



# The South Carolina Environmental Law Project

*Lawyers for the Wild Side of South Carolina*

a 501c3  
non-profit organization

**Amy E. Armstrong**  
*Executive Director*  
**Amelia A. Thompson**  
*Staff Attorney*  
**Jessie A. White**  
*Staff Attorney*

**OFFICE ADDRESS**  
430 Highmarket Street  
Georgetown, SC 29440

**MAILING ADDRESS**  
P.O. Box 1380  
Pawleys Island, SC 29585

(843) 527-0078  
Fax (843) 527 0540  
E-mail amy@scelp.org  
amelia@scelp.org  
jessie@scelp.org

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May 30, 2016

RECEIVED

APR 01 2016  
SC Court of Appeals

Honorable Jenny Abbott Kitchings  
Clerk, Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

Re: Kiawah Development Partners, II, Inc. & DHEC v.  
Coastal Conservation League; Docket Nos. 09-  
ALJ-07-0029-CC & 09-ALJ-07-0029-CC

Dear Jenny:

I am enclosing the South Carolina Coastal Conservation League's Notice of Appeal, along with my certificates of service and filing fee. I am also enclosing a copy of the League's motion to transfer, which is being filed with the Supreme Court today.

Please return a clocked-in copy of the notice in the enclosed postage-paid envelope. Thank you for your kind cooperation and assistance with this matter.

Yours very truly,

Amy E. Armstrong

cc: Brady Churdar Esquire  
G. Trenholm Walker, Esquire  
Jana Shealy, Clerk, Administrative Law Court

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS  
IN THE SUPREME COURT

**RECEIVED**  
APR 01 2016  
SC Court of Appeals

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

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

South Carolina Coastal Conservation League, ..... Appellant,

v.

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

Of Whom

South Carolina Department of Health and Environmental Control is, ..... Appellant,  
and Kiawah Development Partners, II, is, ..... Respondent.

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

Kiawah Development Partners, II, ..... Respondent,

v.

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

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**MOTION FOR ORDER TRANSFERRING  
CASE TO THE SUPREME COURT**

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TO: THE SUPREME COURT OF SOUTH CAROLINA, THE COURT OF APPEALS AND  
THE RESPONDENTS:

PLEASE TAKE NOTICE that the Appellant, South Carolina Coastal Conservation

League, hereby moves the Supreme Court and the Court of Appeals, pursuant to SCACR 204(b), for an order certifying this case for review by the Supreme Court before it has been determined by the Court of Appeals. Appellate Court Rule 204(b) states that the Supreme Court may certify any case for review before it has been determined by the Court of Appeals, and that certification is “normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance.”

The reasons that the Appellant Coastal Conservation League (“the League”) seeks Supreme Court review are: (1) the decision on appeal arises from a Supreme Court opinion reversing and remanding the case back to the Administrative Law Court; (2) this case involves issues of significant public interest and legal principles of major importance; and (3) the public interest and judicial economy would best be served by resolution of this case by the Court that is already intimately familiar with the factual and legal issues. In support of this motion, the Appellant submits the following:

### **INTRODUCTION**

The Supreme Court previously granted the League’s motion to transfer its appeal of Administrative Law Judge Ralph King Anderson, III’s Final Order and Decision dated January 22, 2010. Since accepting the case, the Supreme Court granted two rehearings, resulting in three decisions, ultimately remanding the case to the Administrative Law Court (“ALC”) to consider the Court’s legal analysis. The Amended Final Order and Decision on Remand and Order Granting Motions for Clarification and Denying Motions for Reconsideration presently on appeal involve nearly the identical errors of law presented in the initial appeal, which continue to be of significant public interest and major legal importance.

First, whether the Coastal Zone Management Act (“CZMA” or “Act”) allows the construction of a half-mile long hard erosion control structure along the banks of the Kiawah River to facilitate a residential development on Captain Sams Spit on Kiawah Island is an issue of significant public interest. Second, whether the Act and regulations promulgated thereunder allow the degradation and elimination of public uses of critical area tidelands resulting from the construction of a hard erosion control structure that will serve only to benefit a developer is a legal principle of major importance.

Finally, whether the Orders on appeal, which crafts a new permit without any evidentiary support, carries out the clear directives and sound analysis from the Supreme Court’s December 2014 Opinion is a matter of both significant public interest and a legal principle of major importance.

