STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League; Petitioner, vs. South Carolina Department of Health and Environmental Control and KDP, II, LLC and KRA Development, LP, Respondents.	)	Case No. 15-ALJ-07-0369-CC **MOTION FOR RECONSIDERATION**

TO: CHIEF ADMINISTRATIVE LAW JUDGE RALPH KING ANDERSON, III, AND THE RESPONDENTS AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that Petitioner South Carolina Coastal Conservation League (the "League") hereby moves the Administrative Law Court pursuant to SCALC Rule 29(D) and SCRCP Rule 59(e) for an order reconsidering its Final Order and Decision, dated September 24, 2018 ("Order"). The basis for this motion is as follows:

I. The Court Erred in Concluding that the League "Abandoned" Certain Issues

The League moves this Court to reconsider its determination that the League "abandoned" its arguments that DHEC's authorization of the proposed project conflicts with its denial of the 2008 permit that would facilitate the exact same residential development and the Supreme Court's opinion in *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 766 S.E.2d 707 (2014) (hereinafter "*Kiawah I*"), upholding that decision, in addition to the DHEC Board's decision overturning staff's authorization of a 340' steel sheet pile wall for this development.

At base, a determination of abandonment is a determination that an issue is not preserved. The question of preservation arises in the context of appellate review, and is not a determination that

has ever been made at the trial court level. In order to preserve an issue for appellate review, "an issue must have been: (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *Lapp v. S.C. Dep't of Motor Vehicles*, 387 S.C. 500, 507, 692 S.E.2d 565, 569 (Ct. App.2010). The Order's abandonment determination that arguments regarding inconsistency with prior agency decisions and the Supreme Court holdings is thus misplaced, as is the Order's reliance on *Oien Family Invs., LLC v. Piedmont Mun. Power Agency,* 424 S.C. 168, 817 S.E.2d 647 (Ct. App. 2018) (hereinafter *Oien*).

In *Oien*, the quote cited in the Order applies to whether an issue that was before the trial court (which is how the ALC functions here) was abandoned on an appeal before an appellate court. The *Oien* court specifically cites to the legal authority requiring a party to cite and present legal authority and argument found in S.C. Appellate Court Rules, Rule 208(b)(1)(D) (requiring "discussion and citations of authority" for each issue in an appellant's brief). *See also Broom v. Jennifer J.*, 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013) (finding an issue abandoned when the party's brief cited only one family court rule and presented no argument as to how the family court's ruling was an abuse of discretion or constituted prejudice); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (finding an issue not preserved when brought up in the appellate court, but not adequately supported or argued).

Here, the ALC Rules contain no such provisions requiring a party to present legal citations and legal arguments in a "prehearing statement, at trial or in its proposed orders," as stated by the Order. First, it bears noting that the ALC Rules regarding prehearing statements, briefs and proposed orders are entirely discretionary in nature. Rule 14 allows that the administrative law judge "may request each party to prepare and return a Pre-Hearing Statement setting forth with particularity the issues in the contested case." ALC Rules, Rule 14. Rule 29.A.8 states that "[b]riefs and proposed

findings of fact and conclusions of law may be requested by the administrative law judge."[1] ALC Rules, Rule 29.A.8.

This Court determined that the League cannot raise any issues that are not set forth "with particularity" in a Pre-Hearing Statement. Such approach conflicts with the law, and specifically with the Court of Appeals ruling in *Sierra Club v. Chem-Nuclear.* In *Sierra Club*, the Court stated that "we do not believe *McNeely* holds that, as a general rule, only those claims presented in a prehearing statement will be considered on appeal. Instead, **we find the general preservation rule, that an issue must be raised to and ruled upon in order to be preserved for review, should apply**." *Sierra Club v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 424, 432–33, 693 S.E.2d 13, 17 (Ct. App. 2010) (citing *Brown v. S.C. Dep't. of Health & Envtl. Control*, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) ("[I]ssues not raised to and ruled on by the AL[C] are not preserved for appellate consideration."). In *Sierra Club,* the Court of Appeals explained that an issue is preserved for review, even if raised to the trial court through a Rule 59(e) motion: "because the Sierra Club properly filed a Rule 59(e) motion with the ALC, we believe these issues are preserved even though the ALC did not specifically rule on them." *Sierra Club*, 387 S.C. 424, 434, 693 S.E.2d 13, 18 (Ct. App. 2010).

Stated simply, this Court's abandonment determination ignores the long-standing rule that issues are preserved so long as they are "raised to and ruled on" by the ALC, whether in a Pre-Hearing Statement, during trial or by Rule 59(e) motion.

Notwithstanding the Court's reliance on an improper legal standard, the League did raise the

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[1]The League notes that while briefs must "set forth the factual and legal position of the party and be served on the Court and on parties of record," this Court requested findings of fact and conclusions of law in the form of a proposed order, and not a brief.

issue of inconsistency in its Prehearing Statement ("PHS"), dated September 29, 2015.[2] Specifically, the League raised the inconsistency between DHEC's issuance of the 2015 permit and certification authorizing the 2,380 foot steel sheetpile wall, access road and associated infrastructure with DHEC staff's 2008 decision denying the 2,513 foot bulkhead/revetment structure, and the DHEC Board's decision overturning staff's 2009 certification of a 340 foot sheetpile wall along the Kiawah River. PHS p. 3. The purpose of each of these projects is to facilitate a 50-house residential development on approximately 20 acres on Captain Sams Spit, and to do so specifically with a bank stabilization/erosion control structure. Additionally, the League raised the inconsistency between the DHEC 2015 permit and certification and the Supreme Court's opinion in *Kiawah I*. PHS p. 3.

The League asserted that the staff's 2015 permit and certification decision should have been denied for the same reasons staff denied the 2008 bulkhead revetment, a decision which was upheld by the Supreme Court in *Kiawah I*, as well as that the DHEC Board overturned staff's issuance of the sheetpile wall, and that the 2015 permit and certification is "fundamentally inconsistent" with those prior rulings as a result. PHS p. 3. Accordingly, the League asserted that the same CMP policies and regulatory provisions of the CZMA that applied to the 2008 bulkhead/revetment and the 2009 sheet pile wall on Captain Sams Spit must also be interpreted and applied to the 2015 permit and certification "in the same manner as they were applied" previously. PHS, p. 4.

At trial, the League presented evidence related to how the Department interpreted and applied its policies and regulatory provisions to the 2008 bulkhead/revetment and 2009 sheetpile wall proposed for Captain Sams Spit, which precludes an alternate determination regarding the pending challenge of the 2015 sheetpile wall and related infrastructure for the same proposed residential

[2] This issue was also raised in Petitioner's Request for Final Review Conference to the DHEC Board, dated June 12, 2015, and Request for Contested Case Hearing, dated August 5, 2015.

development on the same piece of property. (Tr. p. 66, line 11–p. 77, line 6; p. 1140, line 25–p. 1151, line 3; p. 1155, line 9–p. 1165, line 1; p. 1179, line 12–p. 1185, line 12; p. 1186, line 1–p. 1187, line 13; p. 1203, line 17–p. 1223, line 25; p. 1235, line 23–p. 1244, line 24; p. 1264, line 19–p. 1268, line 25.

