STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, vs. South Carolina Department of Health and Environmental Control and KDP, II, LLC, Kiawah Development Partners, LP, Respondents. In re: Cape Charles, Phase 1.	Docket No. 15-ALJ-07-0369-CC **ORDER DENYING MOTION FOR RECONSIDERATION**

This matter came before the South Carolina Administrative Law Court (ALC or Court) pursuant to Petitioner South Carolina Coastal Conservation League's (Coastal's) request for a contested case hearing pursuant to section 1-23-600(A) of the South Carolina Code (Supp. 2015) and section 44-1-60 of the South Carolina Code (2018). Coastal challenged the South Carolina Department of Health and Environmental Control's (the Department's) decision to issue Kiawah Development Partners, II (KDP) a NPDES Stormwater Construction Permit (SCR100913), a Water Supply Construction Permit (3039S-WS), a Wastewater Construction Permit (38828-WW), and a Coastal Zone Consistency Certification (CZCC) for KDP's proposed project on Captain Sam's Spit (the Spit), part of Kiawah Island, South Carolina. On September 24, 2018, this Court issued a Final Order upholding the Department's decision.

Thereafter, on October 9, 2018, Coastal filed a Motion for Reconsideration (Motion). On October 24, 2018, KDP filed a Response to the Motion. The parties then stipulated Coastal could file a reply and, on November 9, 2018, Coastal filed its Reply. The Department did not submit a Response to the Motion.

Coastal raises several issues in its Motion, and the Court will address each in turn.

"Abandonment" of Certain Issues

Coastal argues this Court erred in finding that it "abandoned" three issues it raised in its Prehearing Statement. Specifically, Coastal argues this Court erred in finding abandoned its issue

regarding whether the Department's decision in this case was inconsistent with (1) the Department's denial of critical area permit OCRM-08-117-E dated December 18, 2008, (2) the South Carolina Supreme Court's (Supreme Court) decision in *Kiawah Development Partners, II v. South Carolina Department of Health and Environmental Control*, 411 S.C. 16, 766 S.E.2d 707 (2014) (*Kiawah II*); and (3) the Department's Board's decision in 2009 to overturn the Department staff decision to issue a certification for a 340-foot sheet pile wall along the Kiawah River.

340-foot Sheet Pile Wall

Before discussing the Court's treatment of the other two issues, the Court will address the third issue from this list that the Court erred in failing to address: the alleged inconsistency of the current Department decision with the Department staff decision concerning a 340-foot sheet pile wall. This is fundamentally an issue of this Court's *de novo* review and, by extension, an issue of the burden of proof.

In its Reply, Coastal acknowledges that, "In essence, *de novo* review empowers this Court to conduct a full contested case hearing and make its own findings of fact based on the evidence presented." It further acknowledged that "in its *de novo* review this Court is not bound to DHEC's factual findings and may look at facts not considered by the agency and outside of the agency's record." Therefore, this Court is not bound by a Department decision, and whether a prior Department decision is inconsistent with the current decision is not very probative unless statutory deference to a Department interpretation is at issue.

Furthermore, as the party bringing this case before this court, Coastal had the burden of proof to show the current Department decision was inconsistent with the previous Department decision regarding the 340-foot sheet pile wall. *DIRECTV, Inc. & Subsidiaries v. S.C. Dep't of Revenue*, 421 S.C. 59, 78, 804 S.E.2d 633, 643 (Ct. App. 2017), *reh'g denied* (Jan. 11, 2018), *cert. denied* (May 2, 2018) ("In general, the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of proof."). However, Coastal presented *no evidence* of the Department decision regarding the 340-foot sheet pile wall, did not explain why this previous Department decision was inconsistent with the current decision, and made no legal arguments as to how these inconsistencies should affect this Court's *de novo* decision in the current case. Because Coastal failed to present any evidence to support its argument, the Court did not consider this issue in its Final Order. *See Caines v. Marion Coca Cola Bottling Co.*, 196 S.C. 502, 14 S.E.2d 10, 11 (1941) ("A Court is not warranted in submitting to a jury, by instructions, an issue raised

by a pleading which is abandoned in open Court by the party pleading it, and in support of which no evidence is presented."). Nevertheless, in light of Coastal's contentions, the Court expressly finds that Coastal failed to carry its burden of proof on this issue by failing to present any evidence, much less a preponderance of the evidence, as to this issue. *See DIRECTV, Inc.*, 421 S.C. at 78, 804 S.E.2d at 643 (holding "[i]n general, the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of proof"); *see also Honea v. Honea*, 292 S.C. 456, 458, 357 S.E.2d 191, 192 (Ct. App. 1987) ("We have stated before, and we reiterate here, that a party cannot sit back at trial without offering proof, then come to this Court complaining of the insufficiency of the evidence to support the [trial] court's findings.").[1]

Inconsistency with the Department decision in 2008 and *Kiawah II*

The Court next addresses Coastal's contention that it did not abandon the issues of whether the Department's decision in this case was inconsistent with the Department's previous denial of critical area permit OCRM-08-117-E dated December 18, 2008, and the Supreme Court's decision in *Kiawah II*. Coastal contends this Court's use of the term "abandoned" is misplaced because it exclusively applies in the context of preservation and appellate review. However, this Court described Coastal's failure to cite to any case law or otherwise make legal arguments or conclusions as showing it has "*essentially* abandoned" this issue. *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 18-ALJ-07-0237-CC, 2018 WL 4854113, *37 (Sept. 24, 2018) (emphasis added).