#### **STATEMENT OF THE CASE**

The Respondent, Kiawah Development Partners, II, Inc. LLC, (“KDP”) applied for a critical area permit and coastal zone consistency certification to construct a 2,783’ long and 40’ wide articulated concrete block revetment and bulkhead system along the banks of the Kiawah River at Captain Sam’s Inlet in Charleston County. On December 18, 2008, the South Carolina Department of Health and Environmental Control (“DHEC”) granted a permit to construct 270’ of the revetment/bulkhead along the northeastern end of the proposed project area, which is along the southwest portion of the parking lot at Beachwalker Park. DHEC denied the request for the remaining 2,513’ of revetment/bulkhead.

On December 31, 2008, both the League and KDP filed requests for a Final Review Conference before the DHEC board in connection with the DHEC staff decision. KDP

challenged the denial of the 2,513' feet of the revetment/bulkhead system. The League challenged the issuance of the 270' of revetment/bulkhead system and sought to uphold the denial of the 2,513' of structure. The DHEC Board decided not to conduct a Final Review Conference and notified the Coastal Conservation League in writing of its decision on January 14, 2009.

On January 20, 2009 and January 29, 2009, KDP and the League filed Requests for Contested Case Hearing before the Administrative Law Court ("ALC"), respectively.

The matter came before the ALC for a hearing August 24 – 28, 2009. The Administrative Law Judge Ralph King Anderson, III, issued a Final Order and Decision on January 22, 2010. That Order reversed the special condition denying 2,513' of the bulkhead/revetment, and authorized the structure for the entire length of 2,783' with some minor limitations in specific areas.

On February 2, 2010, the League filed a Motion to Reconsider, To Open the Record and Admit New Evidence and For Stay. On February 2, 2010, DHEC filed a Motion to Reconsider. On February 26, 2010, Judge Anderson issued an Order on the Motions for Reconsideration denying the requested relief, and issued an Amended Final Order and Decision. On March 26, 2010, the League filed a Notice of Appeal and a Petition for Order of Supersedeas in the Court of Appeals. On March 29, 2010, DHEC filed a Notice of Appeal in the Court of Appeals. On April 22, 2010, the League filed a motion to transfer, which was granted.

On November 21, 2011, the Supreme Court issued an Opinion reversing Judge Anderson's 2010 Order. KDP filed a Petition for Rehearing, which was granted. On February 27, 2013, the Supreme Court issued an Opinion affirming the 2010 Order. The League filed a Petition for Rehearing, which was granted. On December 10, 2014, the Supreme Court issued an

Opinion reversing Judge Anderson's 2010 Order and remanding the case back to the ALJ "for further consideration consistent with this Opinion."

On December 2, 2016, Judge Anderson issued a Final Order and Decision on Remand. The League, DHEC and KDP all filed motions for reconsideration and/or for clarification.

On March 22, 2016, Judge Anderson issued an Amended Final Order and Decision on Remand ("Amended Order on Remand") and an Order Granting Motions for Clarification and Denying Motions for Reconsideration, attached (duplicative copies not provided). The Amended Order on Remand again authorizes 2,783' of erosion control structure. On March 30, 2016, the League filed a Notice of Appeal of both Orders contemporaneously with this Motion to Transfer.

## ARGUMENT

### **I Background**

#### *The Permit Requested by KDP*

KDP sought a revetment and bulkhead system that would be located within public trust critical area tidelands on the banks of the Kiawah River near Captain Sams Inlet. Captain Sams Spit is adjacent to Captain Sams Inlet at the Southwest end of Kiawah Island. The Spit is a sandy land formation and is surrounded on three sides by water – the Atlantic Ocean, the inlet and the Kiawah River. It is connected to the main body of Kiawah Island by a narrow strip of land, often referred to as the "neck" of the Spit.

The revetment/bulkhead system sought by KDP would begin at Beachwalker Park, and continue around the bend of the river, along the neck of the Captain Sam's Spit for 2,783 feet. The structure would have two components – a vertical bulkhead wall constructed at the critical area line and a sloped concrete block revetment starting at the bulkhead and extending into the

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critical area.<sup>1</sup> The revetment portion of the structure would be 40' wide and follow the bulkhead, beginning at the mean high water or critical area line and extending below the mean low water line and into the channel of the Kiawah River. The bulkhead/revetment system would be constructed entirely within critical areas.

