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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

Docket No. 15-ALJ-07-0369-CC
Appellate Case No. 2019-000074

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

v.

South Carolina Department of Health and Environmental Control, KDP II, LLC, and KRA Development, LP, ... Respondents.

BRIEF OF APPELLANT SOUTH CAROLINA COASTAL CONSERVATION LEAGUE

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August 27, 2020

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STATEMENT OF ISSUES ON APPEAL

I. **WHETHER DHEC AND THE ALC ERRED IN AUTHORIZING A STRUCTURE THAT WILL ELIMINATE PUBLIC ACCESS TO AND USE OF CRITICAL AREA PUBLIC TRUST TIDELANDS?**

II. **WHETHER THE ALC ERRED IN AFFIRMING A PERMIT DESPITE AN EXPLICIT ACKNOWLEDGMENT THAT THE PROJECT CANNOT BE CONSTRUCTED AS PERMITTED AND IN ACCORDANCE WITH THE PERMIT CONDITIONS?**

III. **WHETHER DHEC AND THE ALC'S DECISIONS ARE INCONSISTENT WITH THIS COURT'S HOLDINGS IN *KDP I* AND *KDP II* AND, IF SO, WHETHER DHEC AND THE ALC ARE COLLATERALLY ESTOPPED FROM ARRIVING AT THOSE INCONSISTENT DECISIONS?**

IV. **WHETHER THE ALC'S ORDER VIOLATES STATE POLICIES AND IS UNSUPPORTED BY THE SUBSTANTIAL EVIDENCE?**

STATEMENT OF THE CASE

This case arises from the South Carolina Department of Health and Environmental Control's ("DHEC") decision authorizing KPD II and KRA Development, LP, ("KDP") to construct a 2,380-linear-foot steel sheet pile wall along the banks of the Kiawah River, along with an access road, gravity sewer line, manholes, a pump station, force main, and water lines to facilitate the first phase of a fifty house residential development on Captain Sams Spit, Kiawah Island. DHEC authorized the permit and certification on May 28, 2015. (R. pp. 2952-2963). The Coastal Conservation League ("League") filed timely challenges to the agency decisions before the DHEC Board on June 12, 2015, and the Administrative Law Court on August 4, 2015. (R. pp. 172-230).

KDP filed a motion to partially lift the automatic stay to allow construction of the 2,380' steel wall, which Administrative Law Judge Ralph King Anderson, III, granted on November 4, 2015. (R. pp. 158-170). The League filed a petition for extraordinary relief to enjoin the lifting of the stay in this Court, which was granted on November 20, 2015. (R. pp. 156-157).

The ALC conducted a contested case hearing on August 21-25 and 28-29, 2017. On September 24, 2018 the ALC issued a Final Order and Decision affirming the permit and certification in all respects. (R. pp. 89-137). On September 25, 2018, the League filed a motion for stay pending appeal, which the ALC granted on December 14, 2018. (R. pp. 75-87). The League filed a timely motion for reconsideration, which was followed by an Order Denying Motion for Reconsideration and an Amended Final Order and Decision, which were also issued on December 14, 2018. (R. pp. 55-73). On January 14, 2019 the League filed a notice of appeal with the Court of Appeals. On May 17, 2019 the League filed a motion to transfer with this Court.

STATEMENT OF FACTS

The Nature of Captain Sams Spit

Captain Sams Spit is an approximately 170-acre barrier island spit adjacent to Captain Sams Inlet at the Southwest end of Kiawah Island. (Joint Ex. 5; R. p. 2948). The Spit is a sandy land formation and is surrounded on three sides by water – the Atlantic Ocean, the inlet and the Kiawah River. (Pet. Ex. 1, R. pp. 3010(a)-3010(c); Pet. Ex. 2, R. pp. 3011-12; Pet. Ex. 15, R. pp. 3362-63). It is one of only three places in all of South Carolina where the public has access and can experience a pristine, undeveloped barrier island spit. (R. p. 1863). As such, the Spit is a well-loved and well-used state treasure. It is publicly accessible (1) by land through the adjacent Beachwalker Park, which consists of a parking lot and restroom facilities, and (2) by water via the Kiawah River.

Because of the Spit's geography, it is highly dynamic and has been completely underwater at least three times in recorded history. (R. pp. 901-05, 2123; Pet. Exs. 4A, 4B, 5, 6, R. pp. 3023-3212); *See also Kiawah Development Partners, II, Inc. v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 766 S.E.2d 707, 716 (2014) (hereinafter "*KDP I*"). Dr. Miles Hayes described his 1970s study of Kiawah Island's history and erosion, surveying the interdial zone every two weeks for a year at twelve permanent sites. (R. pp. 898-99). He identified nautical charts which showed that in 1822 and 1922 the spit was gone. (R. p. 901; Pet. Exs. 4A & 4B, R. pp. 3023). He identified aerial images from 1949 which also showed that the spit was gone. (R. p. 905; Pet. Ex. 5, R. p. 3024).

The ALC found that the Spit is "geographically and morphologically unstable" as inlets, like Captain Sams, are the most dynamic part of our coast. (Am. Order, p. 6, R. p. 7). DHEC describes Captain Sams Spit as a fragile coastal resource. (R. pp. 1943, 3456-64).

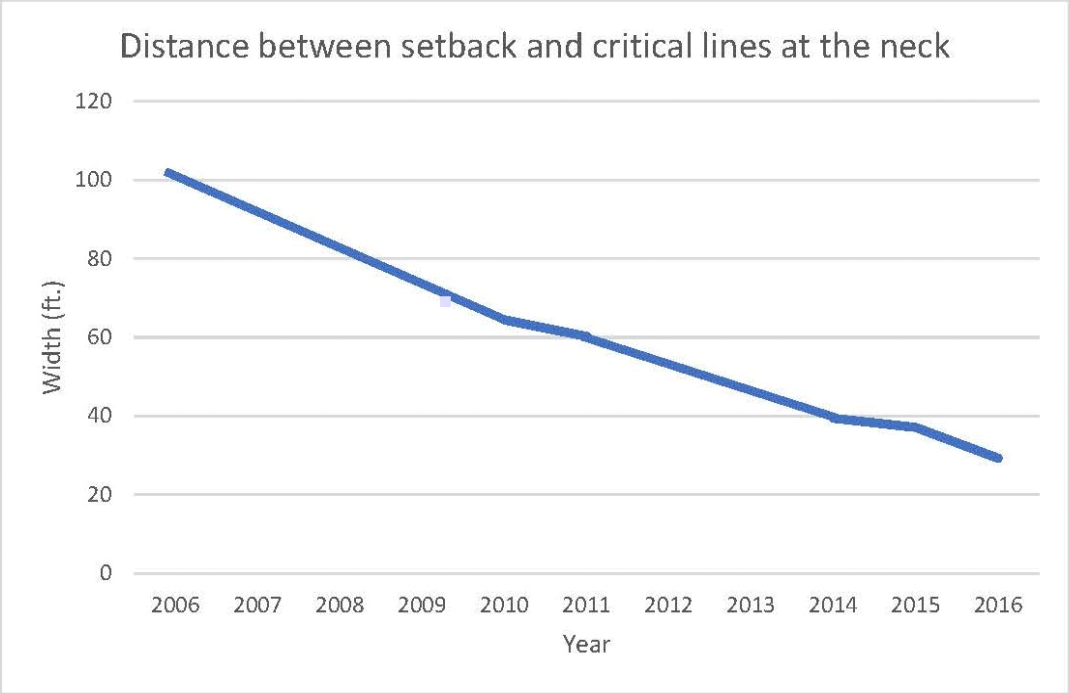
The League's Dana Beach explained that Captain Sams Spit is "one of the least stable land forms on the coast. And so that is why it is also one of the least appropriate areas for permanent habitation," which led the CCL to appeal the authorizations. (R. p. 828, lines 16-19). Rich Thomas has observed "considerable erosion" over the course of 8-9 years, both on the river side, as well as on the beachfront after Hurricane Matthew. (R. p. 876, lines 17-18, lines 4-9).

Although Captain Sams Spit has been accreting, during Hurricane Matthew - a Category 1 storm – the first row of dunes and part of the second row of dunes were lost. (R. p. 1540). Captain Sams Spit experienced 120 feet of erosion (Am. Order, p. 6: R. p. 7), compared to 30-40 feet of erosion in the central part of Kiawah Island. (R. p. 1544). This difference is expected because "Captain Sams Spit is far more exposed to multiple coastal hazards than the central part of Kiawah." (R. p. 1548, lines 1-3).

Tim Kana, KDP's expert, explained that the end of the spit is moving towards Seabrook Island at a rate of about 200 feet per year. (R. p. 2095). The spit's growth is what "forces Captain Sam's Inlet to migrate from east to west." (R. pp. 2096, line 24 - 2097, line 1; KDP Ex. 29, R. p. 3569). Kana acknowledged that Captain Sams Spit, bounded by a shallow inlet, is unstable in its geographic location. (R. p. 2124).

While the Spit is experiencing accretion on the oceanfront, the river has been eroding causing the neck – the narrow strip of land connecting Captain Sams to the mainland of Kiawah – to narrow between 2006 and present. (Am. Order, p. 7, R. p. 8; R. p. 2128; Pet. Ex. 1, R. pp. 3010(a)-3010(c)).

Due to the persistent erosion, DHEC has approved multiple critical line[1] delineations over time which reflect that the neck, where the road and steel wall would cross, is narrowing. (R. pp. 2203-04). Between 2010 and 2016 the critical line moved landward 10.38 feet at the neck. (Resp. Ex. 42, R. p. 3645-47; R. p. 2202).



Critical Line Year	2010	2011	2014	2015	2016
Distance between 2009 Setback and critical line	64.43 feet	60.26 feet	39.41 feet	37.06 feet	29.25 feet

[1]Critical areas are defined as coastal waters; tidelands; beaches; and the beach/dune system. S.C. Code Ann. § 48-30-10(J). DHEC has authority to determine the critical area boundaries and to delineate coastal waters or tidelands in accordance with the process set forth in S.C. Code Ann. § 48-39-210(B). Critical lines are typically valid for five years, except for eroding coastal saltwater stream banks where it can be expected that the line will move before the expiration of the five year time limit. S.C. Code Ann. § 48-39-210 (D).

(Pet. Ex. 1, R. pp. 3010(a)-3010(c); Pet Ex. 12, R. p. 3359; Joint Ex. 2, R. pp. 2689-93; Joint Ex. 5, R. pp. 2948-51; Am. Order, p. 7, R. p. 8).

Public Use of Captain Sams Spit and the Kiawah River

Five members of the Coastal Conservation League testified regarding their long-standing access and use of the Spit and Kiawah River.

Dana Beach explained that "we've had a stronger response to [Captain Sams Spit] from our membership than any, I guess, almost any issue we've ever been involved with." (R. p. 842, lines 23-25). "People identify with this area because it is one of the great last refuges on the coast where you can go see the birds and I think people, not only do they want to see them, but they just care that there's a place for them." (R. p. 843, lines 7-12).

League member Rich Thomas testified that he lives on Johns Island about 2-3 miles from Kiawah Island. (R. 855-56). Typically every week for the past 8-9 years he rides his bike to Captain Sams Spit. (R. 856-57). He enjoys seeing the "land, animals, birds, the dolphins, the turtles, . . . other sea creatures. All very pleasant and enjoyable to see so close to where I live." (R. p. 858, lines 17-20). He also kayaks in the river, and sees paddle boarders, kayakers and boaters fishing or going to view the dolphins along the back side of the Spit. (R. 856 & 859; Pet. Ex. 3, R. pp. 3013-22). Paddle boarders and other recreational users of the river pull up on the Spit near the neck, where the steel wall is proposed, at low tide. (R. pp. 869-70). Mr. Thomas also pulls up his kayak onto the sandy beach along the river and walks around. (R. p. 870). He has observed dolphins strand feeding on the "backside where the neck is . . . up and down that area . . . on the spit side" from both the bank of the river and from his kayak in the river. (R. p. 872, line 6). Thomas took photographs reflecting the public's use on one particular day (Pet. Ex. 3, R. pp. 3013-22), but he "quite often" sees people out using the river along the spit, particularly

in the summer. (R. p. 872, line 24). Based on the drawings in Joint Ex. 7, the proposed steel wall would be adjacent to the shoreline where Thomas observes the public recreating. (R. p. 884; Pet. Exs. 2 & 3, R. pp. 3011-22).