Coastal contends that a determination of abandonment is a determination that an issue is not preserved. While failure to preserve an issue and abandonment may be used interchangeably from time to time, there is a distinction, which I believe is captured by the South Carolina Court of Appeals' decision in *Oien Family Investments, LLC v. Piedmont Municipal Power Agency*, 424 S.C. 168, 817 S.E.2d 647 (Ct. App. 2018), *reh'g denied* (Aug. 16, 2018). In *Oien Family Investments., LLC*, the South Carolina Court of Appeals (Court of Appeals) stated, "[b]ecause OFI did not cite to any authority and failed to present further argument as to how this ruling was an

[1] Furthermore, Coastal cannot now use its Motion to supplement its case-in-chief by attaching the prior Department decision concerning the 340' steel sheet pile wall as Exhibit A. A party files a Rule 59(e) motion when "she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it" or to preserve the issue for appellate review "when an issue or argument has been raised, but not ruled on." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Notably absent from the reasons for filing a Rule 59(e) motion is to submit evidence that a party could have submitted, but failed to, in its case-in-chief.

abuse of the circuit court's discretion or otherwise legally erroneous, we find it has abandoned this issue on appeal." *Id.* at 184, 817 S.E.2d at 656. This was not an issue of preservation—the issue was preserved for the Court of Appeals' review. Rather, it was a failure by the party asserting the issue to provide any meaningful case law or arguments to support its contention in its appellate brief. Herein lies the distinction between preservation and abandonment.

Coastal argues that the theory of abandonment in *Oien Family Investments, LLC* is not an appropriate here because, in support of its finding of abandonment, the Court of Appeals cites to a specific appellate rule, Rule 208(b)(1)(D), SCACR, which requires "discussion and citations of authority" for each issue in an appellant's brief. *Oien Family Investments, LLC*, 424 S.C. at 184, 817 S.E.2d at 656. However, this Court's rules and its Orders for Pre-Hearing Statements place similar requirements upon a party in a contested case hearing. Specifically, SCALC Rule 14 provides that "the administrative law judge assigned to the case, by pre-hearing order, may request each party to prepare and return a Pre-Hearing Statement setting forth with particularity the issues in the contested case."[2] Further, the Order for Prehearing Statements in this case provided:

> IT IS HEREBY ORDERED that each party who intends to appear at the hearing must file with the undersigned's office a Prehearing Statement stating the following:
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> * * *
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> 3. The issues presented for determination, including *any* claims or defenses expected to be raised;
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> 4. The action requested of the Court and a *detailed statement of the law* which supports the requested action, including statutory and/or case citations;

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[2] Notably, SCALC Rule 14 was amended in response to the South Carolina Court of Appeals' decision in *Sierra Club v. South Carolina Department of Health & Environmental Control*, 387 S.C. 424, 432, 693 S.E.2d 13, 17 (Ct. App. 2010). In *Sierra Club*, the Court of Appeals held that because "the Sierra Club raised overall compliance with regulation 61–63 in its prehearing statement," any issue falling under that extensive regulation could be considered at trial. The implication of that holding was that a party could raise any issue by simply asserting an overall violation of a broad regulation and then the ALC and the other parties would have to discern from the Department's extensive regulatory scheme what specific parts of the regulation were at issue in the proceeding. Moreover, if the Court failed to discern and address those issues, a party could explicitly raise the sub-issue for the first time in a motion for reconsideration.

In light of this holding, the ALC amended Rule 14 to provide that the administrative law judge "may request each party to prepare and return a Pre-Hearing Statement setting forth *with particularity* the issues in the contested case." SCALC Rule 14 (emphasis added). Moreover, the note to the Rule provides that "Rule 14 is amended to require that prehearing statements must set forth with particularity the issues for consideration in the contested case." Therefore, it is now abundantly clear that if a prehearing statement is requested, a party must now must set forth the issues it wishes to be considered with particularity. A party can no longer rely upon a blanket assertion of a violation of a regulation to raise a sub-issue to the ALC.

* * *

Order for Prehearing Statements (filed Sept. 9, 2015) (emphasis added). Coastal points out that whether an ALJ issues an order for prehearing statements is discretionary under SCALC Rule 14, disregarding the fact that an Order for Prehearing Statements was, indeed, issued in this case. Therefore, Coastal was, at the very least, ordered to present "the issues for determination" and the "action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citations." *Id.* While it is true that the theory of abandonment is usually found in the context of appellate review, the principle behind it is sound and this Court believes it applies here. The principle being that a party must support its issues with legal citations and arguments, otherwise the Court is forced create the party's arguments and legal theories for them, which is not the Court's role.

