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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

Appellate Case No. 2019-000074

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

v.

South Carolina Department of Health and Environmental Control, KDP II, LLC, and Kiawah Development Partners, II ..... Respondents.

FINAL BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

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August 26, 2020
Charleston, South Carolina

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[1] Kiawah Development Partners, II v. S.C. Department of Health & Environmental Control and South Carolina Coastal Conservation League, 411 S.C. 16, 766 S. E. 2d 707 (2014).

[2] Kiawah Development Partners, II v. S.C. Department of Health & Environmental Control and South Carolina Coastal Conservation League, 422 S.C. 632, 813 S.E.2d 691 (2018).

STATEMENT OF THE CASE

This case involves the Department of Health and Environmental Control's ("DHEC" or the "Department") issuance of (1) National Pollutant Discharge Elimination System (NDPES) General Permit Coverage for Stormwater Discharges from Construction Activities SCR100913, (2) a Water Supply Construction Permit Number 30395-WS, (3) and a Wastewater Construction Permits Number 38828-WW (collectively, the "Permits"), along with (4) Coastal Zone Consistency Certification Number CZC-13-0336 (the "CZCC" or "CZC Certification"). (R. p. 227-230). The CZCC constitutes the Department's determination that the construction and other activity authorized by the Permits are consistent with South Carolina's Coastal Zone Management Program ("CZMP"). These Permits and CZCC were issued to Respondents KDP, II, LLC, and KRA Development, LP (jointly referenced as "KDP") for a project known as Cape Charles, Phase I, on the southwestern end of Kiawah Island called Captain Sam's Spit. (R. p. 220-223).

On June 12, 2015, the South Carolina Coastal Conservation League ("SCCCL") filed its Request for Final Review Conference by the DHEC Board. (R. p. 172). On July 6, 2015, the Board sent a letter denying SCCCL's Request for a Final Review Conference. SCCCL filed its appeal to the Administrative Law Court ("ALC") and Request for Contested Case Hearing on August 5, 2015. (R. p. 206-213).

The Court conducted the contested case hearing on August 21-August 25, and August 28 and 29, 2017.

On September 24, 2018, the ALC issued a *Final Order* affirming the Department's permitting and CZCC decisions. (R. p. 89).

On October 9, 2018, SCCCL filed a *Motion for Reconsideration* of the ALC's September 24, 2018 Final Order. (R. p. 589).

On December 14, 2018 the ALC issued an *Order Denying Motion for Reconsideration* and also issued an *Amended Final Order*. (R. p. 55).

On January 14, 2019, SCCCL filed a Notice of Appeal challenging the following ALC Orders: (1) December 14, 2018 *Amended Final Order*; (2) December 14, 2018 *Order Denying Motion for Reconsideration of Final Order*; (3) January 22, 2018 *Order Denying Petitioner's Motion to Compel or, in the Alternative, to Strike or Exclude Evidence*; and (4) February 28, 2018 *Order Denying Petitioner's Motion for Reconsideration of Motion to Compel or in the Alternative to Strike or Exclude Evidence*. (R. p. 139).

The January 22, 2018 *Order Denying Petitioner's Motion to Compel or, in the Alternative, to Strike or Exclude Evidence* and the February 28, 2018 *Order Denying Petitioner's Motion for Reconsideration of Motion to Compel or in the Alternative to Strike or Exclude Evidence* involves a discovery dispute between SCCCL and KDP regarding the production of documents as well as the testimony of KDP's expert, Dr. Travis Folk. Accordingly, the Department's Respondent's Brief does not address the Appellant's arguments related to these two Orders.

On May 17, 2019, SCCCL filed a *Motion to Transfer* appellate review to this Court, which was granted on August 1, 2019. (R. p. 1).

STATEMENT OF FACTS

CZC Certification

On May 28, 2015, the Department issued a CZC Certification to KDP for 12.8 acres of land disturbance associated with the construction of a 26 lot, single-family residential development and the associated road, stormwater management system[3], and water and sewer

[3] The stormwater management system for the proposed roadway will consist of bio-retention areas that have been designed to retain stormwater runoff and provide water quality treatment. Stormwater discharges will be controlled during construction activities by the implementation of

utilities. The CZC Certification constitutes the Department's determination that the construction and other activity authorized by the Permits are consistent with South Carolina's Coastal Zone Management Program.

In issuing a CZC Certification to KDP, the Department applied the following Resource Policies from the Coastal Management Program document (CMP):[4] (1) Residential Development; (2) Transportation Facilities; (3) Recreation and Tourism; (4) Public Services and Facilities (Sewage Treatment, Solid Waste Disposal, Public/Quasi-Public Buildings, Dams and Reservoirs, Water Supply); (5) Activities in Areas of Special Resource Significance (Barrier Islands, Dune Areas, Navigational Channels, Public Open Spaces and Wetlands); and (6) Stormwater Management (Runoff, Bridge Runoff, Golf Course Management, Mines, Landfills).

Special Conditions of the CZC Certification

The CZC Certification was issued with the following conditions relevant to the issues in this appeal:

> **1. The permittee must submit an updated Critical Area Line for review and approval 30 days prior to initiation of construction. Impacts to tidelands critical area associated with any aspect of construction or construction related activities is not authorized.** (Emphasis added).
>
> 2. The 2,380 linear feet of erosional riverbank of the Kiawah River must be stabilized by the construction of an in-ground steel sheet pile wall (SSPW). The sheet pile wall must be constructed in accordance with and per the phasing detailed in the construction drawings last revised April 10, 2015, and signed by Tony M.

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a surface water protection plan, appropriate phasing of construction activities, and the installation of multiple best management practices including but not limited to buffers, silt fence and rock ditch checks. The goal of this permit and the techniques mentioned is to provide for environmental protection.

[4] As part of the Coastal Zone Management Act ("CZMA"), passed in 1978, DHEC was required by statute to develop a comprehensive coastal management program ("CMP") for the "coastal zone," an area defined as Beaufort, Berkeley, Charleston, Colleton, Dorchester, Horry, Jasper, and Georgetown counties. See S.C. Code Ann. § 48-39-80. In developing the CMP, DHEC was required to develop a system whereby it was authorized to review all State and federal permits for compliance with the CMP. Id.

Woody, PE on April 13, 2015. The erosion control structure must be installed and the surrounding area stabilized before construction of any portion of the project (roadways, utilities, residential development, etc.) can occur.

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

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

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

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

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

Geographic and Geologic Characteristics of Captain Sam's Spit

The proposed development is located on the Captain Sam's Spit portion of Kiawah Island. This Spit is a peninsula of approximately 150 acres on the southwest end of Kiawah Island terminating at Captain Sam's Inlet that separates Kiawah Island from Seabrook Island. (R. p. 2284, [Transcript Page 1589:21-23]). The peninsula of Captain Sam's Spit is connected to the greater part of Kiawah Island by an isthmus often described as the "neck." The Spit has a drumstick-like shape with the wider portion next to Captain Sam's Inlet. The Atlantic Ocean is on

the southern side of the isthmus. The tidal Kiawah River is on the northern side of the isthmus. The Spit is well vegetated on the river side West of the neck with a growing maritime forest on the river side.