League member George Finly was in the construction supply business for 30-35 years and has owned a cottage at Inlet Cove on Kiawah since 2011. (R. p. 1030). Inlet Cove is the closest neighborhood to the spit. (R. pp. 1031-32). He and his family boat, kayak and fish on the Kiawah River. (R. pp. 1032-33). He describes the river as "a beautiful spot" that is "pretty peaceful" and "unspoiled" for watching dolphins and other kayakers enjoy the river. (R. p. 1034, lines 18-21, R. p. 1035, line 1). He hops off his kayak, stretches his legs and takes a dip from the sandy beach area along the spit, which he describes as "a great spot. I've seen dolphin strand feed there." (R. p. 1040, lines 20-21). The permitted wall, road and development would adversely affect his use because even if "tastefully done, certainly takes away the natural pristine feel of the whole place." (R. p. 1039, lines 4-5).

League member George Meriwether has been going to Kiawah for over 40 years, since he was a child, and typically goes to Captain Sams Spit once a month. (R. pp. 1048-50). When he was growing up Kiawah had 17-18 houses, but the "development . . . transformed it" and now "this particular spit is . . . one of the few places left that's not dramatically developed." (R. p. 1052, lines 4-7). He and his wife enjoy the beach from Beachwalker Park, but more than that they kayak and boat in the river. (R. p. 1049). Sometimes they kayak all the way to the ocean, but often they beach the boats along the river and enjoy a swim from the river bank. (R. p. 1050). The area is "very attractive to the kayak and paddling and boating community. We saw, you know, 20 or more kayaks, plus paddle boards . . . this weekend before last." (R. p. 1053, lines 2-6). "It's harder and harder to find a place that's not got a dramatic amount of development . . .

it's not as easy to find a waterway where you can go and have public access and enjoy a very nice kayak stretch . . . you can picnic or something on the [river] beach . . . and then come back. . . it's something where you've got a lot of unusual wildlife activity. So if you are interested in paddling and wildlife, it's got a combination of appeal that's hard to find." (R. pp. 1053, line 12 – 1054, line 1).

League member Sidi Limehouse grew up on Johns Island right across from Kiawah. (R. pp. 1363-64). He also grew up going to Captain Sams Spit and describes it as all white beach sand from the river to the ocean. (R. pp. 1375-77). Limehouse takes people to Spit and he "always" sees people either using the Kiawah River or on its banks. (R. p. 1381). He is concerned because "what this wall would do is eliminate the public's property." (R. p. 1386, lines 2-3).

Chad Hayes, a licensed charter captain, has worked as a naturalist at Kiawah and then later with the Department of Natural Resources, and currently provides ecotours in the Kiawah River. (R. pp. 1063-65). He often observes numerous birds, fish and other wildlife, as well as kayakers, paddleboarders, and people biking, fishing and walking along the sandy banks of the river in the location of the proposed road and steel wall. (R. p. 1073).

Bill Eiser, the former DHEC employee who reviewed permits related to the Captain Sams Spit development, explained that the public uses the sandy beach along the Kiawah River: "You would see kayaks pulled up and people walking along that beach." (R. p. 1836, lines 17-19).

The Permitting History

For over a decade, KDP has attempted to harden the natural, undisturbed shoreline of the Kiawah River with various hard erosion control structures, resulting in a prolonged permitting and litigation history surrounding it proposed development on Captain Sams Spit. On December 18, 2008, DHEC denied the majority of KDP's application to for a 2,783-foot long, 40-foot wide vertical bulkhead wall and revetment system along the Kiawah River shoreline to facilitate residential development on Captain Sams Spit, instead authorizing only a 270-foot section along the edge of the parking lot at Beachwalker Park. The League challenged that permit, and on January 22, 2010, the ALC reversed the Department's denial, authorizing the full length of the wall and revetment structure with minor limitations. The League and DHEC appealed the adverse ALC ruling, which culminated in three rounds of oral arguments and opinions issued by this Court. On December 10, 2014, this Court issued its third Opinion finding that KDP's proposed erosion control structure would eliminate public tidelands solely for a private economic gain and result in significant long-range cumulative impacts to a valuable state treasure in violation of state policies and regulations. *See KDP I*. This Court reversed and remanded to the ALC to issue findings consistent with its Opinion. *Id.*

On March 22, 2016, the ALC issued an amended final order and decision on remand authorizing the entire 2,783-foot length of vertical bulkhead wall, but eliminating the 40-foot wide revetment except for the 270-foot length adjacent to Beachwalker Park. On appeal, on April 18, 2018, this Court overturned the vertical bulkhead wall portion of the structure, ruling that such structure would ultimately fail without the revetment and would and result in an unacceptable loss of the public trust shoreline of the Spit. *Kiawah Dev. Partners, II, Inc. v. S.C. Dep't of Health & Envtl. Control*, 422 S.C. 632, 813 S.E.2d 691 (2018) (hereinafter "*KDP II*").

Also during this time, KDP applied for a permit to construct a 340-foot vertical sheet pile wall outside the critical area along the narrow neck of the Spit. On January 7, 2010 the DHEC Board issued an order overturning staff's authorization of the wall based on long-range cumulative impacts of the structure and, specifically, impacts to critical area. (R. pp. 197-203).

The Permitted Project at Issue

KDP[2] proposes to construct a 50 house residential development on approximately 20 acres of Captain Sams Spit. In order to facilitate the development, KDP sought and received permits and certifications authorizing the construction of a road, water lines and sewer lines through an access corridor at the neck of the Spit. Because the riverbank is eroding, (Am. Order, p. 6, 7, R. pp. 7, 8), the buildable width for the access corridor has narrowed. (Am. Order, p. 7, 10, R. pp. 8, 11). And because of the persistent erosion at the neck, KDP has sought to fix the shoreline first through construction of a 2,783' long bulkhead/revetment system and presently through construction of a 2,380' steel sheet pile wall. (Am. Order, p. 10, R. p. 11; R. p. 2316).

As permitted, the road would be 20 feet wide with an additional 5 feet needed to allow for construction of the steel wall. (Am. Order, p. 10, R. p. 11). The permit contains special conditions that require KDP to obtain a new critical line delineation within 30 days of construction due to the dynamic nature of the shoreline, and to construct the project in accordance with permitted drawings dated April 15, 2015. (Joint Exs. 6 & 7, R. pp. 2952-3005) 2966). The permit also prohibits any construction in the critical area. (Joint Ex. 6, R. p. 2952).

[2]KDP was bought by Coral Canary Company, which is managed by South Street Partners and backed by a hedge fund out of New York. (R. p. 2488). The hedge fund assumed a mortgage upwards of $80 million in acquiring the property. (R. p. 2489).

The wall would be constructed in two phases. The first phase would be built along the neck and the residential area, and the second phase would include Beachwalker Park. (R. p. 2314).

STANDARD OF REVIEW

This Court may affirm the ALC decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is: (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 or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-380(5).

ARGUMENT

Summary of Argument

The ALC authorized structures that effectively eliminate existing public access to and use of the sandy beach banks of the Kiawah River, which are both public open spaces and public trust resources in violation of numerous statutory and policy provisions and the Public Trust Doctrine. Despite this Court's rulings in *KDP I* and *KDP II*, which emphasizes the priority and value the law places on these resources, the ALC instead arrived at a contrary and inconsistent interpretation and application of the law. Many of the ALC's findings and conclusions are not supported by any evidence, much less substantial evidence. Moreover, the ALC erred in

affirming a permit and certification which, according to its own findings, cannot be constructed in accordance with the permit conditions prohibiting critical area impacts.

Overview of the Regulatory Framework

The Coastal Zone Management Act ("CZMA") and Coastal Management Program ("CMP") are designed to protect and promote public use of and access to our coastal zone. The General Assembly found that the "increasing and competing demands upon the lands and waters of our coastal zone occasioned by ... residential development, ... have resulted in the decline or loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use and shoreline erosion." S.C. Code Ann. §48-39-20(B). The Act continues that "The coastal zone and the fish, shellfish, other living marine resources and wildlife therein, may be ecologically fragile and consequently extremely vulnerable to destruction by man's alterations." S.C. Code Ann. §48-39-20(D). The General Assembly further found: "Important ecological, cultural, natural, geological and scenic characteristics, ... and historical values ... are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values." S.C. Code Ann. § 48-39-20(E).

Thus, the basic state policy underlying the CZMA is "to protect the quality of the coastal environment …" and more specifically: "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(A)-(B)(1).

The General Assembly recognized the need to implement policies that ensure that we, our children, our children's children and beyond can enjoy our coast in directing DHEC: "To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations." S.C. Code Ann. § 48-39-30(B)(2).

In reviewing projects, DHEC must consider the extent to which a proposed project: "would affect production of ... any marine life or wildlife or other natural resources in a particular area...[;]" "could cause erosion ...[;]" "could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources[;]" and "the economic benefits as compared with the benefits from preservation of an area in its unaltered state." S.C. Code Ann. § 48-39-150(A).

It is within this framework that the Supreme Court issued its rulings in *KDP I* and *KDP II*, and through which the ALC should have based its decision. It did not.

I. DHEC and the ALC Erred in Authorizing a Structure that Will Eliminate Public Access to and Use of Critical Area Tidelands and Public Open Space

The CZMA and CMP are replete with provisions that prioritize and mandate protections for public access to and use of critical area tidelands, particularly when those areas are considered public open space. Yet instead of giving these public trust recreational lands and open spaces the protection warranted under the law, the ALC sanctioned their destruction.

A. The ALC Erred in Authorizing a Project That Will Impact the Critical Area and the Public's Uses Thereof

The CZMA mandates that: "Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of

uses that will generate measurable maximum dollar benefits." S.C. Code Ann. § 48-39-30(D). Further, the CMP governs projects on barrier islands and requires that such projects "must demonstrate reasonable precautions to prevent or limit any direct negative impacts on the adjacent critical areas . . . [b]ecause of their proximity to and strong ecological relationship with the critical areas of the coastal zone[.]" CMP Policies III.C.3.XII.(A) & (B)(1). Here, the sandy shoreline of the Kiawah River is critical area on a barrier island.

The ALC's conclusion that loss of this shoreline is "speculative" is without any evidentiary support. Every witness, including KDP's, acknowledged that the steel wall will be completely exposed at some point. The witnesses opining on the impact of an exposed wall collectively agreed that such occurrence will eliminate the sandy shoreline, just as this Court found in *KDP II* (2018 remand) (a "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." *KDP II* at 694). The only speculation is the exact date when total shoreline loss will occur. But given the persistent erosional trend, even if the wall could be built outside of the critical area, the imminent loss would be swift. (R. pp. 1573-74).

Because 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). In *KDP I*, this Court held that the ALC erred in its application of S.C. Code Ann. § 48-39-30(D) because "it was clear that only the developer, not the *public*, would benefit from the construction of this enormous bulkhead and revetment" along the Kiawah River at Captain Sams Spit. *KDP I* at 30, 716. The Court ruled that to "allow the

benefits to a private developer to override the interest of the people of South Carolina undermines the statute and defeats the very purpose of the public trust doctrine." *Id*.

Here, the ALC failed to apply this State policy in accordance with *KDP I,* instead giving it passing and cursory treatment in both asserting that it does not apply (Recon. Order, p. 17, R. p. 71) and that the project will actually provide public benefits.[3] (Am. Order, p. 32, R. p. 33). The ALC's failure to apply this key State policy, which was central to this Court's analysis in *KDP I,* is reversible error.

Bill Eiser, who conducted the permit review in *KDP I* told his DHEC colleagues that:

> if the sheet pile wall is constructed on high ground, but only five to ten feet landward of the erosional scarp line, that the erosion will continue. At some point in the future, the sheet pile wall will become exposed; it will be in the critical area. The sandy beach at the base of that sheet pile wall will be eroded away; and the public use of that beach . . . .will be diminished and then eventually lost.