Here, in response to prompt 4 on the Prehearing Statement, Coastal presented the following:

> **4. The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citations;**
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> [Coastal] requests that the Court reverse DHEC staff's decision to issue NPDES Permit Coverage SCR100913; Water Supply Construction Permit #30395-WS; and Wastewater Construction Permit #38828-WW; and Coastal Zone Consistency Certification #CZC-13-0336 to KDP. *The legal and factual basis supporting this requested action is outlined in item #3 above and item #5 below.*

(emphasis added). This Court looked to items #3 and #4, but there was little to no law in items #3 and #5 to support this request, *particularly* regarding the alleged inconsistencies. In item #3, Coastal generally stated the current Department current decision is "fundamentally inconsistent" with the Department's previous denial of critical area permit OCRM-08-117-E [the permit at issue in *Kiawah II*] and the Department Board's decision overturning the staff's issuance of a certification for a 340-foot sheet pile wall.[3] In item #3, Coastal briefly discussed how the Supreme Court analyzed the scope of the area considered under Regulation 30-11(C)(1) in *Kiawah II*, but did not apply the Supreme Court's decision to this case or draw any legal conclusions. Coastal also listed general factual similarities between this case and the previous case to argue:

> The policies of the Coastal Management Program Document must be applied to this proposed stormwater permit in the same manner as they were applied to the

[3] As previously discussed, the Court will not engage in a review of the Department's decision concerning the 340-foot sheet pile wall because no evidence was presented on this issue at trial.

> critical area permitting decision in *KDP II v. DHEC*. The agency concluded that the project in *KDP II v. DHEC* would contravene numerous policies found in the CMP document. Specifically, the policies found at Chapter III.C.3.XII.A, B & D, Chapter IV.A.2.a.8. These policies require consideration of activities on barrier islands, in dune areas, and in public open spaces. They also require consideration of threatened and endangered species and the state's erosion control policy. And most importantly, DHEC must consider the long-range and cumulative effects that will result from authorizing a structure that would facilitate development of the Spit.

This paragraph suggests two legal arguments: (1) the Department improperly failed to consider the referenced policies and (2) the Department failed to apply these policies in "the same manner" as in *Kiawah II*. As to the first argument, both the Department and this Court considered all the policies referenced; therefore, this was not an issue. As to the second argument, Coastal presented some evidence at trial to demonstrate inconsistency between the Department's application of the policy evaluating the "long-range, cumulative effects on the general character of the area" in this case compared to how it applied this policy in the 2008 case (*Kiawah II*).[4] In this regard, the Court finds Coastal presented enough evidence for the Court to review whether the decisions are inconsistent as to this narrow issue, and grants Coastal' request for reconsideration as to this particular issue.

However, outside of the alleged discrepancy in the application of the "long-range, cumulative effects on the general character of the area," Coastal failed to identify specific inconsistencies and to support them with evidence such that this Court could draw any legal conclusions. It is obvious that the Department's prior decision, reviewed in *Kiawah II*, resulted in a different outcome than the Department's decision in this case. But different outcomes in the Department decision does not inherently mean the Department decision in this case is *legally* inconsistent with Supreme Court's decision, especially when the two cases have factual differences in the type of erosion control structure at issue and the permits at issue. It is quite possible for policies to be applied the same way with different outcomes when the factual circumstances are different. Thus, Coastal's argument, without more factual and legal analysis, is conclusory.

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[4] Coastal presented the testimony of the Department's employee, Curtis Joyner, who explained that with regard to determining the scope of the "area" reviewed under CZMP Policy III.C.3.I(7), the Department looked at a broader area in this case than it did in the previous case in 2008. Coastal also presented the testimony of Bill Eiser, a former Department employee involved in the Department's 2008 permit decision, who described the general character of the area as a "pristine," undeveloped property, unlike the Department's determination that the area is "residential" in this case.

Furthermore, Coastal asks the Court to address a generic assertion that the Department's decision in this case is inconsistent with its last decision without presenting legal arguments as to what relief these inconsistencies demand. Indeed, though a demonstration of inconsistency can show that deference to an agency interpretation of law is not warranted,[5] it is also true that "an agency must be allowed to assess the wisdom of its policy on a continuing basis." *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 215 (4th Cir. 2009) (internal quotation marks and citation omitted)). Moreover, "as long as interpretive changes create no unfair surprise . . . the change in interpretation alone presents no separate ground for disregarding the Department's present interpretation." *Id.* (citation omitted). Therefore, in addition to failing to identify specific inconsistencies, Coastal made no argument concerning the legal grounds for relief from the alleged inconsistencies.

Thus, the Court will address this issue in an amended final order, but only in the narrow context of whether the Department's interpretation of the policy requiring it to evaluate the project's long-range, cumulative effects on the general character of the area in this case is inconsistent with its previous interpretation of this policy as reviewed by the Supreme Court in *Kiawah II*. As to any other alleged issues of law or fact Coastal would have this Court find to be inconsistent with the Department's previous decision or with the Supreme Court's decision in *Kiawah II*, the Court explicitly finds that Coastal failed to meet its burden of proof to show by a preponderance of the evidence what these inconsistencies were and how these inconsistencies legally affect this Court's decision-making and relief granted in this case.[6]

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[5] *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140, (1944) (standing for the principle that deference to an agency interpretation depends "upon the thoroughness evident in its consideration, the validity of its reasoning, *its consistency with earlier and later pronouncements*, and all those factors which give it power to persuade, if lacking power to control." (emphasis added)); *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 149, 694 S.E.2d 525, 530–31 (2010) ("An agency's *long-standing interpretation* of a statute is usually entitled to be given deference and should not be overruled by a reviewing court in the absence of cogent reasons, but the interpretation will not be sustained if it contradicts a statute's plain language." (emphasis added)).

[6] The Court stresses that Coastal has had several opportunities to flesh out its issues and arguments throughout this case and the Court would have been happy to hear them. Coastal could have amended its prehearing statement at any time, made legal arguments and conclusions at trial, or made legal arguments and conclusions in its proposed order. *See* SCALC Rule 18 ("Any document filed with the Court may be amended at any time upon motion and for good cause shown, unless the amendment would prejudice any other party in the presentation of its case."). Moreover, the parties were aware that their proposed orders were to be submitted in place of their closing arguments in this case.