DHEC issued the critical area permit with special condition No. 1 limiting the request to 270' bulkhead/revetment in front of the parking lot at Beachwalker Park.

*The ALC's 2010 Final Order & the Supreme Court's December 2014 Opinion*

The ALC's 2010 Final Order and Decision ordered that the permit be issued deleting special condition No. 1 which limited the bulkhead/revetment structure to 270', and authorizing the structure to be constructed for the entire 2,783' length with some minor limitations. The 2010 Order allowed that KDP may get approval from DHEC for the entire structure.

The Supreme Court, in its third and final Opinion of December 2014, held that the ALJ erred in its application of S.C. Code Ann. § 48-39-30(D), which requires that "critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate maximum measurable dollar benefits." The Supreme Court held that "it was clear that only the developer, not the *public*, would benefit from the construction of this enormous bulkhead and revetment." Kiawah

Development Partners, II, Inc. v. S.C. Dep't of Health & Env'tl. Control, 411 S.C. 16, 766 S.E.2d

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<sup>1</sup>"Critical area" is defined as coastal waters; tidelands; beaches; and the beach/dune system. S.C. Code Ann. § 48-39-10(J). "Coastal waters" are defined as "the navigable waters of the United States subject to the ebb and flood of the tide and which are saline waters, shoreward to their mean high-water mark." S.C. Code Ann. § 48-39-10(F). The definition of "tidelands" includes "all areas at or below mean high tide . . ." S.C. Code Ann. § 48-39-10(G). The structure KDP is proposing to construct falls entirely within the critical area.

707, 716 (hereinafter "KDP"). Court ruled that to "allow the benefits to a private developer to override the interest of the people of South Carolina undermines the statute and defeats the very purpose of the public trust doctrine." Id.

The Supreme Court also ruled that the ALJ erred in its application of Regulation 30-11.C.(1), which requires DHEC's decision to be guided by the "extent to which the long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area." S.C. Code Ann. Regs. 30-11(C)(1); *see also* CMP Policy III.C.3.I.(7) at p. III-14. Specifically, the Court held that the ALJ erred in ruling that the agency does not have regulatory authority outside the critical area and that the agency's review of the long-range, cumulative impacts in the context of possible future development and the general character of the area is limited to only critical area impacts. KDP at 714.

*The "Permit" Issued by the ALC on Remand*

On Remand, the ALJ issued an Amended Final Order in which he crafted a new permit authorizing the entire 2,783' of vertical bulkhead, but limited the concrete block revetment to the 270' in front of Beachwalker Park. In arriving at his new permitting decision, the ALJ made new findings of fact that are unsupported by any testimony and ignored uncontradicted testimony, even from KDP's own witnesses. More significantly, by permitting an extensive erosion control structure in the critical area, the ALJ failed to apply the plain language of § 48-39-30(D), as directed by the Supreme Court, to provide the combination of uses of the critical area that insures the maximum benefit to the people.

The ALJ concluded that eight (8) parking spaces for use only by Kiawah Island residents "constitutes a public benefit that will be realized through the construction of the bulkhead and

revetment that will allow the limited development that includes this community facility.”

Amended Order on Remand, p. 6. The ALJ also concluded that “preservation of approximately 80% of the Spit in a natural state, . . . bestows this same public benefit, albeit to a slightly less extent than if there was no development at all on the Spit. This public benefit can only be realized if the development that depends on the stabilization of the riverbank through the bulkhead and revetment occurs.” Amended Order on Remand, p. 7. Clearly indicative of his continuing confusion about the Supreme Court’s 2014 Opinion, the ALJ asks “which is of greater importance – the preservation of the shoreline in its natural state or the public benefit [8 parking spaces and a potential conservation easement on a portion of the Spit] gained by its use?” Amended Order on Remand, p. 8, fn. 6.

The ALJ concludes that “the evidence did not establish that the bulkhead would adversely affect the recreational use of the sandy shoreline,” despite uncontradicted evidence to the contrary. Amended Order on Remand, p. 15. The CZMA finds an “urgent need to protect and give high priority to natural systems,” S.C. Code Ann. § 48-39-20(F), and the Supreme Court recognized that “accretion, erosion, and breach of the spit is a natural system,” Kiawah at 43. Yet the ALJ finds and concludes that the presence of the bulkhead and revetment “will not have any material effect” on the “natural cycle” of erosion at Captain Sams Spit in contradiction to the uncontested evidence on this point. Amended Order on Remand, p. 17 & 23. The ALJ concludes that the 2,783' bulkhead will protect the use and nature of the shoreline and “will have no negative impact on recreational activity.” Amended Order on Remand, p. 23 & 25.