Additionally, the League presented the testimony of Bill Eiser, who was the project manager on the 2008 critical area permit for the bulkhead/revetment on Captain Sams Spit and testified to the facts and circumstances he considered in rendering that Department decision, as well as how the applicable policies and regulatory provisions were interpreted and applied, including the public use of the Spit and sandy riverbank, the general character of the area, and the effects of the proposed structure and the residential development it would facilitate. (Tr. p. 1139, line 1–p. 1140, line 21; p. 1146, lines 15-23; p. 1151, lines 9-15; p. 1154, lines 8-17; p. 1164, line 10–p. 1166, line 2; p. 1166, line 17–p. 1167, line 1; p. 1173, line 24–p. 1174, line 15; p. 1175; p. 1188, line 2–p. 1189, line 17; p. 1204, line 4–p. 1205, line 2).

The League also presented the testimony of Curtis Joyner, the DHEC/OCRM Coastal Zone Consistency Manager and project manager who issued the 2015 certification at issue. (Tr. pp. 1225-1354). Mr. Joyner testified to the facts and circumstances he considered in rendering that Department decision, as well as how the applicable policies and regulatory provisions were interpreted and applied, including the public use of the Spit and sandy riverbank, the general character of the area, and the effects of the proposed structure and the residential development it would facilitate. (Tr. p. 1226, line 19–p. 1227, line 11; p. 1228, line 22–p. 1229, line 2; p. 1229, line 23–p. 1235, line 17; p. 1245, line 2–p. 1249, line 4; p. 1251, line 22–p. 1261, line 5; p. 1261, line 18–p. 1262, line 24; p. 1263, line 5–p. 1264, line 6; p. 1269, line 23–p. 1276, line 23; p. 1287, line 22–p. 1291, line 22; p. 1336, line 2–p. 1338, line 4; p. 1340, line 15–p. 1345, line 9).

Further, Petitioners presented numerous exhibits in support of their arguments that the Department's interpretation and application of the long-range, cumulative impact policy was contrary to its prior interpretation and application regarding the proposed development that would be facilitated by both permits and certifications. See Ex. 3; Ex. 4; Ex. 5; Ex.18; Ex. 19; Ex. 28; Ex. 30; Ex. 31; Ex. 36; Ex. 40; Joint Ex. 6; Ex. 41; Ex. 42; Proffered Ex. (Transcript of 30(b)(6) Deposition of DHEC: Curtis Joyner, dated September 13, 2016).

In sum, the League has never abandoned the issues of whether the Department's interpretation and application of the law to its 2015 permitting decision is "fundamentally inconsistent" with its interpretation and application to either the 2010 DHEC Board decision or its 2008 permitting decision and the Supreme Court's ruling affirming the same. The League asserts that the Department, and this Court, are precluded from interpreting and applying the law in a contrary manner.

II. This Court Is Precluded From Making Findings and Conclusions Inconsistent With Issues Already Decided

Prior administrative and judicial decisions, particularly regarding the same parties and the same legal and factual issues, preclude this Court from arriving at a contrary decision.

"Collateral estoppel occurs when a party in a second action seeks to preclude a party from relitigating an issue which was decided in a previous action." *S.C. Prop. & Cas. Ins. Guaranty Ass'n v. Wal–Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991) (adopting the general rule set forth in the Restatement (Second) of Judgments § 27 (1982)). The doctrine of collateral estoppel is also known as "issue preclusion." *In re Crews*, 389 S.C. 322, 698 S.E.2d 785 (2010); *Zurcher v. Bilton*, 379 S.C. 132, 666 S.E.2d 224 (2008); *Shelton v. Oscar Mayer Foods Corp.*, 325 S.C. 248, 481 S.E.2d 706 (1997). Issue preclusion bars the relitigation of only the particular issues that were

actually litigated and decided in the prior suit. *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 493 S.E.2d 826 (1997). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App.2009).

Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of res judicata, a "litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (cited with approval in *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011)). Res judicata may be applied if (1) the identities of the parties are the same as in the prior litigation, (2) the subject matter is the same as in the prior litigation, and (3) there was a prior adjudication of the issue by a court of competent jurisdiction. *Johnson v. Greenwood Mills, Inc.*, 317 S.C. 248, 250–51, 452 S.E.2d 832, 833 (1994). *Catawba Indian Nation v. State*, 407 S.C. 526, 536–38, 756 S.E.2d 900, 906–07 (2014)

Res judicata encompasses both issue preclusion and claim preclusion. *Crestwood Golf Club, Inc.*, 328 S.C. at 216, 493 S.E.2d at 834. However, res judicata is more commonly referred to simply as claim preclusion. *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432, 449, 511 S.E.2d 48, 57 (1998). When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. *Catawba Indian Nation v. State*, 407 S.C. 526, 536, 756 S.E.2d 900, 906 (2014)

Unlike claim preclusion, issue preclusion can affect the outcome of a different, unrelated

claim and can also affect a party in a second action with an unrelated third party. Restatement (Second) of Judgments §. 27. "We see no injustice in this dichotomy because the reach of issue preclusion is broader than that of claim preclusion. *Laughon v. O'Braitis*, 360 S.C. 520, 526, 602 S.E.2d 108, 111 (Ct. App. 2004) (citing Restatement (Second) of Judgments § 27 (1982 & Supp.2012). Under the doctrine of issue preclusion, if an issue of fact or law was actually litigated and determined and necessary to a valid and final judgment, the determination is conclusive in a subsequent action on that claim or a different claim. *Carman v. S.C. Alcoholic Beverage Control Comm'n*, 317 S.C. 1, 6, 451 S.E.2d 383, 386 (1994).

In the instant case, this Court is bound by issues of fact and law that were actually litigated and determined and which were necessary to the Supreme Court's final judgment in *Kiawah I*, and is precluded from making alternative, inconsistent findings and conclusions. The League will identify below all of the issues which were actually litigated between these same parties, directly determined and necessary to support the Supreme Court's 2014 Opinion in *Kiawah I*.

A. The General Character of the Area

In addressing CMP Policy III.C.3(7), which was litigated and directly determined by the Supreme Court, that Court ruled on what constitutes "the area" as well as the "general character" of that area. The Supreme Court, affirming the Department, identified the entirety of the Spit itself as "the area" in interpreting and applying CMP Policy III.C.3(7). The Court found the area to be "untouched by human alteration" and one of the "State's natural treasures." *Kiawah I* at 44, 723 ("Unlike much of our State's coastline which is now armored and unnatural, the spit remains untouched by human alteration. The area, particularly the pristine sandy beach, is undoubtedly one of this State's natural treasures.")