Res Judicata and Collateral Estoppel

Now, for this first time in this Motion, Coastal presents the legal arguments of collateral estoppel and res judicata.[7] The Court reviewed Coastal's prehearing statement, the entire trial transcript, and Coastal's proposed order and found no mention whatsoever of collateral estoppel, estoppel, res judicata, or preclusion (claim or issue). Nevertheless, Coastal contends that collateral estoppel and res judicata were raised under its inconsistency theory discussed above. Coastal argues this Court must consider whether it is "bound by issues of fact and law that were actually litigated and determined and which were necessary to the Supreme Court's final judgment in *Kiawah I[I]*,[8] and is precluded from making alternative, inconsistent findings and conclusions." Also for the first time, Coastal identifies the following specific issues and/or factual findings it believes the Court is bound to by the Supreme Court's previous decision in *Kiawah II*:

1. the "general character of the area" pursuant to CZMP Policy III.C.3(7)
2. the "long-range, cumulative effect of the project" pursuant to CZMP Policy III.C.3(7)
3. the public's use of and access to the riverbank along the Kiawah River
4. the non-beneficial nature of a wall beyond Beachwalker Park
5. the detrimental nature of a vertical wall to the public's use of the riverbank

"Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier." *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 705 F. Supp. 698, 701 (D.D.C.), *vacated on other grounds*, 707 F. Supp. 3 (D.D.C. 1989). Although the Court recognizes that inconsistency can be an element related to collateral estoppel or res judicata, when Coastal

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[7] Coastal did not specify which legal theory it was applying to the issues it raised—collateral estoppel, res judicata, or both. As the South Carolina Court of Appeals noted in *Beall v. Doe*, "[t]he doctrines of res judicata and collateral estoppel are, of course, two different concepts." 281 S.C. 363, 369, 315 S.E.2d 186, 190 (Ct. App. 1984).

> A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of res judicata in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action. Under the doctrine of collateral estoppel, on the other hand, the second action is based upon a different claim and the judgment in the first action precludes relitigation of only those issues actually and necessarily litigated and determined in the first suit.

Id.

[8] In its Motion, Coastal alleges inconsistency with the Supreme Court's 2014 decision, *Kiawah II*. However, it is clear from some of the arguments in its Motion that some of its preclusion arguments are based upon the Supreme Court's most recent decision in this case issued this year: *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 422 S.C. 632, 636, 813 S.E.2d 691, 693 (2018) (*Kiawah Remand*).

raised its inconsistency issue it never made the connection between these concepts. As this Court already stated, it is not the Court's function to make counsel's arguments for them. *See Brock v. Carroll*, 107 F.3d 241, 242 (4th Cir. 1997) ("Nowhere in his complaint did Brock allege a claim under RFRA, and . . . the district court was under no obligation to construct such a claim sua sponte."). The Court finds that the inconsistency issue, being deficient of its own accord in many respects, was likewise insufficient to also raise the issues of collateral estoppel and res judicata under its umbrella.[9] *See Johnson v. Sonoco Prod. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider."). Nevertheless, this Court will address these issues below as if they were properly raised.

Res Judicata

The South Carolina Supreme Court discussed the doctrine of res judicata at length in *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408 (2011). In *Judy*, the Supreme Court identified the following three elements that must be shown for res judicata to bar a lawsuit: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. *Id.* at 167, 712 S.E.2d at 412. However, the Supreme Court also noted that a determination of whether res judicata bars a claim "cannot be reduced to a formulaic process," and, therefore, the Supreme Court declined "to adopt or attempt to define a single standard." *Id.* at 171–72, 712 S.E.2d at 414. The doctrine of res judicata "flows from the principle that public interest requires an end to litigation and no one should be sued twice for the same cause of action." *Duckett v. Goforth*, 374 S.C. 446, 464, 649 S.E.2d 72, 81 (Ct. App. 2007).

The primary issue in *Judy* dealt with the second element of res judicata—whether the lawsuit at issue consisted of the same subject matter as the previous lawsuit. In evaluating this issue, the Supreme Court noted that "[r]es judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Judy*, 393 S.C. at 172, 712 S.E.2d at 414. Additionally, to find that

[9] If Coastal was trying to raise res judicata and collateral estoppel in its pleading, it was insufficient because: (1) Coastal never argued or identified the claims or issues that were specifically precluded by the Department's prior decision in 2008 or the Supreme Court's decision in *Kiawah II* and (2) Coastal never argued the elements of res judicata or collateral estoppel and how they applied to the facts of this case. Thus, even though it is not always necessary to name a legal theory or concept by its official name to raise it, Coastal did not raise these issues in the substance of their arguments or the relief sought. *See Standard Fed. Sav. & Loan Ass'n v. Mungo*, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991) (holding the Master properly addressed the petitioner's issue as a Rule60(b) motion even though it was not labeled as such because "the substance of the relief sought was the same regardless of the form in which the request for relief was framed").

the subject matter in one lawsuit constitutes the same subject matter as another does not necessarily require the same cause of action to be at issue in both lawsuits; rather, the courts look to "the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon." *Id.* (internal quotation marks and citation omitted).

