



On June 12, 2015, Coastal requested the Department's Board (the Board) conduct a final review conference of the Department's staff decision to issue the above-referenced permits and CZCC. On July 6, 2015, the Board declined to conduct a final review conference, making the staff decision the final agency decision pursuant to section 44-1-60(f) of the South Carolina Code (2018). Thereafter, on August 5, 2015, Coastal filed this request for a contested case hearing. A hearing on this matter was held before the ALC in Columbia, South Carolina, from August 21-25, 2017, to August 28-29, 2017.

Following the issuance of the initial final order in this case, Coastal filed a Motion for Reconsideration, which this Court granted in part. Accordingly, the Court now issues this Amended Final Order.

### ISSUES<sup>2</sup>

1. Whether the Department's decision to issue the permits and CZCC in this case was improper because the issuance of the permit and CZCC result in violations of the following provisions of the South Carolina Coastal Zone Management Act (CZMA) and the Coastal Zone Management Plan (CZMP):
  - a. CZMP Policy III.C.3.I(7)
  - b. CZMP Chapter IV.A.2.a.8
  - c. CZMP Chapter III.C3.XII.A, B & D
  - d. Section 48-39-30 of the South Carolina Code
  - e. Section 48-39-150(A) of the South Carolina Code
2. Whether the Department's issuance of the CZCC is fundamentally inconsistent with its denial of critical area permit OCRM-08-117-E dated December 18, 2008, and the Board's decision to overturn the Department staff decision to issue a certification for a 340-foot sheet pile wall along the Kiawah River.
3. Whether the Department's issuance of the CZCC is fundamentally inconsistent with the South Carolina Supreme Court's decision in *Kiawah Development Partners, II v. South*

<sup>1</sup> The findings and determinations made in the Order Denying Motion for Reconsideration are incorporated into this Amended Final Order.

<sup>2</sup> In the section of its Prehearing Statement discussing the issues to be raised, KDP expressed that it "intends to raise a question as to the standing of [Coastal] in this case." However, KDP never filed a motion to dismiss based on standing, nor did KDP raise or argue the issue of standing at trial. However, KDP submitted a proposed final order to this Court in which it argued Coastal did not have standing to bring this action. Based upon KDP's failure to express more than an intention to raise this issue in its Prehearing Statement and its failure to argue the issue at trial, this Court deems the issue of standing, if it ever was an issue, abandoned and declines to address it. *See, e.g., 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.").

**FINDINGS OF FACT**

Having observed the witnesses and exhibits presented at the hearing and taking into consideration the burden of persuasion and the credibility of the witnesses, I make the following findings of fact by a preponderance of the evidence:

**Background**

This is not the first time these parties have come before the Court in reference to KDP's proposed development of Captain Sam's Spit. A similar case came before this Court in 2010, and a decision in that case was recently issued by the South Carolina Supreme Court.<sup>3</sup> The primary differences between the 2010 case and the case at bar are the types of permits requested and the type of erosion control structure proposed by KDP to facilitate development of the Spit. Pursuant to its plan for development, on August 8, 2011, KDP submitted an application to the Department for coverage under the NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities and for a Coastal Zone Consistency Certification for its proposed residential development on the Spit. On April 1, 2013, KDP submitted a construction application for Water/Wastewater Facilities to the Department for approval of the water and sewer infrastructure necessary to service the same twenty-six lots. On May 28, 2015, the Department granted the permits and issued a CZCC.

Specifically, the Department issued a Wastewater Construction Permit for the construction of 1,644 linear feet of eight-inch PVC gravity sewer, eleven manholes, one duplex pump station, and 465 linear feet of four-inch force main to serve twenty-six residential lots and a community dock site. The Department also issued a Water Supply Construction permit for the construction of 5,000 linear feet of ten-inch PVC water line and seven fire hydrants to serve twenty-six residential lots, a pump station, and one community dock site. Both the water and wastewater will be served by Kiawah Island Utility, LLC. The Department next approved the construction of a 2,380-linear-foot steel sheet pile wall associated with the proposed development. Finally, the Department also issued a CZCC subject to the following conditions:<sup>4</sup>

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<sup>3</sup> *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env'tl. Control*, Op. 27790 (S.C. Sup. Ct. filed April 18, 2018); see also *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env'tl. Control*, 411 S.C. 16, 766 S.E.2d 707 (2014).

<sup>4</sup> In issuing the CZCC, the Department considered the following Resource Policies from the CZMP: (1) Residential Development; (2) Transportation Facilities; (3) Recreation and Tourism; (4) Public Services and Facilities (Sewage

1. The permittee must submit an updated Critical Area Line for review and approval 30 days prior to initiation of construction. Impacts to tidelands critical area associated with any aspect of construction or construction related activities is not authorized.

2. The 2,380 linear feet of erosional riverbank of the Kiawah River must be stabilized by the construction of an in-ground steel sheet pile wall (SSPW). The sheet pile wall must be constructed in accordance with and per the phasing detailed in the construction drawings last revised April 10, 2015, and signed by Tony M. Woody, PE on April 13, 2015. The erosion control structure must be installed and the surrounding area stabilized before construction of any portion of the project (roadways, utilities, residential development, etc.) can occur.

3. To ensure there are no impacts to the tidelands critical area, the developer/owner must construct the SSPW prior to any work commencing on any other aspect of the development. Temporary access to the SSPW site can be installed prior to the SSPW.

4. The impact footprint of each home-site must conform to Low Impact Development (LID) practices during construction to ensure that long term, permanent low impact practices are instituted as agreed upon in the Planned Unit Development agreement between the Town of Kiawah and the developer/owner, signed December 5, 2013, and in the revised application and report dated April 13, 2015.

5. No pole mounted lighting is allowed within the development, including associated with habitable structures, and all landscape lighting must be shielded to direct illumination downward away from the beachfront.

6. The number of shared beach access walkways is limited to eight (8) as agreed to in the Planned Unit Development Agreement between the Town of Kiawah and the developer/owner, signed December 5, 2013, and also referenced in the NPDES Construction General Permit for Stormwater Discharges for Large and Small Construction Activities permit application dated April 13, 2015.

7. A conservation easement must be placed on the 33.20 unimpacted upland acres consistent with the agreed upon conditions in the Planned Unit Development agreement between the Town of Kiawah and the developer/owner, signed December 5, 2013. A copy of the recorded easement must be submitted to SCDHEC within 90 days of the issuance of the NPDES permit and prior to commencement of any construction activities.

8. In the event that any historic or cultural resources and archaeological or paleontological remains are found during the course of work, the applicant must notify the State Historic Preservation Office and the South Carolina Institute of Archaeology and Anthropology pursuant to South Carolina Code of Laws. Historic

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Treatment, Solid Waste Disposal, Public/Quasi-Public Buildings, Dams and Reservoirs, Water Supply); (5) Activities in Areas of Special Resource Significance (Barrier Islands, Dune Areas, Navigational Channels, Public Open Spaces and Wetlands); and (6) Stormwater Management (Runoff, Bridge Runoff, Golf Course Management, Mines, Landfills).

or cultural resources consist of those sites name to the National Register and those sites that are eligible for the National Register and other areas of special historic significance. Archaeological remains consist of any material made or altered by man, which remain from past historic or prehistoric times (i.e., older than 50 years). Examples include old pottery fragments, metal, wood, arrowheads, stone implements or tools, human burials, historic docks, structures, or non-recent vessel remains. Paleontological remains consistent of old animal remains, original or fossilized, such as teeth, tusks, bone, or entire skeletons.

### **General Characteristics and Geomorphology of the Spit**

Kiawah Island is a ten-mile barrier island off the South Carolina coast. Kiawah Island is approximately ninety percent developed and contains both residential and limited commercial development. At the southwest end of Kiawah Island is Captain Sam's Spit, an undeveloped, drumstick-shaped piece of land that is connected to Kiawah Island by a narrow strip of land referred to as "the neck." The Spit is bounded on the northeast by Kiawah Island, the southeast by the Atlantic Ocean, the southwest by Captain Sam's Inlet and Seabrook Island, and the northwest by the Kiawah River.

The Spit contains dune areas on the ocean side, a sandy bank and brackish vegetation and marsh areas along the backside of the Spit next to the river, and a small inland maritime forest. Just above the neck of the Spit lies Beachwalker Park (the Park). The Park is a popular public park facility operated by Charleston County Parks and Recreation Commission (Charleston County). Charleston County leases the land for the park from KDP. The park consists primarily of a large parking lot, rest rooms and other facilities, and a boardwalk that leads to the front beach.

In 1999, the Department established a baseline and set-back line on the Spit, effectively opening the Spit for development. The last critical line on the Spit was certified by the Department in June 2016. As of 2016, the Spit had approximately 174 acres of highland, and approximately 44.03 acres of that highland was buildable area above the baseline and critical line.<sup>5</sup>

The Spit is a geomorphological land form called a down drift spit. Down drift spits commonly form off barrier islands where the longshore sediment transport system is pushing sand from north to south. Experts from both Coastal and KDP agreed Kiawah Island, including the Spit, has been accreting over the last fifty to one hundred years and advancing in a southwesterly

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<sup>5</sup> Previously, in 2006, the Spit contained 40.301 acres of buildable highland. In 2011, as a result of the adjustment of the baseline seaward in 2009, the Spit contained 43.36 acres of buildable highland. Overall, the amount of buildable highland has slowly, but steadily increased.

direction towards Seabrook Island. Dr. Tim Kana, who was qualified as an expert in coastal geology and coastal processes, explained<sup>6</sup> the accretion is largely due to the huge volume of sand released from sand shoals in the mouth of the Stono River and which comes ashore on the beach at Kiawah Island.<sup>7</sup> The volume of accretion that has occurred at Kiawah Island over the last few decades is exceptional for the East Coast. Due to the southward movement of sand down the coast, Kiawah will keep accreting “for several decades.” Because of the accretion, the Spit migrates towards Seabrook Island at a rate of approximately 200 feet per year. Further, although sea levels are rising at a rate of approximately three millimeters (the width of a “couple of [stacked] nickels”) each year, the rate of accretion at the Spit is currently outpacing the rate of sea level rise.

The Spit is located next to an inlet (Captain Sam’s Inlet), which is a dynamic area in the coastal zone. Tides interact with the river at inlet locations to create more intense erosion, particularly during storm events. Dr. Kana agreed the Spit is geographically and morphologically unstable and that inlets are the most dynamic part of barrier islands. He nonetheless explained that a hurricane is going to have a devastating effect no matter what part of the island it hits. Dr. Kana remarked it is for this reason “I don’t own any coastal property because all parts of the coast are vulnerable.” Although the Spit is located in a dynamic area, it shows signs of stability. For example, the presence of several dune rows on the Spit, including some dunes as high as fourteen feet, indicate stability of the shoreline in those locations over time. Furthermore, even Coastal’s expert, Dr. Young, agreed that the presence of vegetation and a maritime forest on the Spit indicates the central and western parts of the Spit are stable. Additionally, even though the Spit sustained 120 feet of erosion as a result of Hurricane Matthew, the Spit has already regained much of its beach due to the extraordinary accretion rates along Kiawah Island.

### **Erosion of the Riverbank**

The Kiawah River is currently eroding the backside of the Spit. The photographic evidence portrays the collapse of portions of the riverbank over time, including the loss of some trees and vegetation for most of the length of the riverbank where the proposed SSPW would be installed. A vertical sand escarpment extends down most of the riverbank in this area, ranging in elevation

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<sup>6</sup> When this court uses the term “explained” regarding a witness, it is accepting that testimony as a finding of fact.

<sup>7</sup> Dr. Kana is a preeminent expert in the field of coastal geology and processes. I found his testimony was more detailed and comprehensive than Coastal’s expert’s testimony. Therefore, I found his testimony to be particularly persuasive.

from approximately two feet to around ten feet, with the escarpment generally getting smaller towards the southwest from Beachwalker Park to the end of the Spit. Although the Kiawah River is eroding the backside of the Spit, the neck and the Spit have been steadily accreting on the oceanfront side, moving seaward. In fact, the rate of accretion along the beach is equal to or greater than the rate of erosion along the riverbank.

In the past two-hundred years, the Spit has “breached,” or became disconnected at the neck from the larger part of Kiawah Island two or three times, most recently in 1949. However, since 1949, the Spit has not breached and has steadily accreted. The exceptional level of accretion at Kiawah has thus reduced the vulnerability of the neck to a breach. Indeed, although the neck sustained erosion during Hurricane Matthew in 2015, it remained intact. And, despite the erosion as a result of Hurricane Matthew, the neck has generally stayed the same width over time and has migrated seaward. Moreover, if the erosion was stopped on the Kiawah River side of the neck, the neck of the Spit would widen due to the continued accretion.

Although the neck has maintained a consistent width, because the baseline is affixed the buildable width of the neck has narrowed as the neck and Spit have moved oceanward. In August 2006, the buildable width at the narrowest location on the neck was 97.52 feet. In contrast, in August 2010, this same location measured 64.43 feet; in June 2011 it measured 60.26 feet; in October 2014 it measured 39.41 feet; in June 2015 it measured 37.06 feet; and in May 2016, when the most recent Department critical line was certified, it measured 29.25 feet.