This Court's Order acknowledges that the Department interpreted and applied this policy in

2008 to arrive at the conclusion that "the area" is only the Spit itself. Similarly, the Order recognizes that the Supreme Court has already addressed the question of interpretation and application of the policy, but then finds that the Supreme Court's ruling merely "provides guidance" to this Court's interpretation and application. The Order then goes in the opposite direction of the Supreme Court's determination and finds that "the area" is the Spit, all of Kiawah Island and part of Seabrook Island and thus that "the general character of the area is residential." (Order, p. 30). The Department and this Court were not permitted to replow an interpretation and application which had already been determined by the Supreme Court. And the Supreme Court was clear that "the area" in question is the Spit itself, which is "untouched" and "natural."

B. The Long-Range, Cumulative Effects of the Project

The Supreme Court found an "urgent need to protect and give high priority to natural systems in the coastal zone . . . .," and specifically the Spit, which is one of those natural systems. S.C. Code Ann. §48-39-20(F). It held that protection of public trust resources is the paramount consideration, and that Captain Sams Spit, the resource that is at the heart of this appeal, is an "invaluable – in environmental, social and economic terms – stretch of tidelands" which is a "finite" and "precious public resource." *Kiawah I*, 411 S.C. 16, 22, 766 S.E.2d 707, 710-11 (2014). The Supreme Court, affirming the Department's 2008 decision, determined that the purpose of the bulkhead/revetment is "to halt ongoing erosion along that stretch of tidelands in order to facilitate a residential development on the adjacent highland area." *Id.* at 22, 711. The purpose of the steel sheet pile wall is the same: to facilitate a 50 house residential development.

On the ultimate issue of compliance with CMP Policy III.C.3(7), the Supreme Court affirmed the Department's conclusion that the development the structure would facilitate would "have a significant impact on the general character of the area," by converting a pristine barrier island into

residential development. *Id.* at 25, 713. The Supreme Court found that "the upland area of the spit is to be transformed from a completely natural area into a residential development." *Id.* at 37, 720. In the instant case, the same 50 house development facilitated by the project would also have the identical significant impact on the general character of the area.

Additionally, the Supreme Court affirmed the Department's determination that the cumulative effects of the project would be to stop shoreline migration. The structure would "prevent the normal shoreline migration and the cycle of creation and subsequent in-fill of a tidal inlet." *Id.* at 25, 713. The steel sheet pile wall is similarly designed to stop shoreline migration, which is an adverse cumulative impact.

C. Public's Use of and Access to the Shoreline Along the Kiawah River

The Order finds that the public use of the sandy shoreline along the Kiawah River is "only occasional,"(Order, p. 22), and that the "riverbank is . . . the less utilized public area of the spit." (Order, p. 31). Again, the issue of the extent of public use of the shoreline along the Kiawah River has already been determined by the Supreme Court, who specifically rejected this Court's "conclusion that public use of the beach is insignificant. All of the evidence presented at the hearing was that the public regularly uses the beach for a variety of recreational purposes."[3] *Id.* at 43, 722.

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[3]Specifically, the Supreme Court determined that:

> Dr. Greg VanDerwerker testified that he kayaks in the Kiawah River a couple of times per month and each trip he pulls his kayak out onto the beach where the revetment would be constructed. While there, he routinely observes others using the beach as a place to land their kayaks and to fish. Sophia McAllister testified that she kayaks in the Kiawah River on a weekly basis and regularly swims near the bank of the river where the revetment would be located. Sidi Limehouse testified that he goes to the spit once or twice per year and pulls his boat up on the beach where the revetment would exist. He also testified that he has taken several groups of people out to the spit in recent years. Bill Eiser, the DHEC project manager assigned to Kiawah's permit application, testified that he conducted four site visits in order to review the project area and observed people walking on the beach, kayaks pulled up on the beach, and people fishing or crabbing from the beach. Thus, the record establishes that the public use of the beach was much more significant than the "limited" use ascribed to it by the ALC.

The Order's finding that the use of the riverbank "is only occasional" is contrary to the Supreme Court's findings about use of the shoreline and was already reversed once: the "ALC's conclusion that public use of the beach is insignificant is not supported by substantial evidence. All of the evidence presented at the hearing was that the public regularly uses the beach for a variety of recreational purposes." *Id.* at 42, 722. Relitigation of the issue of public use of this sandy shoreline is unnecessary and, moreover, precluded.

D. The Public Will Not Benefit From a Wall Beyond the Park

The Supreme Court recognized that "the public interest is usually best served by preserving tidelands in their natural state." *Kiawah I* at 29, 715. The Court found and concluded that "it is to the public's benefit to protect natural processes like the cyclical erosion, breach, and accretion process of the spit." *Id.*, 31, 716. The Supreme Court specifically ruled that "elevation of economic development over the importance of public access would also be inconsistent with the significance the CZMA accords to public access." *Id.* at 40, 721. As such, the Supreme Court affirmed the Department and determined that only the 270' of wall in from of Beachwalker Park would provide a benefit to the public; the remaining structure beyond the Park designed to facilitate residential development had no public benefit, but instead would harm the public's beneficial uses. *Id.* at 38-41.

This Court determined that "preservation of Beachwalker Park is a greater benefit" to the public tham loss of the shoreline that will result as the wall becomes exposed. (Order, p. 40). The Order overlooks that Beachwalker Park is only adjacent to 270' of the entire 2,380' steel wall structure. Thus, the majority of the structure, 2,110', will provide no public benefit. This Court's Order finding that the entire 2,380' wall will provide a public benefit is contrary to the Supreme Court's ruling and precluded as already determined.

Id. at 43, 722

Moreover, Beachwalker Park's parking lot is already afforded protection by way of the Supreme Court's Order affirming the Department's 2008 permit authorizing the construction of a bulkhead/revetment system along 270' directly adjacent to Beachwalker Park. This Court's Order fails to account for the fact that protection of the Park has already been judicially determined.

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

This Court's Order recognizes that the permitted structure is a vertical wall, and that at least a portion of that wall will become exposed on the critical area. The Supreme Court similarly addressed the impacts of such a structure in its 2018 Opinion: "a vertical bulkhead alone, without anything to protect the toe against reflective wave energy, would cause even more exacerbated erosion," which is why "KDP's engineers designed the structure as a tandem bulkhead and revetment." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 422 S.C. 632, 637, 813 S.E.2d 691, 693–94 (2018) (hereinafter "*Kiawah II*"). The Supreme Court found that a vertical wall will eliminate the public beach as it currently exists. "Dr. Rob Young, the League's expert in coastal geology, explained how the sand from the upland dunes acted like a conveyor belt to feed the shoreline along the Kiawah River. Young testified that the vertical bulkhead would choke off this supply of sand, effectively shutting down the conveyor belt that replenishes the eroded sand and eliminating the beach as it currently exists." *Id.*

The Supreme Court ruled that:

> [The] bulkhead alone would be more injurious to the public's use of the critical area because the existing shoreline would ultimately be lost to erosion, without any source of upland sand to replenish it. The result would therefore jeopardize upland property owners and have detrimental effects on the public's use of the critical area. With the loss of shoreline, the public could no longer use the area for the recreational purposes many citizens currently enjoy."