Here, like in *Judy*, the issue in evaluating whether to apply res judicata is whether the two lawsuits (the current one and the lawsuit in *Kiawah II*) arise from the same subject matter. The other two elements are met—the identity of parties in this case and *Kiawah II* are the same and the lawsuit that was the subject of *Kiawah II* was fully litigated and a judgment was issued on the merits. Therefore, turning to the subject matter of the prior lawsuit and this lawsuit, it is evident that this lawsuit did not arise out of the same transaction or occurrence as the last lawsuit. *See Judy*, 393 S.C. at 172, 712 S.E.2d at 414 ("Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties.").

The prior case before this Court and before the Supreme Court in *Kiawah II* involved a Department permitting decision regarding a combination bulkhead and revetment (2,783' long by 40' wide) that would be located in the critical area on Captain Sam's Spit. This current case arose from a Department permitting decision involving a 2,380' steel sheet pile wall that would be located on Captain Sam's Spit, but not in the critical area. While it is true that both cases deal with a permit request to install a large erosion control structure on Captain Sam's Spit to facilitate development of the Spit, the two cases arose from challenges to difference erosion control structures, in slightly (but significantly) different locations, requiring different permits, with different impacts. These factual differences are significant enough such that this Court cannot say that these cases arose out of the same "transaction or occurrence" for the purpose of applying res judicata. *See Judy*, 393 S.C. at 172, 712 S.E.2d at 414 (evaluating "the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon" (internal quotation marks and citation omitted)). Moreover, unless this Court was greatly mistaken, the Supreme Court did not hold in *Kiawah II* that any and all development on Captain Sam's Spit would contravene the CZMA and CZMP such that there are no circumstances under which any permits or certifications could be issued following the issuance of that opinion.

Collateral Estoppel

Collateral estoppel, unlike res judicata, "rests generally on equitable principles." *Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995). It "prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action." *Shelton v. Oscar Mayer Foods Corp.*, 325 S.C. 248, 251, 481 S.E.2d 706, 707 (1997); *see Beall*, 281 S.C. at 370, 315 S.E.2d at 190 ("The public interest demands an end to the litigation of the same issue."). Further, "[p]rinciples of finality, certainty, and the proper administration of justice suggest that a decision once rendered should stand unless some compelling countervailing consideration necessitates relitigation." *Id.* at 370, 315 S.E.2d at 190.

"Collateral estoppel applies to specific issues, regardless of whether the claims in the first and subsequent suits are the same." *Judy*, 383 S.C. at 7, 677 S.E.2d at 217. "It applies only if the precluded party has had a full and fair opportunity to litigate the issue in the first action." *Id.* (internal quotation marks and citation omitted). Coastal asserts that collateral estoppel bars the Department and this Court from deciding some issues of fact or law differently than the Supreme Court in *Kiawah II*. The Court will address below each issue Coastal raised in this context.

The General Character of the Area

Coastal contends that, in addressing CZMP Policy III.C.3.(7)'s requirement that the Department evaluate the "long-range, cumulative effects" of the project in the context of "the general character of the area," the Supreme Court ruled in *Kiawah II* on what constitutes "the area" and what the "general character" of that area is, thus precluding the Department or this Court from finding otherwise.[10] Specifically, Coastal argues the Supreme Court ruled that "the area" to be considered is the Spit itself, and not the rest of Kiawah Island or part of Seabrook Island. Additionally, Coastal argues the Supreme Court ruled that the general character of the area is "untouched" and "natural."

Evaluating Coastal's argument requires an examination of the Supreme Court's decision with regards to this policy in *Kiawah II* to determine whether this issue was actually and necessarily litigated and determined on the merits. *See Shelton*, 325 S.C. at 251, 481 S.E.2d at 707. This Court's reads Supreme Court's decision in *Kiawah II* to hold that this Court erred in failing

[10] In *Kiawah II*, the Supreme Court addressed regulation 30-1 of the South Carolina Code of Regulations, not CZMP Policy III.C.3.(7). *Compare Kiawah II*, 411 S.C. at 32-37, 766 S.E.2d at 717-720 *with* CZMP Policy III.C.3.(7). However, the regulation and this policy are practically identical.

to defer to the Department's interpretation of what constitutes the scope of the "area" for the purpose of evaluating the "general character of the area" under this policy. *Kiawah II*, 411 S.C. at 32, 766 S.E.2d at 717 ("[T]he ALC erred by failing to give deference to DHEC's interpretation of its regulation."). In *Kiawah II*, the Supreme Court held that the Department's *interpretation* of the area of consideration was entitled to deference. *Id.* at 35, 766 S.E.2d at 719 ("Here, DHEC's interpretation is neither arbitrary, capricious, nor manifestly contrary to the statute. . . . DHEC's interpretation is reasonable and consistent with its statutory authority.").

The Department interpreted CZMP Policy III.C.3.(7) "as requiring it to consider not only a proposed project's impact on the critical area, but also the project's impacts on upland areas within the larger coastal zone." *Id.* at 32, 766 S.E.2d at 717. The Supreme Court found that the Department's reasoning behind considering impacts on uplands outside the critical area was "sound because [the Department] cannot be expected to protect the coastal zone as instructed by the General Assembly if it cannot consider how projects within the critical area may affect the broader coastal zone." *Id* at 36, 766 S.E.2d at 719. In a summation of its holding in this regard, the Supreme Court stated: "Accordingly, the ALC erred in failing to give deference to DHEC's interpretation and construing regulation 30–11(C)(1) as not permitting consideration of upland impacts." *Id.*

Thus, in *Kiawah II*, the Supreme Court did not make a finding as to the specific geographical area to be considered under this policy or the character of that geographical area. Rather, it endorsed the Department's *interpretation* of the regulation, which was that the Department was authorized to consider the upland area in addition to the critical area, and concluded this Court should have deferred to the Department's interpretation of this policy.