Finally, the ALJ authorizes a structure without any evidence on its efficacy, and indeed contrary to *all* of the evidence presented. The ALJ even acknowledges that “KDP asserts that the

bulkhead and revetment must be considered in tandem” and recognizes that if “the revetment terminates in a high velocity zone, the shoreline may be susceptible to erosion around its terminus.” Amended Order on Remand, p. 19.

## **II. Scope of Review on Remand**

“When we remand a case, the trial court has only the jurisdiction and authority mandated by this court.” Prince v. Beaufort Memorial Hosp., 392 S.C. 599, 709 S.E.2d 122 (Ct. App. 2011). The mandate of the appellate court is jurisdictional. S.C. Dep't of Soc. Servs. v. Basnight, 346 S.C. 241, 250–51, 551 S.E.2d 274, 279 (Ct.App.2001) (citing 5 Am.Jur.2d Appellate Review § 784, at 453 (1995)).

When an appellate court remands a case, the lower court must implement both the letter and spirit of the mandate, and this rule applies with equal authority and weight to administrative agencies. Scott v. Mason Coal Co., 289 F.3d 263 (4th Cir. 2002); 18 Charles Alan Wright et al., Federal Practice and Procedure § 4478, at 794 (1981). The decision of the appellate court is final as to all questions decided. Id.; see also Bobo v. Marshane Corp., 302 S.C. 86, 88-89, 394 S.E.2d 2, 4 (Ct. App. 1990) (reversing the full workers compensation commission for exceeding its authority in failing to follow directions of the court on remand and going much further to reverse the panel’s decision and substitute a new decision with a different result).

The ALJ failed to implement both the letter and spirit of the Supreme Court’s holdings, instead contorting and confusing those holdings to arrive at a decision authorizing a significant encroachment of a hard erosion control structure on a pristine, natural spit of land.

## **III. Transfer is Warranted Under Rule 204(b)**

### **A. *The Public’s Use and Enjoyment of the Spit is an Issue of Significant Public Interest***

The Supreme Court relied on undisputed evidence of public benefit in leaving the shoreline unarmored and allowing the natural processes to take place. KDP at 716. (“undisputed evidence . . . established that the accretion of the spit followed by the erosion of the neck of the spit and the formation of a new inlet is a natural process . . . [the CZMA] provides that it is to the public’s benefit to protect natural processes like the cyclical erosion, breach and accretion process of the [Spit].”) The CZMA states that “there is often great value in allowing nature to take its course, rather than having our coast become an armored, artificial landscape.” Id. at 716-717. The regulations “generally prohibit alterations to the tidelands except when the public interest requires otherwise” and “altering tidelands remains the exception to the rule.” Id. The State’s policy is “that the public interest is usually best served by preserving tidelands in their natural state.” Id. (citing §§ 48-39-20 to -30).

“If there ever were a case of a substantial adverse effect on public access, it is this case,” as the evidence demonstrates that public access impacts would be significant. Id. 722. In support of its conclusion, the Supreme Court cites to “uncontroverted evidence” indicating that effects on public access would be substantial.

The League presented uncontroverted testimony of three of its members relating to the nature, characteristics and uses of the critical area tidelands that would be impacted by the structure proposed by KDP. Greg VanDerwerker, Sophia McAllister and Sidi Limehouse are regular users of the area where KDP proposed to construct the erosion control structure. These citizens describe the area as a 20' – 30' wide sandy beach. Photographs and surveys of the location of the proposed bulkhead and revetment structure depict an expanse of white sand and KDP’s expert coastal geologist, Dr. Tim Kana, testified that this white sandy beach is eroding.