The historical geologic information shows that Captain Sam's Spit tends to accrete and grow towards the southwest, moving Captain Sam's Inlet toward Seabrook in the process at a rate of roughly two hundred feet each year. The historical information shows that the Spit breached or washed over 2 or 3 times over the last 200 years, most recently as shown in an aerial photograph from 1949. (R. p. 3024, [Pet. Ex. 5]).

Development Permits

On May 28, 2015, the Department also issued coverage under the General Permit for Stormwater Discharges from Construction Activities to KDP for Cape Charles Phase 1.

On May 28, 2015, the Department issued a Wastewater Construction permit for the construction of 1,644 linear feet of 8 inch PVC gravity sewer, 11 manholes, one duplex pump station and 465 linear feet of 4 inch force main to serve 26 residential lots and a community dock site.

Finally, on May 28, 2015, the Department issued a Water Supply Construction permit for the construction of 5,000 linear feet of 10 inch PVC water line and 7 fire hydrants to serve 26 residential lots, a pump station and one community dock site. Per the permits, both water and wastewater would be serviced by Kiawah Island Utility, LLC.

The activities, as proposed in the permit applications, also include the construction of 2,380 linear feet of in-ground steel sheet pile wall that will be driven to an elevation of 6.5 feet at ground level. The proposed location of the face of the sheet pile wall varies between 5 and 10 feet

inland from the toe of the escarpment along the Kiawah River as it existed on October 7, 2014. The sheet pile wall is proposed to be constructed in two phases.

At trial, Counsel for SCCCL stipulated that SCCCL is not challenging the technical design and engineering design of the sheet pile wall, nor is Petitioner challenging the design sufficiency of the NPDES Stormwater Construction Permit (SCR100913), the Water Supply Construction Permit (3039S-WS), and the Wastewater Construction Permit (38828-WW). Rather, the Petitioner is challenging the resulting environmental impact of the sheet pile wall and the three above-referenced permits. (R. p. 2067, [Transcript Page 1371:7-11] and R. p. 2070 [Transcript Page 1374:10-18]).

Dr. Richard Porcher and Cecelia Dailey Testimony

Regarding the location of the proposed development and the Critical Area, SCCCL presented the testimony of Richard Porcher, PhD, and Cecelia Dailey in support of its contention that portions of the project will be constructed in the critical area on the marsh side of the Spit. The Department contends that the testimony fails to support SCCCL's assertion that the areas inspected by Dr. Porcher and Ms. Dailey are critical area tidelands.[5]

Dr. Porcher and Ms. Dailey made visits to the rear side of Captain Sam's Spit at a period of time they describe as during king tides. (R. p. 1699-1700, [Transcript Pages 1003:16 to

[5] S.C. Code Regs. 30-1.D(50) defines "tidelands" as "all areas which are at or below mean high tide and coastal wetlands, mudflats, and similar areas that are contiguous or adjacent to coastal waters and are an integral part of the estuarine systems involved. Coastal wetlands include marshes, mudflats, and shallows and means those areas periodically inundated by saline waters whether or not the saline waters reach the area naturally or through artificial water courses and those areas that are normally characterized by the prevalence of saline water vegetation capable of growth and reproduction. Provided, however, nothing in this definition shall apply to wetland areas that are not an integral part of an estuarine system. Further, until such time as the exact geographic extent of this definition can be scientifically determined, the Department shall have the authority to designate its approximate geographic extent."

1004:21]). Ms. Dailey testified she took photographs of Dr. Porcher's efforts to measure water depths and used a handheld GPS device to attempt to locate these spots. (R. p. 1401, [Transcript Page 705:11 to 705:15]). Ms. Dailey then created illustrations on aerial photographs which SCCCL sought to enter into evidence. According to Ms. Dailey, she used her computer and Photoshop® to manipulate the images as PDFs and then imported information from Google Earth in an attempt to demonstrate precisely where on satellite imagery the photographs were taken. (R. p. 1431-1432, [Transcript Pages 735:13 to 736:12]). The ALC denied SCCCL's request to certify Ms. Dailey as an expert witness. (R. p. 1425-1426, [Transcript Pages 729:5-11]; and R. p. 1426-1427, [Transcript Pages 730:11-25 to 731:1-5]). The ALC restricted Ms. Dailey's testimony to her observations and what she did. (R. p. 1429-1440, [Transcript Pages 733-744]). The ALC did not recognize Dr. Porcher as an expert in the field of critical area delineation, but certified him as an expert in the field of botany. (R. p. 1626-1627, [Transcript Pages 930-931]).

According to their testimony, Dr. Porcher and Ms. Dailey walked the length of the marsh sloughs on the Kiawah River side of Captain Sam's Spit. Dr. Porcher and Ms. Dailey timed their visits to coincide with king tides because they wanted to inspect these areas to see where water might be present during a tide that is significantly higher than a usual tide, as high as 7.2 feet. (R. p. 1714, [Transcript Page 1018]). Their testimony has limited value since the inundation of the uppermost reaches of these tidal sloughs during a king tide is not indicative of whether these locations should be classified as tidelands critical areas. Notably, SCCCL's own expert Mr. Alan Wood testified that areas inundated only during king tides would not be considered part of the critical area. (R. p. 1352-1354, [Transcript Pages 656-658]). Mr. Wood was qualified as an expert in the determination of critical areas while Dr. Porcher was not. Mr. Wood testified that a particular location must be inundated by the normal tide once or twice per week for it to be

considered critical area based on tidal inundation. (R. p. 1352-1353, [Transcript Pages 656:22-657:13]). There was no proof that the areas photographed by Ms. Dailey are "periodically inundated by saline waters" as required by the regulatory definition of tidelands.

SCCCL further failed to carry the burden of proof to establish that the locations where Dr. Porcher and Ms. Dailey observed water on a king tide were the precise locations they visited and photographed. Several proposed exhibits Ms. Dailey prepared were intended to depict the overlay of the project area in conjunction with data points on satellite imagery that Ms. Dailey combined using multiple methods. The ALC did not admit these proposed exhibits into evidence, because SCCCL failed to establish their accuracy to the requisite degree of scientific certainty. Even assuming that the GPS data discussed by Dr. Porcher and Ms. Dailey was accurate and reliable, SCCCL also failed to carry the burden of proving (1) the points identified by the GPS coordinates were tidelands critical area *at the time the CZC Certification decision and the permitting decisions were made*[6] and (2) the points identified by the GPS coordinates will be within the construction area of the project. As previously stated, **by the terms of the CZC Certification, no project activity may occur in the critical area**.

Likewise, SCCCL did not carry the burden of proof to establish that the areas Dr. Porcher and Ms. Dailey identified would qualify as tidelands critical areas based on the prevalence of saline water vegetation capable of growth and reproduction.[7] Dr. Porcher explained that as he moved up the sloughs, the vegetation included both freshwater plants and brackish plants. (R. p.

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[6] Dr. Porcher's and Ms. Dailey's site visits were made more than a year after the CZC Certification decision and the permitting decisions were made. (R. p. 1698, [Transcript Page 1002:17 to 1002:20]).

[7] In fact, Dr. Porcher testified that he did not know the salinity level of the water he observed in the sloughs, because he did not conduct a salinity test to determine if the water was fresh, brackish or saltwater. (R. p. 1802, [Transcript Page 1106:6-8]).