(R. p. 1869, lines 1-11). He made the agency aware that the critical line "was moving, the shoreline was eroding, and at some point the sheet pile wall would be in the critical area." (R. p. 1873, lines 4-6). Eiser sums up KDP's predicament: "the applicant was trying to hit a moving target. They were trying to build a structure out of the critical area, but the location of the critical area was changing." (R. p. 1874, lines 1-5).

Witnesses from all parties agreed that the wall would be unnecessary if it were not going to be exposed and in the critical area because it is designed to hold the road in place against the

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[3]The ALC's "public benefits" determination is based on its finding that stopping erosion and stabilizing the parking lot at Beachwalker Park benefits the public because it will gain "continued, protected access to the Spit." (Am. Order, p. 32, R. p. 33). However, this Court affirmed a permit that would ensure viable protection of the parking lot with a 270' long revetment/bulkhead in *KDP II*. At a minimum, all that is needed to protect the parking lot at Beachwalker Park is 270' of wall, not 2,380'. The ALC did not find any public benefit to the remaining 2,180' of wall beyond the Park, and none exists.

moving shoreline: "That's the point of it. If the seawall . . . was not going to be exposed, there would be no point in putting it in;" (R. p. 830, lines 8-17); "if there was no concern about this area eroding towards the seawall, then you wouldn't need . . . the sheet pile wall." (R. p. 1174, lines 17-20). Assuming the steel wall could be built as permitted outside of the critical area despite the continuing erosion, it would not remain buried because according to the League's expert Dr. Robert S. Young:[4]

> very quickly, the wall is going to become a part of the Kiawah River shoreline and, in fact, if the wall were not going to become part of the Kiawah River shoreline, you would probably never build it because if the wall was just going to remain buried in the interior of the island forever, there would be not much point in having the wall. So, certainly, there has to be an expectation that you build a structure like that to prevent the Kiawah River shoreline from eroding the island."

(R. pp. 1573, line 16 - 1574, line 2).

Once the wall is exposed, "**the shoreline will shift until the river is right up against the structure and the beach and the sand and all those physical environments along the structure are going to disappear**, so it'll be just sheet pile bulkhead and the river." (R. p. 1574, lines 18-24). The "beach [along the Kiawah River in Exhibit 3A, B and F] is going to disappear." (R. p. 1576, line 11). Although it would not happen instantaneously, ultimately,

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[4]Robert S. Young received his Ph.D. in coastal geology from Duke University and has been the Director of the Program for the Study of Developed Shorelines for the past 12 years. (R. pp. 1519-20). He conducts scientific research on coastal processes, coastal erosion, and storm events all over the world, including significant amounts in the Carolinas. (R. p. 1520). He develops tools that are science-based, but also have very practical applications, such as his contract work assessing the vulnerability of all the National Park Service assets in the United States – everything from the Statue of Liberty to an outhouse in the Everglades. (R. pp. 1521-22). Dr. Young was invited by the DHEC Board to serve on the Blue Ribbon Committee, charged with examining the existing Beachfront Management Act and make recommendations to improve the Act. (R. p. 1525). Dr. Young testified as an expert in coastal geology and coastal zone management and policy. (R. p. 1528).

there would be no sandy beach at low tide because this is an eroding shoreline. (R. p. 1576). Without contradiction, Dr. Young opined that "**it's an undisputable fact" that the "intertidal zone and beach that we've seen . . . will be gone**." (R. p. 1578, lines 1-3).

The uncontroverted evidence establishes that the project as designed will result in elimination of the sandy shoreline, and also that at least parts of the project as permitted could not avoid being constructed in critical areas. In this regard, the ALC's finding that "the extent to which the SSPW would be exposed in the future is unknown" is without evidentiary (or logical) support. (Am. Order, p. 11; R. p. 12). The ALC acknowledged that the riverbank where the proposed steel wall would be installed is collapsing. (Am. Order, p. 6; R. p. 7). The ALC accepted that the critical line had moved landward in a way that the project as permitted would cross critical area. (Am. Order, p. 11; R. p. 12). The ALC recognized that "impact to the critical area and public open spaces along the riverbank where the SSPW will be installed is foreseeable." (Am. Order, p. 31; R. p. 32). But later the ALC makes the contradictory statement that "[a]ll of the development's facilities have been designed to avoid critical areas and wetlands" and "no part of the development as currently proposed directly impacts the critical area or crosses a critical area."[5] (Am. Order pp. 37-38; R. pp. 38-39).

The ALC's flawed, contradictory and unsupported findings were the basis for its conclusion that the project is consistent with Section 48-39-30(D) and CMP Policy III.C.3.XII(A)(2) in preventing and limiting negative impacts on the critical area. The inherent

[5]While it is possible that the ALC is looking at the authorizations in a vacuum to arrive at such a conclusion, which would be the only way to do so, the undisputed evidence is that the project could not proceed as authorized and avoid the critical area. At a minimum modifications would be necessary, but more importantly, the ALC recognizes critical area impacts resulting from the migration and erosion of the riverbank.

inconsistencies in the ALC's Order cannot be squared. And because no evidence supports the finding of no critical area impacts, that finding is erroneous and reversible. What is left is the ALC's determination that the river shoreline is eroding; the critical line has moved landward; critical area impacts are foreseeable; and the project as permitted cannot avoid the critical area, *i.e.*, "some adjustment" is necessary. (R. p. 2505).

That the project will impact critical area cannot be disputed, the ALC simply finds that the project will provide benefits in the form of "increase[d] tax revenues . . . jobs, and otherwise contribute to the economic and social improvement of the citizens of this state," which outweighs the public's loss of 2,380' of critical area sandy shoreline. (Am. Order, p. 48; R. p. 49). The ALC also concluded that the "Spit . . . will be improved" by the project. *Id*. No basis in fact or law exists to support the ALC's conclusions on public beneficial uses of the critical area, particularly here, where the evidence is that the beach along the entire length of the structure will be eliminated as a result of this project.

B. The ALC Authorized a Project Which Will Impede and Eliminate Public Access to Open Space

DHEC must consider the "extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources." S.C. Code Ann. § 48-39-150(A)(5). The CMP policies are also specifically designed to ensure that public access to coastal resources and open spaces is protected. The CMP requires that "**project proposals which would restrict or limit the continued use of recreational open area or disrupt the character of such a natural area (aesthetically or environmentally) will not be certified where other alternatives exist**." CMP Policy

III.C.3.XII.D.(1) (emphasis added). The CMP further requires that "**structures must not interfere with existing or planned public access unless other adequate access can be provided"** and that "**structures shall not impede public use of beaches below the mean high water line**." CMP Policies IV.C.(4)(c)(2) & (3) (emphasis added).

"The values of public recreational and open space areas through the coastal zone cannot be overemphasized . . . these limited resources become even more precious, as increasing numbers of people seek to find recreational opportunities within more urbanized areas and from fewer available open spaces." CMP at III-73. Accordingly, DHEC should support and encourage efforts to increase the amounts and distribution of public open space and recreational areas. CMP Policy III.C.3.XII.D.(2).

In particular, the CMP requires DHEC to consider whether this steel wall would restrict, impede or interfere with the public's use of and access to the shoreline of the Kiawah River. CMP Policies IV.C.4(c)(2) & (3) at p. IV-57 & XII.(D) at III-73. The applicable policies include requirements that: (1) such structures will only be considered as part of a comprehensive erosion control program; (2) the structures not interfere with existing or planned public access unless no adequate access can be provided; and (3) the structure not impede public use of beaches below mean high water. Collectively, these policies prohibit this steel wall because it would eliminate existing public use of and access to nearly a half-mile of open space sandy beach shoreline below the mean high water mark.

This Court has spoken to the harm to public use if a vertical wall is built along the Kiawah River at Captain Sams Spit:

> [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."

KDP II at 638, 694

The ALC erred in two key respects. First, the ALC's finding that value and use of the riverbank is "limited" and "only occasional" is contrary to the evidence, and to the rulings in *KDP I and II*. (Am. Order, pp. 22-23; R. pp. 23-24). Second, and more importantly, the ALC committed an error of law in concluding, without any evidence, that "public trust lands will be enhanced and preserved by the SSPW." (Am. Order, p. 49: R. p. 50).

On the first point, the ALC's casual dismissal of the witnesses who testified regarding use of Captain Sams and specifically the river and its shores, instead concluding without any evidence that "the greater use is primarily at the southern end of the Spit," particularly in light of the holdings in *KDP I*,[6] is reversible error. (Am. Order, p. 32; R. p. 33).

DHEC's Curtis Joyner testified that the Spit is a significant dune system and the beach and banks of the Kiawah River should be considered public open spaces. (R. p. 2016). KDP's Mark Permar admitted that he sees people out using the sandy banks of the Kiawah River, and specifically that people were doing that on the day that he took pictures of the Spit. (R. pp. 2466-67). Permar admitted that sandy shoreline exists all along the river shoreline where the wall

[6]"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." *KDP I* at 44. Captain Sams is an "invaluable – in environmental, social and economic terms – stretch of tidelands" which is a "finite" and "precious public resource." *Id*. at 22.

would be located. (R. p. 2468). Despite the erosion that has occurred over the years, the public has continued to use the sandy shoreline (R. p. 2469), which has been migrating naturally.

The League's Meriwether observed that attempts to combat erosion along the coast have "almost inevitably been problematic. I am very worried that . . . the appeal of this as a kayaker or somebody who likes to just walk along the beach and observe nature is going to be changed negatively and permanently." (R. p. 1061, lines 1-5).

Drs. Robert F. Young and Robert S. Young agreed that the steel wall would lead to a loss of the public beach. Mr. Limehouse similarly expressed that the wall will "keep the river from moving toward the ocean which will deny the people access to the back beach because the back beach won't be there any more. It will be a steel wall. . . I'm against them putting that wall there because I know that's going to take away the – destroy the beach. It won't be there anymore." (R. p. 1380, lines 16-25). The ALC's finding of limited public use is unsupported.

Here, public access to 2,380' of shoreline where the steel wall is authorized will be eliminated. Such a loss is significant in light of the overwhelming evidence regarding its use and value to the citizens of South Carolina. On the other hand, no testimony or evidence was presented that if the project does not proceed the public will lose access to any of the public trust lands on the Spit. At most, a few parking spaces may be lost.

After first hedging that public access would be impaired, the ALC later acknowledged that the riverbank would be lost due to erosion, but concluded that there were no alternatives. (Am. Order, p. 40; R. p. 41). That is incorrect. KDP's initial application did not include a

request for such structure,[7] thus KDP proposed to build the road and associated infrastructure without the SSPW. Moreover, KDP holds a permit, affirmed by this Court, to build a bulkhead/revetment in front of the Park which provides protection for the parking lot – the "access" that the ALC was presumably trying to protect. *See KDP II*.

In rejecting the "no action" alternative, the ALC shifted focus from continued public access to and use of the riverbank to the use of Beachwalker Park, *i.e.*, the parking lot. (Am. Order, p. 41; R. p. 42). The ALC's finding that protection of the Park is "tied to KDP receiving a permit" is unsupported by any evidence, as well as the law. The evidence is that "a permit was obtained by Kiawah Development to construct a bulkhead in that area near the riverbank that has never been done" according to the Charleston Parks and Recreation Department. (R. p. 2485-86).

On the second point, the ALC misunderstands and/or overlooks the public trust resources at stake and the reasons why Captain Sams Spit is so unique and special to the public: it is natural and undisturbed. Construction of a steel wall would drastically and permanently change these pubic trust lands, not enhance or preserve them as the ALC erroneously concluded. (Am. Order, p. 49; R. p. 50). Instead of focusing its inquiry on the public trust resources at stake, the ALC focused on the parking lot at Beachwalker Park which is not a public trust asset.[8] While the Appellant (and this Court) recognize the value of the Park in providing access to the Spit, the Park does not qualify for the protections given to public trust tidelands.

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[7]The steel wall was added later at the behest of DHEC to allay its fear of "asphalt falling into the river." (R. pp. 2311-16).

[8]Even assuming a "substantial benefit [to the] public" by installation of the steel wall, a permit exists for a wall that would allow protection of the parking spaces at the KDP-owned Park. *See KDP I & KDP II*.