Kiawah II at 638, 694.

This Court is bound by these determinations and must apply them to the policies set forth in

the Coastal Zone Management Ac in the same manner here.

III. The Order Fails to Address Applicable Statutory and Regulatory Provisions

A. The Order Fails to Rule on Compliance with § 48-39-30(D)

The Order acknowledges that over time the wall will become exposed on the critical area, but fails to account for those critical area impacts in its analysis. Section 48-39-30(D) states that "[c]ritical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits." The Supreme Court determined that a wall beyond the Park would provide no public benefit. This Court is bound by the Supreme Court's findings regarding the impacts that such a vertical structure will have on the critical areas and the public use thereof, as required by Section 48-39-30(D), see Section II.E. above.

B. The Order Fails to Rule on Compliance with CMP Policy III.C.3.VII

The Court failed to rule on compliance with the Wildlife and Fisheries Management Policy at CMP III.C.3.VII, declaring that it would "not consider" those policies because they were not specifically listed in the League's Pre-Hearing Statement. (Order, p. 16). However, the issues of compliance with this policy were tried before the Court, with several witnesses testifying on the topic. An issue may be properly raised to the trial court by way of a Pre-Hearing Statement, at trial or post-trial Rule 59(e) motion. The League raised the issue at trial and is raising it again by Rule 59(e) motion because the Court failed to rule on it.

C. The Order Fails to Rule on Compliance with CMP Policy III.C.3.I.(8)

The Court's analysis of the GAPC policies did not include consideration of CMP Policy III.C.I.(8), which prohibits projects with significant impacts to a GAPC "unless there are no feasible alternatives or an overriding public interest can be demonstrated, and any substantial environmental

impact is minimized." CMP Policy III.C.3.I.(8). This Court's Order does not rule on compliance with this policy.

D. The Order Fails to Rule on Compliance with CMP Policy III.C.3.I.(9) and CMP Policy III.C.3.V.A.

The proposed sheetpile wall, access road and associated infrastructure to facilitate residential development on the Spit authorized by the DHEC permits, and affirmed by this Court, will result in degradation of the environmental quality and natural character of the Spit as an open space and public recreational area, which is inconsistent with CMP Policy III.C.3.I.(9). Further, the project is inconsistent with the specific policies pertaining to recreational use of parks and open spaces. CMP Policy III.C.3.V.A. This Court's Order did not address compliance with these policies.

E. The Order Fails to Rule on Whether the DHEC Authorization is Precluded by a Prior DHEC Board Interpretation

Additionally, the League moves the Court to rule on whether the DHEC authorizations of the proposed project is precluded by the DHEC Board's interpretation and application of CMP Policy III.C.3.I(7) in its Final Agency Decision, dated January 7, 2010. In Re: Staff Decision dated October 27, 2009, to Issue OCRM Permit No. 10-09-04-03 to Kiawah Development Partners, II, Inc. for the construction of a steel sheet pile wall system, Board Docket No. 09-RFR-94, ("FAD"), attached as Exhibit A. That permit involved the construction of a steel sheet pile wall buried in the sand along the Kiawah River shoreline, which was nearly identical to the wall at issue here, except that it would be 340' instead of 2,380.' As with the wall at issue here, the Board recognized that the purpose is to "protect the access corridor for a roadway and utilities to facilitate residential development on the Spit." FAD, p. 6. And as with the wall here, the Board recognized that as the Kiawah River erodes, "the sheet pile wall will be in a critical area," which will "have significant impacts on the critical

areas." *Id.* Once exposed, the wall:

> will significantly impact the shoreline, changing it from one that is sandy and gently sloping and easily accessed by the public to one that is a vertical escarpment comprised of a sheet pile wall in accessible by the public. . . . The wall would impede public use of the shoreline of the Kiawah River below Mean High Water and disrupt the environmental and aesthetic character of the pristine Kiawah River, the adjacent public park, and the environmentally sensitive and fragile Captain Sam's Spit.

FAD, p. 6.

The Board determined that the Spit "is a sensitive and fragile area in the coastal zone that must receive heightened protection under the CZMP" under Section 48-39-30(B). FAD, p. 5.

In the Board's FAD, it interpreted CMP Policy III.C.3(7) specifically as it related to the potential effects of the wall. The Board interpreted and applied that policy to conclude that the residential development of 50 homes was "future residential development" that would be facilitated by the wall, and, as such, the project "was likely to have adverse cumulative effects." FAD, p. 3-4. Ultimately, the Board determined:

> Given the pristine nature of the Spit and the Kiawah River in the vicinity, the lack of human improvements, the use of the area around the Spit as a public park, and the fact that much of the Spit is a GAPC . . . and area of special resource significance (barrier island, duen areas, and public open spaces), the Board denies the consistency determination based on the possible long-rang cumulative effects of the project, when viewed in the context of other possible development and the general character of the area.

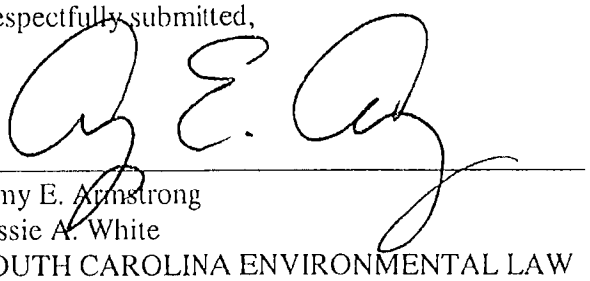
FAD, p. 4.

Since the Board's decision has not been reversed, it stands as the Final Agency Decision on the question of interpretation and application of these policies and this Court is precluded from making alternate and contrary determinations.

For the above-stated reasons, the League respectfully requests that the Court reconsider, clarify and amend its Final Order and Decision. The League requests that the Court stay any construction activities, or the prerequisites to such construction activities, until it has rendered a

decision on this motion.