1643, [Transcript Page 947]). Dr. Porcher's testimony did not establish that these areas are characterized by the prevalence of saline water vegetation capable of growth and reproduction as required by S.C. Code Ann. Regulations §30-1.D(50). In fact, Dr. Porcher repeatedly testified that the plants he observed in the upper sloughs were brackish plants; he did not identify a prevalence of saline vegetation. (R. p. 1663-1675, [Transcript Pages 967-979 {especially 975-976}]; R. p. 1724-1728, [Transcript Pages 1028-1032]; and R. p. 1781-1782, [Transcript Pages 1085-1086]).

STANDARD OF REVIEW

This Court's review of the ALC's Orders are governed by the Administrative Procedures Act, which provides that the Court may reverse the decision of the ALC if the ALC's Orders are "(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary and capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(5); Bailey v. South Carolina Dept. of Health and Environmental Control, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010); also S.C. Code Ann. § 1-23-610.

ARGUMENT

I. The ALC did not err in affirming the Department's CZC Certification decision as the Department properly applied the "reasonable precautions" requirement of CMP Policy III.C.3.XIII(A)(2) for Barrier Islands.

When evaluating the ALC's affirmation of the Department's CZC Certification decision, it is important to keep in mind that the CMP's policies that are applicable to barrier islands do in fact contemplate the construction and development of barrier islands. The *Resource Policies*

portion of Section B (Summary of The South Carolina Coastal Program), Part 1 of the CMP states that "[b]arrier islands represent both a major economic resource and potential hazard for South Carolina. The Coastal Program policies provide specific guidance for the further *orderly development* of this resource." CMP Part I.B, page 8. (Emphasis added).[8] Furthermore, the CMP states that "[c]onstruction and development on barrier islands shall retain to the extent feasible existing dune ridges, drainage patterns and natural vegetation in landscaping and construction plans in order to maintain the value of the island as a storm buffer." CMP Chapter III.C.3.XIII(A)(1). While the CMP acknowledges that barrier islands like Kiawah Island will be developed, such development has restrictions. For example, the CMP cautions that "[b]ecause of their proximity to and strong ecological relationship with the critical areas of the coastal zone, project proposals for activities on barrier islands must demonstrate *reasonable precautions* to prevent or limit any direct negative impacts on the adjacent critical areas (beaches, primary dunes, coastal waters and wetlands)." CMP Chapter III.C.3.XIII(A)(2). (Emphasis added). The Department asserts that, contrary to Appellant's arguments, the May 2015 CZC Certification does in fact implement such "reasonable precautions" in accordance with CMP Chapter III.C.3.XIII(A)(2). CZCC special condition # 1 states that "[t]he permittee must submit an updated Critical Area Line for review and approval 30 days prior to initiation of construction. *Impacts to tidelands critical area associated with any aspect of construction or construction related activities is not authorized.*" (Emphasis added). CZCC special condition

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[8] CZC Project Manager (Curtis Joyner) testified in accordance with this policy as follows:

Question: "Curtis, do you think that there's any possibility that the policies of the Coastal Management Program and the Act itself could be seeking to discourage development in areas like Captain Sam's Spit?"

Answer: "I prefer the word manage. I think it allows us to manage coastal resources and impacts to them. We do it every day." (Transcript Page 1274:10 to 1274:17).

3 was included "[t]o ensure there are no impacts to the tidelands critical area..." These special conditions address the concerns Appellants advocate for and are "reasonable precautions," even in light of the significant erosion rates to which SCCCL's expert Dr. Rob Young testified.[9] (R. P. 1569, [Transcript Page 873:16 to 873:24]; and R. p. 1608, [Transcript Page 912:14 to 912:16]).

The "reasonableness" of special condition # 1 as a precaution was borne out by the testimony of Curtis Joyner and John Byrnes. Curtis Joyner was an OCRM Project Manager who testified that OCRM asked KDP for a current critical area line delineation when making this CZC Certification decision. This request triggered the Critical Area staff to delineate a new critical area line "multiple times." (R. p. 1972, [Transcript Pages 1276:18 to 1276:23]). KDP's expert witness, Mr. John Byrnes[10] testified at trial regarding the proposed location of the sheetpile wall and the critical area line along the "neck" area of Captain Sam's Spit.[11] Specifically, Mr. Byrnes testified that at two locations along the "neck" of Captain Sam's Spit (R. p. 2201, [Transcript Page 1506:4 to 1506:15]) where the sheetpile wall is to be located per the CZC Certification (identified at location # 4 and # 6 on Resp. Ex. Number 19 [R. p. 3562]), that these locations should both be considered critical area (R. p. 2220, [Transcript Page 1525:12 to 1525:22] and R. p. 2222-2223, [Transcript Pages 1527:19 to 1528:3]). If these two locations

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[9] Specifically, Dr. Young testified that along the banks of the Kiawah River, "[t]he erosion rate estimates are from, you know, from two to four feet a year up to eight feet a year, depending upon the data that you're looking at." (R. p. 1569, [Transcript Page 873:21 to 873:24]).

[10] Mr. Byrnes is a professional land surveyor with Seamon Whiteside and Associates Surveying in Charleston since 1980. (R. p. 2179-2180, [Transcript Pages 1484:21 to 1485:5]).

[11] In reality, Mr. Byrnes' testimony regarding critical area lines was not specific to the Department's two most-recent critical area delineations (May 31, 2016 and June 8, 2016) associated with the Cape Charles development permits and CZC Certification. Rather, he compiled five or six DHEC-approved critical area lines that were delineated between 2006 to 2016 (R. p. 3645, [Resp. Ex. Number 42]) and testified based on that compilation. (R. p. 2201, [Transcript Page 1506:4 to 1506:24]; and R. p. 2204, [Transcript Page 1509:21 to 1509:22]).

or any other possible locations where the proposed sheetpile wall are in the critical area when a new critical area line is delineated 30 days prior to initiation of construction, then **CZCC Special Condition # 1 prohibits any construction-related impacts to the tidelands critical area at these locations (including installation of the sheetpile wall).**[12] (R. p. 2004, [Transcript Page 1308:5 to 1308:9]). Thus, the CZC Certification demonstrates reasonable precautions to prevent or limit any direct negative critical area impacts and the Appellant's argument fails.

The Appellants also argue that there is no evidentiary support for "the ALC's conclusion that loss of this shoreline is 'speculative.'" (Appellant's Brief, p. 12). However, the Appellant misstates the ALC's holding. In reality, the ALC held, not that the loss is speculative, but rather that "*when* the loss of riverbank will occur and *the percentage* of the SSPW that will eventually be exposed is speculative." (*Amended Final Order*, page 31). (Emphasis added). This

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[12] The Department addresses this critical-area-intrusion issue as a future contingency (i.e., "if these two locations...") because the dynamic nature of the critical area often creates uncertainty when determining the extent of the Department's critical area permitting authority. In fact, this uncertainty is such an existential reality, that the General Assembly enacted S.C. Code Ann. § 48-39-210 to assist the Department in determining such authority in *only five year increments from the department date on the survey*. S.C. Code Ann. § 48-39-210(C). In particular, S.C. Code Ann. § 48-39-210(B) states that

> "[a] critical area delineation for coastal waters or tidelands established by the department is valid only if the line is depicted on a survey performed by a professional surveyor, the line is reviewed by the department, the department validates the location of the boundaries of the coastal waters or tidelands critical area on the survey by affixing a stamp and date to the survey, and the survey contains clearly on its face in bold type the following statement: 'The area shown on this plat is a representation of department permit authority on the subject property. *Critical areas by their nature are dynamic and subject to change over time. By delineating the permit authority of the department, the department in no way waives its right to assert permit jurisdiction at any time in any critical area on the subject property, whether shown hereon or not.*'" (Emphasis added).