Moreover, no evidence exists that the Park and all its facilities would be lost without the steel wall. The ALC acknowledges that the Park has only "lost several parking spots." (Am. Order, p. 32; R. p. 33). The Park, *i.e.*, the parking lot and facilities, are not located on the Spit, but rather on the mainland of Kiawah northeast of the neck. (Pet. Ex. 1, R. p. 3010; Pet Ex. 15, R. pp. 3362-63). The ALC's conclusion that further erosion of the riverbank poses a threat to public access erroneously focuses the inquiry on a parking lot rather than the public trust resources at stake. While the steel wall may protect some parking spaces at the Park (even though the steel wall will not be installed at the Park until phase 2 of the project), it undoubtedly will eliminate the public's access to and use of the public trust tidelands along the River.

Finally, leaving the Spit in its present condition and allowing for continuation of existing uses is an alternative. Indeed, the Spit historically was envisioned to be a public open space. (Pet. Ex. 6; R. pp. 3025-3212). Only when the state's beachfront jurisdictional lines changed in 1999 was development of the Spit even a possibility. In addition to the no action alternative, the alternative of building the revetment/bulkhead which was affirmed by the This Court in *KDP II*, is viable and feasible. (*Id.*).

To be sure, this project is **not** about protecting the Park, it is about facilitating a 50 house development on the Spit. The uncontradicted evidence from members of the public who use the Spit is that the steel wall would be a detriment, not a benefit, to their access to and use of public trust resources at the Spit. (R. pp. 1039, 1061, 1380, 1386, 1573-76, 1869-73). The ALC's contrary conclusion is unsupported by the evidence and is reversible error of law.[9] *Altman v.*

[9]Further, no evidence supports the ALC's conclusion that the public will benefit from a conservation easement on the Spit. (Am. Order, p. 42; R. p. 43).

Griffith, 372 S.C. 388, 642 S.E.2d 619 (Ct. App. 2007) (An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support.).

II. The Project Cannot be Constructed as Permitted

Due to the nature of the property at issue – surrounded by water on three sides, migrating and shifting, and specifically eroding along the Kiawah River – the ALC should have determined whether the project can even proceed as authorized and, if not, what additional action may be necessary to protect public open space critical areas and public access to and use of them as required by law.

DHEC imposed special conditions on the coastal zone consistency certification that prohibit impacts to critical area tidelands associated with construction, and that require the steel wall to be "constructed in accordance with and per the phasing detailed in the construction drawings last revised April 10, 2015." (Joint Ex. 6, R. pp. 3025-3212; Am. Order p. 4, R. p. 5). The ALC erred in affirming DHEC's certification despite its explicit acknowledgment that the project cannot be constructed in compliance with these permit conditions.

A. The Steel Wall and Road Cannot be Constructed in Accordance with Construction Drawings

At its closest point in 2015 when the permit was issued, the steel wall was only 5 feet from the critical area. (R. pp. 2326-27). After the permit was issued, DHEC certified a new 2016 critical area line such that the wall as designed, permitted and depicted in the construction drawings would fall within critical area as it existed in 2016. Since Captain Sams Spit is so unstable and rapidly changing, between the date that the permit was issued and the date of the trial, Dr. Young stated that "portions of that steel sheet pile bulkhead would – there isn't the land

to drive it through any longer along portions of that shoreline as it was indicated in the 2015 [permitted] drawing." (R. p. 1570, lines 21-25) constructed according to the permitted drawings and the 2016 approved critical area line, the wall could not be built without impinging on coastal waters. (R. p. 1573).

KDP's Karkowski admitted that the project could not be constructed as designed and permitted and would need "some adjustment" to make the project work within the 2016 line.[10] (R. p. 2505). The 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, R. p. 12). As a result KDP admits – and the ALC acknowledges – that the project cannot be constructed in compliance with condition number 2 of the permit requiring the steel wall to be constructed as designed in the permitted drawings dated April 10, 2015, which DHEC confirmed is in a specific geographic location. (R. pp. 2387-88, 3708). KDP further admits that "an updated [critical line] survey is going to differ in an erosional site from where the wall was designed and located previously." (R. p. 2388, lines 8-12).

While KDP asserted that the wall could still be built even though it would need "some adjustments to the design as permitted,"[11] such "adjustments" would violate the permit conditions. (R. p. 2505, lines 1-2; KDP Ex. 18, R. pp. 3551-61; Joint Ex. 6, R. pp. 2952-65).

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[10]KDP's engineer, Rick Karkowski, has never been involved with a project where the critical line changed as frequently and as often as it has on Captain Sams Spit. (R. p. 2517). The shoreline, and specifically the critical line, has changed so much that Karkowski had to shift the road location multiple times in an effort to keep up with the changing conditions on the ground. (R. p. 2518).

[11]DHEC's 30(b)(6) deponent confirmed that if the location of the steel wall changes as a result of a new critical line location, KDP would need to submit a revised permit application. (R. p. 3708).

Indeed, KDP's Pantick said that DHEC's condition number 2 was in error, and that KDP cannot comply with that condition. (R. pp. 2398-99). No dispute exists that the construction cannot proceed as permitted, yet the ALC upheld the permit as issued nonetheless.

B. The Structures Cannot Avoid the Critical Area

The permit conditions state that "[i]mpacts to critical area associated with any aspect of construction or construction related activities is not authorized." (Joint Ex. 6, R. pp. 2952-65). The permit prohibits critical area impacts, and thus any such impacts would violate Section 48-39-130(A): "no person shall utilize a critical area for a use other than the use the critical area was devoted to on such date unless he has first obtained a permit from the department." DHEC's Curtis Joyner testified that he would not have authorized the wall, road and related infrastructure if he knew that the road would cross critical area. (R. p. 1971).

For construction of the permitted activities, KDP needs: 20 feet for the road; 1.5 feet for a guard rail; 2 feet for the steel wall; and 5 feet for the construction of the wall. (R. p. 2385). In sum, KDP would need 28.5 feet of upland under the existing authorizations to avoid impacts to critical area or the beachfront jurisdictional area - both of which would require an additional permit.

As KDP admits, the project as designed and permitted cannot be constructed without impacting the critical area. Karkowski acknowledged that if the critical line is where the League's expert delineated it, then the road could not be designed to avoid the critical area. (R. pp. 2518-19). Indeed, KDP's Pantlick was also aware of an area where the critical line dipped in and touched the oceanfront setback line. (R. pp. 2380-82, 2386-87). Even in 2015, KDP was aware of and had concern over whether it would be able to build the wall and road given the

ongoing erosion. (R. pp. 2382-84). KDP's Mark Permar testified at length about the "collapse in the vegetation as a result of erosion" (R. p. 2454, lines 4-5) and the "collapse of the shoreline" between 2014-2017 where "vegetation has died off and collapsed along the sandy shoreline." (R. p. 2455, line 5; R. p. 2458, lines 6-8; R. pp. 2445-55).

Despite KDP's own testimony, the ALC found that all of "the project's facilities are designed to avoid the critical area." (Am. Order, p. 9; R. p. 10). The ALC's finding on this point is erroneous. Even more problematic is the fact that the critical area line is continually moving landward, reducing the land width available for the permitted construction, and making avoidance of critical area, and thus compliance with the permit, impossible.

The League's Alan Wood is a professional wetlands scientist and testified as an expert in wetlands science and critical line delineations.[12] (R. pp. 1279, 1287-90). In 2017, Wood conducted a critical line survey along the banks of the Kiawah River in the location of the prosed project, placing flags where he determined the location of the critical line with scientific certainty. (R. pp. 1294-96). Those flags were picked up by a registered surveyor using a survey-quality GPS.[13]

When Wood delineates a critical area line he "Flag[s] every line as if [the Corps or DHEC is] going to come out and scrutinize it." (R. p. 1283, lines 3-4). He has submitted around 40-50 critical area delineations to DHEC and all of them have been approved. (R. p. 1278). On

[12]Wood's work encompasses delineating both fresh and saltwater wetlands and seeking permits from the Corps of Engineers and DHEC to impact those wetlands. (R. pp. 1269-70). He typically represents clients that seek to develop properties or undertake construction in areas that could impact wetlands. (R. p. 1271).

[13]The most expensive, but most accurate way to place the lines that Wood flags on a map is to use land surveyor quality GPS because is accurate within 3 inches or less. (R. p. 1283).

the other hand, DHEC rejected KDP's expert John Byrnes'[14] submissions, including his 2016 critical line along the riverbank at the neck of the Spit.[15] (R. pp. 2197-98). DHEC re-flagged the 2016 critical area line over Byrnes' work and, in fact, was concerned enough with Byrnes' line that they asked for a CAD file, which they had never done before. (R. pp. 2198-99, 2227-28).

Wood utilized the permitted drawings (Joint Ex. 7, R. pp. 2966-3005) to place the location of the sheet pile wall and the road onto a drawing he created (Pet. Ex. 14; R. p. 3361) depicting DHEC's 2016 critical line and the 2017 critical line that he delineated. (R. pp. 1329-31). DHEC's 2016 critical line reflects that the road impinges into the critical area. (R. pp. 1331-35). For Wood's 2017 critical line, there are "a bunch of spots that it would have to have a permit to cross" because the road and SSPW impinge the critical area in approximately six locations. (R. p. 1335, lines 6-7). In one location the critical line touches the oceanfront setback line. (R. pp. 1335-36). In that area, it would be impossible to construct a road along the neck without crossing critical area. (R. 1336; Pet. Ex. 14 & 15, R. pp. 3361-63).

Byrnes' testimony that he did not believe some of the areas identified by Wood were critical area was based on the fact that he did not see water in these areas and did not see saline

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[14]Byrnes is a land surveyor with no training in botany, freshwater or saltwater vegetation. (R. pp. 2184-85). When asked whether he considered the uppermost reach of water during a kind tide to be critical area Byrnes said "no," but that he's "not sure" why. (R. p. 2188, lines 10-16). Byrnes was also unable to determine whether vegetation in his photographs was saline vegetation. (R. pp. 2238-39; KDP Ex. 19, R. p. 3502). In fact, he only knew the names of two types of saline vegetation, even though he knows more exist. (R. pp. 2238-39). Nor did he know what a wrack line is. (R. p. 2241).

[15]DHEC also had concerns with the 2015 line flagged by Byrnes. (Tr. 1532: R.2227). And KDP's engineers showed a 2015 critical line that was different from the line that Byrnes produced, even though Byrnes provided his information to the engineers. (Tr. 1536-38; R. 2231-33).

vegetation. (R. pp. 2220-22). But as Wood explained, the line would be partially based on the fact that saltwater intolerant vegetation would be dying back, not necessarily whether saline vegetation was present. (R. pp. 1304-06; KDP Ex. 19, R. pp. 3562-64). He explained that with semi-regular tidal inundation, wax myrtles and other freshwater vegetation will get stressed and die because they cannot tolerate saltwater. (R. 1305; Pet. Ex. 1C, R. p. 3010(b); Pet. Ex. 37, R. p. 3445). In one particular area (marked 5 on KDP's Ex. 36, R. p. 3576), which Wood determined was critical area because saltwater had intruded it enough to kill saltwater intolerant wax myrtles, Byrnes acknowledged that the wax myrtles were dead, but did not know what caused them to die or whether saltwater could cause them to die.[16] (R. pp. 2237-38, 2240). Ultimately, Byrnes agreed that Woods' areas 4 and 6 were critical area. (R. p. 2237).

By all accounts, the shoreline is eroding, the critical area is moving landward, and at least part of the road and steel wall as permitted would impact critical area during construction. The ALC erred in concluding that the project is designed to avoid critical area and in affirming the permit despite its prohibition on critical area impacts.

III. DHEC and the ALC Erred in Arriving at Decisions that are Inconsistent with This Court's Ruling in *KDP I*

In *KDP I*, this Court ruled that the Public Trust Doctrine is the lodestar in protecting the public's beneficial uses of the Kiawah River critical area.[17] It directed that "public access is to

[16]In area 5, Byrnes acknowledged that Wood's pink flag was in the dead marsh grass, and admitted that the only way dead grass could have gotten there was to be pushed up by the tides. (R. pp. 2241-42).