(Exhibit A, Tr. 613)<sup>2</sup>. KDP's expert engineer explained that to stabilize the bank, both the revetment and bulkhead would need to be use in combination. (Exhibit A, Tr. 465-478). This is because "velocity erosion" is impacting the shoreline causing the sand on the shore to wash away. (Exhibit A, Tr. 475-476). The revetment was designed to address the velocity erosion and prevent "adverse end conditions [that] would contribute to increased erosion in that area and actually narrow the spit even more." (Exhibit A, Tr. 446-447). Mr. Bohannon testified as follows:

A: We certainly didn't want anything to happen -- we were really concerned about end conditions on the PRC permit. If they put a bulkhead, there would have been probably -- there are usually some -- if you don't design it correctly and don't take -- aren't really careful, you'll have some adverse end conditions and we were worried that adverse end conditions would contribute to increased erosion in that area and actually narrow the spit even more.

Id.

No contradictory evidence was presented regarding the efficacy and viability of a bulkhead without a supporting revetment. Instead, the League presented evidence from KDP's experts that at least 40' of revetment would be needed to support the bulkhead due to the high velocity forces acting upon the shoreline. (Exhibit A, Tr. 238-239; 475-476) Those experts recommended a 60' wide revetment and the use of "training jetties" extending out into the Kiawah River as a way to discourage undermining of the bulkhead. Id.

Simply put, no evidence supports the ALJ's findings in the Amended Order on Remand that a bulkhead would stabilize the shoreline and such a finding is contrary to evidence from witnesses on all sides, as well as the letter and spirit of the CZMA and Supreme Court's Opinion.

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<sup>2</sup>Exhibit A is a compilation of excerpts from the hearing transcript before the ALJ. The transcript is part of the record on appeal in the first instance and is provided for the convenience of the Court. All citations refer to the page number of the transcript.

Moreover, the League's expert coastal geologist Dr. Rob Young testified that "if you seal off this entire shoreline, the first thing that you're going to do is eliminate that entire beach." (Exhibit A, Tr. 936). The reason is because the "sand from that retreating bluff [which the bulkhead would be stabilizing] builds the beach" along the Kiawah River shoreline and stopping the natural erosion of the bluff will deprive the beach of sand and result in its loss. (Exhibit A, Tr. 935).

B. *The Amended Order on Remand Raises Legal Principles of Major Importance*

*i. The ALJ Erred in Applying the CZMA's Public Benefits Requirement*

The ALJ's Amended Order on Remand is contrary to the plain language of the regulations and policies of the CMP, as discussed at length in KDP, 766 S.E.2d 707, 723, 411 S.C. 16 (2014). The fundamental flaw in the Amended Order on Remand is its misapplication of Section 48-39-30(D). Section 48-39-30(D) states that "**critical areas** shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate maximum measurable dollar benefits." This provision requires an assessment of the existing combination of uses **of the critical area** compared to the proposed combination of uses **of the critical area**. See S.C. Code Ann. § 48-39-30(D). It is use of the **critical areas** that must provide the maximum public benefits, not other activities that may or could flow from an applicant's use of that critical area.

The Amended Order on Remand disregards the requirement that "critical areas **shall** be used to provide maximum benefits to the people" and the policies favoring leaving the critical area in its natural condition. Section 48-39-30(D) is confined to consideration of uses of the **critical area**. The word "shall" is mandatory; thus, if a proposed use of a critical area will not

provide a combination of uses that will insure the maximum benefit to “the people”<sup>3</sup> then the proposed use violates this policy.

In discussing public benefits, the Supreme Court consistently discusses these public benefits in the context of how the critical area will be used, *i.e.*, the benefits accruing to the public if the critical areas are left in their natural state versus if structures are constructed over and on the critical areas. The Supreme Court held that “it was clear that only the developer, not the *public*, would benefit from the construction of this enormous bulkhead and revetment.” KDP at 716. The Court concluded that to “allow the benefits to a private developer to override the interest of the people of South Carolina undermines the statute and defeats the very purpose of the public trust doctrine.” Id. Further, the Court found that “it is to the public’s benefit to protect natural processes like the cyclical erosion, breach, and accretion process of the spit” and overturned the ALJ’s previous finding that the “erosion has no positive benefit for anyone.” Id.

Yet instead of assessing how the public would benefit from any structures on the shoreline, the Amended Order on Remand only considers tenuous public benefits which do not stem from actual use of the critical area and do not directly flow from the critical area uses. The ALJ discusses what it calls “public benefits”<sup>4</sup> on lands that are not critical areas, and that are not predicated upon the construction of the erosion control device at issue in this case.