The Department's two most-recent critical area delineations (May 31, 2016 and June 8, 2016) associated with Cape Charles and identified as Petitioner's Exhibit Number 3 (R. p. 3016) and Petitioner's Exhibit Number 5 (R. p. 3024) contained the above-referenced statement required by S.C. Code Ann. § 48-39-210(B).

conclusion of law by the ALC is not error. It is an uncontested fact that at the time the CZC Certification was issued, the sheetpile wall's permitted location was *not* in the critical area. Furthermore, the barrier islands section of the CMP does not give the Department the authority to completely prohibit KDP from protecting or developing their own private property. So even if the property boundaries of littoral property owners are subject to change as the mean high water mark changes, their private property rights, including the right to develop or make improvements to that property, remain.[13] The regulatory challenge at Captain Sam's Spit occurs because KDP's private property rights are being exercised at a location where the line between critical area and littoral property has shifted significantly over time. However, despite this challenge, "the government does not have unlimited power to redefine property rights." Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419, 439, 102 S. Ct. 3164, 3178, 73 L. Ed. 2d 868, 885 (1982) (citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980) ("a State, by *ipse dixit*, may not transform private property into public property without compensation")). If the Department were to follow the Appellant's interpretation of the CMP's barrier islands section so as to completely prohibit KDP from developing their own private property[14] (when such a ban is beyond the scope of the CMP), the State is potentially subject to

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[13] Appellant may argue in Reply that "[t]he extent of littoral rights in this jurisdiction is an unanswered question." Lowcountry Open Land Trust v. State, 347 S.C. 96, 109, 552 S.E.2d 778, 785 (Ct. App. 2001). However, the Court of Appeals in the Lowcountry Open Land Trust case was not addressing the private property ownership rights in the upland, but rather the "scope of an upland owner's *incidental property rights in tidelands*." Id. at 109. (Emphasis added). That is a separate and distinct issue from the matter before this Court.

[14] Appellant argues that the alternative to KDP's proposed development is "leaving the Spit in its present [undeveloped] condition and allowing for continuation of existing uses..." (Appellant's Brief, p. 21). Because Appellant makes no distinction between KDP's privately-owned upland and the public trust tidelands, Appellant would presumably have this Court apply their alternative-use argument to the entire Spit, including the upland owned by KDP. However, such an approach is also at odds with this Court's limitation on the Department's authority to prohibit upland

regulatory takings liability exposure per Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).[15]

Within this potential regulatory takings context, it is important to address an upland private property owners' right to exercise vigilance to prevent their private property from transitioning into public trust property subject to the control of the State. This Court addressed such a scenario in McQueen v. S.C. Coastal Council, 354 S.C. 142, 580 S.E.2d 116 (2003). In that case, Mr. McQueen filed a regulatory takings claim after the S.C. Coastal Council denied his critical area permit application to backfill his two lots and build bulkheads. Id. at 146, 580 S.E.2d at 118. Over a period of about thirty years, the majority of McQueen's two lots had reverted to tidelands or critical area saltwater wetlands because of "continuous" erosion. Id. at 146, 580 S.E.2d at 118. In denying McQueen's takings claim, this Court articulated how high the stakes are for private littoral property owners. Particularly, this Court held that "[p]roof that land was highland at the time of grant and tidelands were subsequently created by the rising of tidal water cannot defeat the State's presumptive title to tidelands." Id. at 150, 580 S.E.2d at

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development. In Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 766 S.E.2d 707 (2014), this Court stated that

> "Regulation 30-11 does not give DHEC any power to *prohibit* upland development; rather, DHEC only has the power to grant or deny a permit for a project in the critical area, and that decision may be based in part on the upland impacts that would result from the project." Id. at 36, 766 S.E.2d at 719 (2014) (Emphasis added).

While the Department does not concede that direct critical area regulatory authority governs the CZC Certification decision in this case, this Court's limitation on such critical area regulatory authority is instructive regarding limitations on the Department's ability to apply the CMP to the CZCC so as to prohibit KDP's development of Captain Sam's Spit.

[15] KDP filed a Summons and Complaint in the Charleston County Court of Common Pleas (Case No. 2009-CP-10-2847) alleging a Fifth Amendment regulatory taking and $100 million in damages for the Department's application of the critical area statutes and regulations regarding the bulkhead and revetment permit application at Captain Sam's Spit (R. p. 3770-3784). On June 15, 2018 the Circuit Court issued a *Third Amended Consent Order of Stay* for Case No. 2009-CP-10-2847 pending the final disposition of this appellate action. (R. p. 3785-3789).

120 (citing State v. Fain, 273 S.C. 748, 259 S.E.2d 606 (1979)). It was the "reversion to tidelands [that] effected a restriction on McQueen's property rights inherent in the ownership of property bordering tidal water." Id. at 150, 580 S.E.2d at 120. Before reversion occurs, private property owners, including KDP, can exercise vigilance to prevent upland property loss. In McQueen, this Court found that the upland property loss (and consequent economic loss) was caused "by the forces of nature and [Mr. McQueen's] own *lack of vigilance* in protecting his property." Id. at 150, 580 S.E.2d at 120. (Emphasis added).

In the case before this Court, McQueen provides important context to KDP's efforts to prevent their private property from "rever[ting] to tidelands"[16] by placing a sheetpile wall outside the critical area in the upland. Id. at 150, 580 S.E.2d at 120.[17] The expected tension that occurs between the private littoral property owner's exercise of vigilance and the Department's

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[16] Appellant SCCCL's counsel demonstrated how prone Captain Sam's Spit is to a *reversion to tidelands* by telling the ALC that "in 1949, an aerial photograph showing that there's no [Captain Sam's] spit there at all because it's a very dynamic system and it moves regularly..." (R. p. 768, [Transcript Page 72:5 to 72:8]).

[17] SCCCL may argue in its Reply Brief that based on Horry County v. Woodward, 282 S.C. 366, 318 S.E.2d 584 (Ct. App. 1984), KDP bears an inherent risk of property loss from erosion as a littoral property owner and has no right to fix the boundaries of its property by building a steel sheet pile wall. The Court of Appeals' stated the common law rule in Horry County v. Woodward, 282 S.C. 366, 318 S.E.2d 584 (Ct. App. 1984) that "lands gradually encroached upon by water cease to belong to the former riparian or littoral owner." Id. at 370, 318 S.E.2d at 586. However, this rule is irrelevant to KDP's effort to *prevent* their private property from reverting to tidelands critical area. Woodward merely addressed the common law rule in the context of the *effects* of accretion and erosion on the *ownership* of Bird Island when that ownership interest was being claimed by three different individuals (Edgar Woodward, Hazel Butler and Ralph Price) who all wanted the compensation Horry County was offering for a Fifth Amendment taking of the island. Id. at 368-69, 318 S.E.2d at 586. Unlike the dispute in Woodward, no person or entity other than KDP claims ownership of Captain Sam's Spit. The common law rule in Woodward does not require a private property owner such as KDP, whose upland ownership is not in question, to stand helplessly by and watch the effects of erosion cause their littoral upland property to disappear. Stated another way, the Woodward Opinion does not prevent a littoral property owner from taking measures through a legislatively-sanctioned permitting process to prevent the loss of its upland property due to erosion.