[17]The Public Trust Doctrine is the foundation for the CZMA and the CMP. Under the Public Trust Doctrine, tidelands (areas between HWM and LWM), submerged lands and navigable waters are held in trust for and subject to public purposes and rights of navigation,

be accorded great protection while private economic development is suspect and only permitted when in the public interest." *Id*. at 41, 722. The Court noted that if "there ever were a case of substantial adverse effect on public access, it is this case." *Id*. at 42, 722.

As with the ALC's previous rulings, which were reversed in *KDP I & KDP II*, the ALC's Order is again affected by error in its "misapprehension about public use and the failure to accord it the importance it deserves" which "is fundamentally at odds with the public nature of the tidelands at issue here." *KDP I* at 43, 722. The ALC again failed to follow the lodestar, and again authorized a structure that will fix the shoreline and eliminate the public's beneficial uses.

A. DHEC and the ALC's New and Inconsistent Interpretation and Application is Arbitrary and Capricious

DHEC must consider "extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area." CMP Policy III.C.3.I.(7) at III-14. As the ALC noted, this policy is nearly identical to the provision applied by DHEC (and this Court) in *KDP I*. (R. p. 28). This Court affirmed DHEC's conclusion that the development facilitated by the structure[18] would "have a significant impact on the general character of the area," by converting a pristine barrier island into residential development. *Id*. at

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boating, bathing, fishing, recreation and enjoyment. *Sierra Club v. Kiawah Resort Associates*, 318 S.C. 119, 456 S.E.2d 397 (1995); S.C. Opinion Attorney General 329 (Dec. 10, 1970). The public has the right to use public trust lands and waters for recreational purposes, including fishing, bathing, swimming and other recreational uses. *Id.*; *Martin v. Waddell*, 41 U.S. 367 (1842).

[18]The Court found 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 this wall is the same: to facilitate a 50 house residential development.

25, 713. This Court affirmed that "the upland area of the spit is to be transformed from a completely natural area into a residential development." *Id*. at 37, 720. The ALC recognized that this Court affirmed the agency's interpretation and application of this policy. (Am. Order, p. 27; R. p. 28).

KDP proposes a nearly identical vertical wall to facilitate the same 50 house development which would have the same significant impacts on the general character of the area. But here the ALC concluded that "the Department's interpretation and application of this policy is consistent with its previous decision in 2008 and the Supreme Court's decision in *Kiawah II*." (Am. Order, p. 50; R. p. 51).

Specifically, the ALC concluded that the character of the area is "residential development" and thus the proposed 50 house residential development would not change the "character of the area" nor have any cumulative impact: "the development of the proposed project, which is residential, will be consistent with the surrounding area, which is residential." (Amended Order, p. 31; R. p. 32). The ALC's finding is inconsistent with the *KDP I*, the agency's 2008 interpretation and is contrary to DHEC's testimony in two key respects.

First, DHEC reversed course in its determination of the general character of the area. Bill Eiser was the staff oceanographer for DHEC/OCRM from 1989 through 2015, and was the staff person who made the permit decision regarding the proposed bulkhead/revetment system that was the subject of *KDP I*.[19] (R. pp. 1831-32). Eiser reviewed the 2008 critical area permit for the bulkhead and revetment and he "characterize[d] the general area as pristine, undeveloped

[19]KDP lodged numerous objections over Mr. Eiser's testimony related to the agency's interpretation and application of its regulations on the basis that it was not relevant and the ALC agreed. (R. pp. 1836-55).

portion of a barrier island." (R. p. 1836, lines 19-21). Eiser explained that he was "was required to come up with a determination of the general character of the area and at that time, as the project manager, I determined that the area was Captain Sam's Spit and the character was that it was a pristine, undeveloped beachfront property." (R. p. 1842, lines 18-23). He considered how the general character of the area would be changed as a result of the permitted activity, and specifically the impacts that the bulkhead/revetment structure would have on the public use of that sandy beach. (R. p. 1850). He considered the development of the Spit with a road and 50 house sites in making his decision that the project would significantly change the character of the area. (R. p. 1862).

The ALC acknowledged that DHEC interpreted "the area" where the project would occur as only the Spit itself when applying the policy to its 2008 decision which was affirmed in *KDP I*. And DHEC's Joyner acknowledged that when issuing other permits, like dock permits, to assess the general character of the area staff goes out on site to the location of the proposed project and looks around on the ground to determine the character of the area around the project. (R. p. 1950). That is not how the interpretation was applied here.

Yet the ALC adopted DHEC's new determination that "the area" is all of Kiawah Island and part of Seabrook and that its "character" is residential and not pristine and undeveloped. The ALC failed to question the agency's new interpretation that the area is something more than the project site because "its all area generally" so all of Kiawah Island and part of Seabrook Island are included in "the area." (Am. Order, p. 21; R. p. 22). The agency's new and inconsistent determination that the general character of the area is "beachfront development"

which led to the ALC's determination that development of the Spit is "in keeping with the general character of the area" is arbitrary and capricious. (Am. Order, p. 22; R. p. 23).

The ALC and agency are not charged with looking at the general character of "surrounding area," but the general character of "the area," i.e., the area where the project and activities it facilitates will occur, as the agency did in *Kiawah I.*[20] The ALC misunderstood and misapplied this Court's opinion. The Court in *KDP II* did not say that the "the area" includes uplands surrounding the critical area impacts, as the ALC incorrectly states. (Amended Order, p. 28, 29; R. 29, 30). The Court said that in considering the "cumulative impacts" the agency (and ALC) must look at impacts to uplands outside the critical area. *KDP II* at 32, 717 (the agency must "consider not only a proposed project's ***impacts*** on the critical areas, but also the project's ***impacts*** on uplands areas within the larger coastal zone"). The Court did not hold or even imply that in considering the character of "the area" that the agency must consider "the area" to be anything other than Captain Sams Spit.

Second, DHEC failed to assess the cumulative impacts of the project and the ALC compounded that error. DHEC's 30(b)(6) deponent testified as follows:

> Q. So the Department, it looks to me, recognizes that there's going to be an impact in transforming a pristine area into residential development. You acknowledge that there's going to be some impact. What is that impact?

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[20]In addition, the agency and the ALC's interpretation of "the area" would effectively render the entire coast as "residential development" because other undeveloped areas are, like Captain Sams, "directly connected to" or "immediately across" a waterway or "directly across from" other developed areas. This new interpretation effectively renders the entire coast of South Carolina as having a residential or commercial "character." That cannot be the legislative intent. Such an interpretation would render the requirement to consider the character of the area meaningless.

> A. Well, I think it's what you just stated. I think there will be an impact. Anytime there is any development, obviously there's going to be an impact in a change from its current state to whatever is proposed. In this case, residential development.

(DiNovo Depo., R. p. 3684). She also testified that the steel wall will "change the general – that nature of that area right there." (DiNovo Depo., R. p. 3687, lines 8-9).

DHEC's Curtis Joyner was the project manager for this permit and certification and admitted that "there was a lot of pressure put on the agency in reviewing this certification decision." (R. p. 1929, lines 2-3). Joyner knew that the applicant was told that the agency "was not going to review its project for long range cumulative impacts."[21] (R. p. 1930, lines 6-9). DHEC's 30(b)(6) deponent acknowledged that the DHEC Board directed staff to relax the standards on development of Captain Sams Spit and not to consider cumulative impacts. (Depo. DiNovo, R pp. 3699-3700). Indeed, the agency's Director of Environmental Affairs sought to persuade Joyner not to review the project for long range and cumulative impacts. (R. p. 1931).

> Q: Okay, outside of a board meeting, have you ever heard the DHEC board give direction to staff on how to handle the Cape Charles?
>
> A: (Continuing) There were -- yes.
>
> . . .
>
> Q: And what was -- was there any specific request made by the board that you received ultimately, whether it was communicated directly to you or through somebody in upper management?
>
> A: Yes. That we needed to consider -- let me -- that our previous determinations on other projects had been very narrow in scope, that we were being very prescriptive, and

[21]Indeed, KDP's Pantlick was communicating with Mark Lutz, then-DHEC Board Chairman about the proposed development on Captain Sams. (R. p. 2377). Pantlick secured a meeting with Lutz, the DHEC Commissioner and another DHEC Board member seeking assistance in securing the permits and certifications at issue. (R. pp. 2377-78; Pet. Ex. 15, R. pp. 3362-63).

> to not be so prescriptive, not so narrow. . . . That interpreting the policies the way we were was more restrictive than they felt they should be.
>
> Q: More restrictive on development?
>
> A: On -- yes.

(R. pp. 3699, line 8 - 3700, line 20).

DHEC admitted that the DHEC Board's new direction affected the agency's review, and specifically that the agency would not evaluate cumulative impacts of a project. (R. pp. 3702-04).

The ALC recognizes that DHEC's interpretation was litigated and ruled on by this Court in *KDP I*. The ALC recognizes that the DHEC arrived at a different determination in this case, despite the fact that both projects involve hard erosion control structures along the Kiawah River to facilitate a 50 house development on the Spit. The ALC simply erred in concluding that the two decisions are consistent without explaining how DHEC can apply an interpretation to the same set of fact, but arrive at a different conclusions. (Recon. Order, p. 13; R. p. 67). And no such explanation exists in law or fact.

B. The ALC Erred in Granting Deference to DHEC's Inconsistent Decision

The ALC erred in upholding the agency's new interpretation that the character of the area is residential under the guise of deference, and in doing so committed reversible error. The error is in concluding that the policy could be "applied the same way with different outcomes," despite the same central facts. (Am. Order, p. 50; R. p. 51). The ALC fails to explain how a conclusion that the transformation of the spit from pristine and undeveloped to developed with 50 houses is inconsistent with the character of the area in *KDP I*, but is not in this case.

The ALC's deference to the agency is apparently dependent upon whether the agency is granting or denying KDP authorization in connection with development of the Spit, rather than any legal principles. In *KDP I*, where the agency denied the vast majority of the bulkhead/revetment the ALC opted not to defer to the agency – despite this Court's ruling. Here, where the agency granted the entirety of the structure, the ALC opts to defer to the agency. In so doing, the ALC fails to apply the law of agency deference. Neither law nor logic permits the ALC to do so.

The agency receives deference for a consistent interpretation of a regulation. James T. O'Reilly, ADMINISTRATIVE RULEMAKING § 18:8 (2019 ed. 2019). But "agencies are not free, under Chevron, to generate erratic, irreconcilable interpretations of their governing statutes and then seek judicial deference." *INS v. Cardoza–Fonseca*, 480 U.S. 421, 446, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987). And the agency's interpretation of a regulation that changes, under identical circumstances (i.e., both the 2008 permit and the present permits and certifications would facilitate a 50 house residential development on approximately 20 acres of Captain Sams), is not entitled to any deference. Indeed, an unexplained inconsistency in agency interpretation is arbitrary and capricious and "is itself unlawful and receives no Chevron deference." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26, 195 L. Ed. 2d 382 (2016).

Arguments that an agency makes in the course of litigation are a classic example of a type of "interpretation" that does not receive deference under *Chevron*.

> These "convenient litigating positions" never receive deference, regardless of whether the interpretation adopted during litigation is a change from prior interpretations or concerns a question that the agency has never previously considered. The problem with these interpretations, whether or not they are revisionary, is that they are inherently suspect; needless to say, an agency is going to try to win litigation in which it has become involved.

> If courts deferred to litigation positions, agencies would almost never lose cases. All that an agency would have to do to win a case would be to "interpret" the statute in its brief, regardless of the agency's actual interpretation of that statute or the position it had argued to the court in a previous case.

David M. Gossett, Comment, *Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681, 691-92 (1997).

"Moreover, when an agency interpretation is inconsistent with prior court precedent or when an agency assumes an interpretation for purposes of pending litigation, courts should not defer to the interpretation, regardless of whether the agency's interpretation is a revision of a previous one." *Id.* at 707-710.

"In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26, 195 L. Ed. 2d 382 (2016) (citing *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16, 129 S. Ct. 1800 (2009)). Thus, an "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26, 195 L. Ed. 2d 382 (2016) (citing *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981, 125 S.Ct. 2688 (2005)).