Another factor that is artificially impacting the geomorphology of the Spit is the periodic relocation of Captain Sam’s Inlet. The inlet has been relocated several times beginning in 1983, then in 1996, and most recently in 2015 to replenish the sand on Seabrook Island’s beach. Dr. Kana, who has been involved in the relocations, explained that the inlet has been relocated by cutting a channel across the tip of the Spit and diverting the Kiawah River through that new channel and sealing up the old one, effectively resulting in the detachment of the tip of the Spit every time the inlet is relocated.<sup>8</sup> The detachment shortens the length of the Spit resulting in the sand in the detached tip of the Spit moving towards the beach of Seabrook Island and renourishing it. Each

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<sup>8</sup> Interestingly, these relocations involved a significant impact to an area of public use upon the Spit and an area in which the dolphins strand feed. The relocations also appear to have directly cut through a federally designated habitat for piping plovers.

time the inlet is moved, it begins to slowly return to its original location, moving east to west, and requiring the inlet to be relocated once again in a continuous cycle.

### **The Proposed Project**

KDP proposes to initially build a twenty-six-lot residential development on 12.8 acres of the Spit called Cape Charles, Phase 1. Ultimately, KDP intends to build out the development to fifty homes total, disturbing a total of approximately twenty acres. In order to stabilize the neck and facilitate development on the Spit, KDP proposes to install a 2,380-foot steel sheet pile to stop erosion along the Kiawah River.

The Town of Kiawah Island's (Town's) Planning Commission approved the preliminary subdivision plat, including the road and lots for Cape Charles, Phase 1, on September 4, 2013. The proposed development also complies with the zoning ordinances of the Town of Kiawah Island, which has zoned the Spit for limited residential development. Additionally, the proposed subdivision for Cape Charles, Phase 1 is authorized by the Amended and Restated Development Agreement (Development Agreement) between the Town and KDP dated December 5, 2013.<sup>9</sup>

Under the terms of the Development Agreement, KDP must employ environmentally sensitive approaches to its development on the Spit to minimize the impacts of development. In addition, KDP is required to construct new beach parking spaces on Captain Sam's Spit west of Beachwalker Park for the benefit of the members of the of the Kiawah Island Community Association (KICA). The Development Agreement requires that KDP impose a permanent restriction prohibiting any alteration of the natural areas of Captain Sam's Spit that are outside the lots and the rights of way of the roads and any other community improvements. Further, KDP agreed to impose a restrictive covenant on all remaining highlands ensuring they remain non-developed green space thereby preserving this area in a natural state forever. Currently, KDP plans to convey a conservation easement covering the remaining undeveloped highland to the Kiawah Island Natural Conservancy. Thus, the Development Agreement will immediately prohibit the

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<sup>9</sup> The Development Agreement specifically allows the development of up to fifty residential lots on twenty acres of the Spit. KDP obtained this right to develop a limited portion of the Spit in negotiations in 2005 associated with a prior development agreement in return for relinquishing the right to build a hotel on the west end of Kiawah Island near Captain Sam's Spit, just to the east of Beachwalker Park. The Development Agreement specifies that the rights accorded KDP under its terms constitute vested rights for the development of the property.

development of ten or more acres of land that could otherwise be developed today based on the current location of the setback line and critical line.

#### Development Methods

The storm water management system for the entrance road, infrastructure, and twenty-six lots has been engineered according to best management practices in a manner to prevent run-off into the river. The stormwater management techniques designed for this development are more environmentally sensitive than usual. KDP will not only use best management practices to limit or eliminate the amount of runoff that goes to the adjacent rivers or ocean, they will install a swale system along the roads, which will eliminate a "curb and gutter." Additionally, shallow bioretention ponds will allow runoff to infiltrate into the ground rather than running over the land into adjacent water bodies. The natural vegetation will not be disturbed where possible and pervious surfaces will be used where possible. All of the project's facilities are designed to avoid the critical area and any wetlands.

KDP will take other **extensive** actions to reduce the impact of the future twenty-six houses.<sup>10</sup> The project is low density single-family residential development. The houses will be limited in size and can be no more than one and one-half stories high even though the Development Agreement would allow up to two-and-a-half stories. The houses will be embedded in the vegetation to the extent possible. Houses will be made of natural materials. Lots will share driveways. An effort will be made to minimize impervious surfaces. No lawns will be allowed and landscaping will be limited to indigenous plants. Home sites have been located to avoid known wildlife areas. Home sites will be situated to minimize the removal of vegetation and KDP will make efforts to limit alteration of the existing topography.

The development will be landward of the dune ridges running parallel to the beach and from 200 feet to 1,000 feet landward of the beach. The boardwalks to the beach will be communal and spaced every 500 to 700 feet. Rather than allow individual docks for the lots on the river side, there will be either one or two community docks. The lots will be served by the public water and wastewater systems of Kiawah Island Utility and no septic tanks will be allowed. The project land

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<sup>10</sup> Mark Permar testified that he has been involved in the development of Kiawah Island since 1979 and the entire island is "sensitive" and required development that responded to "unique sensitivity issues," including fresh water wetlands, tidal marshes, a chain of hummocks, Ocean Park, and other unique natural conditions. He testified he has previously dealt with developing narrow properties surrounded by critical area.

will be encumbered by its own set of restrictive covenants that enact the environmentally sensitive measures.

The proposed project will be accessed through the neck of the Spit by way of an "access corridor." The access corridor will be used to accommodate the access road, stormwater system, and underground utilities. However, the width of the access corridor is constrained by the critical line on the river side of the Spit and the set-back line on the ocean side. As previously mentioned, the width of the access corridor has been steadily shrinking as the critical line moves oceanward due to the erosion of the riverbank while the set-back line remains fixed. The access road would be elevated to an extent that a seven-foot high king tide would not top the road. As proposed, the road would be twenty feet wide without a variance, and KDP does not have a variance at this time. Nevertheless, the Development Agreement would allow a sixteen-foot wide road, and the width of the road could be narrowed by using a guardrail instead of a shoulder. Rick Karkowski, the project engineer, explained that "given some adjustment to the design as permitted we could make the project still work as intended" based upon the Department's most recent critical line certified in June 2016.

#### Steel Sheet Pile Wall (SSPW)

To stabilize the access corridor and protect the neck from the erosional effects of the river, the Department has authorized KPD to install a 2,380-foot steel sheet pile wall on the highland outside of the critical area. The in-ground SSPW would be installed on the river side of the neck beginning at Beachwalker Park and continuing southeast down the Spit. The SSPW would be constructed of interlocking forty-foot long steel sheet piles that would be treated with two coats of coal tar epoxy and would be driven into the ground. A galvanized channel wale would be installed horizontally across the wall and would be anchored to the land at least every six feet along the length of the wall. The top elevation of the wall would be approximately 6.5 feet above mean sea level.

As permitted, the wall would be built in two phases. The first phase would encompass construction of the wall near the neck and the residential area. The second phase would be installed later and would begin at the neck and run northwest up to the southeast corner of the parking area at Beachwalker Park. Regarding the placement of the SSPW in relation to the critical line through the access corridor, the SSPW would be five feet away from the June 2016 critical line at its closest point.

Coastal does not challenge the engineering of the SSPW, but rather its placement in relation to the critical line and its effect on the environment. Coastal contends the wall will eventually become a part of the Kiawah River shoreline. Therefore, Coastal asserts that if the SSPW is installed, the riverbank along the neck will erode until it is gone and the SSPW is exposed. The Court finds the Kiawah River is likely to continue to erode the riverbank along the Spit and it is likely that if the SSPW is installed, the continued erosion will eventually result in some loss of the riverbank and exposure of the SSPW to some degree. However, the extent to which the SSPW would be exposed in the future is unknown.

### **The Location of the Critical Line**

Coastal contends that due to the instability of the neck and continued movement of the critical line oceanward, the proposed location of the SSPW and road as of April 10, 2015, now falls within the critical area.<sup>11</sup>

Coastal provided the expert testimony of Alan Wood in support of this contention. Wood delineated a critical line on the Spit in March 2017 and, based on this delineation, he identified six areas where he believed the proposed road servicing the development would cross the critical line as he delineated it. However, KDP's expert, John Byrnes, explained he believed only two of the cross-over areas identified by Wood were actually critical areas.<sup>12</sup>

In resolving the conflict between the experts' testimony, I find Byrnes well-qualified in his field of expertise, having extensive experience with critical line delineations over his career. Furthermore, based upon this Court's review of the photos of the areas and testimony from both experts, Byrnes's testimony was more consistent with the photographic evidence depicting the areas in question. Consequently, the Court finds that the critical line should be adjusted to reflect the two changes in areas four and six. Nevertheless, based upon the evidence in the record, installation of the road, storm water system, and in-ground SSPW are currently feasible within the critical line with some adjustments. Therefore, modification of the critical line to include the two areas designated by Byrnes to be critical areas does not currently endanger the viability of the project and thus does not warrant denial of the permit.

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<sup>11</sup> The Department approved the proposed location on May 28, 2015, and this is the most recent proposal approved by the Department.

<sup>12</sup> Though Byrnes testified that section four and six were in the critical area, admittedly his testimony regarding section four is confusing. See Tr. p. 1525, l:23 to p. 1526, l:1.

Importantly, a condition of the CZCC is that KDP must submit an updated critical line to the Department for its review thirty days prior to the initiation of construction.<sup>13</sup> Thus, if, at the time of re-certification, parts of the proposed project have moved into the critical area, KDP will not be able to move forward without resolving that issue.

Coastal also presented the testimony of Cecelia Dailey and Richard Porcher, PhD, concerning whether the proposed homes would be built in the critical area. Though both individuals appeared to be sincerely concerned about development upon the Spit, neither were experts in critical line delineation. Furthermore, Dr. Porcher and Dailey timed their visits to the Spit to coincide with king tides on October 17, 2016, and November 15, 2016, because they wanted to inspect these areas to see where water might be during these significantly higher tides. Dailey testified to her observations and what she did when she was walking the Spit with Dr. Porcher.<sup>14</sup> Dr. Porcher testified that as he moved up a slough<sup>15</sup> on the backside of the Spit, he observed several areas that concerned him because he believed the development was proposed for areas that would be affected by water in the slough. However, Dr. Porcher was not able to confirm the precise location of the water he observed in the slough, only its general location. He also opined that as a botanist, he would be concerned about the destruction of a slough because it is a conduit for organic material from the end of the slough to the estuary, providing material for the food chain along the way. Nevertheless, Porcher confirmed he has never delineated a critical line and does not know the legal definition of tidelands or wetlands. In fact, he was not aware of the location of the critical line in this case.

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<sup>13</sup> The Court finds that Condition 1 of the CZCC in this case requires that KDP provide a current survey with certification of the critical line within thirty days of commencement of construction. Condition 1 further prohibits any construction or construction activities in the critical area. Because of the ongoing erosion, it is possible that the critical line may have moved oceanward enough to narrow the neck to a point where development is no longer feasible. However, based upon the current certified critical line from 2016, the Court finds the development will not take place in the critical area.

<sup>14</sup> Dailey took photographs of Dr. Porcher's efforts to measure water depths at various points around the Spit and used a handheld GPS device to document where the measurements were taken. Dailey then entered the GPS coordinates into Google Earth and, using the aerial image of the Spit supplied by Google Earth, dropped a numbered pin at each location where a photograph was taken. Dailey also testified she then used PhotoShop® to manipulate images of the proposed project and overlay them on the Google Earth aerial images to show the pins in relation to the proposed project. However, Coastal provided no foundation for accuracy of Google Earth and was unable to qualify Dailey as an expert in importing data into Google Earth to create visual representations. KDP objected to the admission of the aerial imagery from Google Earth and the overlays. The Court ultimately determined that the pinpoints upon the Google Earth photo were admissible to reflect the approximate position where the photos were taken.

<sup>15</sup> Dr. Porcher described a slough as a low area that goes into the highland area.

The Court finds that the inundation of the uppermost reaches of a tidal slough during a king tide is not indicative of whether a location should be classified as critical area. Notably, Coastal's own expert, Wood, testified that areas inundated only during king tides would not be considered part of the critical area. Rather, the location must be inundated by the normal tide once or twice per week for it to be considered critical area based on tidal inundation. Yet, there was no proof that the areas photographed by Dailey are inundated by a normal tide once or twice a week. Furthermore, Porcher described the presence of brackish plants as he moved inland down the slough. Accordingly, the Court finds that the areas in the upper reaches of the sloughs walked by Dr. Porcher and Dailey are not characterized the presence of purely saltwater vegetation that would indicate the presence of tidelands as defined by section 48-39-10(G) of the South Carolina Code.

#### **Economic Impact of the Development**

The estimated gross revenues from Phase 1 of the Cape Charles development are \$109 million. Additionally, the remaining twenty-four lots of Phase 2 are projected to raise total gross revenues to \$210 million. The projected annual real property tax revenue at buildout of fifty homes is \$5 million per year based on current millage rates. The construction of fifty houses would also provide employment for contractors over the ten years projected until build out is complete. Therefore, the development will have a significant economic impact in the area both in the jobs created during the build-out and the expansion of the tax base—a significant expansion in the overall amount of taxes collected even in if the actual expansion of the base is relatively small.