The Amended Order recognized that “leaving the area in its natural state” was to be given “strong consideration,” (Order on Remand, p. 3), yet rather than including strong consideration in

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<sup>3</sup>The Court applied the plain language of the term “the people” as “the public at large rather than a single developer.” KDP at 716.

<sup>4</sup>As discussed below, there is no evidentiary support for the efforts the Order on Remand takes to arrive at what it suggests are findings of public benefit.

its analysis the ALJ concludes that 8 parking spaces and a prospective conservation easement on 80% of the Spit are overriding justifications against “leaving the area in its natural state.” The ALJ fails to consider the public benefits from allowing the cyclical erosion, breach and accretion processes on the Spit to continue, as directed. KDP II, v. DHEC & SCCCL, 766 S.E.2d 707, 723, 411 S.C. 16 (2014). KDP at 716.

The Amended Order on Remand searches for supposed “public” benefits outside the critical area and independent from the use of the critical area authorized by that Order. The ALJ finds that a conservation easement that will presumably be placed on part of the Spit if and when residential development occurs, together with 8 parking spaces for Kiawah residents, is sufficient public benefit to warrant 2,513' of bulkhead. Notably, the word “easement” in the context of a conservation easement on Captain Sams Spit was used only twice (page 166 of the hearing transcript) during the week-long hearing. No evidence even suggested that the public would benefit from a privately held conservation easement. No evidence established that the placement of a conservation easement is contingent upon, or even relevant to, the construction of the bulkhead or revetment. No conservation easement is required by the DHEC permit. And no conservation easement has been executed. When the conservation easement was mentioned during the contested case hearing, KDP’s witness merely and generally referred to a letter admitted solely for the purpose of notice and inquiry that “30 acres will one day be placed under a . . . conservation easement.” (Tr. 166, lines 3-5). No evidence could reasonably be inferred to suggest, much less establish, that a conservation easement that “will one day” (presumably) be

placed on the Spit would provide a benefit to the public.<sup>5</sup>

Moreover, consideration of the upland impacts resulting from the development must be compared with the Spit as it exists in its natural, undisturbed state. Even fifty (50) houses covering 20% of the Spit while the remaining 80% may be placed under conservation easement is a substantial encroachment and disturbance from the Spit's present condition. The Order on Remand completely ignores the fact that by authorizing some form of hard erosion control structure, it is allowing development of the Spit, which otherwise would remain in its present natural condition. The finding that the "public benefit can only be realized if the development . . . occurs" is unsupported by the evidence. Again, no evidence indicates that the public benefits from the development, instead the probative evidence establishes that the public benefits from the Spit remaining in an untouched state.

The ALJ lost sight of the Supreme Court's Opinion holding that the ALC had "made no findings of any public benefit" and "failed to identify any benefit flowing to the public at large," instead "[q]uite to the contrary [of finding any public benefit], it was clear that only [KDP], not the *public*, would benefit from the construction of this enormous bulkhead and revetment." KDP at 716. Simply stated, parking spaces and a conservation easement on uplands are not public benefits as contemplated by Section 48-39-30(D) because they do not involve uses of the critical area. At most they would be an ancillary result of other agreements made in connection with the development of the Spit that may or may not come to fruition.

Presently, the critical area uses include sandy beach for pulling up boats and kayaks,

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<sup>5</sup>In any event, the conservation easement arises as a result of KDP's agreement with the Town of Kiawah Island, not as a result of the use of critical area for a hard erosion control device.

walking, swimming, fishing and crabbing. Those are the critical area uses that provide public benefits. If an erosion control structure were constructed on this critical area, effectively eliminating existing public uses and access, this critical area would no longer be providing that combination of uses that currently provides great benefit to the people. In effect, a fragile and sensitive area would be destroyed and open space for public use would be decreased.