During the deposition of DHEC's Shannon Hicks, who reviewed the stormwater permit, described "the general character of the area where the project is proposed" as "beach area, dune systems, maritime forest area." (Hicks Depo., R. p. 3748, lines 5-8). She stated that if the project proceeds as authorized "[i]t will change [that character] from being an undeveloped area to developed." (R. p. 3748, lines 8-9). But by the time of trial DHEC had reversed course as

Curtis Joyner stated that the character of the area is "residential," and thus the character of the area will not change. (R. pp. 1951-54.

In this case, the only "explanation" for the inconsistency is that the DHEC Board and management told staff not to apply the law. Specifically, the DHEC Board instructed staff: to "limit review to only that which is occurring in clearing limits;" "Do not evaluate cumulative effects;" and that because the Board is "pro-development [and] pro-property rights . . . staff should be there to help permit applicants," specifically with respect to this project. (Pet. Ex. 28; R. pp. 3426-28). KDP knew that the "staff was going to receive new policy direction from the DHEC Board with respect to the project" at issue here. (T. p. 2516, lines 15-17).

The ALC unquestioning acceptance of the agency's new interpretation and application – one that is contrary to its previous determination for the same development proposal on the same property; one that is contrary to this Court's affirmance of the previous determination; and one that is a convenient litigation position – was an abuse of discretion.[22]

C. The ALC Erred in Ruling that CCL "Abandoned" the Issue of Inconsistency

At base, a determination of abandonment is a determination that an issue is not preserved. "In order to preserve an issue for appellate review, a party must both raise the issue to the trial court and obtain a ruling." *Foster v. Foster*, 393 S.C. 95, 99, 711 S.E.2d 878, 880 (2011). If the trial judge fails to rule on a raised issue, a party must file a Rule 59(e) motion to amend or alter

[22]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. *Etiwan Fertilizer Co.*, 217 S.C. at 359, 60 S.E.2d at 684; *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). The ALC rejects the "long-standing interpretation" requirement for deference on the basis that it was "not raised in this case." (Amended Order, p. 29, fn. 26; R. 30).

the judgment in order to preserve the issue for appellate review. *Pye v. Fox*, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006).

The question of preservation arises in the context of appellate review, and is not a determination for the trial court. If an issue is raised on appeal but is not argued in the appellant brief, then the issue will be deemed abandoned. *Wright v. Craft*, 372 S.C. 1, 20 (S.C. Ct. App. 2006). Similarly, an issue is abandoned if it is raised in a brief but not supported by authority. *State v. Lindsey*, 394 S.C. 354, 636 (S.C. Ct. App. 2011). 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).

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).[23]

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[23]*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

The ALC'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.[24] 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 this Court's rulings affirming the same. The ALC acknowledges that the issue of inconsistent interpretation and application was squarely raised before it and its abandonment determination is meritless. (Am. Order, p. 50; R. p. 51).

IV. DHEC and the ALC are Collaterally Estopped from Arriving at a Decision Inconsistent with *KDP I and KDP II*

A. Collateral Estoppel Bars DHEC's Inconsistent Determination

Collateral estoppel or issue preclusion bars the relitigation of 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

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supported or argued).

[24]The League raised the issue of inconsistency in its Prehearing Statement and at trial. (R. p. 249; R. pp. 762, line 11– 773, line 6; R. pp. 1836, line 25– 1847, line 3; R. pp. 1851, line 9–1861, line 1; R. pp. 1875, line 12–1881, line 12; R. pp. 1882, line 1–1883, line 13; R. pp. 1899, line 17– 1919, line 25; R. pp. 1931, line 23– 1940, line 24; R. pp. 1960, line 19– 1964, line 25; Pet. Ex. 3, R. pp. 3016-3022; Pet. Ex. 4, R. p. 3023; Pet. Ex. 5, R. p. 3024; Pet. Ex.18, R. p. 3364; Pet. Ex. 19, R. p. 3372; Pet. Ex. 28, R. p. 3426; Pet. Ex. 36, R. p. 3429; Pet. Ex. 40, R. p. 3449; Joint Ex. 6, R. p. 2952; Ex. 41, R. p. 3456).

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).

Here, the issue of whether the proposed project would have "long-range cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area" was actually litigated, directly determined and necessary to support the ruling in *KDP I* and *KDP II.* CMP Policy III.C.3.I.(7) at III-14.

That regulatory provision requires two considerations: (1) cumulative effects of the project in light of other possible development and (2) cumulative effects of the project in light of the general character of the area. The parties litigated the cumulative effects of the project, including effects on the critical area and upland areas outside of the critical area (this Court rejected the ALC's conclusion that it could not consider impacts outside the critical area in *KDP I*). The parties litigated the character of the area. And the parties litigated how those cumulative impacts would effect the character of the area. Each of these issues was necessary to support this Court's ruling regarding the long-range, cumulative impacts of the project in the context of the general character of the area. CMP Policy III.C..3.I.(7).

The ALC recognizes that DHEC's interpretation was litigated and ruled on by this Court, but erred in allowing the agency to arrive at a contrary decision. The ALC never explains how DHEC can apply an interpretation to the same set of core facts, but arrive at a different conclusions, (Recon. Order, p. 13; R. p. 67), particularly when the steel sheet pile wall is simply a "variation on a theme of the first very large bulkhead that was proposed on the edge of the marsh which was overturned." (R. p. 839, lines 5-7).

The ALC's determination that "the area" should be viewed differently because in one case a critical area permit was required and in the other only a coastal zone consistency certification was required is without factual or legal support. The proposed project – a combination bulkhead/revetment in 2008 and a vertical steel sheet pile wall in 2015 – serve the identical purpose: 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. Those key facts are the same, they were litigated in *KDP I*, they were directly determined and necessary to the ruling.

Bill Eiser was employed with OCRM when the agency issued the permit at issue and he was asked for his opinion about whether the sheet pile wall would be effective and/or shift the erosion problem. (R. p. 1864). Eiser explained that in determining the character of the Spit, he took multiple site visits, walked around, took pictures and made observations. (R. p. 1885). Upon returning to the Spit in 2017, Eiser confirmed that "the general character of the area is still essentially the same. I observed public use of the sandy beach along the Kiawah River shoreline; three different groups of kayakers pulled up, got out, walked around. One group even climbed up onto the high ground that's adjacent to that sandy beach area." (R. p. 1848, lines 13-19).

DHEC's Joyner admitted that once houses and a road are constructed the character of the area will be changed. (R. pp. 1954-55). Joyner admitted that the steel wall will prevent shoreline movement and affect the ability of the inlet to migrate, which are impacts. (R. p. 1955). Joyner admitted that as erosion continues the wall ultimately will be exposed and in a critical area, which will change the character of the shoreline and be a cumulative impact. (R. p. 1955).

In short, nothing has changed factually or legally that would warrant abandoning the ruling in *KDP I* on the significant change in character of the Spit flowing from the proposed development, and DHEC and the ALC erred in failing to apply it.

The ALC concluded that "the area to be considered [in this case] is slightly, but significantly different than the area in *Kiawah II*." (Amended Order, p. 29; R. p. 30). But the only difference is how the agency interpreted "the area." Both projects have the purpose of stabilizing the shoreline of the Kiawah River to allow a road and other infrastructure to be constructed in the access corridor in order to facilitate a 50 house development on Captain Sams Spit. The ALC completely fails to explain how or why "the area" could or should be any different than it was in 2008, erroneously accepting to the agency's new-found and contrary interpretation.

The ALC was well aware of DHEC's contrary interpretation and application in: (1) noting the agency's "divergent positions the Department has taken in these cases" (R. p. 3653) and then (2) asking the agency post-trial to explain how it interprets CMP Policy III.C.3.I.(7). (R. p. 3655). The ALC compounded DHEC's error in perpetuating this alternative and inconsistent interpretation and application, and should be collaterally estopped.

DHEC's 30(b)(6) deponent testified that the 2008 permit decision was denied because "there was a potential for impact to the shoreline, as well as other issues that were addressed . . . regarding the general character of the area." (DiNovo Depo., R. p. 3692, lines 1-5). Eiser, who issued that decision, based his denial on his determination that "the proposed activity would not be consistent with the general character of the area" . . . "the proposed development, which at that time indicated up to 50 residential homes . . . would not be consistent with what he

determined was the general character of the area. . . . he characterized the general character of the area [as] thee property itself, this Captain Sam's inlet and the spit, and so obviously his conclusion was that development would change that character." (R. pp. 3690, line 25- 3691, line 18).

No basis exists in law or fact for the agency to arrive at a contrary interpretation and application of CMP Policy III.C.3.I.(7) and DHEC and the ALC should be estopped from doing so.

The Court in *KDP II* similarly made rulings about the impacts to public trust critical area tidelands and the use thereof if only a vertical wall were constructed and concluded that such a structure would:

> exacerbate erosion in the long run, ultimately making the bulkhead itself susceptible to collapse . . . 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. . . . With the loss of shoreline, the public could no longer use the area for the recreational purposes many citizens currently enjoy.

KDP II at 637-38.

The only consequential differences between the vertical wall at issue in *KDP II* and here are that the previous one would have been constructed entirely in the critical area from the start. Here, the structure as permitted would be constructed at least partially in critical area (despite the permit requiring that it not be). But both structures are designed and intended to be located in the critical area, and when that happens the harm to public uses of the critical area will be identical. The ALC erred in issuing another vertical wall along the banks of the Kiawah River that will eliminate the existing shoreline and uses thereof, despite this Court's ruling denying the same structure.

B. The ALC Erred in Rejecting the Collateral Estoppel Argument

The ALC erroneously found that the League did not properly raise the issue of collateral estoppel and determined that the failure to raise these issues in the League's prehearing statement renders them abandoned. (Recons. Order, p. 9; R. 63). However, the League did raise inconsistency between DHEC's current decision with *KDP II* to the ALC through its prehearing statement: "Whether staff's issuance of this certification is fundamentally inconsistent with the S.C. Supreme Court's third and final opinion in *Kiawah Dev. Partners, II v. S. Carolina Dep't of Health & Envtl. Control*, 411 S.C. 16, 766 S.E.2d 707 (2014)." (R. p. 251). While the ALC recognized that "inconsistency can be an element related to collateral estoppel or res judicata," it held that inconsistency is "deficient of its own accord . . . to also raise the issues of collateral estoppel and res judicata under its umbrella." (Recon. Order, p. 8-9; R. pp. 62-63).

The ALC erred by increasing the requirements to sufficiently raise the issue of claim preclusion. The ALC relied on *Johnson v. Sonoco Prod. Co.*, 381 S.C. 172, 672 S.E.2d 567 (2009), to substantiate its assertion that inconsistency is insufficient on its own to raise res judicata or claim preclusion. *Id*. However, *Jonson v. Sonoco Prod. Co.* does not address the issue of properly raising the issue of collateral estoppel and thus provides no precedential basis for this assertion.

South Carolina has not set forth a formulaic process by which to raise collateral estoppel and has not explicitly detailed what is required to plead with particularity in a prehearing statement. However, by way of the inconsistency theory, the League put the other parties on notice that they would assert that the Department Decision in 2008 and *Kiawah II* would preclude further litigation. This has been sufficient to properly raise issue preclusion in many

other jurisdictions lacking a formulaic process by which to raise it. *See, e.g., In re P.D.D.*, 256 S.W.3d 834, 839 (Tex. App., 2008)*; In re Marriage of Write*, 841 P.2d 358, 360 (Colo. App., 1992); *Barrett v. Town of Guernsey*, 652 P.2d 395, 398 (Wyo., 1982).

V. The ALC's Determination that the Project is Consistent with State Policies is Not Supported by Substantial Evidence

The basic state policies underlying the CZMA require protection of the coastal environment, and particularly sensitive and fragile areas from inappropriate development. S.C. Code Ann. §§ 48-39-30(A)-(B)(1). DHEC is directed: "To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations." S.C. Code Ann. § 48-39-30(B)(2).

The "findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." *Able Commc'ns, Inc. v. S.C. Pub. Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986); *Spartanburg Reg'l Med. Ctr v. Oncology & Hematology Assocs. of S.C., LLC*, 387 S.C. 79, 91-92, 690 S.E.2d 783, 789 (2010). The Court in *Able* held that conclusory findings of the Public Service Commission did not provide the Court with sufficient explanation to allow it proper review because it could only speculate as to "the reasons underlying the decision." *Id.*

An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. *Altman v. Griffith*, 372 S.C. 388, 642 S.E.2d 619 (Ct. App. 2007). In this case, the ALC made conclusory findings unsupported by, and in contradiction with, the substantial evidence.