#### **Threatened and Endangered Species**

Chris Joyner, the manager of the Department's Coastal Zone Consistency Section, explained that when the Department conducts its consistency review, it relies on the United States Fish and Wildlife Service (USFWS) and the South Carolina Department of Natural Resources (SCDNR) to identify and designate critical habitats for threatened and endangered species pursuant to the Endangered Species Act (ESA) and state law that may be affected by a proposed project. Here, USFWS and SCDNR identified two federally threatened species in the vicinity of the proposed project: the loggerhead sea turtle and the piping plover, a shorebird. Furthermore, because portions of the Spit were identified as critical habitat for piping plovers and loggerhead sea turtles, the Department generally identified the Spit as a Geographic Area of Particular Concern (GAPC) under the state's Coastal Zone Management Plan (CZMP).

The designated habitat boundaries for piping plovers are established by 50 C.F.R. 17 (Federal Register Vol 66, No. 132, Page 36038). This Federal Regulation describes the federally designated habitat for piping plovers as SC Unit 10, which includes the following:

SC Unit 10, Seabrook Island, 117 ha (290 ac) in Charleston County. This unit runs from just 0.16 km (0.10 mi) north of Captain Sams Inlet to the southwest approximately 3.4 km (2.1 mi) along the Atlantic Ocean shoreline.

Federal Register Vol 66, No. 132, Page 36069. Accordingly, the piping plover territory extends one tenth of a mile north of Captain Sam's Inlet and does not include the development area. Moreover, piping plovers generally inhabit an area that is oceanward of the baseline. In this instance, the footprint of the development will be located one to five dune rows away from the beach. Regarding loggerhead sea turtles, the beach-dune system immediately seaward of the proposed home sites is a suitable nesting habitat for loggerhead sea turtles.

In response to the concerns raised by USFWS and SCDNR as to both species, the Department included Conditions 5 and 6 in the CZCC. Condition 5 provides:

No pole mounted lighting is allowed within the development, including associated with habitable structures, and all landscape lighting must be shielded to direct illumination downward away from the beachfront.

Condition 6 provides:

The number of shared beach access walkways is limited to eight (8) as agreed to in the Planned Unit Development Agreement between the Town of Kiawah and the developer/owner, signed December 5, 2013, and also referenced in the NPDES Construction General Permit for Stormwater Discharges for Large and Small Construction Activities permit applicated dated April 13, 2015.

In sum, the footprint of the development will not overlap with the critical habitat area for piping plovers. Similarly, the development will not be located in loggerhead sea turtle nesting areas. But, to the extent the proximity of the proposed development and its features could impact these species, the Court finds the conditions adopted by the Department as part of the CZCC will minimize any potential impacts on both species. Also, the Court finds there is no current risk of a taking of either species under the ESA and any future risk of a taking is speculative.

### **Other Species**

#### Evidentiary Issues

Coastal offered evidence that the proposed project will affect diamondback terrapins and bottlenose dolphins. The Department objected to any testimony in this regard, arguing that consideration of these non-threatened and non-endangered species would fall under CZMP Policy

II.C3.VII (“Wildlife and Fisheries Management”), which the Department did not find applicable to this project and which Coastal never raised as 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.<sup>16</sup>

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.

In response to the Department’s objection to the testimony and jurisdictional argument, the Court allowed the testimony of three experts to be proffered regarding diamondback terrapins and bottlenose dolphins. The three experts were Dr. Robert F. Young for Coastal, Dr. Whit Gibbons for Coastal, and Dr. Travis Folk<sup>17</sup> for KDP. The Court informed the parties it would resolve the issue of whether to consider the testimony in its final order. Accordingly, it is necessary to address the admission of this testimony.

The South Carolina Court of Appeals’ decision in *Sierra Club v. South Carolina Department of Health & Environmental Control* is instructive in this case. 387 S.C. 424, 693 S.E.2d 13 (Ct. App. 2010). In *Sierra Club*, the Court of Appeals found that Sierra Club had

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<sup>16</sup> Curtis Joyner testified the Department did not consider the development’s potential effects on diamondback terrapins and bottlenose dolphins in its decision-making process because the development does not involve a plan to manage fish or wildlife resources. Joyner testified he generally believes diamondback terrapins and bottlenose dolphins are coastal resources, but the management of wildlife is outside the scope of the Department’s authority and the Department relies on the SCDNR to identify species of concern during the permitting process. He explained that SCDNR did not identify diamondback terrapins or bottlenose dolphins as species of concern in the permitting area.

<sup>17</sup> Dr. Folk was also the subject of an objection from Coastal, who filed a Motion in Limine before trial to exclude his testimony, arguing KDP failed to disclose all relevant discovery related to Dr. Folk or properly disclose him as an expert to testify about diamondback terrapins, thus, Coastal would be prejudiced if his testimony was allowed at the hearing. Coastal again objected to his testimony as a preliminary matter at trial. The Court considered Coastal’s objections and offered several opportunities for Coastal to depose Dr. Folk during trial to cure any discovery issues; however, Coastal never took advantage of the opportunities to depose Dr. Folk. After trial, Coastal filed a Motion to Compel or, in the Alternative, to Strike or Exclude Evidence, arguing the same issues. The Court denied Coastal’s Motion in an Order dated January 22, 2018, and again in an Order denying Coastal’s subsequent Motion for Reconsideration.

sufficiently raised an issue simply by citing generally to regulations 61–72 and 61–63 of the South Carolina Code of Regulations. These regulations consisted of hundreds of pages and an immense number of potential issues, placing the responding party in a difficult position. Therefore, following the Court of Appeals issuance of *Sierra Club*, the ALC amended its rules and required that the parties must set forth the issues with “particularity” in pre-hearing Statements. SCALC Rule 14. Indeed, Coastal followed that requirement of particularity when it stated its issues in its pre-hearing statement as follows: “[w]hether the proposed project violated the following provisions of the S.C. Coastal Zone Management Act and CZMP” and then proceeded to list specific provisions of the CMA and CZMP, not to include CZMP Policy III.C3.VII, which governs Wildlife and Fisheries Management.

Therefore, unlike in *Sierra Club* where Sierra Club was able to assert an issue by raising the issue of compliance with a regulation in general, Coastal did not state its issues broadly enough to encompass a general violation of the CZMA or CZMP such that it can argue the Department failed to properly consider the Wildlife and Fisheries Management section of the CZMP. The Court will thus not consider the Wildlife and Fisheries Management section of the CZMP in its review. Accordingly, neither the Department nor KDP will suffer any prejudice in this regard.

Nevertheless, the Court finds it has jurisdiction to review the issue of the impact of the proposed project on non-threatened and non-endangered species such as diamondback terrapins and bottlenose dolphins because the impact on these species could be considered part of the long-range, cumulative effects of the project. See CZMP Policy III.C.3.I(7). Unlike the Wildlife and Fisheries Management section, Coastal specifically raised an issue with the Department’s application of CZMP Policy III.C.3.I(7) requiring the Department to evaluate the “long-range cumulative effect of the project, when reviewed in the context of other possible development and the general character of the area.” CZMP Policy III.C.3.I(7). While the connection between diamondback terrapins and bottlenose dolphins and the long-range cumulative effects of a project in the context of “other possible development and the general character of the area” is tenuous, the Court will consider the testimony on these species. *Id.* Additionally, Coastal also raised the application of section 48-39-30 of the South Carolina Code as an issue in its pre-hearing statement, which includes subsection (B)(2), stating it is this state’s policy to “protect and, where possible, to restore or enhance the resources of the State’s coastal zone for this and succeeding generations.” S.C. Code Ann. § 48-39-30(B)(2). Furthermore, Coastal also raised section 48-39-150(A) of the

South Carolina Code in its Pre-hearing Statement, which includes consideration of the extent a project would “affect the production of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural resources in a particular area including but not limited to water and oxygen supply.” S.C. Code Ann. § 48-39-150(A)(3). Whether these last two sections warrant this Court’s review is debatable in light of the Department’s position. Nonetheless, the Court will review the testimony on diamondback terrapins and bottlenose dolphins.

#### Diamondback Terrapins

Coastal contends that the proposed project will affect diamondback terrapins. In support of this contention, Coastal offered the testimony of Whit Gibbons, PhD, who was qualified as an expert in herpetology, including diamondback terrapins. Dr. Gibbons explained that diamondback terrapins are present along the East Coast. Though diamondback terrapins are not officially threatened or endangered pursuant to the ESA, he opined that they are threatened “in the generic sense.” However, the Court finds that under current South Carolina law, a person can possess two terrapins for non-commercial purposes. *See* S.C. Code Ann. § 50-5-2300(A) (2008). Moreover, the threats to diamondback terrapins are quite diverse, including not just development, but also crab pots, roads, dogs, and racoons. In fact, crab traps may be the worst threat to the terrapins.

Turning to this case, Dr. Gibbons testified the proposed development of Captain Sam’s Spit as authorized by the Department will result in severe adverse impacts to terrapins who utilize the Spit as their prime nesting habitat. That conclusion was based upon the premise that the Spit is “the prime nesting area” for diamondback terrapins in the Kiawah River and tidal creeks. And though Dr. Gibbons testified to various unspecified observations of turtles upon the Spit, the cogency of that premise was primarily supported by a focused study of terrapins nesting on the Spit that took place in 1991. However, a study which noted a population of nesting terrapins upon the Spit twenty-seven years ago is not reliable to conclude that activity is still occurring, or at least the extent of that activity, at this time. In fact, Dr. Gibbons explained that nesting patterns vary. Thus, it is difficult to determine where the turtles are currently nesting upon the Spit and the extent to which that nesting is occurring.

Moreover, assuming that terrapins nest upon the 174-acre Spit, the issue is whether the SSPW will impede their nesting. Here again, Dr. Gibbons testimony, though apparently genuine, was not persuasive. He explained that terrapins will not cross a barrier to reach high ground for nesting that is even a few inches high, regardless of the barrier’s material. Similarly, Dr. Folk

explained terrapins would not be able to cross much of the current natural escarpment that is present where the SSPW would be placed. Yet here, the vast majority of the riverbank where the SSPW would be placed has an escarpment of greater than a few inches high. Recognizing the inability of terrapins to cross the natural escarpment that already exists leads to the question of where a terrapin would naturally seek to enter the Spit. Dr. Gibbons provided that answer. While terrapins do not nest in mud flats or salt marsh, they will cross them to access other areas. There is a significant expanse of such areas on the Spit that would be unobstructed by the SSPW. Moreover, when terrapins meet a barrier, they may go back and forth along it for a little while and then go back to the water and try again. Dr. Gibbons's testimony suggests that the area where the SSPW is proposed to be installed is not an area where terrapins would access the Spit to nest because of the natural escarpment and, even if it were a previous path to a nest, there are other suitable access areas on the Spit.

Furthermore, Dr. Travis Folk explained that the proposed project will not negatively impact diamondback terrapins living in and around the Kiawah River. Even with the installation of the SSPW, there will still be areas suitable for the terrapins to access the Spit for nesting south of the wall towards Captain Sam's Inlet.

In sum, diamondback terrapins are not a threatened or endangered species within the meaning of the ESA. As to the impact of the SSPW on the terrapins, while the SSPW would create a barrier the terrapins will be unable to cross, the natural escarpment located in the area where the wall would be built already creates a natural vertical barrier. In fact, both experts agreed that vertical barriers of more than a few inches, regardless of the material, can create a barrier for terrapins. Therefore, the Court finds the impact of the SSPW on the accessibility of the Spit for terrapins nesting will be minimal at most. Moreover, the SSPW will not completely eliminate access to potential nesting area on the Spit because the SSPW will not extend the entire length of the river-side of the Spit. In fact, Dr. Folk explained that the wall will extend less than half the length of the current access area for terrapins along the river.

Also, neither expert was able to reasonably determine the population of terrapins present at the Spit. This information is necessary to judiciously determine what impact the SSPW and development would have on the terrapin population. In other words, how can the Court determine whether the development would detrimentally effect diamondback terrapins if it cannot determine to what degree the population level would be affected or diminished? If Coastal had sufficiently

shown that the SSPW completely eliminated access to the Spit and that the Spit was the primary nesting habitat in the area for terrapins, then this Court would be inclined to agree the development would have a detrimental effect. However, under the evidence presented, any affect upon an unknown population of terrapins nesting at the Spit is speculative, especially considering the impediment terrapins already face crossing the natural escarpment where the wall is proposed to be installed. I therefore find there was no evidence submitted to support the contention that the SSPW and development will have a detrimental effect on diamondback terrapins.

#### Bottlenose Dolphins

Coastal contends that the proposed project will affect bottlenose dolphins because it will impair their ability to “strand feed.” In support of this contention, Coastal presented the testimony of Dr. Robert F. Young. He explained that the feeding behavior known as “strand feeding” occurs when a group of dolphins rush a bank and the wave created by the rush essentially throws fish out of the water and onto the shore. The dolphins then strand themselves on the bank to reach the fish and then slither back into the water. The behavior takes places at lower tides, when the river bank/beach is exposed.

However, Dr. Young has never personally studied or observed the dolphins in the vicinity of the Kiawah River and the Spit. Rather, Dr. Young’s opinions about the dolphins located in the Kiawah River were formed from information he collected in conversations with Captain Chad Hayes and researchers at the National Oceanic and Atmospheric Association (NOAA). Importantly, the NOAA researchers’ observations were based, in part, upon information gathered from surveying the general public who were in the vicinity of the Spit. The depth of NOAA’s reliance upon those anecdotal observations was never explained. Accordingly, the reliability of the NOAA information is questionable considering there was no testimony that the people surveyed could properly identify bottlenose dolphins, strand feeding, or other dolphin behaviors. Nevertheless, Coastal presented the testimony of Captain Hayes, Richard Thomas, and George Meriwether concerning dolphins feeding along the river side of the Spit. Based upon Dr. Young’s description of strand feeding, the observations of Captain Hayes, Thomas, and Meriwether was strand feeding presumably by bottlenose dolphins.