Furthermore, the ALJ's new finding that the "general character of the area" is "residential, with some commercial development" (Amended Order on Remand, p. 12) is inconsistent with *all* of the testimony and evidence describing the character and nature of the Spit. The Amended Order on Remand would escape this inescapable conclusion by altering the language of R. 30-11(C)(1) to consider the "general character of the area **around** the Spit," but not the Spit itself. *Id.* That is not the standard, and the ALJ may not lawfully inject a new standard and add to the regulation. Most of the new findings in the Amended Order on Remand are unsupported by the evidence and ignore the Department's specialized knowledge, which was utilized in determining that there would be long-range cumulative impacts that were sufficiently significant to weigh conclusively against authorization of the structure. Only by ignoring the testimony could the ALJ determine that the League and the Department did not present evidence of the cumulative impacts.<sup>6</sup> And that

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<sup>6</sup>The League and the Department presented evidence that the Spit experiences "geomorphic instability" which means that at any given time there could be changes in the channels, adjacent beaches and entire shifting of the inlet. (Tr. 709). It is a dynamic area in that it is in a constant state of movement. The inlet zone is unstable and is subject to immediate and drastic changes. (Tr. 599). Captain Sams Spit was designated a "COBRA Zone" under the federal Coastal Barrier Resources Act ("CBRA"). 16 U.S.C. 3501, *et seq.* (Tr. 340; CCL Ex. 8). Areas designated as COBRA Zones are ineligible for any federal subsidies, including federal flood insurance. The purpose of this prohibition on federal expenditures is to discourage development on areas that are pristine, sensitive and potentially dangerous to build on. (Tr. 341, 933).

Dr. Young said that "there is absolutely no doubt from a coastal hazard's perspective that

there is “no public policy against development of private property that has never been developed” (Amended Order on Remand, p. 14) is not a relevant or appropriate consideration under the applicable standards.

The Supreme Court held that the uncontroverted evidence demonstrated that there *would* be upland impacts in that “the upland area of the spit is to be transformed from a completely natural area into a residential development.” *Id.* at 720. Even a limited development will change the pristine, undeveloped character of the Spit from what it is today. (Tr. 1365). It will no longer be a natural, pristine environment where the land can respond to forces that occur naturally in an unstabilized inlet area. (Tr. 1365).

ii. *Whether the ALJ Can Craft Its Own Permit Without Any Evidentiary Basis is a Legal Principle of Major Importance*

The second principle of legal significance is whether the ALC can act as an agency-of-one and issue a permit for a structure that was not applied for, not reviewed by the agency, and for which no evidence was presented regarding its viability or compliance with the regulations. One of the most troubling aspects of the Amended Order on Remand is the purported authorization of a vertical bulkhead structure without the supporting revetment that the ALJ permits. There is no support for the ALJ to find and conclude that such a structure complies with the statutory and

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the most vulnerable places on this island . . . are the areas near the inlet.” (Tr. 928, lines 12-16). If a severe storm were to hit Captain Sams Spit and if there is residential development on the Spit, the impacts to the houses and infrastructure could be devastating. Such a storm could result in significant damage, not only to homes, but also to the surrounding beach, inlet and river that would be littered with debris. The long-term, cumulative impacts of such a storm event would be loss of property and saddling the taxpayers with the financial burden of cleaning up and rebuilding after the storm event.

regulatory requirements. KDP's witnesses who testified on the subject said that the revetment was critical and necessary to make the overall structure feasible. No evidence supports the finding that a bulkhead without a supporting revetment would be technically possible, feasible or advisable, much less whether it would serve the project purpose. KDP's engineer, Mitchell Bohannon testified at length as to why the revetment is necessary:

A: 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. So that's just one of the things --

Q: And when that happens --

A: -- you'd have to do.

Q: -- Mr. Bohannon, does that erosion occur on the bottom?

A: Oh, yes.

Q: And it disrupts it?

A: Yes.

Q: In this particular design, does the revetment part, which is the articulated concrete block matted over the bank, play into reflective wave energy?

A: Yes.

Q: How so?

A: Well, it prevents that reflected wave from causing erosion on the bottom.

Q: With respect to the bottom, does it help stabilize the bottom?

A: Yes.

Q: There's been some discussion about the length of the revetment. How is the length and the location of the revetment determined?

A: Well, we went out in the field. I mean, we've had survey data and a number of studies done. We've actually been in the field and located kind of the beginning and end the erosion zones and that's where the revetment -- we're asking to put a revetment. It's pretty clear when you go in the field where it starts and stops.

Q: And when you scaled it out, did it come to whatever the distance is, 2,763 or 83 feet?

A: I think it's 2,783.

THE COURT: How far would the block go out?

THE WITNESS: About 40 feet (indicating).

THE COURT: Well, if the block went out 40 feet, it would pretty well cover all the sand that's in that picture?

THE WITNESS: Yes. Yes, sir.