A. The ALC's Determination that Development of Spit is Consistent with State Policies is Unsupported

Residential development has placed "demands upon the lands and waters of our coastal zone" which "have resulted in the decline or loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use and shoreline erosion." S.C. Code Ann. §48-39-20(B). The General Assembly further found: "Important ecological, cultural, natural, geological and scenic characteristics, ... and historical values ... are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values." S.C. Code Ann. § 48-39-20(E). Accordingly, the General Assembly emphasized the "urgent need to protect and give high priority to natural systems in the coastal zone . . . ." S.C. Code Ann. §48-39-20(F).

This Court held that "it is to the public's benefit to protect natural processes like the cyclical erosion, breach, and accretion process of the [S]pit" and that "there is often great value in allowing nature to take its course, rather than having our coast become an armored, artificial landscape." *KDP I* at 716-17. The Court emphasized that protection of public trust resources is the paramount consideration, and that Captain Sams Spit, the resource at the heart of this appeal, is an "invaluable – in environmental, social and economic terms – stretch of tidelands" that is a "finite" and "precious public resource." *Id*. at 22, 710-11. Indeed, the laws "generally prohibit alternations to the tidelands except when the public interest requires otherwise" because "the public interest is usually best served by preserving tidelands in their natural state," *Id*. at 29, 715 (citing S.C. Code Ann. §§ 48-39-20 to -30).

The ALC erroneously states that Appellant "did not show that [the Spit] is inappropriate for development." (Am. Order, p. 48; R. p. 49). This finding ignores the evidence that the Spit is highly dynamic and has been completely underwater at least three times, and specifically the testimony of Dr. Young and Dr. Hayes. The ALC also ignores uncontradicted testimony that the Spit is "one of the great last refuges on the coast," (R. p. 843, line 7-8) and "one of the few places left that's not dramatically developed." (R. p. 1052, lines 6-7).

Both the S.C. Department of Natural Resources and the U.S. Fish and Wildlife Service (FWS) advised that the Spit is too unstable to be built upon and strongly discouraged development on the Spit. (R. p. 1984; Pet. Ex. 18 & 19, R. pp. 3364-77). Specifically, the FWS told DHEC that the Spit is "inappropriate for permanent development of this nature. . . . We do not believe an area this prone to significant changes from both long-term processes and storm events should be artificially anchored through hardened developments." (Pet. Ex. 19, R. p. 3376).

Due to Captain Sams Spit's "instability, it also is highly inappropriate for development." (R. p. 830, lines 4-5). The spit changes and is vastly different every 5-10 years. (R. p. 1377). Mr. Limehouse recalls going to the Spit in 1949 when it eroded away and said "it was a big sand dune in this bend. Somebody took a knife and cut it in half." (R. p. 1378, lines 4-6). Dr. Tim Kana explained that in 1949 the inlet was in the location of the present day neck; that the neck breached at least four times since 1661; and previously expressed his "hope that this dynamic beachfront area [Captain Sams Spit] will always remain undeveloped and serve as a natural buffer." (R. pp. 2099, 2147, lines 10-13).

Dr. Young explained that it matters not the integrity or design of the houses to be built on the Spit; rather, when you build anything in an "incredibly dynamic, exposed to strong coastal

hazards" area like the Spit, "it's a problem." (R. p. 1553, lines 11-13). Based on his observations and experience, Dr. Young explains that the development plans for Captain Sams are "an unwise development proposal" (R. p. 1564, line 18) because trying to maintain access along the neck of the Spit is "kind of like trying to shove a hippo through a mouse hole . . . I worry about . . what is the real life span of this sand and this geomorphology that you're trying to place everything on here." (R. p. 1565, lines 7-13). Moreover, "development in a place like this is going to place an increased financial and emergency management burden on the locality, the county, and the state." (R. p. 1561, lines 22-24).

Dr. Richard Porcher[25] described the topography of the Spit has having series of dune ridges and swales or sloughs. (R. p. 1652). Sloughs are the low areas between the dune ridges that contain a variety of freshwater and saltwater plants. (R. p. 1643). Additionally, based on review of the development plans, his familiarity with the site and his ecological expertise, Dr. Porcher became concerned that portions of the proposed lots and access road would be inundated with water from tidal action.

Dr. Porcher collected data and documented his findings on multiple site visits. Celie Dailey worked with Dr. Porcher to collect GPS location data, measurements of water height and photographs, which data she imported into Google Earth to create maps reflecting that information. (R. pp. 1391-1571). As a result of multiple site visits and a review of the permit

[25]; Dr. Porcher is a field botanist who received his Ph.D. from the University of South Carolina in 1974 and testified as an expert in botany. (R. pp. 1612-1822). He is Professor Emeritus in Biology at The Citadel and author of numerous books on South Carolina botanical and cultural resources. He became concerned about the proposed development project when he visited the Spit to photograph the beach and dune plant communities but found those communities absent and significant erosion of the dunes on the oceanfront side of the Spit.

drawings and GPS location data, he concluded that the road would cross over the slough, or wetland area: "I knew up the slough there was going to be houses, parking lots, roads, all kinds of things, water plants, and I couldn't imagine it." (R. pp. 1642, 1645, 1699, 1701, lines 20-22).

Every place Dr. Porcher took GPS readings and photographs water was present in the slough. (R. p. 1752). The water came all the way up into lots 129 and 123, as depicted on Joint Ex. 7, p. C1.5. (R. p. 1751). He determined that the proposed development would be partially located in areas periodically inundated with water – the road, a parking lot and lot 129 all would be within the slough which contains water and wetlands vegetation. (R. p. 1752). As a field botanist, Dr. Porcher is "certainly ... concerned about the destruction of the slough. It is a conduit for organic material . . . which forms the base of the food chain." (R. p. 1756, line 24 - 1757, line 7). The wetlands and slough that the road would cross are an integral part of the estuarine system. (R. pp. 1765, 1807, 1861). He explained that anywhere you have a continuous flow of water, that system is an integral part of the estuarine system. (R. p. 1805).

Dr. Porcher explained that "climate change is going to have a hell of an effect on the coastal processes and how high the tides go into estuaries . . . And that's one thing that's going to affect this place here. 50 years down the road we know what's going to happen . . . [with] sea level rise." (R. p. 1816, lines 6-20). Dr. Kana also stated that climate change is occurring and, as a result, we are experiencing more frequent and more severe storm events, in addition to sea level rise. (R. p. 2148). He has concluded that sea level rise equates to about 0.3 feet per year of erosion, which is a conservative estimate. (R. p. 2151).

The ALC gave no weight to this testimony, simply (and erroneously) concluding that the project would not result in critical area impacts. In so doing, the ALC missed the point of Dr.

Porcher's testimony, which was not to establish the critical line or impacts to critical area, but to establish that the development would be placed in areas that are inundated with tidal waters at least twice a month. (Am. Order, p. 13; R. p. 14). While the houses may not be in "critical area," the fact that they would be in areas that are inundated with tidal waters indicates that the project is an "ill-planned" development in violation of state policy designed to prevent such development, and that the project will have additional harmful cumulative impacts. S.C. Code Ann. § 48-39-20(E).

B. The ALC's Findings on Impacts to Coastal and Marine Resources is Unsupported

"The coastal zone and the fish, shellfish, other living marine resources and wildlife therein, may be ecologically fragile and consequently extremely vulnerable to destruction by man's alterations." S.C. Code Ann. §48-39-20(D). In reviewing projects, DHEC must consider the extent to which a proposed project: "would affect production of ... any marine life or wildlife or other natural resources in a particular area." S.C. Code Ann. § 48-39-150(A)(3). DHEC's Joyner admitted that plants and animals are coastal resources and that the agency must consider impacts to those resources. (R. pp. 1956-57). The agency has regulatory authority over species like terrapins and dolphins because they are a coastal resource. (R. pp. 2039-40).

The ALC's Order raises important legal issues surrounding the scope of the ALC's review and the substantial evidence standard. Each of the League's experts has been conducting research within their respective fields of expertise for decades. In response, KDP presented one witness, Travis Folk, who professed expertise in all of these topics, even though he has conducted no research in any of them. While Appellant recognizes that conducting research is not necessary to

qualify an expert, the ALC's complete and total reliance on such generalized "expertise" to the exclusion of qualified experts with specific and particular expertise on the issues of diamond backed terrapins, dolphins and wetland vegetation and hydrology fails the substantial evidence test. The ALC's treatment of witnesses is particularly troubling in light of the Appellant's motion in limine seeking to exclude Dr. Folk's testimony because KDP failed to disclose that he would be testifying about terrapins or dolphins.[26] He was disclosed to only discuss "threatened and endangered species." (R. p. 3822).[27]

DHEC's Joyner confirmed that "threatened and endangered species" references the federal definition of those species under the Endangered Species Act and that FWS designates species as

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[26]On the eve of trial, KDP produced substantial documents indicating for the first time, and contrary to its prior disclosure, that it intended to utilize Travis Folk as a witness to testify regarding diamondback terrapins, bottlenose dolphin and general wildlife impacts. Accordingly, Appellants filed their Motion in Limine or, in the Alternative, for a Continuance, which was denied by the ALC. (R. pp. 456-63). Then, based on Folk's testimony at trial, wherein the extent to which not only the substance of his testimony was withheld but also documents and communications with the witness, Appellants filed their Motion to Compel or, in the Alternative, to Strike or Exclude Evidence. (R. pp. 464-72). Even assuming Appellants broke in the middle of trial to take Folk's deposition as the ALC proposed (R. pp. 44-49), which counsel for Appellants assert would have interfered with their ability to zealously represent their client's interests, this could not cure the discovery violation and Appellants still would be required to seek relief.

[27]For this reason Appellant informed the ALC that upon the disclosure, it determined that it need not depose the witness. The ALC, apparently recognizing the deficiency in the disclosure, attempted to remedy the deficiency by offering that Appellant could take the deposition in the middle of trial. Appellant asserts that if the ALC were truly inclined to allow it to conduct discovery, it should have continued the contested case to allow Appellant to conduct discovery *before* the hearing not during it. Undertaking discovery when trial has already commenced puts a party at a severe disadvantage. (R. pp. 44-49; 554-57). For instance, the Appellant would not be able to share the deposition transcript with its experts in order to prepare for and refute the deponent's testimony. The Appellant's trial strategy would have changed significantly with Dr. Folk's deposition transcript, and Appellant would have taken such deposition, *if* KDP had properly and timely disclosed the very broad and all-encompassing expertise that its witness professed on the eve of trial. (R. pp. 554-57).

threatened or endangered under the Act. (R. pp. 2021; 1985-86). Folk similarly recognized that the terminology "threatened and endangered species" referred to species formally listed as such by the state or federal government. (R. p. 2565, 2599-2602).

Moreover, Dr. Folk admitted that aside from one brief article about the cattle egret, all of his research relates to game species. (R. pp. 2537-38). Folk has never testified nor given opinions regarding terrapins, dolphins or sea turtles; his sole methodology in forming opinions on such species was through literature review. (R. p. 2542). He has not collected any data, done any research nor consulted or formed any opinions with regard to dolphins and terrapins outside of this particular case. (R. pp. 2543-46). He simply read other scientists' articles, and yet claimed to be able to determine how any project will impact any species, from dolphins to gorillas. (R. pp. 2549-50).

i. Findings on Terrapins are Unsupported

Whit Gibbons[28] began studying diamondback terrapins on Kiawah Island in 1983 and has continued every year since. (R. p. 954). His study has included determining the ecology, population dynamics and demography of the terrapins. (R. p. 954). Dr. Gibbons first learned of the proposal to develop Captain Sams Spit when the developer asked him to be its consultant to support the project, which he declined because "it didn't sound like a project to me that would be

[28]Dr. Gibbons received his Ph.D. in zoology and worked at the Savannah River Ecology Lab through the University of Georgia as a research faculty member for his entire career, and was qualified as an expert in herpetology and diamondback terrapins. (R. pp. 948-50, 956). During that time he authored 20 books and around 200 peer-reviewed articles on ecology, reptiles and amphibians. (R. p. 951; Pet. Ex. 7, R. pp. 3213-52). He has authored over a dozen peer-reviewed articles that focus specifically on diamondback terrapins. (R. p. 952).

of any value to the environment. It sounded like it would – might be detrimental and I did not feel I could be supportive of that." (R. pp. 958, line 21 – 959, line 1).