Having established that dolphins strand feed at the Spit, the Court turns to Dr. Young’s opinion concerning the impact of the SSPW on the dolphins. Dr. Young opined that if the SSPW was installed and erosion eventually eliminated the riverbank that is currently present, the dolphins

would not be able to strand feed in locations where the wall becomes exposed because strand feeding requires the presence of a riverbank. Dr. Young opined that loss of the riverbank would significantly impact the dolphins because the dolphins would potentially lose a substantial part of their diet, which could cause them to completely change their foraging tactics. However, the evidence simply did not establish that premise.

Richard Thomas, a witness for Coastal, testified to observing dolphins strand feeding at Captain Sam's Inlet at the southern tip of the Spit (an area that will not be affected by the proposed project). Indeed, when asked by Ms. White if the dolphins strand feed "in the same location," he answered, "No, not at all." Furthermore, Chad Hayes, also a Coastal witness, testified that he has observed dolphins strand feeding along the Spit. He testified he observed strand feeding used to take place closer to the inlet on either side of the river, but now it has moved towards the neck of the Spit. Hayes further testified he has noticed an increased public presence on the end of the Spit, and more people utilizing the river. With that increase he has witnessed "a lot more harassing events of the animals, people trying to get too close to take a picture, or just paddle with them."

Dr. Folk, who was qualified, in part, as an expert in wildlife population dynamics with an emphasis on the quantitative analysis of populations, explained that if the installation the SSPW causes the dolphins in the Kiawah River area to lose a feeding site, it will not have a negative impact on that population of dolphins. Based upon the peer-reviewed scientific literature on bottlenose dolphins, Dr. Folk was unable to identify any literature concluding the removal of a **single** feeding site would negatively impact a dolphin population.

In sum, bottlenose dolphins engage in strand feeding along the river side of the Spit primarily at low tide. Furthermore, if the erosional process of the Kiawah River results in the elimination of a portion of riverbank and exposure of the wall, then the strand feeding area for bottlenose dolphins may be partially eliminated depending upon the extent of the degradation of the shoreline. Nevertheless, bottlenose dolphins are not a threatened or endangered species within the meaning of the ESA. Additionally, the evidence did not establish that the eventual elimination of a portion of the riverbank would significantly impact their food sources in the area or even the number of dolphins in the area. Rather, in the area of the Spit there are other locations that the dolphins do or could utilize to strand feed. In fact, the SSPW will not run the entire length of the Spit on the side of the river in which it would be installed. Moreover, the significance of strand feeding as a source of food for dolphins was palpably speculative. Therefore, the evidence failed

to establish that the proposed installation of a SSPW will have a detrimental impact on that population of dolphins.

### **General Character of the Area**

In conducting its CZCC review, the Department considered a policy requiring it to review the long-range, cumulative effects of the project in the context of other possible development and the general character of the area. Whether the Department properly interpreted this policy and is entitled to deference in its application of the policy is at issue in this case. Therefore, the Court makes the following findings concerning the Department's interpretation and application of this policy.

Curtis Joyner<sup>18</sup>, who has extensive experience with the Department in coastal resource management, explained that with regard to determining the scope of the "area" reviewed under this policy, although the Department may have only considered the Spit itself when determining the general character of the area during a previous review in 2008, the application of the "general character of the area" standard found in CZMP Policy III.C.3.1(7) includes more than just the specific project site. He explained that "in a review of a certain area, I can't discount an adjacent area. It's all area generally." When Coastal asked whether there was a "set standard" for determining the scope of the area the Department reviews, Mr. Joyner responded that

[t]here's no set standard. You know, as we all – for those of us who use and interact with the enforceable policies, they're very broadly written. I don't believe there's a definition of how specific we need to be.

Following that analysis, Mr. Joyner explained that he "included parts of Seabrook and the rest of Kiawah" in the area reviewed since "Seabrook is immediately across the Kiawah River from Captain Sam's Spit and Kiawah, parts of it are directly connected, too." The Department's staff memorandum found that "while there will be impact in transforming a portion of the pristine natural [Spit] into residential development," the "**current general character** of Kiawah Island is beachfront development consisting of both single-family and multi-family habitable structures."<sup>19</sup> (emphasis added). The Department found Seabrook Island to be residential in nature too.

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<sup>18</sup> I found Mr. Joyner to be a credible and persuasive witness.

<sup>19</sup> It is notable that Mr. Joyner responded "yes" to the question, "the wall is going to change the character of **that** area" (emphasis added). However, I find that in the context of that question and considering his testimony as a whole, his answer was only referring to a change the character of the shoreline where the SSPW would be exposed from the erosion. He was not suggesting that the SSPW will change the character of the general area.

Coastal's witness Bill Eiser, who used to work for the Department, also conceded that some limited development in character with the area would be proper.

Therefore, residential development for the Spit is in keeping with the general character of the area.

#### Public Use and Access of the Spit

The public use of the Spit is diverse. There is significant public use of the coastal beach along the Spit. The public use of the beach extends from the access point at Beachwalker Park to the tip of the Spit and around the mouth of the Kiawah River to the banks of the river. However, around the tip of the Spit is a marsh area that divides the tip of the Spit from the riverbank. Public use and access decreases once the marsh is reached and access to the riverbank becomes more difficult.

Turning to the issue in this case, there are two primary areas of public use at issue in this case. First, Beachwalker Park is a popular public park facility just northwest of the neck of the Spit, and it is through the Park that the public predominately gains access to the Spit for recreation on the beach. The Park is well-used by the public. Therefore, the Park is a valuable asset for granting the public access to use of the open spaces on Kiawah beach and the Spit. However, the continued erosion of the riverbank caused by the Kiawah River is currently threatening the public's use of Beachwalker Park. In fact, in May 2012, Charleston County wrote KDP notifying them that erosion of the riverbank next to the park was causing concern for the safety of humans and vehicles and thus negatively affecting the way that Charleston County was operating and serving those who use the park. Indeed, the Town of Kiawah Island's emergency vehicular access from the end of Beachwalker Park to the beach had to be moved inland from its original location along the riverbank because of the ongoing erosion. Furthermore, since Charleston County does not own the land, the protection of the Park would be tied to KDP receiving a permit that it will utilize.

The second area of public use is the riverbank where the SSPW is proposed to be installed. This area is distinct from the area accessed by the public via Beachwalker Park. Due to the erosion, there is no access to the river shoreline from Beachwalker Park because the area has collapsed. Furthermore, there is significant escarpment that appears to make any access from the Park dangerous. Additionally, as noted above, a marsh separates the Southwest end of the Spit from the riverbank in this area. The access to the riverbank and thus its use is more limited.

For instance, George Finly, a member of Coastal, testified that when he utilizes the Kiawah River for kayaking he “occasionally” uses the area of the riverbank of the Spit. However, he explained you cannot really use the riverbank at “high, high tide, but maybe low you can.” Eiser also confirmed his previous observations that he observed public use of the open recreational space of “all of Captain Sam's Spit” but only “some, not a whole lot” in the area of the riverbank. From Coastal evidence, I thus find that the use of the riverbank in the area of the propose project is only occasional, e.g. for beaching kayaks, mostly at low tide when the bank is more accessible.

Therefore, the beach shoreline extending to the end of the Spit and the riverbank in that area is more significantly used by the public. In other words, the public primarily uses the beach and the southwest end of the Spit for recreation.

### **CONCLUSIONS OF LAW**

Based upon the above Findings of Fact, I conclude the following as a matter of law:

#### **Standard of Review**

Pursuant to the Administrative Procedures Act, the ALC is the fact finder in this case and conducts its review *de novo*. *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002); *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 9, 698 S.E.2d 612, 616 (2010). The burden of proof in a contested case hearing is by the preponderance of the evidence. *Nat'l Health Corp. v. S.C. Dep't of Health & Envtl. Control*, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989). “In general, the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of proof.” *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). When applicable, the Court “shall give consideration to the provisions of § 1-23-330 with regards to the Department's specialized knowledge.” S.C. Code Ann. § 44-1-60(F)(2) (2018).

Additionally, “[t]he qualification of a witness as an expert in a particular field is within the sound discretion of the trial judge.” *Smoak v. Liebherr-America Inc.*, 281 S.C. 420, 422, 315 S.E.2d 116, 118 (1984). Where the expert's testimony is based upon facts sufficient to form the basis for an opinion, the trier of fact determines its probative weight. *Berkeley Electric Coop. v. Pub. Service Comm'n*, 304 S.C. 15, 402 S.E. 2d 674 (1991). Furthermore, the trier of fact is not compelled to accept an expert's testimony, but he may give it the weight and credibility the he determines it deserves. *Florence County Dep't of Social Services v. Ward*, 310 S. C. 69, 425 S. E.2d 61 (Ct. App.1992). The trier of fact may accept one expert's testimony over that of another.

*S.C. Cable Television Ass'n v. Southern Bell Telephone and Telegraph Co.*, 308 S. C. 216, 417 S. E.2d 586 (1992).

The Court now turns to consideration of the laws and policies which Coastal contends were violated. Nevertheless, in addressing these concerns, the Court notes that other than citing the law itself and then generally asserting a violation of what was cited, very little reasoning was presented in Coastal's proposed order to support this Court's adoption of its views. In fact, the greatest explanation was given regarding CMP Policy IV.C.4. which, as explained below, is inapplicable to this case.<sup>20</sup>

### **NPDES, Stormwater, Water Supply, and Wastewater Construction Permits**

Pursuant to the National Pollutant Discharge Elimination System (NPDES) implemented under the Clean Water Act (33 U.S.C.A § 1251 *et seq.*), and in conjunction with this State's Pollution Control Act (S.C. Code Ann § 48-1-10 *et seq.* (2008 & Supp. 2017)), a permit is required "for the discharge of 'pollutants' from any 'point source' into 'waters of the State' and into 'waters of the United States.'" S.C. Code Ann. Regs. 61-9.122.1(b)(1) (2011). Point sources include discharges of storm water as set forth in regulations 61-9.122.26 and 61-9.122.30 through 61-9.122.36. S.C. Code Regs. Ann. 61-9.122.26, 61-9.122.30-61-9.122.36 (2011). Furthermore, under this State's Stormwater Management and Sediment Reduction Program, unless exempted, "a person may not undertake a land disturbing activity without first submitting a stormwater management and sediment control plan to the appropriate implementing agency and obtaining a permit to proceed." S.C. Code Ann. § 48-14-30 (2008).

Compliance with the NPDES requirements and state stormwater management requirements is accomplished in one permitting action, the issuance of a "General Permit" known as the "NPDES General Permit for Stormwater Discharges, from Large and Small Construction Activities." The Department administers the NPDES General Permit for Storm Water Discharges. S.C. Regs. Ann. 61-9.122.26 and 61-9.122.28 (2011).

Here, the site improvements associated with the development of Cape Charles, Phase 1, triggered the requirement for a General Permit. Furthermore, because the proposed activity is located within one of the eight coastal counties that comprise the state's coastal zone, the

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<sup>20</sup> In cases before the ALC these proposed orders are even more significant because they not only serve as the written explanation of a party's legal position but they also often serve as a party's closing argument, as they did in this case.

Department's Office of Ocean and Coastal Resource Management (OCRM) must review the project to determine consistency with the policies and procedures of the CZMP. S.C. Code Ann. § 48-39-80 (2008); *see also* S.C. Code Ann. § 48-39-10(B) (2008) (listing the eight counties defining the coastal zone).

The site improvements also triggered the need for a Water Supply Construction Permit, which is also administered by the Department. S.C. Code Ann. § 44-55-40 (2018)) (granting the Department authority to permit extension of public drinking water system); S.C. Code Ann. § 44-55-822 (2018) (granting the Department authority to issue approval for wastewater systems for platted subdivisions).

Coastal does not challenge the technical or engineering aspects of the Department's decision to grant these permits; rather, Coastal challenges these permits in the context of its argument that the development, as a whole, is not consistent with the CZMA or CZMP.

**Coastal Zone Consistency Certification**

The Coastal Zone Management Act (CZMA) was enacted in 1977. Under the CZMA, the Department<sup>21</sup> was charged with developing and administering a Coastal Zone Management Program (CZMP). § 49-8-39-80. The Department was also required to “[d]evelop a system whereby the [D]epartment shall have the authority to review all state and federal permit applications in the coastal zone,<sup>22</sup> and to certify that these do not contravene the management plan.” § 48-39-80(B)(11). A Coastal Zone Management Program was thereafter developed and approved by the General Assembly.<sup>23</sup> The Department determines whether a project is consistent with the CZMP by issuing a Coastal Zone Consistency Certification (CZCC). Here, because KDP had to seek federal and state permits for the proposed project, the Department was required to determine whether the issuance of the permits for the development was consistent with the CZMP. S.C. Code Ann. § 48-39-80 (2008).

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<sup>21</sup> This duty to oversee this program is currently with the Department's Office of Coastal and Resource Management (OCRM), formerly known as the South Carolina Coastal Council.