duties per CMP Chapter III.C.3.XIII(A)(1) is exacerbated in this case by a particularly dynamic environment where the tidelands critical area and upland property boundaries are continuously moving. Nonetheless, Special Condition # 1 of the Department's CZC Certification does satisfy the "reasonable precautions" requirement of CMP Chapter III.C.3.XIII(A)(2) and the ALC did not err in affirming the Department's Certification.[18]

II. The ALC did not err in finding S.C. Code Ann. § 48-39-30(D) inapplicable to the CZC Certification.

SCCCL argues that "[b]ecause the permitted project will undeniably impact the critical area, the ALC should have assessed whether those critical area uses would provide the maximum benefit to the people in accordance with Section 48-39-30(D)."[19] (Appellant's Brief, page 12). SCCCL cites this 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) as authority that (1) a statutory policy regarding use of the critical area (S.C. Code Ann. § 48-39-30(D)) must be applied *beyond the critical area* into the adjacent upland and (2) that the ALC erred by not applying 48-39-30(D)

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[18] The Department is neither "pro-development" nor "anti-development" when making permitting and CZC Certification decisions, but rather is like a baseball umpire calling "balls" and "strikes". However, it seems that KDP may be mistakenly arguing that the Department's 1999 extension of the baseline and setback line down the peninsula of Captain Sam's Spit towards the inlet is a "pro-development" position by the Department. For example on page 5 of its Initial Respondent's Brief, KDP argues that "*the Department opened the door for development* on the highland of KDP landward of the setback line." (Emphasis added). Again, on page 11 of its Initial Respondent's Brief, KDP argues that "the League ascribes no significance to ... *the designation of Captain Sams as developable by the Department* when it extended the jurisdictional lines in 1999." (Emphasis added). Simply stated, the Department is neither *for* nor *against* development when applying its statutes and regulations or the CMP.

[19] S.C. Code Ann. § 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. 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." (Emphasis added).

in its analysis of the Department's development permits and CZC Certification.[20] However, the ALC properly recognized that the statutory language itself restricts its application to the critical area.[21] While the Department unequivocally stands by its critical area permitting decision that was the subject of the above-referenced Kiawah Opinion, the Department is constrained by both the statutory language as well as the language of the CMP in the present CZC Certification decision. Specifically, S.C. Code Ann. § 48-39-30(D) addresses the usage of and impacts to *critical area*, not the adjacent upland. This limitation is confirmed by the CMP which states that "[t]he South Carolina Coastal Council employs a two-tier approach to management of activities having a direct and significant impact on coastal waters. The 'critical areas' will receive *more intensive attention* through the direct permitting system, while the remainder of the coastal zone will be managed through cooperation with other State agencies and their adherence to coastal program policies." CMP Part I.A, (page 6). (Emphasis added). The Department shares SCCCL's concerns regarding the Kiawah River eroding into the sheetpile wall and the probable adverse consequences thereafter. However, the Department does not understand its authority to apply a critical area statutory policy to a CZC Certification decision

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[20] Appellant cites the following excerpt from the Kiawah Opinion: "... it was clear that only the developer, not the public, would benefit from the construction of this enormous bulkhead and revetment" and that to "allow the benefits to a private developer to override the interest of the people of South Carolina undermines the statute and defeats the very purpose of the public trust doctrine." Id. at 30, 766 S.E.2d at 716.

[21] The ALC stated that, regarding S.C. Code Ann. § 48-39-30(D), "[t]he 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." (ALC's *Order Denying Motion for Reconsideration*, p. 17*)*.

based *only* on the admittedly-realistic concern that the erosion along the banks of the Kiawah River may or will place portions of the sheetpile wall in the critical area at some point *in the future*. The impacts from the development permits and CZC Certification authorized by the Department will occur in the upland outside the critical area. As this Court affirmed in S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 363 S.C. 67, 610 S.E.2d 482 (2005), "[a]s a creature of statute, OCRM has 'only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged.'" Id. at 74, 610 S.E.2d at 485 (citing Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991). While SCCCL asserts that the ALC erred in not applying S.C. Code Ann. § 48-39-30(D), the Department contends that CZCC special condition # 1 is the proper means of mitigating against the sandy shoreline disappearing adjacent to the sheetpile wall, based on the authority granted to the Department by the General Assembly.

III. The ALC did not err in applying the CMP policies on Public Access to Open Space per CMP Policy III.C.3.XII.D.(l) and SCCCL's reliance on CMP Policies IV.C.(4)(c)(2) and (3) related to Seawalls, Bulkheads and Revetments (Riprap) is misplaced.

KDP correctly argues that SCCCL mistakenly relies on the CMP section that "mandates the Coastal Council to develop a comprehensive *beach* erosion control policy,"[22] and consequently SCCCL erroneously argues that the Department's CZC Certification decision is controlled by this policy despite the fact that the CZCC had nothing to do with *beach* erosion. Expanding on KDP's argument at pages 14 to 21 of its Initial Respondent's Brief, SCCCL's reliance on the applicability of the first beachfront erosion control policy in CMP Policy IV.C.(4)(c) is also misplaced because sheetpile walls *in the upland adjacent to the critical area* are not considered or even mentioned in the evaluation of these five erosion control activities *in*

[22] CMP Policies IV.C.(1), page IV-51. (Emphasis added).

the critical area.[23] Yet SCCCL argues the ALC erred by not applying the policies articulated in CMP Policies IV.C.(4)(c)(2) and (3) that pertain to Seawalls, Bulkheads and Revetments (Riprap). "[S]tatutes authorizing administrative agencies to exercise powers tending to interfere with established or traditional property rights *are strictly interpreted.*" 3 Sutherland Statutory Construction § 65:2 (6th ed.). (Emphasis added). While the CMP is not a statute, this Court held in Spectre, LLC v. S.C. Dep't of Health & Envtl. Control, 386 S.C. 357, 688 S.E.2d 844 (2010) that it is, nonetheless, enforceable as regulatory authority. Id. at 370-371, 688 S.E.2d at 851. Accordingly, this general rule would properly govern SCCCL's argument and a "strict interpretation" of CMP Policies IV.C.(4)(c)(2) and (3) would exclude any requirement that seawall, bulkhead and revetment policies be applied to either the CZC Certification decision regarding the sheetpile wall or the ALC's review of that decision.

Finally, the South Carolina General Assembly enacted S.C. Code Ann. § 48-39-290(B)(2)(a) on June 25, 1990 banning new erosion control structures or devices seaward of the setback line. Accordingly, if the sheetpile wall was proposed to be located in either the *beaches* or *beach/dune system* critical areas instead of in the uplands adjacent to the *tidelands* critical area, S.C. Code Ann. § 48-39-290(B)(2)(a) would prohibit the installation of such a structure and the CMP section SCCCL relies on[24] would be superfluous.

IV. The ALC did not err in finding that the development project "will not take place in the critical area" based on "the current certified critical line from 2016."