Respectfully submitted,



Amy E. Armstrong
Jessie A. White
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Mailing address: Post Office Box 1380
Pawleys Island, SC 29585
Office address: 430 Highmarket Street
Georgetown, SC 29440
Telephone (843) 527-0078
FAX (843) 527-0540

Attorneys for the Coastal Conservation League

Georgetown, South Carolina

October 9, 2018

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, vs. KDP II, LLC, KRA Development, LP, and the South Carolina Department of Health and Environmental Control, Respondents.	Docket No. 15-ALC-07-0369-CC **CERTIFICATE OF SERVICE**

I hereby certify that on this date I served the foregoing Motion for Reconsideration upon both Respondents by placing copies of same in the U.S. Mail addressed to:

Trenholm Walker
Tom Gressette
P.O. Box 22167
Charleston, SC 29413

Brad Churdar
SCDHEC/OCRM
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

Amy E. Armstrong

Georgetown, South Carolina

October 9, 2018

Exhibit A

SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL

FINAL AGENCY DECISION

In Re: Staff Decision dated October 27, 2009, to issue OCRM Permit No. 10-09-04-03 to Kiawah Development Partners II, Inc., for the construction of a steel sheet pile wall system.

Board Docket Number 09-RFR-94

Appearances: Amy E. Armstrong, Esq., for South Carolina Coastal Conservation League
G. Trenholm Walker, Esq., for Kiawah Development Partners, II, Inc.
Sidi Limehouse, for Friends of the Kiawah River
Sara Bazemore, Esq., for South Carolina Department of Health and Environmental Control

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BACKGROUND

This matter comes before the Board of Health and Environmental Control for final review pursuant to S.C. Code Ann. § 44-1-60 on requests filed by Friends of the Kiawah River and the South Carolina Coastal Conservation League (the "League") to review a decision made by Department staff on October 27, 2009, issuing Permit No. 10-09-04-03. The staff decision authorized the construction of a steel sheet pile wall system near Beachwalker Park on Captain Sam's Spit, adjacent to the Kiawah River, Kiawah Island, Charleston County, South Carolina. The staff decision was made in response to Kiawah Development Partners, II, Inc.'s ("KDP") request to the Department dated April 4, 2009. The staff decision authorized KDP to install a 340-foot long, interlocking, steel sheet pile wall system and temporary construction access for the sheet pile wall installation only to be driven approximately 35 feet below existing grade in an upland area.

Requestor Friends of the Kiawah River timely filed a request for final review on November 10, 2009. Requestor South Carolina Coastal Conservation League timely filed a

RETURN BY RESPONDENTS TO APPELLANT'S MOTION TO STRIKE MATERIALS FROM RESPONDENTS' DESIGNATIONS OF MATTER
EXHIBIT 1 Page 18 of 25

request for final review on November 13, 2009. The Board conducted a final review conference on December 10, 2009. For the reasons set forth below, the Board has determined that the Staff's decision to issue the permit should be reversed and the permit denied.

In its request for review and at the review conference, Requestor Friends of the Kiawah River raised several arguments in support of its challenge to the staff's decision, including the following: a) the piling is to be placed in a location in the beach sand where water will simply flow around the end of the piling and cause a breach at one, if not both ends of the structure; b) KDP's project is requested with the aim of reinforcing the sand and to allow a road to be built, which Requestor sees as "blatant attempt to find a loophole around the [Department's decision on Permit No. OCRM-08-117-E]"; and c) that the project does not comply with the Coastal Zone Management Act and the Coastal Zone Management Program (CZMP).

In its request for review and at the review conference, Requestor South Carolina Coastal Conservation League raised several arguments in support of its challenge to the staff's decision, including the following: a) members of the League who use and enjoy the waters, critical areas, and other natural resources on Kiawah Island would be adversely affected by the sheet pile structure proposed; b) the proposed work is situated in a Geographic Area of Particular Concern (GAPC); c) the project does not comply with the Coastal Zone Management Act and the Coastal Zone Management Program (CZMP); d) the staff's issuance of this permit and certification is inconsistent with its decision on critical area Permit No. OCRM-08-117-E, dated December 18, 2008; and e) the League believes that the impacts of the proposed structure will cause significant degradation of the environment on Captain Sam's Spit, reduce the value of surrounding property and have severe negative impacts on wildlife within the impact area, as well as have negative impacts on erosion patterns on Kiawah Island.

DISCUSSION

Having reviewed the administrative record and heard from the parties in this matter, the Board concludes that the staff decision should be overturned. Department staff reviewed the permit and certification requests under the applicable statutory provisions, but staff did not adequately consider the potential cumulative effects of the wall in the context of possible future development and the general character of the area. The resource policies of the CZMP require that in review and certification of permit applications in the coastal zone, the Department be guided by "[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." CZMP, Guidelines for Evaluation of All Projects, Policy I.(7) at p. III-14.

KDP argues that the Department must consider only the impact of the immediate area of land disturbance for the sheet pile project and should not consider the long-range cumulative effects of the project when reviewed in the context of possible future development and the general character of the area because KDP does not have development plans, and any future permitting actions for construction will receive applicable review at that time. The staff also took the position that it need not assess the potential effects of this wall in the context of the future residential development, because, in their view, construction of the sheet pile wall will not facilitate residential development. The Board does not agree. It is clear from the record, including the permit application, representations contained in correspondence from KDP, and statements to the Board by representatives of KDP that the primary purpose of the sheet pile wall is to protect land for an access corridor including a possible future road and utilities to facilitate a residential development on the Spit of up to fifty homes. The fact that KDP has not formalized its development plans does not negate the Department's obligation under the CZMP to consider

the possible long-range cumulative effects of the project, reviewed in the context of possible future development and the general character of the area. Furthermore, the Board is not persuaded that the 2005 Development Agreement between KDP and the Town of Kiawah provides a sufficient basis to assure that possible future development will not have a significant impact on the general character of the area or other adverse effects on the resources on the Spit. In addition, the Board finds that the Development Agreement does not assure that possible future development will be consistent with applicable policies for Geographic Areas of Particular Concern and the applicable policies for Areas of Special Resource Significance.

Moreover, staff's decision in regard to cumulative effects is inconsistent with the Department's decision on Permit # OCRM-2008-1366-1IQ-P, which involved a request for an erosion control structure for the purpose of protecting an access corridor for future residential development on the Spit. In that decision, the Department found that that proposed activity, when reviewed in the context of possible future residential development and the general character of the area, was likely to have adverse cumulative effects. Neither KDP nor the staff has persuaded the Board that this sheet pile wall, when reviewed in the context of the same possible residential development and the general character of the area, would not have adverse cumulative effects. Given the pristine nature of the Spit and the Kiawah River in the vicinity, the lack of human improvements, the use of the area around the Spit as a public park, and the fact that much of the Spit is a GAPC (habitat to threatened or endangered species) and an area of special resource significance (barrier island, dune areas, and public open space), the Board denies the consistency determination based on the possible long-range cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area.