<sup>22</sup> The “coastal zone” includes the counties of Beaufort, Berkeley, Charleston, Colleton, Dorchester, Horry, Jasper and Georgetown. S.C. Code Ann. § 48-39-(10)(B) (2008).

<sup>23</sup> *See* South Carolina Coastal Zone Management Program Document, available at <http://www.scdhec.gov/HomeAndEnvironment/Water/CoastalManagement/CoastalZoneManagement/CoastalManagementProgram/>. This web address provides access to the CZMP through the Department's website and, due to the cumbersome nature of the site address, shall not be repeated in other citations to the CZMP in this order; however, all references to sections of the CZMP in this order can be accessed through this web address.

In implementing the CZMA, the General Assembly declared it is the “basic state policy . . . to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State.” S.C. Code Ann. § 48-39-30(A) (2008). The General Assembly then further outlined specific policies, to include the following policies:

(1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;

(2) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations;

S.C. Code Ann. § 48-39-30(B) (2008). A review of this State’s policy shows the general goal of this state in adopting the CZMA and adopting the CZMP is to balance economic and social development of the coastal zone with preservation of this state’s coastal resources. *Kiawah Dev. Partners, II*, 411 S.C. at 41, 766 S.E.2d at 721 (finding “we believe the CZMA was intended to achieve a balance between environmental and public considerations on the one hand and economic and private considerations on the other”). It is notable that in discussing a consistency review, the manager of the Department’s Coastal Zone Consistency Section characterized this review as a “management technique.” That comment does not discount the Department’s role, but it recognizes that the Department does not strictly regulate development. Rather, the Department, and in turn this Court, must balance the competing interest set forth in the CZMA. Moreover, as in this case, even if the CZCC is denied, that does not preclude development upon the Spit. It simply precludes the construction of the development as currently proposed by KDP.

Coastal challenges the Department’s determination that the proposed project is consistent with four specific sections of the CZMP. The Court will address each in turn.

CZMP Policy III.C.3.I(7)

Coastal argues the proposed project violates CZMP Policy III.C.3.I(7) because it will have long-term, cumulative impacts on the general character of the area. Chapter Three of the CZMP includes “Guidelines for All Projects,” which is a list of “general considerations” the Department “will be guided by” in reviewing and certifying projects in the coastal zone. CZMP Policy

III.C.3.I. The seventh consideration on this list is “[t]he possible long-range, cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area.”<sup>24</sup> CZMP Policy III.C.3.I(7).

In *Kiawah Development Partners II v. South Carolina Department of Health & Environmental Control*, 411 S.C. 16, 766 S.E.2d 707 (2014) (*Kiawah II*), one of the issues before the Supreme Court was the interpretation of regulation 30-11(C)(1), which contains almost identical language to CZMP Policy III.C.3.I(7). Therefore, the Supreme Court’s review of regulation 30-11(C)(1) provides guidance as to the interpretation of CZMP Policy III.C.3.I(7).<sup>25</sup> In *Kiawah II*, the Department interpreted regulation 30-11(C)(1) 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.” 411 S.C. 16, 32, 766 S.E.2d 707, 717. In contrast, this Court had rejected the Department’s interpretation and concluded:

The pertinent inquiry is the cumulative impacts of the project within the critical area, not the impact of future development on the high ground outside the critical area. In other words, the area for which [the Department] has regulatory authority is the critical area, not the high ground outside the critical area.

Upon review, the Supreme Court determined “[t]he language of regulation 30–11(C)(1) is ambiguous in terms of the scope of the ‘area’ [the Department] may consider in making permitting decisions.” *Id.* at 33, 766 S.E.2d at 717. It then reversed this Court holding that the Department’s interpretation of regulation 30-11(C)(1) was entitled to deference because the agency’s interpretation was not “arbitrary, capricious, nor manifestly contrary to the statute.” *Id.* at 35, 766 S.E.2d at 719. Specifically, it found “[the Department’s] interpretation is sound because it 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 (emphasis added). In sum, the Supreme Court held “the ALC erred in failing to give deference to DHEC’s interpretation and construing regulation 30–11(C)(1) as not permitting

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<sup>24</sup> The Court notes that “[t]he possible long-range, cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area” is a *consideration* for the Department. CZMP Policy III.C.3.I(7). The Department is not required to deny a consistency certification if long-range, cumulative effects are found to be present. This is in keeping with the CZMP as a whole, which provides for a framework on how to identify and ultimately balance and weigh competing uses and the values of preservation versus development. See § 48-39-30(B).

<sup>25</sup> Regulation 30-11(C)(1) of the South Carolina Code of Regulations (2011) provides that in review of critical area permits, the Department must consider “[t]he extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area.”

consideration of upland impacts.” *Id.* With *Kiawah II* in mind, this Court reviews the proposed project.

Here, the determination of the “long-range, cumulative effects” is made “in the context of” both the possibility of other development and the general character of the area. The Court thus must first clarify the context of this review to make a determination of the “long-range, cumulative effects” of the project. As to the “possibility of other development,” the proposed project currently consists of Phase 1 of a development, but is projected to ultimately result in a Phase 2. Accordingly, approval of Phase 1 is likely to lead to the development of Phase 2. Therefore, this Court’s analysis of the long-range, cumulative effects, if any, takes into consideration the overall impact of both phases, to include a total of fifty houses and the disturbance of approximately twenty acres. However, there is no evidence in the record to show that the proposed project will spur further development of the surrounding area beyond Phase 2. Nor is there any evidence that the development of Cape Charles will interact or overlap with other current or potential developments in the area such that it would produce “long-range, cumulative effects” within the context of “other possible development.” In fact, further development of the Spit beyond what is proposed in Phases 1 and 2 is not possible because the remainder of the undeveloped portion of the Spit will be put under a conservation easement and, pursuant to current South Carolina law, even if the Spit continues to accrete, development will never be able to occur oceanward of the current baseline as of December 31, 2017. *See* S.C. Code Ann. § 48-39-280 (Supp. 2017). Consequently, this project will not lead to further development of the Spit. *Cf. Olson v. S.C. Dep’t of Health & Env’tl. Control*, 379 S.C. 57, 68, 663 S.E.2d 497, 503 (Ct. App. 2008) (upholding the denial of a dock permit, in part, based on the long-term, cumulative effects that would flow from allowing a dock to be built down a ditch/drainage easement because it “would open it up to others being able to build a dock down any ditch that runs to the Intracoastal Waterway”).

Next, determining the possible effects of the project in the context of the “general character of the area,” requires both a legal and factual consideration of what constitutes the general character of the area. As already noted, the Supreme Court in *Kiawah II* found the scope of the “area” of review under the regulation to be ambiguous, but it also found the Department’s interpretation that the “area” includes a consideration of surrounding uplands was entitled to deference. 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.

This case, unlike *Kiawah II*, case does not concern a critical area permit such that the "area" of review is similarly expanded to include uplands. Rather, the permits and certification at issue are for upland structures, including the SSPW and infrastructure for the development. Therefore, the area to be considered is slightly, but significantly different than the area in *Kiawah II*. Here, the Department interpreted the "area" encompassing its review under this policy to include not just the Spit, but the surrounding area, *i.e.* Kiawah Island and the portion of Seabrook Island directly across from the Spit. I find the Department's interpretation is consistent with its prior interpretation of this policy as requiring review of an area greater than just the project area itself—indeed, the policy provides the "general" character of the area is to be considered. *See Kiawah II*, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (upholding the Department's interpretation of regulation 30-11(C)(1) 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"); *see also Young v. S.C. Dep't of Health & Env'tl. Control*, 383 S.C. 452, 462, 680 S.E.2d 784, 789 (Ct. App. 2009) (upholding the ALC's conclusion that there were no long-range, cumulative effect where "[a]s noted by the ALC, the *area surrounding Young's property* is not a 'pristine wilderness, unmarked by docks and piers, but is a creek familiar with development, including docks with boatlifts and other boat storage methods.'" (emphasis added)). The Court further concludes, like the Supreme Court concluded in *Kiawah II*, that the Department's interpretation of the scope of the area to be considered in determining the general character of the area under CZMP Policy III.C.3.I(7) has a rational basis and is entitled to deference.<sup>26</sup> *See Kiawah II*, 411 S.C. at 35, 766 S.E.2d at 719.

While the policy clearly requires consideration of an area that is bigger than the project area itself, the policy does not establish a "bright line" standard for delineating the scope of the

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<sup>26</sup> When determining whether an agency interpretation is entitled to deference, our courts have often considered whether the agency interpretation is long-standing and has been openly known for a sufficient period of time to be "acquiesced in by the General Assembly." *Etiwan Fertilizer Co. v. South Carolina Tax Commission*, 217 S.C. 354, 60 S.E.2d 682 (1950) ("We have held in many cases that where the construction of the statute has been uniform for many years in administrative practice, and has been acquiesced in by the General Assembly for a long period of time, such construction is entitled to weight, and should not be overruled without cogent reasons."). Though the Supreme Court's deference analysis in *Kiawah II* did not focus on whether the Department's interpretation was long-standing, the Court's lack of consideration of that issue should not be interpreted as dismissing that requisite in a deference analysis. Rather, in *Kiawah II* the issue of whether the Department's interpretation of regulation 30-11(C)(1) was long-standing was never raised and, therefore, not an issue this court or the Supreme Court ever considered. Likewise, it was not raised in this case.

area. This is an issue of application, and such a determination is inherently a factual, case-by-case determination which involves consideration of the various aspects of the area, including an area's geographic proximity to other areas. As Mr. Joyner explained, "for those of us who use and interact with the enforceable policies, they're very broadly written." The Department's interpretation of this policy allows the exercise of discretion in recognition of the fact that landscapes are unique and what constitutes the scope of the general area in one situation may not be the same for another geographic location or project.

In applying this policy, the Department limited the area of review to adjacent areas and did not arbitrarily include an area like Myrtle Beach that has little to no connection to the area of the proposed development. However, the Department considered more than just the specific project site in determining the "general character of the area." Mr. Joyner explained he "included parts of Seabrook and the rest of Kiawah" in his CZCC decision since "Seabrook is immediately across the Kiawah River from Captain Sam's Spit and Kiawah, parts of it are directly connected, too." The Department's inclusion of the mainland of Kiawah Island in its review is not only rational considering the Spit is part of Kiawah Island, but it is also logical. Additionally, including the portion of Seabrook Island directly across from the Spit is also rational and logical considering their proximity. Therefore, I find that the Department's geographical determination of the scope of the area was a reasonable interpretation of CZMP Policy II.C.3.I.(7) as applied to the facts of this case. Accordingly, the Court finds the appropriate scope of the area to review under CZMP Policy II.C.3.I.(7) is the Spit, the rest of Kiawah Island, and the part of Seabrook Island directly across the river from the Spit.

Having defined the scope of the area, the Court also agrees with the Department's factual determination that the general character of the area is residential. While the Spit itself is natural, it is part of Kiawah Island, which consists primarily of residential development with some limited commercial development. Significantly, there is also residential community on Seabrook Island across from the Spit. Likewise, there is a development on the mainland of Kiawah Island just north of Beachwalker Park and condominiums are currently slated to be built near the neck. Accordingly, the Court finds the general character of the area is residential.

Having determined the general character of the area, the Court turns to a consideration of the long-range, cumulative effects of the proposed project in the context of that determination. Obviously, transformation of a small portion of the Spit from a natural area to a residential area

will inherently result in a long-range effect. But in the context of this case, the development of the proposed project, which is residential, will be consistent with the surrounding area, which is residential. Moreover, the transformation will not be without regard for the environment in which the homes will be placed. KDP offered considerable proof as to the environmentally sensitive nature of the proposed residential development and the extensive precautions it will take to avoid altering the landscape and vegetation to the extent possible. This sensitive development of the area is likewise consistent with the rest of the development on Kiawah Island. Further, the area to be transformed is a relatively small portion of the Spit. Therefore, this proposed development will be in keeping with other developments on Kiawah Island and the general character of the area, while preserving a sizeable portion of the Spit in its natural state.

Of greater concern are the long-range, cumulative effects of the SSPW. It is reasonably certain that the Kiawah River's erosive forces will eventually cause the SSPW to be exposed to some degree, resulting in a loss of riverbank where the SSPW is exposed. This is a long-range effect. However, when the loss of riverbank will occur and the percentage of the SSPW that will eventually be exposed is speculative. Consequently, the initial installation of the SSPW does not trigger the need for a critical area permit or review of regulations associated with the critical area. However, impact to the critical area and public open spaces along the riverbank where the SSPW will be installed is foreseeable, thereby bringing this consideration under the terms of this provision. This Court will thus consider the impact on the riverbank in its review of the cumulative effects of the SSPW because the riverbank is part of the public trust and a public open space.