[23] CMP Policy IV.C.(4)(c) directs OCRM to apply these policies in its review and evaluation of permits for the following five erosion control activities: (1) Seawalls, Bulkheads and Revetments (Riprap); (2) Groins; (3) Offshore Breakers and Jetties; (4) Artificial Beach Nourishment; and (5) Sand Dune Management.

[24] CMP Policies IV.C.(4)(c)(2) and (3), page IV-57.

SCCCL focuses on the ongoing movement of the Kiawah River shoreline, (i.e., "[t]he ALC acknowledged that the critical line had advanced even further landward by the time the League's expert had conducted another critical line survey in 2017. (Am. Order, p. 11)"). However, the Department makes a permitting decision and CZC Certification decision at a moment in time and may address ongoing concerns or future contingencies thru special conditions. The General Assembly sought to reconcile the fact of a very dynamic critical area by codifying a five year maximum time limit on critical area delineations. S.C. Code Ann. § 48-39-210(C). In fact, the General Assembly specifically recognized that saltwater stream banks, like the shoreline of the Kiawah River, fluctuate so much that the five year maximum time limit on critical area delineations along these banks needs to be an especially "fluid" constraint on the Department's critical area authority. Specifically, S.C. Code Ann. § 48-39-210(D) states that

> "[e]xceptions to [the five year limit on critical area delineations in] subsection (C) are eroding coastal saltwater stream banks where *it can be expected that the line will move due to the meandering of the stream before the expiration of the five year time limit* and where manmade alterations change the critical area line." (Emphasis added).

Such a constraint, while flexible, is nonetheless a limitation on the Department's critical area authority in the tidelands critical area and because the sheetpile wall was approved for installation *outside the tidelands critical area* and because Special Condition # 1 was included, the ALC did not err in this regard.

V. <u>The ALC abided by the rulings of this Court in KDP-I and KDP-II and did not violate their holdings or commit an error of law</u>.

Appellant claims that the ALC erred as a matter of law by allegedly rendering a decision that is contrary to the rulings of this Court in KDP-I[25] and KDP-II[26].

SCCCL argues that based on the rulings of the Court in the prior two opinions, any erosion control structure that reduces or eliminates a part of the sandy riverbank is inconsistent with the CZMP as a matter of law. SCCCL further asserts that since the project may ultimately cause the loss of a portion of the riverbank adjacent to the location of the in-ground SSPW, it is inconsistent with the CZMP. SCCCL's argument mischaracterizes the holdings of this Court.

In KDP-I, the Court's ruling did not prohibit a project even if it would result in the loss of a stretch of beach. Indeed, in regard to the proposed "huge bulkhead and revetment," the Court held that the loss of use of "the pristine sandy beach ... alone is not a valid reason to reverse the ALC's approval of a permit to construct a huge bulkhead and revetment there." 766 S.E. 2d 707 at 723. The case was remanded to the ALC to determine if there was countervailing public benefit under Section 48-39-30(D),[27] noting that solely economic benefit to the owner would not constitute benefit to the public. 766 S.E.2d 707 at 716.

In the bulkhead-revetment cases, there was no proof of public economic benefit. In this case, the ALC found that there was public benefit from protecting the Beachwalker Park parking lot

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[25] Kiawah Development Partners, II v. S.C. Department of Health & Environmental Control and South Carolina Coastal Conservation League, 411 S.C. 16, 766 S. E. 2d 707 (2014).

[26] Kiawah Development Partners, II v. S.C. Department of Health & Environmental Control and South Carolina Coastal Conservation League, 422 S.C. 632, 813 S.E.2d 691 (2018).

[27] S.C. Code Ann. § 48-39-30(D) "Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter."

and the conservation easement on the remainder of Captain Sams Spit. Those findings are conclusive if supported by substantial evidence. Appellant does not make a case that the ALC findings are not supported under the substantial evidence standard.

It is consistent with the rulings of this Court, for the ALC to conclude that loss of a portion of the riverbank at low tide does not prohibit a project. The CZMA and CZMP provide for the balancing of the various considerations which the Department staff and the ALC did.

There are other crucial differences between KDP-I and KDP-II and this case. Those cases involved a permit to construct a bulkhead-revetment in the critical area under the Department's direct permitting authority and associated statutes and regulations, including Section 48-39-30(D). The SSPW in this case is part of an upland project and the parties have stipulated to the sufficiency of its design. (R. p. 2064, [Transcript Page 1368:16-19] and R. p. 2067, [Transcript Page 1371:6]).

SCCCL also claims that the ALC erred as a matter of law by allegedly rendering a decision that is contrary to the rulings of this Court in KDP-I and KDP-II in regard to the "area" that can be considered for purposes of the cumulative impacts analysis. SCCCL asserts that the "area" must be confined to the peninsula of Captain Sams Spit.

SCCCL states that the "Court in KDP II did not say that the 'the area' includes uplands surrounding the critical area impacts, as the ALC incorrectly states." (Appellant's Brief, p. 31). Again, this mischaracterizes the holdings of this Court. However, this Court specifically held in KDP-I that is was legal error to restrain consideration to only the project area. This Court stated the CZMA and CZMP require the Department to "consider how projects within the critical area may affect the broader coastal zone." 766 S.E. 2d 707 at 719.

This Court held that "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." 766 S.E. 2d 707 at 719. Rather than determining a specific area that must be considered for a cumulative impacts analysis, this Court held the Department's interpretation that "area" includes more than the critical area was entitled to deference because it was "neither arbitrary, capricious, nor manifestly contrary to the statute." 766 S.E. 2d 707 at 719. The ALC correctly stated that "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." (*Order Denying Motion for Reconsideration*, p. 12; *Amended Final Order*, p. 28).

The determination of "area" for purposes of the cumulative impacts analysis is fact specific. Appropriately, significant weight was given to the testimony of Mr. Joyner, the Department staff member who conducted the consistency review. "The agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence." S.C. Code Ann. § 1-23-330(4). He "explained, 'for those of us who use and interact with the enforceable policies, they're very broadly written.'" (*Amended Final Order*, p. 30; Transcript Page 1256:12-15). As the testimony of Joyner and the Department's written consistency review demonstrate, OCRM conducted a cumulative impacts analysis that considered the "area" for purposes of the cumulative impacts analysis to be larger than the project site, just as this Court ruled in KDP-I. (R. p. 1952-1953, [Transcript Pages 1256:9-1257:9]; and R. p. 3462, [Pet. Ex. 41, p. 6]). The record supports the ALC's finding that the general character of the area

is residential, as the Department determined. (*Amended Final Order*, p. 30 - "Having defined the scope of the area, the Court also agrees with the Department's factual determination that the general character of the area is residential").

The fact-specific cumulative impacts analysis of the CZMP, which is a guideline for all projects that do not seek a critical area permit, states:

> In review and certification of permit applications in the coastal zone, the Coastal Council [now OCRM] will be guided by the following general considerations (apply to erosion control and energy facility projects, as well as activities covered under Resource Policies): * * *
>
> 7) 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."
>
> GUIDELINES FOR EVALUATION OF ALL PROJECTS, CZMP III.C.3.1(7), at III-14.

As the wording itself attests, the "area" must be distinct from the "project." It is the effects of the "project" that are considered "in the context of other possible development and the general character of the area."