Having determined what the Supreme Court held with regards to the policy section at issue, we can now review the holding in the context of the doctrine of collateral estoppel. This Court finds that because the Department's *interpretation* of the policy at issue in this case was actually and necessarily litigated and ruled on by the Supreme Court, the Court's ruling presumably estops the Department or this Court from interpreting the policy differently.[11] However, in this instance, the Department's interpretation was consistent with its interpretation in *Kiawah II* and the Supreme

[11] However, I note the Department can arguably change its interpretation based upon sound reasoning. *Ohio Valley Envtl. Coal*, 556 F.3d at 215 (holding "an agency must be allowed to assess the wisdom of its policy on a continuing basis" (internal quotation marks and citation omitted)).

Court's decision in that case. Further, this Court analyzed the Department's interpretation in its Final Order and determined, like the Supreme Court in *Kiawah II*, that the Department's interpretation was worthy of deference. Therefore, the Department's interpretation of this policy in this case (to which this Court deferred) is consistent with the interpretation endorsed by the Supreme Court in *Kiawah II*, and collateral estoppel is not applicable.

What it appears that Coastal is really taking issue with is not the interpretation of CZMP Policy III.C.3.(7), but the Department's application of this policy to the facts of this case compared to the prior case. When the Department applied its interpretation to the project at issue in *Kiawah II*, it only looked at the area of Spit itself and determined the character of the Spit was pristine and undeveloped. In contrast, in this case the Department looked at the Spit, the rest of Kiawah Island, and part of Seabrook Island to find the general character of the area was residential. Arguably, the Supreme Court impliedly endorsed the Department's application of this policy in *Kiawah II* when it upheld the Department's interpretation, but it did not make findings as to the factual application of CZMP Policy III.C.3.(7). The Supreme Court, as an appellate court, was concerned with whether substantial evidence supported the decision it was reviewing—it obviously was not acting as a fact finder. *See* S.C. Const. art. V, § 5. Indeed, this Court could not find where the Supreme Court ruled in *Kiawah II* that the scope of the area to be considered was limited to the Spit itself or where it ruled that the character of the Spit was "untouched" or "natural" in the context of its review of this policy section.

The Long-Range, Cumulative Effects of the Project

Coastal quotes several passages from the Supreme Court's opinion in *Kiawah II* in its Motion to suggest that the Supreme Court determined that the project at issue in *Kiawah II* would have adverse cumulative effects and, therefore, this Court is precluded from finding, in this case, that there are no adverse cumulative effects. However, the Court finds Coastal cherry-picked passages from the Supreme Court's opinion and couched them in such a way that they misrepresent the rulings of the Supreme Court. For example, in its Motion, Coastal argues that in *Kiawah II* "the Supreme Court affirmed the Department's conclusion that the development the structure would facilitate would 'have a significant impact on the general character of the area,' by converting a pristine barrier island into residential development." This sentence suggests the Supreme Court held that the project was going to "have a significant impact on the general character of the area." However, this quotation is from the "Factual/Procedural Background"

section of the Supreme Court's opinion in *Kiawah II* and was an objective recitation of the Department's findings as part of the procedural history of that case.[12] *Kiawah II*, 411 S.C. at 25, 766 S.E.2d at 713 ("The staff found Regulation 30–11 of the South Carolina Code of Regulations (2011) implicated because the structure would 'prevent the normal shoreline migration and the cycle of creation and subsequent in-fill of a tidal inlet' and because the development the structure would facilitate would 'have a significant impact on the general character of the area.'"). In fact, the Supreme Court made no findings as to whether the project at issue in *Kiawah II* would have long-range, cumulative effects. Rather, the Supreme Court found this Court erred in its legal analysis of this policy by not recognizing that there would be "upland impacts flowing from the construction of the revetment and bulkhead" when it was applying this policy to the facts of the case. *Kiawah II*, 411 S.C. at 37, 766 S.E.2d at 719. Accordingly, collateral estoppel is inappropriate.

Public Use of and Access to the Shoreline Along the Kiawah River

Coastal contends this Court's finding that public use of the shoreline is "only occasional," and the riverbank is the "less utilized public area of the spit" is barred by collateral estoppel because "the issue of the extent of the public use of the shoreline along the Kiawah River has already been determined by the Supreme Court, who specifically rejected [the ALC's] conclusion that public use of the beach is insignificant."

Initially, it is worth pointing out that nowhere in this Court's Final Order in this case does the Court find that the public's use of the sandy shoreline/riverbank is "insignificant." Additionally, more than one of Coastal's witnesses at trial specifically testified that they only used the riverbank "occasionally." This Court's findings reflect the facts as they were presented to this Court in this case.