In *Kiawah II*, the Supreme Court stated that the public's interest in public trust lands must be "the lodestar" that guides the court's legal analysis. 411 S.C. at 29, 766 S.E.2d at 715. The Supreme Court also recognized in *Kiawah II* that "permitting alteration of the tidelands may be in the public's interest in limited circumstances" with the understanding that "the State enacted statutes and promulgated regulations [the CZMZ and CZMP] which generally prohibit alterations to the tidelands except when the public interest requires otherwise."<sup>27</sup> *Id.*

Here, it is clear the Spit is a very popular and well-used destination for public recreation of all kinds. The importance of access to the Spit via Beachwalker Park to the public is evident. Overall, the testimony indicated the public primarily utilizes the beachfront and the Kiawah River

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<sup>27</sup> This begs the question, especially in the context of critical area permits, if construction or repair of a private dock or bulkhead would ever be granted considering these structures usually are not in the broader public's interest.

for recreation. Coastal provided testimony that some people “occasionally” use the riverbank on the Spit, primarily as a place where kayakers can pull up their boats to rest or otherwise get out and see the area. However, the riverbank is, to a significant degree, the less utilized public area of the Spit. And even where the riverbank along the Spit is used by the public, the greater use is primarily at the southern end of the Spit, which is the opposite end from where the SSPW is proposed to be installed. A marsh area prevents the public from walking all the way around the beach to the river bank, although it may be possible to reach the riverbank by crossing the dunes.

It is also clear that erosion caused by the Kiawah River is threatening the continued, safe public access at Beachwalker Park. Indeed, access to the Spit from the Park is via the beachfront because the tall natural escarpment along the Park currently prevents an adventurer from accessing the riverbank from the Park. Furthermore, the photographic evidence in the record shows the Park has already lost several parking spots due to the encroaching escarpment.

Considering the threat to public access that further erosion of the riverbank currently poses, the Court finds the installation of the SSPW will greatly benefit the public in that it will stop further erosion near the Park and stabilize the area, protecting the public’s access to the Spit. Additionally, the substantial benefit the public will gain by having continued, protected access to the Spit with the installation of the SSPW outweighs the partial loss of a less-utilized riverbank in these limited circumstances. *See Kiawah Dev. Partners, II*, 411 S.C. at 29, 766 S.E.2d at 715 (recognizing “permitting alteration of the tidelands may be in the public’s interest in limited circumstances”). Moreover, the SSPW will not run the entire length of the riverbank and it is speculative as to how much of the SSPW will eventually be exposed; therefore, public access to the river bank will remain.

The Court recognizes that the installation of the SSPW will likely halt the natural seaward migration of the riverbank where the wall is installed, and thus halt, to some degree, the natural erosive processes present at the Spit. However, based upon the evidence presented, it is unclear the extent of the effect halting migration in this limited area will have within the context of the general character of the area. In addition to the speculative nature of the effects of halting migration in a limited area, the Court cannot help but note that the Spit is already being heavily altered by the artificial relocation of Captain Sam’s Inlet every few years. This relocation process involves detaching the entire end of the Spit from the rest of it, which most certainly impacts the natural erosion patterns and migration of the Spit and the public. The comparative the effects of

the SSPW seem much less. Accordingly, the Court finds any long-term, cumulative effects on the area due to the SSPW's impact on the Spit's natural migration are unclear and less impactful than the periodic relocations of Captain Sam's Inlet.

The Court also finds that any long-range, cumulative effects on the surrounding wildlife as part of the general character of the area are speculative at this time. The testimony provided by Coastal failed to show by a preponderance of the evidence that the presence of the proposed development and SSPW would materially affect the populations of piping plovers, loggerhead sea turtles, diamond back terrapins, or bottlenose dolphins in the area.

Based on the above, the Court does not find the proposed project will have any negative long-term, cumulative effects to such a degree or amount that would render the proposed project inconsistent with CZMP Policy III.C.3.I(7).

#### CZMP Chapter IV.A.2.a.8

Coastal alleges the Department's decision is contrary to CZMP Policy IV.A.2.a.8 because "Captain Sam's Spit is designated as a Geographic Area of Particular Concern" due to "the existence of endangered species habit [sic] and the CZMP makes it a priority to protect that habitat." This policy discusses threatened or endangered species in the context of GAPCs; specifically:

Policy has been affirmed by both the Federal government and State government in South Carolina that conservation of the natural ecosystem upon which endangered and threatened species depend is a high priority. Untempered economic growth and development can result in the depletion or extinction of various species of fish, wildlife and plants. These species of fish, wildlife and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to our people, our Nation, and to the international community.

The United States has committed itself through numerous treaties with other countries to a pledge of conservation involving migratory birds, fisheries and wildlife preservation, for example. The scope of our responsibility as people and a Nation to protect the delicate balance of the natural ecosystem is demonstrated by these treaties of Federal and State legislation. **As a result, the South Carolina Coastal Council will recognize all designated threatened and endangered species habitats as Geographic Areas of Particular Concern.**

CZMP Policy IV.A.2.a.8 (emphasis added). Additionally, within this policy section is a list of Priority of Uses, which consist of the following:

The following are the uses of priority for all areas identified or designated as critical habitats for threatened and endangered species, beginning with the use of highest priority:

- 1) Uses which are compatible with all regulations and management programs developed to protect any designated habitat area under the Federal or State Endangered Species Acts;
- 2) Uses which maintain the natural functions of areas identified or designated as critical habitat areas of species listed on the State or Federal threatened or endangered species lists; IV-I7
- 3) Non-structural, non-intensive uses which do not create irretrievable damage to any species listed as a threatened species.

CZMP Policy IV.A.2.a.8.

It is important to note that development is not banned in GAPCs, rather these “certain areas are of even more, special significance, and warrant particular attention to their preservation and development.” CZMP Policy IV.A.1. Helping to elucidate a review under this section is the directions for implementation, which provide:

Special management consideration will be given to those areas designated as GAPCs through the process of issuance of permits in the critical areas, and review and certification of permits in the coastal zone. When a project overlaps with, is **adjacent to**, or significantly affects a GAPC, **the Council will carefully evaluate the project based on the criteria listed as the priority of uses which specifically address each type of GAPC. A project would be prohibited if it would permanently disrupt the uses of priority for the designated area.** A project would be strongly discouraged or the permit conditioned if the project would interrupt, disturb or otherwise significantly impact the priority uses of the designated area. For example, in consideration of the permit for a project adjacent to a State Park which would significantly interfere with the primary recreational activities of that GAPC, every effort would be made to preserve this highest priority use of the park. Although all listed priority uses would receive protection, the Council would be committed to especially safeguard the highest priority use.

CZMP Policy IV.A.1.

Further elucidating this Court’s review is the South Carolina Court of Appeals’ decision in *DuRant v. South Carolina of Health and Environmental Control*, 361 S.C. 416, 604 S.E.2d 704, (Ct. App. 2004). In *Durant*, the Court of Appeals reviewed an application for a dock permit adjacent to a state park and determined review under the GAPC policies was appropriate and the Department had the authority to prohibit the dock if it would “permanently disrupt the use of priority for the designated area.” *Id.* at 423, 604 S.E.2d at 708. In *DuRant*, the Court of Appeals upheld the denial of the dock permit because “construction of the dock would permanently disrupt the ability of the Department to utilize the State Park for recreational and educational opportunities along the Oaks Creek marsh.” *Id.* at 423, 604 S.E.2d at 708.

The Court initially finds that the Spit contains a GAPC. As provided above, this state recognizes “all designated threatened and endangered species habitats as Geographic Areas of Particular Concern.” The Spit contains habitat for two threatened species as defined under the ESA: the loggerhead sea turtle and the piping plover. The areas where these species are found on the Spit are designated as critical habitat for these species; therefore, these areas of critical habitat are GAPCs. CZMP Policy IV.A.2.a.8. While the footprint of the development does not directly overlap with the critical habitats for these species, it is adjacent to these habitats. Therefore, the Court further finds an evaluation of the proposed project under the GAPC policies is appropriate. *See DuRant*, 361 S.C. at 423, 604 S.E.2d at 708.

This Court starts its review by looking at the priority of uses for this particular area, with special concern for safeguarding the “highest priority use.” CZMP Policy IV.A.1. The highest priority use in this case is “[u]ses which are compatible with all regulations and management programs developed to protect any designated habitat area under the Federal or State Endangered Species Acts.” CZMP Policy IV.A.2.a.8. The Court finds the proposed project is compatible with all regulations and management programs developed to protect any designed habitat area.

In this case, the critical habitat for piping plovers is located on the southwestern portion of the Spit oceanward of the baseline. No portion of the footprint for the proposed project will overlap with this area. Similarly, the critical habitat for loggerhead sea turtles is located in the beach/dune system seaward of the proposed project. Therefore, the proposed project will not have a direct impact on the critical habitat areas for these species. Furthermore, based on the evidence there is not a current risk of a taking of either of these species under the ESA as a result of the proposed project, and any future taking is speculative at this time.

The second priority use for this area is “[u]ses which maintain the natural functions of areas identified or designated as critical habitat areas of species listed on the State or Federal threatened or endangered species lists.” As stated above, the proposed project will not directly impact the critical habitats for the piping plover or loggerhead sea turtle. Additionally, while there is some evidence that the installation of the SSPW may have an effect on the migration of the Spit, there was no evidence introduced into the record to show that the natural functions in the critical habitat areas for these species would be affected. Moreover, the Court notes the relocation of the inlet is significantly more likely to disrupt the natural function of the area utilized by piping plovers, as

Dr. Kana alluded to in his testimony. Accordingly, the Court finds the proposed project is consistent with the second priority use.

The third priority use for this area is “[n]on-structural, non-intensive uses which do not create irretrievable damage to any species listed as a threatened species.” Here, the development will include structural uses, to include houses, however the structures will consist of a residential LID. Further, the development will not be located in the critical habitat for the species at issue. Moreover, the indirect effect of any such development is mitigated by Conditions 5 and 6 of the CZCC, requiring certain types of lighting and limiting access ways. The Court finds there is no evidence that the proposed project will result in “irretrievable damage” to the identified threatened species.

Overall, the proposed project will not permanently disrupt the priority of uses for a GAPC of this type such that denial of the CZCC is warranted. CZMP Policy IV.A.1. Further, based on the location of the development in relation to the identified critical habitats and the mitigating techniques that will be used in the development, “strong discouragement” from development is also unwarranted. CZMP Policy IV.A.1.

#### CZMP Chapter III.C3.XII.A, B & D

Policy III.C.3.XII identifies “areas of special resource significance” because these areas are “unique and either environmentally fragile or economically significant to the coastal area and the State.” CZMP Policy III.C.3.XII. These areas include barrier islands, dune areas (outside the critical areas), navigation, public open spaces, and wetlands (outside the critical areas). *Id.* “Because of this sensitivity and their role as an integral part of the coastal ecosystem, alteration in these areas are likely to have direct effects on the critical areas,” and, for this reason, the CZMP provides additional policies governing these areas. *Id.* Coastal challenges the Department determination that the proposed project is consistent with three of these policy areas, to include: barrier islands, dune areas, and public open spaces. The Court finds the proposed project is consistent with these policy areas for the reasons stated below.

#### *Barrier Islands*

In reviewing permits associated with barrier islands, the Department considers the following additional policies:

- 1) Construction and development on barrier islands shall retain to the extent feasible existing dune ridges, drainage patterns and natural vegetation in

landscaping and construction plans in order to maintain the value of the island as a storm buffer. Intensive or high density type development may not be suitable on some barrier islands which are less stable or more prone to erosion or other hazard risks; these factors must be taken into consideration when alternative development plans are formulated.

2) Because of their proximity to and strong ecological relationship with the critical areas of the coastal zone, project proposals for activities on barrier islands must demonstrate reasonable precautions to prevent or limit any direct negative impacts on the adjacent critical areas (beaches, primary dunes, coastal waters and wetlands).

3) New road or bridge projects involving the expenditure of public funds to provide access to previously undeveloped barrier islands will not be approved unless an overwhelming public interest can be demonstrated, for example, provision of access to a public recreation area or other facility. Preference will be given to ferry access in those instances where public funds cannot be expended for road access.

4) The extension of public services, such as sewer and water facilities, to barrier islands should only be proposed in a comprehensive approach which considers the natural "carrying capacity" of the island to support development and which integrates these facilities to parallel the level of access which is available to the island.

5) The Coastal Council encourages and supports State, local and private efforts to acquire coastal barrier islands for inclusion in preservation and protection programs. Public recreational benefit should be one primary motivation for these efforts, and where appropriate, barrier islands should be maintained for recreational use, based on the capacity of individual areas to accommodate human activity.

#### CZMP Policy III.C.3.XII(A).

The policy on barrier islands applies because the Spit is part of Kiawah Island, which is a barrier island. I find the proposed project is consistent with the barrier island policies for the following reasons. As to Policy 1, the Spit is more prone to erosion than other coastal areas; therefore, it is important to make sure any development is sensitive to the needs of a dynamic area. Here, the proposed project is responsive to the needs of the dynamic landscape into which it will be integrated and is consistent with this policy for the following reasons. This proposed project is designed to retain the natural landscape and vegetation to the extent possible—the storm water management system, infrastructure, and lots have been engineered according to the best management practices to prevent run-off into the river. All of the development's facilities have been designed to avoid critical areas and wetlands. The proposed project will be consistent with this policy in that it will be low density, not "intensive" or "high density." Additionally, impervious surfaces will be minimized, homes will be built with as little destruction to the surrounding vegetation as possible, and homes will be prevented from having lawns or other

landscaping that would significantly alter the native vegetation and environment. Finally, the project will not interfere with the dune ridges along the beach. Overall, the proposed project is designed to impact the native environment as little as possible to retain the natural dune and water drainage systems as much as possible to preserve the natural systems in place and the development is therefore consistent with this policy.