Joyner considered the "area" for purposes of the cumulative impacts analysis to be larger than the project site, just as this Court ruled in KDP-I. (R. p. 1952-1953, [Transcript Pages 1256:9-1257:9]; and R. p. 3462 [Pet. Ex. 41, p. 6] - "The current general character of Kiawah Island is beachfront development consisting of both single family and multi-family habitable structures. Across the Kiawah River from Captain Sams is Seabrook Island [that] also includes single and multi-family habitable structures"). The ALC's finding, consistent with Joyner's, that the area in the coastal zone to be considered is Kiawah Island and the portion of Seabrook Island directly across from Captain Sams complies with, rather than transgresses, the holding of this Court in KDP-1.

Here, the ALC found facts that supported the Department's determination that the area "'included parts of Seabrook and the rest of Kiawah'" since "'Seabrook is immediately across the Kiawah River from Captain Sam's Spit and Kiawah, parts of it are directly connected, too.'" (*Amended Final Order*, p. 21). Consequently, the ALC found that "residential development for the Spit is in keeping with the general character of the area." (*Amended Final Order*, pp. 21-22, p. 30). The ALC stated that "including the portion of Seabrook Island directly across from the Spit is also rational and logical considering their proximity." (*Amended Final Order*, p. 30). The aerial photos show that the Seabrook peninsula directly across the Kiawah River on the inlet side of Captain Sams is fully developed as residential lots, most with docks. (R. p. 3575, [Resp. Ex. 35]; R. p. 3652, [Resp. Ex. 45]; R. p. 3010, [Pet. Ex. 1]; and R. p. 3469, [Pet. Ex. 44]). Additionally, the wooded land immediately to the East of Beachwalker Park is in the process of being developed as a condominium project. (R. p. 2256-2257, [Transcript Pages 1561:22-1562:13]). This proof in the record supports the ALC's finding that the general character of the area is residential, just as the Department determined. (*Amended Final Order*, p. 30 - "Having defined the scope of the area, the Court also agrees with the Department's factual determination that the general character of the area is residential").

SCCCL contends the ALC improperly deferred to the Department's determination of the "area." Although the ALC rightly found that the Department's determination of the "area" was supported by the proof and rational, the ALC also made his own determination that the area as well as the general character of the area is residential. (*Amended Final Order*, pp. 21-22, pp. 30-31). The ALC's finding that "residential development for the Spit is in keeping with the general character of the area" is supported by substantial evidence. (*Amended Final Order*, p. 22).

Nothing in the ALC's consideration of cumulative impacts - both as to the area to be considered and the impacts of the future limited residential development and the in-ground SSPW - runs afoul of the legal rulings in KDP-I and KDP-II.

VI. The ALC correctly determined that neither the doctrine of collateral estoppel nor judicial deference binds the ALC to the cumulative impacts assessment of the Department staff person who evaluated the bulkhead-revetment in 2008 in a different proceeding.

SCCCL argues that under the doctrines of collateral estoppel and deference to agency interpretation, the ALC was obligated to abide by the cumulative impacts assessment and consistency determination made by OCRM staff member Bill Eiser in 2008 in acting on the application for a permit for the bulkhead-revetment. SCCCL also argues that because the Eiser staff decision and the Joyner staff decision are inconsistent, the one made by Joyner in this case is not entitled to deference.

The ALC correctly rejected these arguments. SCCCL asserts that the ALC committed a legal error in deferring to Joyner's staff assessment for this project and in failing to defer to Eiser's decision on KDP's application for the bulkhead-revetment.

Here the ALC gave deference to the agency's construction of the term "area" as used in Guideline 7 for the evaluation of all projects by considering more than the project area: "[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." GUIDELINES FOR EVALUATION OF ALL PROJECTS, CZMP III.C.3.1(7), at III-14. The ALC considered the uplands and the vicinity surrounding Captain Sams, just as Department staff member Joyner had done in his cumulative impacts assessment - both in keeping with the agency's construction of the term "area." The determination of what was the "area" in this case was fact specific, to be determined based on the evidence presented in this case. The doctrine of deference does not

require the program staff or the Board or the ALC in this case to accept Eiser's 2008 assessment of what constituted the "area" for a different application.

Likewise, Eiser's staff assessment in 2008 on an entirely different project does not satisfy the elements for collateral estoppel. "Under the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, re-litigation of those issues actually and necessarily litigated and determined in the first suit is precluded as to the parties and their privies in any subsequent action based upon a different claim." Richburg v. Baughman, 290 S.C. 43 1, 351 S.E.2d 164, 166 (1986). Eiser's staff assessment in 2008 was not an adjudicated finding in a final judgment on the merits.

Additionally, SCCCL's *inconsistency argument* does not provide a basis for relief. While SCCCL argues that the two staff determinations are inconsistent, SCCCL does not cite any precedent that holds that an agency staff cannot make differing factual determinations on different applications or on the legal significance of inconsistent staff determinations. The cases cited by SCCCL are inapposite to the inconsistency issue raised by it. The cited cases address whether an agency's inconsistent interpretation of a statute or regulation is entitled to deference. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987); Encino Motorcars, LLC v. Navalto, 136 S. Ct. 2117 (2016). The alleged inconsistency here is not one involving construction of the meaning of a regulation, but the application of the regulation to different facts by different staff members involving different projects.

Finally, the ALC's conclusion that SCCCL is barred from raising collateral estoppel and res judicata because it did not raise either one in its Prehearing Statement or at the contested case hearing is legally correct. (*Order Denying Motion for Reconsideration*, pp. 8-9). The fundamental principles of issue preservation bars SCCCL from raising these issues for the first

time in its motion to reconsider. See C.A.H. v. L.H., 315 S.C.389, 434 S.E.2d 268 (1993) and Anderson Memorial Hosp., Inc. v. Hagen, 313 S.C.497, 443 S.E.2d 399 (Ct. App. 1994) (Supreme Court and Court of Appeals ruling a party cannot raise an issue for the first time in a motion to reconsider).

VII. Diamondback terrapins and bottlenose dolphins are irrelevant to the Department's CZC Certification decision.

At trial, the Department objected to the relevance of expert testimony pertaining to diamondback terrapins and bottlenose dolphins since these are non-threatened and non-endangered species and would fall under CMP Policy II.C3.VII ("Wildlife and Fisheries Management"). (R. p. 963, [Transcript Page 267:11 to 267:17]). The reason such testimony is irrelevant is because (1) this section of the CMP applies to wildlife management and KDP is not managing wildlife with these development permits and CZC Certification decision[28] and (2) SCCCL never raised this section of the CMP as an issue in its Prehearing Statement. (R. p. 962-980, [Transcript Pages 266:4 to 284:14).

The ALC initially allowed all expert testimony pertaining to turtle and dolphin habitat merely as an offer of proof,[29] but later found it to be admissible in its *Amended Final Order* as part of the long-range, cumulative effects analysis per CMP Policy III.C.3.I(7). The ALC correctly stated in its *Amended Final Order* that both Sierra Club v. South Carolina Department of Health & Environmental Control, 387 S.C. 424, 693 S.E.2d 13 (Ct. App. 2010) and SCALC Rule 14 require the parties to set forth the issues with "particularity" in Prehearing Statements.

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[28] Curtis Joyner (CZC Project Manager) testified that the reason he did not apply the Wildlife and Fisheries Management policies in his CZC Certification decision is "simply because they're [KDP] not doing wildlife management on the property." (R. p. 2039-2040, [Transcript Pages 1343:24 to 1344:2]).