The Coastal Zone Management Act, S.C. Code Ann. § 48-39-10, *et seq.* and the CZMP give the Department the authority to review all projects in the Coastal Zone. Activities in the Critical Areas require a direct permit from the Department; permit applications for activities in the coastal zone that are outside the critical areas are reviewed by the Department for consistency with the CZMP. The CZMP and the Act afford heightened protection to the Spit. The policies in 48-39-20 and 48-39-30 require the Department 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..." S.C. Code Ann. § 48-39-30(B)(1) (emphasis added.) As discussed above, the Spit is an Area of Special Resource Significance and is a Geographic Area of Particular Concern under the CZMP. Given the exposure of Captain Sam's Spit to dynamic forces on three sides and the history of the Spit and its susceptibility to washover and breach as well as the pristine nature of the Spit, the Board determines that this is a sensitive and fragile area of the coastal zone that must receive heightened protection under the CZMP.

The Department is also required to review the activity for consistency with the following policies in the CZMP: General Guidelines for Evaluation of All Projects (p. III-14 and III-15), Policies for Activities in Barrier Islands (p. III-69 through III-71), the Policies for Activities in Dune Areas (p. III-71 and III-72), Policies for Public Open Spaces (p. III-73) and the Policies for Erosion Control Programs (p. IV-51 through IV-59). These policies require the Department to consider the potential impacts to critical areas and discourage such activities that would have a negative effect on critical areas. Staff determined that these policies are not violated because the area where the sheet pile wall is proposed to go is not in a critical area. Staff also imposed

conditions on the certification requiring that KDP provide notice to the Department if the wall becomes exposed or becomes critical area and requiring that the Department then conduct additional reviews to determine consistency with the above referenced policies and the Department's Critical Area Regulations.

The Board disagrees with staff's decision to postpone review of this project for consistency with these policies until erosion causes the proposed wall to be located in a critical area. It is undisputed that the purpose of the wall is to protect an access corridor for a roadway and utilities to facilitate residential development on the Spit. The premise behind this project assumes that the Kiawah River will erode to the point where the sheet pile wall is proposed to go. If erosion reaches the point where the sheet pile wall is proposed to go, the sheet pile wall will be in a critical area. The shoreline of the Kiawah River consists of coastal waters and tidelands critical area, and arguably beach critical area, as the shoreline of the Kiawah River is a dry sandy beach subject to periodic tidal and wave action such that no nonlittoral vegetation is present. The Board finds that if installed, the construction of the sheet pile wall will have significant impacts on the critical areas of the coastal zone. If the Kiawah River erodes to the point that the sheet pile wall is exposed, the sheet pile wall will significantly impact the shoreline, changing it from one that is sandy and gently sloped and easily accessed by the public to one that is a vertical escarpment comprised of a sheet pile wall inaccessible by the public. If erosion reaches the sheet pile wall, the wall would impede public use of the shoreline of the Kiawah River below Mean High Water and disrupt the environmental and aesthetic character of the pristine Kiawah River, the adjacent public park, and the environmentally sensitive and fragile Captain Sam's Spit. The policies in the CZMP provide that "except under special circumstances, such as critically eroding shorelines that have a direct measurable effect on the economic well-

being of an applicant or are a threat to public safety, the Council will promote the use of natural features of the dune and beach system rather than artificial protection." CZMP at IV-57, provision IV(C)(4)(c)(7). These exceptions are not present here.

Furthermore, the Board disagrees with the staff's reliance on language in the Consistency Determination that should the sheet pile wall become exposed or come within the Department's critical area jurisdiction, it will be subject to additional review and the Department may require its removal if it is determined to be inconsistent with policies of the CZMP or Critical Area Regulations. The Board is mindful of the extreme difficulty in implementing removal of the wall if the residential development this structure is designed to facilitate and protect has already been constructed.

The Board finds that the issues raised by Requestors have merit and justify reversal of the staff decision. The Board concludes that the proposed activity is inconsistent with the above-cited policies in the CZMP and that this permit and certification were improperly issued. Accordingly, the Board overturns the Department's decision to issue Permit No. 10-09-04-03.

Paul C. Aughtry, III
Chairman
Board of Health and Environmental Control
For the Board

January 7, 2010

Notice of Right to Request Contested Case Hearing Before Administrative Law Court

S.C. Code §44-1-60(F)(2) provides that within 30 days after the receipt of the Board's written final agency decision an applicant, permittee, licensee, or affected person desiring to contest the final agency decision may request a contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act. A request for a contested case hearing before the Administrative Law Court (ALC) must be filed in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

Clerk's Office
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: http://www.scalc.net. If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the following address:

Lisa L. Longshore
Clerk of the Board
SC DHEC
2600 Bull Street
Columbia, SC 29201

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, vs. South Carolina Department of Health and Environmental Control, KDP II, LLC, and KRA Development, LP, Respondents. In Re: Cape Charles, Phase I.	Docket No. 15-ALC-07-0369-CC **RESPONSE BY KDP, LLC AND KRA DEVELOPMENT, LP TO MOTION FOR RECONSIDERATION BY SOUTH CAROLINA COASTAL CONSERVATION LEAGUE**

Respondents KDP, II, LLC and KRA Development, LP (jointly referenced as "KDP") hereby respond to the Motion for Reconsideration by Petitioner, South Carolina Coastal Conservation League ("Coastal"). As set forth herein, Coastal's Motion fails to justify any change to the Court's September 24, 2018, Final Order and, as such, the Motion should be denied.

STANDARD OF REVIEW

Although the Motion fails to identify any authority for the relief it requests, SCALC Rule 29(D) does provide that under certain circumstances a "party may move for reconsideration of a final decision of an administrative law judge in a contested case to alter or amend the final decision, subject to the grounds for relief set forth in Rule 59, SCRCP...." Rule 59(e) of the South Carolina Rules of Civil Procedure permits a party to file a motion to alter or amend the judgment entered in a case decided by the court without a jury. In such circumstances a "party *may* wish to file such a motion [to alter or amend] when [the party] believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to

reconsider or rule on it...." *Elam v. S. Carolina Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphases in original).

However, "[i]f an issue could have been initially presented to the trial court, a party cannot raise that issue for the first time in a post-trial motion." *S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control*, 380 S.C. 349, 380, 669 S.E.2d 899, 915 (Ct. App. 2008); *Patterson v. Reid,* 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct.App.1995) (citing generally *C.A.H. v. L.H.,* 315 S.C. 389, 434 S.E.2d 268 (1993). Therefore, a party cannot use a Rule 59(e) motion to present an issue to the court that could have been raised prior to judgment but was not so raised. *See Fields v. Reg'l Med. Ctr. Orangeburg,* 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005); *RRR, Inc. v. Toggas,* 378 S.C. 174, 185, 662 S.E.2d 438, 443 (Ct.App.2008) ("[A] party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not.").