As to Policy 2, no part of the development as currently proposed directly impacts the critical area or crosses a critical area. Further, any indirect effects will be minimized by the environmentally sensitive design of the development and the preservation of the remaining land on the Spit which will be protected by a conservation easement.

Regarding Policy 3, Coastal did not show that any public funds will be expended to complete the road from the mainland of Kiawah Island to the Spit. To the extent any public funds are expended on the road adjacent to and affecting Beachwalker Park near the neck of the Spit, building and/or further fortifying the road in this area is in the public's interest as demonstrated by the heavy public use of the Park as a recreational destination. Additionally, the Spit is part of Kiawah Island, which is already developed. Accordingly, the road to the Spit does not fall under the category of providing access to a previously undeveloped barrier island under this policy.

Similarly, as to Policy 4, while utility access will be new to the Spit, it will not be new to Kiawah Island, of which the Spit is a part. Additionally, there is no evidence in the record to indicate the size of the proposed utility services would be beyond the carrying capacity of Kiawah Island and the Spit.

As to Policy 5, there was no evidence regarding Coastal or any other private organization seeking to acquire Captain Sam's Spit for inclusion in a preservation or protection program. Nevertheless, to the extent objectives of this policy could apply to consideration of a barrier island that is private property, the installation of the SSPW will protect the public's access to Beachwalker Park and the Spit, thus preserving the public's access for recreational use in accordance with the policy. Furthermore, if the project is approved, KDP asserts it will convey a conservation easement covering the remaining undeveloped highland to the Kiawah Island Natural Conservancy.

#### *Dune Areas*

Primary, ocean-front dunes are considered "critical areas" under the South Carolina Coastal Management Act. CZMP Policy III.C3.XII.B. Regarding secondary dunes, "[t]he [Department]

has no direct jurisdiction over proposed activities in these areas but does have review and certification authority with regard to the major permits of other State agencies.” CZMP Policy III.C3.XII.B. The additional policy considerations for these sensitive, non-critical secondary area dunes include:

- 1) Because of their proximity to and strong physical and ecological relationship with the beach and primary sand dune critical areas of the coastal zone, project proposals in secondary sand dunes must demonstrate reasonable precautions to prevent or limit any direct negative impacts on the adjacent 111-71 critical areas.
- 2) Special attention must be given in new construction activities in ocean-front areas to prevent or mitigate negative impacts on adjacent property owners, specifically, increased erosion or loss of protective dune formations on adjacent lots due to unnecessary destruction of or encroachment onto stable dunes.
- 3) Project proposals in ocean-front and sand dune areas must conform to the policies of the Beach Erosion, and Beach and Shoreline Access sections of the program, as well as other applicable Resource Policies.

CZMP Policy III.C3.XII.B.

There are two further recommended policies in this section as well, which provide:

- 1) Local governments with coastal shorefronts are encouraged to develop and implement strong local zoning and building ordinances for beach and sand dune areas.
- 2) Property owners, development interests and local governments are encouraged to institute and observe set-backs or buffer zones for construction in beach and dune areas.

CZMP Policy III.C3.XII.B.

The proposed project is consistent with these policies. The footprint of the development does not overlap with or disturb any dunes, either primary or secondary. Rather, Coastal’s evidence concerned the potential for erosion on the river side due to the imposition of the SSPW. Moreover, there was no evidence that the proposed project would lead to the destruction, erosion, or development encroachment onto dunes on the Spit so as to compromise the dune areas sought to be protected by this policy. Additionally, there was no evidence that adjacent land owners, the only one of whom is Charleston County Parks via a lease from KDP, would be affected. The Court finds the proposed project complies with this policy and all other associated resource policies and programs. Further, the local government of Kiawah Island has approved this project, which is in compliance with the local ordinances and applicable set-backs.

### *Public Open Spaces*

Coastal argued in its prehearing statement that the proposed project violates CZMP Policy III.C3.XII.D because it fails to protect “public recreational activities.” CZMP Policy III.C3.XII.D provides, generally, that: “[t]he values of public recreational and open space areas throughout the coastal zone cannot be overemphasized.” CZMP Policy III.C3.XII.D. Public open spaces provide “recreational and aesthetic opportunities and amenities which are both desired and needed by the people.” CZMP Policy III.C3.XII.D. The Department is required to review any permits in light of the following policies when proposed activities are located in, or would directly affect, public open space areas:

- 1) Project proposals which would restrict or limit the continued use of a recreational open area or disrupt the character of such a natural area (aesthetically or environmentally) will not be certified where other alternatives exist.
- 2) Efforts to increase the amounts and distribution of public open space and recreational areas in the coastal zone are supported and encouraged by the Coastal Council.

#### CZMP Policy III.C3.XII.D.

Policy 1 prohibits certification of a project that restricts the use of a recreational open area or disrupts the character of a natural open area if an alternative to that restriction or disruption exists. Clearly, the riverbank is both a recreational and a natural open space area. Though the proposed project will not initially limit the use of any recreational or natural open space areas along the riverbank, eventually a portion of the riverbank adjacent to the SSPW will likely be eliminated due to erosion. This potential loss is clearly an important consideration under this policy. Nevertheless, this loss must be weighed in light of whether other alternatives exist. Here, no evidence was presented on this specific issue and policy section of the CZMP by Coastal—including “alternatives” of any nature. CZMP Policy III.C.3.XII.D.

Although the parties did not offer the alternative of a smaller erosion control structure that only protects the integrity of the park, the Court is mindful of this alternative because KDP was granted the authority to build a different erosion control structure to protect only the Park in *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env'tl. Control*, 422 S.C. 632, 636, 813 S.E.2d 691, 693 (2018), but it did not do so. Thus, the Court recognizes the protection of the public's access at Beachwalker Park is unlikely to be accomplished unless KDP can also protect its property

interest.<sup>28</sup> Moreover, presuming, without finding, that the no alternative consideration is applicable to this policy, the alternative of doing nothing does not protect the public's interest in the continued use of Beachwalker Park as a recreational destination.

Therefore, following this analysis, the Court must weigh a public loss of the riverbank against the public gain of protecting Beachwalker Park. In weighing these factors, this Court is justly seeking to determine not what is in the best interest of the KDP or even Coastal, but what is in the best interest of the public in light of the legal and regulatory considerations. Viewing the case as a whole, the Court finds Beachwalker Park and the public trust resources on the Spit are a valuable public asset to protect. Dana Beach, the Executive Director of the Coastal Conservation League, testified that Beachwalker Park is "heavily used" and that "thousands of people all over Charleston County come to Beachwalker Park." The public's access to the public trust resources on the Spit flows primarily from their literal access to the Spit via the Park.<sup>29</sup> Some of the public access the Spit from the river instead of the Park, but it is clear this is not the primary way the public accesses and uses the Spit.

Acknowledging the importance of the Park, this Court cannot ignore the fact that the Park is eroding away and unlikely to be protected unless the entire length of the SSPW is permitted to also protect KDP's interest. Due to the significant erosion along the riverbank adjacent to Beachwalker Park, some parking for the general public has been lost resulting in fewer people having access to the beach and the erosion of the Park is likely to continue. Therefore, the proposed project would greatly assist in preserving that important public benefit. However, the Court is mindful that the cost of protecting the Park could likely result in the loss of some portion of the riverbank, which is part of the public trust. Thus, the cost of protection access to these public trust resources is the foreseeable loss of some of those resources. In contrast, if access to Beachwalker Park is not protected, it is clear that a significant public use will be lost, but the public trust resources may remain intact.<sup>30</sup>

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<sup>28</sup> Indeed, as this Court responded to Coastal's arguments for its Motion to Lift Stay, from a practical perspective, KDP has no incentive to protect the park if they cannot build an erosion control structure that also protects their investment. In this sense, KDP's ultimate goal in protecting the public's access at Beachwalker Park is almost certainly motivated, in part, by its need to protect its own interest. Nevertheless, protection of the park is a positive outcome of installing the SSPW that cannot be overlooked simply because KDP's motivation may not be completely altruistic.

<sup>29</sup> As the testimony indicated, the riverbank is only occasionally used by the public compared to the rest of the Spit.

<sup>30</sup> It is also notable that Coastal contends that the neck could breach again. Though the Court finds that eventuality unlikely considering the testimony, if it does, access to the end of the Spit would be eliminated for the majority of

With all these considerations in mind, the Court finds benefit to the public in protecting Beachwalker Park through installation of the SSPW outweighs the potential loss of some of the less-utilized riverbank along the Kiawah River. The SSPW will benefit the public by enhancing the safety and preserving the longevity of its access to public trust resources at the Spit. The public will further benefit from the conservation easement placed on the majority of the Spit in tandem with the development. Accordingly, when considering the portion of the affected space in the context of the overall amount of public open space on the Spit, the Court finds the public's use and enjoyment of the Spit will not be so disrupted such that the proposed development contravenes this policy. KDP will, obviously, also benefit because the SSPW will allow it to protect its property interest. This outcome is a compromise of public/conservation interests and private/economic interests, which this Court believes is in the spirit of the CZMA and CZMP.

Concerning the disruption of the aesthetic character of the shoreline which is an open area, as addressed above, the Court finds the preservation of Beachwalker Park is a greater benefit.<sup>31</sup> If action is not taken, Beachwalker Park will continue to deteriorate, and the public's current access to the open spaces will be further jeopardized. Furthermore, it is important to recognize that the highland of the Spit is not an open space, but is privately owned property without restrictions at this point. See Black's Law Dictionary (10th ed. 2014) (defining "open space" to mean "[u]ndeveloped (or mostly undeveloped) urban or suburban land that is set aside and permanently restricted to agricultural, recreational, or conservational uses."); S.C. Code Ann. § 12-43-222 (2014) (granting property tax reduction for open space); *Florida v. White*, 526 U.S. 559 (1999) (noting the distinction between a warrantless seizure in an open area and a seizure made on private premises). Nevertheless, even if this aspect is considered, only a small part of the Spit will be transformed into a residential area. And, the portion that is proposed to be developed would be developed in an environmentally sensitive approach incorporating limited impact development practices to minimize the impact of development. When fully implemented, it will result in only

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those who walk to the Spit and the beach from Beachwalker Park. Therefore, even under Coastal's theory of this case, there is a public benefit in building the SSPW, which will reduce the likelihood of another breach.

<sup>31</sup> Interestingly, Coastal has emphasized the public's use of the Spit to support its contention that the Spit should be preserved in its "pristine" state for the public to enjoy. However, obviously the greater the use of an area, the less an area can be considered pristine. Indeed, "pristine," which means "not spoiled, corrupted, or polluted (as by civilization)" is the antithesis of significant public use. Nevertheless, neither party presented arguments addressing the interrelation between the public use and the pristine nature of the Spit. Therefore, the Court has not considered this issue.

about twenty acres of residential development leaving the remaining 150 acres of the Spit to be preserved in a natural state.

As to Policy 2, the public will benefit from the protection of Beachwalker Park, which facilitates the public's access to recreational open space on Kiawah Island. Furthermore, the public will be benefitted by the addition of a conservation easement that will protect the remaining undeveloped highland on the Spit, thus preserving and creating public open space in keeping with this policy.

In sum, this Court's decision concerning this difficult issue was made after much reflection. Nevertheless, in the end, Coastal failed to show by a preponderance of the evidence that the proposed project contravenes this policy section.

#### CZMP Chapter IV.C.4

This section of the CZMP includes the policies accompanying the CZMP's Erosion Control Program. In its prehearing statement, Coastal argues the proposed project violates this policy section because it "fails to consider the extent of up or downdrift damage due to installation of the structures; it is not part of a comprehensive erosion control program to ensure that it does not cause adverse effects on adjoining property owners or accelerate erosion; and it fails to promote the use of natural features of the system, rather than artificial protections."

The Erosion Control Program (ECP) refers to erosion control structures along South Carolina beaches, to include seawalls, bulkheads, revetments, and groins. For instance, in its introduction the ECP states: "The South Carolina Coastal Management Act (Act 123 of the 1977 South Carolina General Assembly) mandates the Coastal Council to develop a comprehensive **beach erosion** control policy. . . ." CZMP Chapter IV.C.1 (emphasis added). Throughout the remaining ECP, it refers to erosion control for beaches and the coastline. It even refers to the specific types of shoreline to be protected as "1) arcuate strand, 2) cusped delta, 3) beach-ridge barrier, and 4) transgressive barrier." Here, there was no evidence that the proposed project involved an erosion control structure along the beach/oceanward-side of the Spit. Therefore, this provision is inapplicable to this case.

#### Section 48-39-150(A)

Coastal argues that the proposed project violates the provisions in section 48-39-150(A) of the South Carolina Code in the following ways:

The project's impact on the production of fish, shrimp, oysters, crabs, clams, other marine life, wildlife or other natural resources; the extent to which the activity could cause erosion; the extent to which the development could affect the habitats for rare and endangered species; the extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state; the extent to which the project will affect the value and enjoyment of adjacent owners; and the extent to which it would affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources.

Pursuant to section 48-39-150(A), when reviewing the merits of each application, the Department must consider the policy considerations of sections 48-39-20 and 48-39-30, and "be guided" by the following considerations, in relevant part:

(3) The extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural resources in a particular area including but not limited to water and oxygen supply.

(4) The extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water.

(5) The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources.