The diamondback terrapin is not listed as a state or federally threatened or endangered species (R. p. 959-60); but they are a resource of the coastal zone. (R. p. 959). Dr. Gibbons explained that based on having worked at Kiawah for over thirty years, Captain Sams Spit is "the prime nesting area for terrapins." (R. p. 981, lines 4-5). While "terrapins will nest in other areas in that region, that's the prime, prime habitat." (R. p. 981, lines 4-6). "It would be the obvious place if you were a turtle biologist to know that that's where they're going to nest." (R. p. 1005, lines 8-10). He explained the value of the Spit as "excellent habitat" because it is "a larger but uninterrupted, unfragmented area. It's sparse vegetation, there's no big canopy cover of big trees . . . it's just ideal nesting habitat." (R. p. 986, lines 6-10).

The ALC's rejection of Gibbons' testimony that the spit is "the prime nesting area" for terrapins is based on the illogical and erroneous conclusion that a sandy escarpment is the same as a hardened, man-made vertical barrier. (Am. Order, p. 17; R. p. 18). In short, a terrapin climbing up a sandy, pliable escarpment is incomparable to a terrapin climbing a vertical steel wall. The finding that a turtle could not climb up a couple inches of sand (Am. Order, p. 17-18; R. pp. 18-19) flies in the face of common sense, as well as documented study and Gibbons' testimony that terrapins climb up and nest in the dunes along the Kiawah River shoreline. The ALC's efforts to equate a natural sandy escarpment to a vertical steel wall are unfounded, as is the finding that terrapins would not be able to climb the escarpment. (Am. Order, p. 18; R. p. 19). Contrary to the ALC's finding (R. p. 19), Dr. Gibbons did not suggest that the SSPW is not where terrapins would access the Spit to nest. Rather, he unequivocally testified that the location of the proposed

SSPW is *the* prime nesting area, which the terrapins cannot reach if there is a vertical wall, as opposed to sand which they can climb. (R. pp. 981, 986, 1005).

Presently, the terrapins can pick a nesting site inland on the Spit and readily cross back to the river without any obstruction. (R. p. 989, lines 8-12 & R. p. 990, lines 17-19). If the 2,380-foot wall were constructed as permitted, the terrapins would have to cross over the wall to get to the prime nesting area because the "nesting habitat in relation to the wall would be between the wall and the other side of the spit, the ocean side of the spit." (R. pp. 997, 998, lines 4-6). But "a terrapin is not going to go over a barrier that is out of the ground that's even a few inches high. It doesn't matter what the wall would be made of, they're not going to go over it if they encounter it. So they would not be able to go from the river to the nesting area if there is a barrier." (R. p. 998, lines 18-24). Terrapins "will not be able to eventually get past that wall. If they can't get past that wall, they can't nest on the spit." (R. p. 1009, lines 14-17). If they are unable to access the nesting area "they might go back and forth a few times, but our experience is they generally turn around and go back and not lay the eggs." (R. p. 999, lines 15-18).

With respect to the road itself, "some of it runs through the habitat itself" (R. p. 1000, line 25), but it also fragments the habitat such that females have to cross the road to nest and the babies need to cross the road to reach the river, which makes them very vulnerable to predators and vehicular traffic. (R. pp. 1001-02). Dr. Gibbons explained that in his scientific opinion, the project "will definitely have a detrimental effect. It could be very serious because that is the prime nesting habitat . . . if that's eliminated, you're not gonna have any way to – for the population to continue. The adults are gonna die off either naturally or from unnatural causes, but as adults die off, they have to be replaced by the juveniles. If there are no juveniles, your population will be

extirpated eventually." (R. p. 1002, lines 12-24). When asked on cross how many terrapins would nest at Captain Sams, the prime nesting area, if the project is completed, Dr. Gibbons said "close to none." (R. p. 1009, line 1). Losing access to the spit would be the death knell for the terrapins at Kiawah. (R. p. 1024).

By contrast, Folk's testimony that the area of the proposed wall is not accessible by terrapins is outside of his population dynamics expertise, beyond his qualifications (R. p. 2580) and contrary to the well-documented use of this area by nesting females. (Pet. Ex. 8, R. pp. 3253-326). Folk pointed to studies indicating that terrapins cannot climb over vertical manmade barriers greater than six inches. (R. pp. 2621-22). While acknowledging the differences between something "sandy" and steel, wood, rock or other manmade structures, Folk nonetheless claimed that the inability of a turtle to scale a man-made vertical wall equates to the inability of a turtle to climb a natural, sandy escarpment, despite the lack of any literature to support such a conclusion. (R. pp. 2591, 2622). Notably, Folk does not personally know whether terrapins are able to physically access and nest on the Spit. (R. p. 2626). Moreover, Folk admitted that the Kiawah River shoreline has been eroding steadily since 1979 and that an escarpment likely existed, although of varying heights, since that time. (R. 2624-25; Resp. Ex. 29, R. p. 3569). Thus, when the Zimmerman study (Pet. Ex. 8, R. pp. 3253-326) identified the prime nesting location for terrapins along the Spit, it was erosional and likely had vertical escarpments of varying heights. (R. pp. 2623-25).

Though Folk admits that terrapins do nest on the Spit, (R. p. 2592), he opined that other accessible areas would still exist on the Spit if the wall is constructed and causing a man-made obstruction. (R. pp. 2604-05). This testimony ignores the decades of research, knowledge and

expertise of Dr. Gibbons who has been studying these terrapins at this location since 1983. (R. p. 954). Folk admitted that Gibbon's student, Zimmerman, conducted the only study on terrapin nesting at Captain Sams, which is the only published, peer-reviewed article on that topic. (R. p. 2615). But he disagrees with it nonetheless. Ironically, Dr. Folk's opinion in 2008 was that the "vegetative architecture" in the dune area where the proposed wall and road would be constructed "is critical to many species." (Tr. 1944, lines 24-25, 1945; R. 2639, 2640).

The ALC's finding that there was "no evidence submitted to support the contention that the SSPW and development will have a detrimental effect on diamondback terrapins" is demonstrably false. (Am. Order, p. 19; R. 20). Moreover, Gibbons gave the ALC a clear opinion about the effect the development would have on the terrapin population, contrary to the ALC's finding. (Am. Order, p. 18; R. p. 19). While the ALC can give more or less weight to the evidence, it cannot deny that such evidence was presented. In so doing, the ALC failed to consider, much less weigh, the evidence.

ii. Findings on Dolphins are Unsupported

For the past 15 years, Captain Chad Hayes[29] has been observing and documenting dolphin strand feeding at Captain Sams Spit, learning as much as he can about the behavior and conducting his own independent research. (R. pp. 1073-74). Based on his extensive

[29]Captain Hayes is a high school marine biology teacher and a licensed charter captain. (R. pp. 1063-64). He first worked as a naturalist at Kiawah and then later with the Department of Natural Resources. (R. p. 1065). In 2004 the Kiawah Island Golf Resort subcontracted him to run the charter boat program, providing interpretive and education eco tours, dolphin watching and sunset cruises and inshore or near-shore fishing charters in the Kiawah River and surrounding waters, and he has continued providing these tours after leaving the resort. (R. pp. 1067-68, 1070-71). Hayes testified that he never came across an area with as much diversity in terms of wildlife as the Kiawah River, that "it literally was like being in the middle of a wildlife documentary each and every day out there," and that as a biologist there was no place he would rather go. (R. pp. 1070, lines 19-21, 1072).

observations, Captain Hayes testified that there are certain spots where strand feeding is more prevalent, that most of the strand feeding activity used to primarily occur at the tip of the Spit in the inlet but that more recently, as human activity at the end of the Spit has increased, he has observed more strand feeding activity along the sandy banks at the neck of the Spit, where the proposed steel wall, road and other infrastructure would be located. (R. pp. 1075-77, 1082-84). Captain Hayes testified about several photographs he took documenting multiple dolphin strandfeeding along the sandy riverbanks at the neck of the Spit. (R. pp. 1078-82; Pet. Ex. 9, R. pp. 3327-32). He also testified to his observations of the natural erosional changes on the river side of the Spit over the years. (R. pp. 1084-85). In addition, several members of the League testified to regularly observing bottlenose dolphins strand feeding on the sandy riverbanks. (R. pp. 869-73, 1040-43, 1054-56).

Dr. Robert F. Young[30] testified as an expert in oceanography and marine ecology. (R. 1122-1212). Dr. Young opined that loss of this beach "would be significant" for the dolphins that utilize it. (R. p. 1179, line 5). He said that the dolphins "could potentially be losing a significant portion of their diet and could quite possibly be impacted to a level where they have to completely change their foraging tactics or move to a new location . . . If they are able to adapt, they can survive. If they're not able to adapt, they may not." (R. 1179, line 6 – 1180, line 3). In his scientific opinion, if the dolphins can no longer strand feed along the banks of the river it will "negatively impact that group of dolphins." (R. p. 1181, lines 3-4). He explained that "this group

[30]Dr. Robert F. Young received his Ph.D. in oceanography and is a Professor of Marine Science at Coastal Carolina University. (R. p. 1122-24). Dr. Young has authored numerous peer-reviewed publications, including four dealing primarily with coastal and estuarine dolphins in South Carolina along with several others pending final review. (R. p. 1126). For over 20 years, Dr. Young has been studying bottlenose dolphins using coastal surveys and conducting ecological and bioenergetic studies looking at the role of dolphins in the salt marsh system and their food intake, including extensive studies on their strand feeding behavior. (R. pp. 1137-40).

[of dolphins] is unlikely to spend a lot of time in neighboring systems since they're sighted so frequently in the Kiawah River." (R. p. 1195, lines 5-7).

The ALC found that bottlenose dolphins strand feed at the Spit, but rejected Dr. Young's opinion that loss of the riverbank from the SSPW would significantly impact the dolphins by eliminating a substantial part of their diet. (Am. Order, p. 20; R. p. 21). The ALC inferred that because no study had been conducted to determine whether a single feeding site would negatively impact a dolphin population, it must not be true. (*Id.*). Such a finding ignores the testimony about the impacts of removal of this feeding site. Rather than accepting the testimony that the loss of the shoreline in the area of the proposed SSPW would significantly impact dolphins, the ALC used the absence of a study proving that such loss would cause significant harm as a reason to reject a qualified expert opinion. Under this theory, a court could reject uncontroverted expert testimony simply because no study had been conducted to support that opinion.

The ALC acknowledges that strand feeding will be "partially eliminated depending upon the extent of degradation of the shoreline." (*Id.*). Appellant submits that the elimination in front of the SSPW will be complete in light of the evidence that the shoreline will be eliminated once the erosion reaches the wall, but even a partial elimination runs afoul of the state policy to protect, restore or enhance the coastal zone's resources. Under the ALC's logic, as long as there is somewhere else that terrapins can nest or dolphins can feed, the elimination of a substantial part of that habitat is entirely consistent with the state's policy: "To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations." S.C. Code Ann. § 48-39-30(B)(2).

Instead of protecting valuable public trust resources on one of our State's last remaining undeveloped and unstable barrier island spits for public beneficial uses for this and succeeding

generations, DHEC and the ALC approved their destruction in violation of the policies and directives – and indeed the spirit – of the Coastal Zone Management Act.

CONCLUSION

WHEREFORE, the Appellant respectfully requests that this Court issue an Opinion reversing the Amended Final Order and Decision on Remand and Order on Reconsideration of the Administrative Law Judge authorizing an erosion control structure along the banks of the Kiawah River at Captain Sams Spit.

Respectfully submitted,

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August 27, 2020

RECEIVED
Aug 27 2020
S.C. SUPREME COURT

Certificate of Counsel

The undersigned does hereby certify that this Final Brief complies with SCRAP Rule 211(b).

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August 27, 2020