THE COURT: Why does the block have to go out that far?

THE WITNESS: Well, because this is the zone of erosion and we believe that the shoreline is going to continue to erode. There's some velocity erosion occurring along here, as well, as the erosion's coming -- and that's part of what's causing this whole phenomenon.

(Exhibit A, Tr. 465 -- Tr. 476).

All of the testimony indicates that from an engineering perspective it is the revetment that is the key component to the project and that if any structure is eliminated, it would be the bulkhead. (Exhibit A, Tr. 465-478; 543-544). The bulkhead alone will undisputably cause problems identified by KDP's witnesses, in addition to converting a natural shoreline into a hardened one and impacting public use and access.

Similarly, there is no evidence that a bulkhead standing alone would not substantially impair the public's use of the shoreline nor change the character of the natural, undisturbed shoreline. The essential purpose of the bulkhead/revetment system is to fix an eroding shoreline in its current location. However, once the erosion reaches the bulkhead, there will be no more

shoreline which the public can access and enjoy. Dr. Rob Young discussed the forces operating upon the Spit and how an erosion control structure on shoreline of the river will deprive the shore of its sand supply and degrade the critical area:

Q: We were talking about -- earlier about this actual revetment structure itself and I'm wondering what would be the impacts of a revetment like the one that's proposed on the physical environment of Captain Sam's Spit.

A: I think it's very important to understand that from the perspective of a coastal scientist and a physical scientist that erosion is not necessarily a negative process. Erosion does not equal bad. It can't have a blanket negative connotation, because **if we didn't have coastal erosion of bluffs and things like that, we wouldn't have beaches**. We wouldn't have spits. You know, we wouldn't have many of our coastal features. So erosion is a natural process.

When there is a certain amount of erosion along a bluff shoreline, like the one on the back side of Kiawah, **the sand from that retreating bluff builds the beach** that we looked at in those photographs. The sand that comes from that eroding bluff feeds other environments that are in the river and also end up on top of wetlands to allow them to accumulate.

**So if you wall off a half a mile of shoreline from, you know, even small amounts of retreat and erosion, then over the long term you're going to be losing a certain amount of your sand supply. And those impacts are cumulative over the long term.**

So, you know, I think that it's important to understand that from a scientific perspective, a scientist would say that just because there's erosion, doesn't mean that we need to stop it. I think that's the first important point that anyone whose job it is to protect critical areas, you know, has to understand that a certain amount of erosion is responsible for maintaining some of those critical areas, like beach and that intertidal beach, especially in front of the revetment.

**So if you seal off this entire shoreline, the first thing that you're going to do is eliminate that entire beach.** And, you know, this is a -- it's a fairly wide structure that's been proposed. Even if the structure doesn't cover the entire beach, as the river channel migrates towards the structure, the beach is going to disappear. And so, you know, one tradeoff any permitting agency would have had to make when they examined this project is, "If we issue this permit, we are eliminating a half a mile of intertidal beach along this shoreline," and, you know, that's -- there's no question about that. That's a direct impact on that critical area of land.

Tr. p. 934, line 23-p. 937, line 10.

The Amended Order on Remand overlooks this critical aspect of the project and its impacts upon the critical area sandy beach along the Kiawah River, which the undisputed evidence shows will be lost if the structure as authorized is constructed.

The Amended Order on Remand raises important public policy issues, as well as legal principles of major importance relating to competing uses of critical areas. The Supreme Court has previously ruled on these issues, yet the ALJ failed to implement the letter or spirit of that ruling. For these reasons, the Appellants submit that the Supreme Court should accept this case.

### CONCLUSION

By reversing the erroneous decision made in this case, the Supreme Court can ensure that critical areas provide the maximum benefit to the people. For the above reasons, the Appellant respectfully requests that the Supreme Court grant its Motion to Transfer.

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Amy E. Armstrong  
Jessie White  
Amelia Thompson  
SOUTH CAROLINA ENVIRONMENTAL LAW  
PROJECT  
Mailing address: Post Office Box 1380  
Pawleys Island, SC 29585  
Office address: 430 Highmarket Street  
Georgetown, SC 29440  
Telephone (843) 527-0078  
FAX (843) 527-0540  
Attorney for the South Carolina Coastal  
Conservation League

Georgetown, South Carolina  
March \_\_\_\_, 2016