As the party moving for reconsideration, Coastal must demonstrate to the Court's satisfaction that at trial Coastal properly pursued the issues for which it now seeks reconsideration and Coastal must also prove its entitlement to any relief. The burden is solely on Coastal and should this Court deny the Motion, that decision "will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Vinson v. Hartley,* 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct.App.1996).

DISCUSSION

The Order properly found Coastal failed to meet its burden of proof.

The Motion asks this Court to reconsider and revise its ruling that Coastal "failed to make any legal arguments or cite any case law in its prehearing statement, at trial, or in its proposed order" to support a *de novo* ruling from this Court that previous decisions by the Department and/or

the Supreme Court regarding "a different permit application involving a completely different erosion control structure outside the critical area" justify a ruling for Coastal in this case. Motion at 1; Order at 48. The Motion argues that "the ALC Rules contain no such provisions requiring a party to present legal citations and legal arguments in a 'prehearing statement, at trial or in its proposed orders,' as stated by the Order." Motion at 2. This is a wholly unsupportable position that ignores the burden upon every party initiating a contested case hearing, and specifically upon Coastal as the petitioner in this case.

"Pursuant to the Administrative Procedures Act, the ALC is the fact finder in contested case such as this one and its review is *de novo.*" Order at 22-23 (citing *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)). Furthermore, as the party contesting the Department's decision to grant KDP's permits, Coastal had the burden of proving its case. *See 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) ("In general, the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of proof.") Proving one's case includes providing the ALC with sufficient evidence during the course of the trial to support the factual findings that underlay the legal conclusions the party asks the Court to reach in its written order at the conclusion of the case. *See* SCALC Rule 29(C)("**Decision.** The administrative law judge shall issue the decision in a written order which shall include separate findings of fact and conclusions of law.") (emphasis in original).

It is hard to fathom that Coastal, as the petitioner in this *de novo* proceeding, would ask this Court to rule that Coastal had no burden to present legal citations, legal arguments, or any factual basis to justify an order reversing the Department's 2015 permitting decision. Equally

absurd is Coastal's assertion that it would only have to present legal citations, legal arguments, and a legal basis to justify a decision reversing the Department's 2015 permitting decision if the Court had requested a "brief" instead of a "proposed order." *See* Motion at 3, fn#1 ("The League notes that while briefs must 'set forth the factual and legal position of the party and be served on the Court and on parties of record,' this Court requested findings of fact and conclusions of law in the form of a proposed order, and not a brief.")

The Order properly addressed Coastal's contentions of allegedly inconsistent decisions.

Documenting Coastal's misunderstanding of the necessity of presenting support for its requested relief and its burden of proof, the Motion goes on to provide a litany of references to instances where Coastal claims to have *raised* or *asserted* certain conclusions:

> *The League asserted* that the staff's 2015 permit and certification decision should have been denied for the same reasons staff denied the 2008 bulkhead revetment, a decision which was upheld by the Supreme Court in Kiawah 1, as well as that the DNEC Board overturned staffs issuance of the sheetpile wall, and that the 2015 permit and certification is "fundamentally inconsistent" with those prior rulings as a result.
>
> [. . .]
>
> At trial, *the League presented evidence* related to how the Department interpreted and applied its policies and regulatory provisions to the 2008 bulkhead/revetment and 2009 sheetpile wall proposed for Captain Sams Spit, which precludes an alternate determination regarding the pending challenge of the 2015 sheetpile wall....

Motion at 4-5 (emphasis added). Wrapping up its recitation, the Motion asserts that Coastal "presented numerous exhibits in support of their arguments" and that Coastal "has never abandoned the issues of whether the Department's interpretation and application of the law to its 2015 permitting decision is 'fundamentally inconsistent'" with DHEC Board decisions and Supreme Court ruling in another case. Motion at 6.

Taking these references at face value, the Motion demonstrates exactly what the Order found:

> Coastal presented its contention that the two permitting decisions were inconsistent, but Coastal failed to make any legal arguments or cite any case law in its prehearing statement, at trial, or in its proposed order as to how this comparison legally precludes this Court's *de novo* review of a different permit application involving a completely different erosion control structure outside the critical area.

Order at 48. In other words, Coastal asserted these two decisions were "inconsistent" but it failed to provide any argument or legal basis whatsoever as to why the asserted inconsistency justified any action(s) by the Court. More specifically, Coastal has still not cited any legal authority or legal analysis for its assertion that two prior decisions "preclude" the Court from conducting a *de novo* review of the evidence and making findings of fact and conclusions of law as to whether the proposed project in this case is consistent with the CZMP.

Coastal also failed to even offer into evidence the decision of the Board of the Department on the other permit application. Recognizing its evidentiary shortcoming, Coastal's Motion attaches as Exhibit A a copy of the Department's Board decision that is the premise for Coastal's inconsistency argument. Coastal cannot remedy its evidentiary failures at this juncture by attempting to supplement the record it failed to establish at trial. *See Fields v. Reg'l Med. Ctr. Orangeburg,* 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005); *RRR, Inc. v. Toggas,* 378 S.C. 174, 185, 662 S.E.2d 438, 443 (Ct.App.2008) ("[A] party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not.").

The Order makes it clear this Court thoroughly understood and studied the record Coastal did provide. Based on the actual record, the Court rejected Coastal's attempt to compare two Department decisions because Coastal failed to present any legal support for relief or a ruling based upon the comparison. *See* Order at 48 ("However, after drawing this comparison, Coastal failed to make any legal arguments or cite any case law in its prehearing statement, at trial, or in

its proposed order as to how this comparison legally precludes this Court's *de novo* review of a different permit application involving a completely different erosion control structure outside the critical area. Accordingly, the Court finds this issue essentially abandoned."). In other words, the Court determined that even if the other decision were in the record, Coastal failed to submit any legal support for its argument that the Court is handcuffed by it. The Order correctly determined that Coastal failed to meet its burden; whether Coastal's argument is labelled as abandoned or incomplete or unsupported, the conclusion is the same.

Coastal's issue preclusion and claim preclusion arguments are unsupported.

The Motion's references to issue preclusion, claim preclusion, and res judicata are also unpersuasive. As the Court noted in its Order, Coastal failed to properly supply the Court with a sufficient record to review the allegedly inconsistent previous decision from 2009 that Coastal is now providing the Court thirteen months after the close of the evidence. *See* Motion, Exhibit A. Also, KDP's position has always been that the doctrine of collateral estoppel, if it were applicable, would preclude Coastal's re-litigation of this Court's determinations in its orders in the Revetment Case that the limited upland development of Captain Sams Spit is consistent with the policies and guidelines of the CZMP. *See* Amended Order and Decision dated February 26, 2010, and Amended Final Order and Decision on Remand dated March 22, 2016, in the Revetment Case; *see also* Proposed Order of KDP submitted January 31, 2018. The state Supreme Court did not tamper with those findings in its opinion affirming this Court's order on remand as modified. *Kiawah Dev. Partners, II v. S.C. Dept. of Health and Envtl. Control*, 422 S.C. 632, 813 S.E.2d 691 (2018).