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[12] Similarly, Coastal also argues "the Supreme Court affirmed the Department's determination that the cumulative effects of the project would be to stop shoreline migration." In support of this statement, Coastal makes the following argument, quoting the Supreme Court: "The structure would 'prevent the normal shoreline migration and the cycle of creation and subsequent in-fill of a tidal inlet.'" This quote, like the one discussed in the body of this Order, is from the Procedural/Background section of the Supreme Court's order and is not adopted later in the opinion as a holding of the Supreme Court. *Kiawah II*, 411 S.C. at 25, 766 S.E.2d at 713 ("The staff found Regulation 30–11 of the South Carolina Code of Regulations (2011) implicated because the structure would 'prevent the normal shoreline migration and the cycle of creation and subsequent in-fill of a tidal inlet' and because the development the structure would facilitate would 'have a significant impact on the general character of the area.'"). Coastal further contends, "The steel sheet pile wall is similarly designed to stop shoreline migration, which is an adverse cumulative impact." The Supreme Court did not expressly find that stopping shoreline migration was an adverse cumulative impact under the applicable policy.

Next, the Supreme Court determined in *Kiawah II* that:

> [I]n view of the uncontroverted evidence, the ALC's conclusion that public use of the beach is insignificant is not supported by substantial evidence. All of the evidence presented at the hearing was that the public regularly uses the beach for a variety of recreational purposes.

Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 42, 766 S.E.2d 707, 722 (2014). Importantly, in *Kiawah II*, the Supreme Court was reviewing evidence presented in 2009. Between that case and this case, several years have passed. At the trial in this case, not only were many of the witnesses different, but these witnesses testified to different facts in this case, and it is quite possible that the public use, enjoyment, and access to the Spit has changed in the intervening years between the two cases. Thus, this is not a factual situation that is appropriate for collateral estoppel. Here, the facts are subject to change over time unlike a car accident that happened in 2010 for which the factual determination of who was at fault would remain the same no matter how many times the accident is litigated.

The Public Will Not Benefit From a Wall Beyond the Park

Coastal contends that this Court's order authorizing the SSPW beyond Beachwalker Park is precluded by the Supreme Court's finding in *Kiawah Remand* that any portion of the bulkhead/revetment that extended past Beachwalker Park would not be in the public interest. *See Kiawah Remand*, 422 S.C. at 638, 813 S.E.2d at 694. However, the Court finds the Supreme Court's holding in this regard does not bar this Court from finding differently in this case because the Supreme Court's ruling was issued in the context of a different erosion control structure, in a different location, and with different impacts than the structure in the last case. In other words, the issue of whether the SSPW violates contravenes the CZMA/CZMP was not "actually and necessarily litigated and determined in a prior action." *Shelton*, 325 S.C. at 251, 481 S.E.2d at 707. While this issue is inappropriate for collateral estoppel, the Court finds upon reconsideration that it could have better explained its reasoning finding the SSPW will provide a public benefit in this case and grants the Motion for Reconsideration in this limited respect.

A Vertical Wall Would be Detrimental to Public Uses and the Shoreline

Coastal suggests this Court is precluded from authorizing an erosion control structure that consists of a vertical wall in this case because in *Kiawah Remand* the Supreme Court determined "a vertical bulkhead alone, without anything to protect the toe against reflective wave energy,

would cause even more exacerbated erosion" and that is why "KDP's engineers designed the structure as a tandem bulkhead and revetment." *Kiawah Remand*, 422 S.C. at 637, 813 S.E.2d at 693. It is worth noting, again, that the current case is dealing with a different erosion control structure than the one previously litigated. In the prior case, the erosion control structure was specifically engineered as a combination bulkhead and revetment and the Supreme Court's order reflected its finding that there was not substantial evidence in the record to show that a bulkhead, without a revetment, was sufficient. *Id.* at 637, 813 S.E.2d at 694. Here, the erosion control structure is not a combination bulkhead and revetment—it is a steel sheet pile wall. Therefore, similar to the last issue raised by Coastal, this issue in inappropriate for collateral estoppel because this specific issue was not actually and necessarily litigated in the last case. *See Shelton*, 325 S.C. at 251, 481 S.E.2d at 707. Moreover, the Court notes that Coastal specifically stipulated to the engineering sufficiency of the SSPW at trial.

Failure to Address Applicable Statutory and Regulatory Provisions

Coastal contends this Court failed to address several applicable statutory and regulatory provisions in its Final Order. Specifically, Coastal contends this Court failed to address section 48-39-30(D) of the South Carolina Code (2008); CZMP Policy III.C.3.VII; CZMP Policy III.C.3.I(8); CZMP Policy III.C.3.I(9); and CZMP Policy III.C.3.V.A.[13] Upon review, with the exception of section 48-39-30(D) and CZMP Policy III.C.3.VII, this Court finds Coastal is raising all of these issues for the first time in this motion and never raised overall compliance with the CZMA or the CZMP in general.[14] It is axiomatic that a "party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." *Anderson Mem'l Hosp.*,

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[13] Coastal also contends this Court failed to rule on whether the Department's decision to issue the permits and CZCC in this case is precluded by a prior Department Board decision. It appears Coastal is arguing that the Department Board's decision not to authorize a 340' steel sheet pile wall in 2009 (Final Agency Decision) precludes the Department and this Court from making contrary determinations. Essentially, this is an estoppel argument flowing from Coastal's request that this Court find the Department's current decision inconsistent with the Department's previous denial of the 340' steel sheet pile wall. As already discussed, Coastal presented no evidence of the Department's decision to deny the 340' steel sheet pile wall at trial and has raised this estoppel argument for the first time in its motion for reconsideration. Therefore, Coastal has failed to carry its burden of proof as to this issue and it has raised this issue inappropriately. *See Johnson*, 381 S.C. at 177, 672 S.E.2d at 570 ("An issue may not be raised for the first time in a motion to reconsider.").