(6) The extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina's coastal zone.

(7) The extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state.

S.C. Code Ann. § 48-39-150(A) (2008).

First, as to sub-section (3), the proposed project will not have a material adverse effect on the production of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural resources, particularly considering production typically relates to commercial use. At trial, evidence was limited to the potential effect of the proposed project on piping plovers, loggerhead sea turtles, diamondback terrapins, and bottlenose dolphins. None of these species are produced commercially. However, to the extent this sub-section includes the natural reproduction of "marine life or wildlife or other natural resources," the Court will consider the potential impact of this project on these species. § 48-39-150(A)(3).

As discussed above concerning GAPCs, the proposed project is located near, but not within the critical habitat areas for piping plovers and loggerhead sea turtles. As such, the proposed project will have no direct effect on these species. Furthermore, based on the evidence, there is

not a current risk of a taking of either of these species under the ESA as a result of the proposed project, and any future taking is speculative at this time. To the extent that lighting from the proposed residential development could adversely affect the loggerheads' ability to locate its nesting area and/or ocean, evidence was presented to show that Conditions 5 and 6 of the CZCC will reduce, if not eliminate, these concerns. These conditions also aim to reduce or eliminate any potential indirect effects on the piping plovers. Thus, it does not appear that the project will significantly affect the reproduction of these species. Nor will the project significantly affect the habitats of these endangered special pursuant to sub-section (6).

Next, Coastal failed to show that the proposed project will have a material adverse effect on the reproduction of either diamondback terrapins or bottlenose dolphins. While the SSPW would impact the diamondback terrapins' ability to access the area behind the SSPW, the evidence established that the natural vertical escarpment present along much of the area where the SSPW will be installed is already too high for the terrapins to cross. Moreover, the SSPW will not extend the entire length of the river-side of the Spit. Accordingly, access areas on the river-side of the Spit will remain. In addition, the evidence did not establish whether terrapins are currently nesting in the area of the proposed installation of the SSPW or that the Spit is the only nesting area utilized by terrapins in the area. Therefore, any material adverse effects on the population, which is unknown, is speculative.

Similarly, although evidence was presented that bottlenose dolphins utilize the Spit for strand feeding, the evidence was speculative as to how the potential elimination of part of this strand feeding area due to the SSPW would impact the overall population. In other words, the evidence simply did not establish that the strand feeding that occurs along the portion of the Spit where the SSPW will be installed is a significant part of the dolphins' diet. To the contrary, the evidence established that the dolphins may adapt without impact.

Regarding subsection (4), clearly there is a natural system of erosion currently occurring at the Spit. Specifically, the Kiawah River is eroding the backside of the Spit. However, there is no evidence in the record to show the SSPW will "cause erosion"—rather the installation of the SSPW will allow the natural cycle of erosion to continue until it is exposed, at which time changes to the natural erosion pattern are unclear. No testimony was offered regarding "shoaling of channels or creation of stagnant water." § 48-39-150(A)(4). Overall, the Court finds the proposed project is consistent with this section.

Addressing subsection (5), the Court finds the proposed project will not affect existing public access to tidal and submerged lands, etc. to an extent that requires the CZCC to be denied. As already discussed, it is likely that some public trust land—specifically a portion of the riverbank—will eventually be eliminated because the Kiawah River will continue to erode the riverbank along the Spit. However, the SSPW will not eliminate the entire riverbank, and the most well-used portions of the Spit—the beach and southern tip of the Spit—will remain intact for the public to enjoy. Considering the significant benefit to the public that the SSPW will provide in protecting and stabilizing public access to the Spit at Beachwalker Park, the Court finds the relatively small loss of access to the riverbank does not outweigh the benefits.<sup>32</sup> Moreover, the development will not impede the public's ability to use the Spit for recreation, including walking, biking, kayaking, boating, and fishing, among other activities. The Court finds the proposed project is consistent with this section.

Finally, as to subsection (7) the Court finds the economic benefits of developing the upland area compared to the benefits of preserving the riverbank does not necessitate denial of the CZCC. The evidence established that the economic benefit of developing the upland area to include real property tax revenues estimated at \$5 million per year when the development is built out to fifty homes. Furthermore, the construction would last around ten years, with the associated contracts precipitating increased spending, job creation, and economic activity in the surrounding area during that time. The evidence thus established the State/County would receive approximately \$109 million in gross revenue, reaching a total of \$210 million in gross revenues after the completion of phase 2. No contrary testimony was presented.

Though significant, this economic benefit does not exclusively justify the loss of a portion of the riverbank; however, it is a factor that legally and factually cannot be ignored. It also noteworthy that only 12.8 acres of the almost over 150 acres that constitutes the Spit will be developed and the remaining un-developed portion of the Spit will be placed under a conservation easement.<sup>33</sup> Therefore, a significant amount of the Spit will be preserved and retain is natural character.

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<sup>32</sup> This benefit is more fully explained in the Public Open Spaces Section.

<sup>33</sup> Though the Court recognizes preservation has its own benefits, the evaluation of those benefits is more complicated than it would appear. If the Court were to consider the benefit of leaving the entire Spit in its unaltered state, it would be ignoring the fact that the Spit is private property that could be otherwise altered at any time. For example, even if the permits at issue were denied and even if the owners decided not to build a single home upon the Spit, the owners could still alter the property significantly by removing the trees and vegetation in keeping with the

The goals of the CZMP are to balance development with preservation and conservation. The Court finds the proposed project's disturbance of a relatively small area paired with the significant projected revenues, and considering that a significant portion of the Spit that will remain untouched, is an illustration of the type of balance the CZMP tries to achieve. The court thus finds the proposed project is thus consistent with this section.

#### Section 48-39-30

Section 48-39-150(A) instructs the Department to be guided by the policy statements in section 48-39-30. S.C. Code Ann. § 48-39-150(A). Coastal argues in its pre-hearing statement that the proposed project violates section 48-39-30 because it:

[v]iolates the State policies of protecting sensitive and fragile areas from inappropriate development; of protecting resources of the coastal zone; and protection of the quality of the coastal environment. This certification is inconsistent with § 48-39-30 in that the basic state policy behind the Act is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone which explicitly requires DHEC to consider impact on the larger coastal zone, including potential development on adjacent uplands such as that proposed by the applicant.

Section 48-39-30 constitutes the General Assembly's "legislative declaration of state policy." This declaration of policy provides, in applicable part:

(A) The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State.

(B) Specific state policies to be followed in the implementation of this chapter are:

(1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;

(2) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations;

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applicable laws. Moreover, an access road has already been created. Therefore, in this instance, the "pristine" and "unaltered state" of the Spit could be subject to further alteration at any time, rendering the Court's valuation of it in its "unaltered state" less meaningful. Nevertheless, consideration of this quagmire is not necessary in light of the evidence in this case. With the exception of the access road, even considering the entire Spit as un-altered, the Court finds the economic and public benefits outweigh the need to preserve the Spit in its current state.

(5) To encourage and assist state agencies, counties, municipalities and regional agencies to exercise their responsibilities and powers in the coastal zone through the development and implementation of comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation.

S.C. Code Ann. § 48-39-30 (2008).

As previously discussed, these policy statements require a balancing of economic and social development with environmental preservation. In reviewing this section in *South Carolina Wildlife Federation v. South Carolina Coastal Council*, the South Carolina Supreme Court commented that:

evidence of purely economic benefit . . . does not support the stated purpose of the Coastal Management Program to protect, restore, or enhance the resources of the State's coastal zone for present and succeeding generations. This public interest must counterbalance the goal of economic improvement.

296 S.C. 187, 190, 371 S.E.2d 521, 523 (1988). The Supreme Court went on to emphasize that “evidence of purely economic benefit is insufficient as a matter of law to establish an overriding public interest.” *Id.*

This proposed project balances these competing goals consistent with the aims of this policy. As explained above, the proposed project will increase tax revenues in the area, create jobs, and otherwise contribute to the economic and social improvement of citizens of this state. The Spit, which is a valuable coastal resource, will be improved with “due consideration for the environment” and within the framework provided by the CZMP. Specifically, as previously found the proposed project will be accomplished in a low-impact, low density, and environmentally sensitive manner. No portion of the proposed project falls within the critical area.

Furthermore, the development plan provides that a significant portion of the Spit will be protected under a conservation easement, balancing development with preservation and helping to protect this state’s resources. While there was testimony that the Spit is a dynamic and fragile resource, Coastal did not show that it is inappropriate for development. To the contrary, Chris Joyner, explained that the purpose of the CZMP is not to prohibit development on barrier islands; rather, it is a collection of “management techniques to manage the potential effects of development upon coastal resources.” Also, Coastal’s own expert conceded that some limited development of the Spit in character with the area would be proper. This evidence certainly influences the determination of how much development is appropriate.

Here, the evidence established that the installation of the SSPW will stabilize the neck, preventing the erosion of any potential road that is constructed to access the Spit that might otherwise render development unfeasible. Moreover, the public's access to this Spit and public trust lands will be enhanced and preserved by the SSPW, which will halt the erosion currently threatening the public's access at Beachwalker Park. Finally, these policies refer to the involvement of local municipalities. The Town of Kiawah Island has worked extensively with KDP to ensure that the development is appropriate for the area and that certain conditions are in place to minimize any negative effects of the development. For all the reasons above, this Court finds the proposed project is not contrary to the state policies listed in section 48-39-30, but rather is in keeping with the competing goals of these policies.

#### Conclusion

Overall, the Court finds that the proposed project is consistent with the CZCC. Importantly, the Court finds the conditions attached to the Department's CZCC are integral to ensuring that the proposed project remains consistent with the policies of the CZMP and should be incorporated into this Court's order.

#### **Consistency with Previous Department Decisions and *Kiawah II***

Coastal contends that the Department's approval of the proposed project is inconsistent with the Department's previous decision in 2008 denying KDP's permit application for a 2,700 combination bulkhead-revetment in the critical area.<sup>34</sup> Similarly, in its prehearing statement, Coastal generally argues the Department's decision in this case is "fundamentally inconsistent" with the Supreme Court's decision in *Kiawah II*. In support of its argument, in its Prehearing Statement, Coastal listed general factual similarities between this case and the previous case to argue:

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<sup>34</sup> When it raised this issue in its prehearing statement, Coastal also contended that the Department's current decision is inconsistent with another Department decision denying an application for a 340-foot sheet pile wall in 2009; however, Coastal provided no testimony or evidence regarding this 2009 decision at trial. As the party bringing this case before this court, Coastal has the burden of proof to show the current Department decision is 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."). Because Coastal has failed to present any evidence on this issue, this Court finds Coastal failed to carry its burden of proof to show by a preponderance of the evidence that the Department's prior decision concerning the 340' sheet pile wall is inconsistent with this one.

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 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 the Department failed to apply the referenced policies in "the same manner" as it did in *Kiawah II*. Coastal presented some evidence at trial to demonstrate the Department inconsistently interpreted and applied CZMP Policy III.C.3.(7) in this case compared to how it applied this policy in the 2008 case (*Kiawah II*).<sup>35</sup> However, as this Court's extensively explained in its analysis of CZMP Policy III.C.3.(7), the Court finds the Department's interpretation and application of this policy in this case is consistent with its previous decision in 2008 and the Supreme Court's decision in *Kiawah II*.

Next, outside of the alleged discrepancy in the application of CZMP Policy III.C.3.(7), Coastal failed to identify specific inconsistencies between this case and the prior Department decision in 2008 and the Supreme Court's decision in *Kiawah II*. 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 decisions do not inherently mean the Department decision in this case is *legally* inconsistent with Supreme Court's decision or otherwise arbitrary or capricious, 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.

Further complicating the Court's review of this issue is Coastal's failure to present legal arguments as to what relief these alleged inconsistencies demand. Indeed, though a demonstration

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<sup>35</sup> 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.

of inconsistency can show that deference to an agency interpretation of law is not warranted,<sup>36</sup> 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)). As the United States Supreme Court has held, “[a]gency inconsistency is not a basis for declining to analyze the agency’s interpretation under the Chevron framework;” rather, “[u]nexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.” *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). Therefore, an agency is not wholesale prohibited from changing its policy; however, it “must show that there are good reasons for the new policy.” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see id.* (holding an agency that changes its policy “need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates”). Coastal made no argument concerning whether the alleged inconsistencies resulted from the Department’s unreasonable or arbitrary exercise of its discretionary authority under the facts of this case.

Therefore, as to any other alleged inconsistencies, this Court finds 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.

### **ORDER**

Based upon the above Findings of Fact and Conclusions of Law, it is hereby:

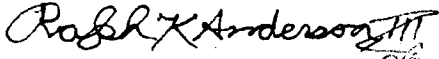
**ORDERED** that the Department’s issuance of NPDES Stormwater Construction Permit (SCR100913), Water Supply Construction Permit (3039S-WS), Wastewater Construction Permit

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<sup>36</sup> *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)).

(38828-WW), and Coastal Zone Consistency Certification (CZCC-13-0336) subject to the Department's conditions, are approved.

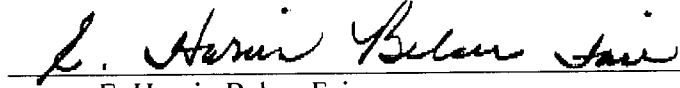
**AND IT IS SO ORDERED.**

  
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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