Despite Coastal's repeated comparisons and the Motion's assertions, the decision of the Department Board in Docket No. 10-ALJ-07-0229-CC is not a final determination for purpose of the doctrine of collateral estoppel because it is neither final nor has there been an evidentiary

hearing. *See League of Women Voters of Georgetown and South Carolina Coastal Conservation League v. South Carolina Department of Health & Environmental Control and Wedgefield Plantation Association*, Docket No.: 07-ALJ-07-0529-CC, 2008 SC ENV LEXIS 75 (2008), available online at http://www.scalc.net/decisions.aspx?q=4&id=11205. Likewise, the Department Board's discussion of consistency with the CZMP in the stayed contested case proceeding (Docket No. 10-ALJ-07-0229-CC) does not meet the finality or due process requirements necessary to qualify for the application of the doctrine of collateral estoppel. The application in that proceeding was for a different structure in a different location. The Board's decision would not be entitled to deference since the decision did not involve the Board's construction of an ambiguous statute or regulation. *See Kiawah Dev. Partners, II v. S.C. Dept. of Health and Envtl. Control*, 766 S.E.2d 707, 717 (S.C. 2014) ("*Kiawah III*") ("If the statute or regulation 'is silent or ambiguous with respect to the specific issue,' the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference."). Instead the Board's decision was simply its application of the CZMP and relevant statutes and regulations to the facts, all of which is subject to a *de novo* determination by the ALC. *See 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)).

Even if the Court were inclined, as urged by Coastal, to consider applying the doctrine of collateral estoppel to previous decisions of the Department Board and staff in the other proceedings, it would create an absurd result. In this permit proceeding the Board of the Department declined to grant Coastal's Request for Final Review Conference as to the Permits and CZCC. The decision of the Board affirming the permits at issue here must be considered when

deciding whether to apply collateral estoppel in the manner requested by Coastal. Adopting Coastal's position would entirely undermine the Board's authority in this case and allow a past Board to deprive any later Board of authority and discretion to review a staff decision on an entirely separate later-filed permit application.

There is no legal authority to the effect that the board of an administrative agency is barred from making different decisions on different permit applications, even if the request is from the same owner for the same property. Nor is there law that the decision of an agency board acting in a review capacity in a contested matter binds a later agency board composed of completely different persons from the first board in their review of a later contested matter.

The Order properly addressed all relevant statutory and regulatory provisions.

In an attempt to have the Court revisit its decision, Coastal's Motion lists several statutory and regulatory provisions that the Motion asserts were not addressed by the Court. *See* Motion at 13-16. The majority of this discussion is devoted to a rehashing of the Motion's claims regarding the impact of the Final Agency Decision, dated January 7, 2010 in the matter captioned as *In Re: Staff Decision dated October 27, 2009, to Issue OCRM Permit No. 10-09-04-03.*

Although the decision appears to have been referenced in Coastal's Prehearing Statement as "DHEC Board's decision overturning staff's October 27, 2009 issuance of a certification for 340 feet of sheetpile wall along the Kiawah River," the Order accurately states that "Coastal provided no testimony or evidence regarding this 2009 decision at trial." Coastal's Prehearing Statement at 3; Order at 48, fn#32. Accordingly, the Court properly ruled that it could not consider the 2009 Staff Decision or the January 2010 Final Agency Decision. *See* Order at 48 ("Therefore, the Court will not consider it, and will limit its review of this issue as it relates to the Department's 2008 decision denying the combination bulkhead/revetment.")

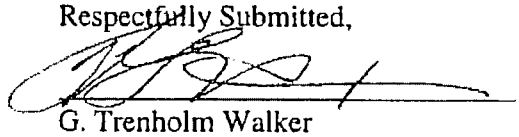
The Motion also cites certain other provisions of the Coastal Management Program ("CMP"), including CMP Policy III.C.3.VII, CMP Policy III.C.3.I.(8), CMP Policy III.C.3.I.(9), CMP Policy III.C.V.A, and asserts the Court failed to review the provisions. *See* Motion at 13-14. However, the Court did review Coastal's "closing arguments" via its proposed order and specifically noted "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." Order at 23; *see also* Order at 23, fn#19 ("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.") A review of Coastal's proposed order confirms that pages 13 through 17 are merely a recitation of various provisions of the CMP; as with the Motion, there is no substantive analysis whatsoever in the proposed order. Having failed to properly present its positions to the Court, Coastal cannot now use a post-trial motion to demand specific rulings.

CONCLUSION

The Court's September 24, 2018, Final Order properly addressed Coastal's failure to meet its burden of proof at the *de novo* trial, and Coastal failure to present the Court with any meaningful analysis in its proposed order. The Motion to Reconsider does not remedy those shortcomings. Coastal has not demonstrated that the Court misunderstood, failed to fully consider, or failed to address any argument properly before the Court. Even were the Court to consider every issue as having been raised, Coastal failed to prove sufficient facts or submit sufficient legal grounds to alter the outcome in any way. At best, even if Coastal were right procedurally, which it is not, any "error" was harmless.

The Motion should be denied.

Respectfully Submitted,



G. Trenholm Walker
Walker@WGFLLAW.com
843-727-2208
Thomas P. Gressette, Jr.
Gressette@WGFLLAW.com
843-727-2249
Walker Gressette Freeman & Linton, LLC
Post Office Drawer 22167
Charleston, SC 29413

Attorneys for Respondents KDP II, LLC
and KRA Development, LP

October 24, 2018

Charleston, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

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

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

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

"Abandonment" of Certain Issues

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

FILED
December 14, 2018
RETURN BY RESPONDENTS TO APPELLANT'S MOTION TO STRIKE MATERIALS FROM RESPONDENTS' DESIGNATIONS OF MATTER
EXHIBIT 3 Page 1 of 20. LAW COURT

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

340-foot Sheet Pile Wall

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Res Judicata and Collateral Estoppel

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

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

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

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

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

Id.

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

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

Res Judicata

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

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

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

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

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

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

Collateral Estoppel

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

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

The General Character of the Area

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

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

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

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

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

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

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

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

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

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

The Long-Range, Cumulative Effects of the Project

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

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

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

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

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

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

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

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

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

The Public Will Not Benefit From a Wall Beyond the Park

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

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

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

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

Failure to Address Applicable Statutory and Regulatory Provisions

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

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

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

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

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

> Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

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

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

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

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

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

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

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

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

ORDER

Based upon the above, it is hereby:

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

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

December 14, 2018
Columbia, South Carolina

CERTIFICATE OF SERVICE

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

E. Harvin Belser Fair
Judicial Law Clerk

December 14, 2018
Columbia, South Carolina