Decision was, in any way, conclusory.

[10] Judge Anderson included a footnote of more than half a page (in small print) explaining why he relied upon Dr. Kana's testimony. **R. pp.3-4, note 6.**

VIII. The ALC has jurisdiction to modify the proposed structure as part of its decision.

The proceeding before the ALJ is a de novo hearing, which includes the presentation of evidence and testimony. Hill v. S.C. Dep't of Health & Envtl. Control, 389 S.C. 1, 9, 698 S.E.2d 612, 616 (2010). Pursuant to section 48-39-150(B) of the South Carolina Code, a "permit may be conditioned upon the applicant's amending the proposal to take whatever measures the department feels are necessary to protect the public interest." Section 30-4(H) of the Administrative Law Code, providing for amendments to a permit, states: "An amendment to a permit can be made without the requirements of a new permit if the proposed change on the amendment does not significantly increase the size or change the use of the permitted project."

In considering KDP's proposal, Judge Anderson clearly determined a reduction in the size of the proposed structure would help protect the public interest, based on Bohannon's testimony that the revetment could be reduced in certain locations. OCRM's argument that Judge Anderson somehow exceeded his authority in imposing conditions on the permit to require a smaller structure than requested, just as OCRM staff did in its permitting determination, has no legal basis. Judge Anderson did not commit a legal error in this regard.

IX. The John H. Chaffee Coastal Barrier Resources System has nothing to do with the permit application.

Appellant OCRM finally points to the impact of the John H. Chaffee Coastal Barrier Resources System, established by the United States Congress pursuant to the Coastal Barrier Resources Act ("CBRA"), codified at 16 U.S.C.A. §§3501-3510. Pursuant to the plain language of the CBRA, the CBRA sets forth a framework for the

expenditure of federal funds to promote the purposes behind the CBRA. There is no state or federal requirement that OCRM or the ALJ consider CBRA in addressing a critical area permit. Moreover, OCRM fails to articulate any specific provision of the CBRA which remotely applies.

Conclusion

The decision in this appeal is controlled by the settled scope of appellate review that the ALC's findings stand unless not supported by substantial evidence. Judge Anderson's legal rulings were not erroneous. Even were the Court to hold that he was mistaken as to a legal issue, any such error was harmless as the ALC made all determinations requested by Appellants, who are simply disappointed he did not agree with them.

Appellants' clear motivation, as acknowledged by Mr. Eiser, is to prevent KDP from developing its oceanfront land under its vested rights in the 2005 DA. OCRM overstepped its bounds in many ways in allowing this objective to dictate consideration of this critical area permit. Judge Anderson found this objective was improper and misguided. The ALC determined that the permit request should only be evaluated based on the considerations in controlling statutes and regulations. Each of his findings as to these considerations is supported by substantial evidence.

Based on the foregoing, Judge Anderson's Amended Final Order and Decision should be AFFIRMED.

Respectfully Submitted,

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The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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November 4, 2010

Charleston, South Carolina

STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

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

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

Kiawah Development Partners, II, ... Respondent,

v.

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

Docket No. 09-ALJ-07-0039-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.

PROOF OF SERVICE

I, Nancy Jane D. Murphy, an employee of Pratt-Thomas Walker, P.A., hereby certify that I have served this 4th day of November 2010, a copy of the Respondent's Final Brief and Certificate of Counsel to counsel of record by placing the same in the United States mail, first-class postage pre-paid, to:

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