[14] The Court found reference to CMP Policy III.C.3.I(8), CZMP Policy III.C.3.I(9), and possibly CZMP Policy III.C.3.V.A in Coastal's proposed order, but the references were to brief statements of these policies without accompanying factual or legal analysis. This Motion is the first time Coastal has specifically raised these policy sections as issues to this Court. The Motion further fails to provide any meaningful factual or legal analysis as to these issues.

Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994); *see Johnson*, 381 S.C. at 177, 672 S.E.2d at 570 ("An issue may not be raised for the first time in a motion to reconsider."). Therefore, the Court will not entertain these new issues raised for the first time in this Motion.

Regarding section 48-39-30(D), Coastal argues this Court's Final Order acknowledged that over time erosion will cause the SSPW to be partially exposed to the critical area and, therefore, the Court must consider this sub-section in its review. Coastal raised compliance with section 48-39-30 as a whole, which discusses the State's legislative declaration of state policy. Subsection 48-39-30(D) specifically provides:

> 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.

The Court did not specifically address this subsection in its Final Order because the Court found it inapplicable to the proposed project. This subsection deals with the use of critical areas. In the prior case, *Kiawah II*, this subsection was considered because that project had a direct impact on the critical area and required a critical area permit. 411 S.C. at 30, 766 S.E.2d at 715 (discussing considerations for a permit to alter the critical area). Here, the current proposed project does not require a critical area permit and will be built on the highland. For this reason, the Court did not find this particular subsection to be applicable, and its position remains the same.

Regarding CZMP Policy III.C.3.VII (Wildlife and Fisheries Management), Coastal attempted to raise this issue for the first time at trial when it offered evidence that the proposed project would affect diamondback terrapins and bottlenose dolphins. The Department objected to any testimony about these species, arguing the Department did not find this policy applicable to this project and Coastal never raised this policy section an issue in its prehearing statement. KDP appeared to join the Department in its position. The Department further argued that because the Department did not even consider this section in its decision-making process and Coastal failed to raise it, the Court was without jurisdiction to consider how the project would affect diamondback terrapins and bottlenose dolphins and any discussion of these species would be prejudicial.

Coastal argued it was not necessarily raising the issue under the CZMP's Wildlife and Fisheries Management section, but rather discussing diamondback terrapins and bottlenose dolphins as "natural resources," and the effect of development on these natural resources is a "cumulative impact" that would flow from the project. It further argued the Department was not

prejudiced as it was present at the deposition of Coastal's experts in this regard and was therefore on notice of the testimony about these species.

The Court heard proffered testimony regarding the species at trial and ruled on this issue in its Final Order, ultimately determining it would not consider the issue of whether the Wildlife and Fisheries Policy was violated because Coastal failed to raise this issue in its prehearing statement.[15] *See* SCALC Rule 14 (providing an ALJ "may request each party to prepare and return a Pre-Hearing Statement setting forth with particularity the issues in the contested case"). While it is certainly possible for a party to raise an issue in the middle of trial, this Court seeks to avoid trial by ambush. *See Norwest Properties, LLC v. Strebler*, 819 S.E.2d 154, 159 (Ct. App. 2018), *reh'g denied* (Oct. 18, 2018) ("Although the spirit of the modern procedural rules is to promote pleading flexibility to ensure disputes are decided on their merits rather than the whims of formalism, Rule 15(b) reminds us that pleading is not altogether formless, and issues cannot enter a trial by stealth."). Moreover, at any time after the case was filed, Coastal could have submitted an amended prehearing statement or moved to amend their prehearing statement at trial to add the Wildlife and Fisheries policy section as an issue, which would have put the Department and KDP on notice. SCALC Rule 18 ("Any document filed with the Court may be amended at any time upon motion and for good cause shown, unless the amendment would prejudice any other party in the presentation of its case."); *see also Norwest Properties, LLC*, 819 S.E.2d at 159 ("Absent an objection, Rule 15(b) allows a court to amend the pleadings to conform to the evidence, but when there is no consent to try an unpleaded issue, as manifested by a trial objection to evidence only relevant to the unpleaded issue, a court may not amend without a formal motion." (internal quotation marks and citation omitted)). Coastal did not amend its pleadings, the Department objected to this issue at trial, and Coastal failed to make a motion to amend its pleadings in response to the Department's objection.

Nevertheless, the Court determined it would consider the proffered testimony because it was relevant to other issues that Coastal properly raised in its prehearing statement, including compliance with CZMP Policy III.C.3.I(7) discussing long-range, cumulative impacts. The Court resolved that neither party would be prejudiced by this outcome because Coastal could present its testimony concerning these species and the Department and KDP were on notice of the issues of

[15] The Court finds no reason to deviate from its ruling in its Final Order or the reasoning therein but takes the time to re-emphasize certain aspects of that decision.

compliance with CZMP Policy III.C.3.I(7) and the other statutory and policy sections Coastal raised in its prehearing statement.

ORDER

Based upon the above, it is hereby:

ORDERED that Coastal's Motion for Reconsideration is **DENIED** in part and **GRANTED** in part.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

December 14, 2018
Columbia, South Carolina

CERTIFICATE OF SERVICE

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

E. Harvin Belser Fair
Judicial Law Clerk

December 14, 2018
Columbia, South Carolina