[29] (R. p. 968, [Transcript Page 272:1-21]).

(*Amended Final Order*, page 16). Because SCCCL "list[ed] specific provisions of the CMA and CZMP, [but did] not to include CZMP Policy III.C3.VII, which governs Wildlife and Fisheries Management,"[30] the ALC drew the following conclusion of law:

> "Therefore, unlike in Sierra Club where Sierra Club was able to assert an issue by raising the issue of compliance with a regulation in general, Coastal did not state its issues broadly enough to encompass a general violation of the CZMA or CZMP such that it can argue the Department failed to properly consider the Wildlife and Fisheries Management section of the CZMP. The Court will thus not consider the Wildlife and Fisheries Management section of the CZMP in its review. Accordingly, neither the Department nor KDP will suffer any prejudice in this regard." (*Amended Final Order*, page 16).

The Department agrees that the lower court's analysis regarding CMP Policy II.C3.VII ("Wildlife and Fisheries Management") under Sierra Club was correct. Furthermore, because SCCCL did not appeal the ALC's application of Sierra Club, this conclusion of law regarding CMP Policy II.C3.VII ("Wildlife and Fisheries Management") is the law of the case.[31]

Accordingly, based on this authority, the ALC should have stopped its evaluation at this point and denied all testimony and evidence related to the diamondback terrapin and the bottlenose dolphin. Instead, the ALC erroneously considered the expert testimony of Dr. Travis H. Folk (KDP), Dr. Whit Gibbons and Dr. Robert F. Young (SCCCL) regarding the diamondback terrapin and the bottlenose dolphin under the premise that "the Court finds it has jurisdiction to review the issue of the impact of the proposed project on non-threatened and non-endangered species such as diamondback terrapins and bottlenose dolphins because the impact on these species could be considered part of the long-range, cumulative effects of the project. *See* CZMP

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[30] (*Amended Final Order*, page 16).

[31] The law of the case doctrine "holds that a decision on an issue of law made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same litigation." Flexon v. PHC-Jasper, Inc., 413 S.C. 561, 572, 776 S.E.2d 397, 403 (Ct. App. 2015) (quoting In re Grossinger's Assocs., 184 B.R. 429, 434 (Bankr. S.D.N.Y. 1995).

Policy III.C.3.I(7)." (*Amended Final Order*, page 16). All parties to this action agree that neither of these species are on the Federal or State Endangered Species lists. Yet over 300 pages of the trial transcript (and more than a day of the trial) was devoted solely to the testimony of these expert witnesses regarding turtles and dolphins, despite the fact that the ALC acknowledged that "the connection between diamondback terrapins and bottlenose dolphins and the long-range cumulative effects of a project in the context of 'other possible development and the general character of the area'[32] is *tenuous*..." (*Amended Final Order*, page 16). (Emphasis added). A significant concern is the potentially onerous burden placed on CZC Project Managers who, because of this CMP interpretation, may be required to start considering the habitat of virtually any and all non-endangered species at a proposed project location as part of a long-range cumulative effects analysis under CMP Policy III.C.3.I(7). For example, despite the fact that Appellant's turtle expert (Dr. Whit Gibbons) testified that "terrapins *will* nest in other areas in that region"[33] (referring to areas *other than* Captain Sam's Spit), Appellant argues that diamondback terrapins must be considered in the CZC Certification decision as a "coastal resource" because they are a "wildlife resource." (R. p. 2040, [Transcript Page 1344:7 to 1344:21]).[34] The ALC's expansive application of CMP Policy III.C.3.I(7) potentially leads to the

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[32] CZMP Policy III.C.3.I(7).

[33] R. p. 981, [Transcript Page 285:14 to 285:15]. (Emphasis added).

[34] Even though Appellant asserts at page 49 of their Initial Appellant's Brief that "DHEC's Joyner admitted that plants and animals are coastal resources and that the agency must consider impacts to those resources," the following colloquy demonstrates that Appellant's Counsel merely asked Curtis Joyner if the diamondback terrapin is a "wildlife resource":

> Question: "...you don't disagree that OCRM has management authority over coastal resources?"
> Answer: "No, I do not."
> Question: "And would diamond back terrapins be a <u>*wildlife resource*</u>?
> Answer: "I would assume so. I don't know that they're endangered ---"
> Question: "I'm not talking about ---"
> Answer: "--- sitting here today."

time-consuming and infeasible requirement that Project Managers must consider the habitat of every animal known to inhabit a proposed project site as long as there is at least a "tenuous" connection with the long-range cumulative effects of a project in the context of "other possible development and the general character of the area."[35] Surely the ALC did not intend such an unreasonable result with this evidentiary ruling, but by not articulating a limiting principle, the ALC arguably created a burden for CZC Project Managers to consider the habitat of every animal at a project site. For this reason, the Department asserts that the ALC's application of CMP Policy III.C.3.I(7) regarding the habitat of turtles and dolphins was beyond the scope of the plain meaning of the text and was error per S.C. Code Ann. § 1-23-610(B) and S.C. Code Ann. § 1-23-380(5).[36]

Question: "Sure. I'm talking about generally, coastal resources and specifically -- I think – would you agree that wildlife resources are one of the coastal resources under the bounty of coastal resources that we have?"

Answer: "Yeah, I think we would consider that."

(R. p. 2040, [Transcript Page 1344:7 to 1344:21]).

[35] CZMP Policy III.C.3.I(7).

[36] The Department argues this matter in its Respondent's Brief in reliance on I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000). In that case, this Court held that "[u]nder the present [appellate court] rules, a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." Id. at 419, 526 S.E.2d at 723. The reason the appellate court rules were amended was to "allow a more flexible process." Id. at 418, 526 S.E.2d at 722. "[T]he present [appellate court] rules provide simply that 'respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c), [SCACR].' Rule 208(b)(2), SCACR. Rule 220(c), in turn, provides that 'the appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal.' Id. at 418, 526 S.E.2d at 722. I'On decrees that the Department, as the "winner" in the lower court, does not bear the responsibility of appealing those findings of fact which the Department disagrees with in order to preserve those arguments for appellate review. I'On stresses the principle of judicial economy by not requiring litigants to resolve unnecessary questions. Id. at 419, 526 S.E.2d at 723. To this point, Justice Waller stated that "[i]t would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review." Id. In this instance, requiring the Department to file a Notice of Appeal about the ALC's finding regarding the applicability of CMP Policy III.C.3.I(7) ("long-range, cumulative effects of the project") when

CONCLUSION

WHEREFORE, for the reasons stated above, with the exception of the ALC's CMP Policy III.C.3.I(7) application to dolphins and turtles, the Department respectfully requests that the Court affirm the ALC's Orders appealed by SCCCL.

Respectfully submitted,

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August 26, 2020
Charleston, South Carolina

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the ALC issued an Order affirming the Department's CZC Certification decision, would force the Court to answer an unnecessary question and further encumber an already over-burdened system.

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Aug 26 2020

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

Appellate Case No. 2019-000074

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

v.

South Carolina Department of Health and Environmental Control, KDP II, LLC, and Kiawah Development Partners, II ..... Respondents.

CERTIFICATE OF COUNSEL

I certify that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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