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**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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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

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

v.

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

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**RECORD ON APPEAL**

**VOLUME III OF IX**

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1 truth, the whole truth and nothing but the  
2 truth, so help you God?

3 **DR. GIBBONS:** I do.

4 **COURT REPORTER:** Thank you.

5 **DR. GIBBONS - DIRECT EXAMINATION BY MS. ARMSTRONG:**

6 Q: Good morning, Dr. Gibbons.

7 A: Hello.

8 Q: If you could go ahead and start by giving The  
9 Court your -- well first, where do you live?

10 A: I live in Aiken, South Carolina.

11 Q: And where are you from?

12 A: I'm originally from Alabama.

13 Q: And how long have you been in South Carolina?

14 A: 1967, however long that would be. 50 years, I  
15 guess.

16 Q: And what's your educational background?

17 A: I got a bachelor's degree at the University of  
18 Alabama, a master's degree at the University of  
19 Alabama in biology and then a Ph.D. at Michigan  
20 State University in zoology.

21 Q: And what is zoology?

22 A: The study of animals.

23 Q: And what was the topic of your dissertation?

24 A: My dissertation at Michigan State was ecology  
25 of the painted turtle, a common turtle in the



1 Eastern United States.

2 Q: And what did you do after you completed your  
3 Ph.D.?

4 A: I came to the Savannah River Ecology Laboratory  
5 in Aiken as a post-doctorate, post-doctor -- or  
6 post-doctoral associate at the University of  
7 Georgia. They have a laboratory in Aiken. And  
8 that's where I -- and I've been with the  
9 University of Georgia ever since, until I  
10 retired.

11 Q: And what was the -- what is SREL or the  
12 Savannah River Ecology Lab, what does ---

13 A: It is a research laboratory that is operated by  
14 the University of Georgia. The people at the  
15 lab, the faculty, many of them are faculty of  
16 the University of Georgia, and I was a  
17 professor at the University of Georgia, and  
18 with a research appointment, although I did  
19 teach herpetology at the University in Athens.

20 Q: What is herpetology?

21 A: Study of reptiles and amphibians.

22 Q: And what was the -- what was your research  
23 focus area?

24 A: My primary research was in herpetology, study  
25 of particularly reptiles and also amphibians.



1 And with reptiles, one emphasis was on turtles  
2 and the other on snakes.

3 Q: And what classes did you teach? Oh, you said  
4 herpetology.

5 A: I have taught ecology before and -- general  
6 ecology and herpetology. Those are the main  
7 classes that I've taught.

8 Q: And what were your roles and responsibilities  
9 at SREL?

10 A: I was a faculty member, research faculty  
11 member. I also was acting director of the  
12 laboratory for one period of time, a little  
13 over a year; and had different administrative  
14 positions, just head of divisions and that, but  
15 that was it. Mainly research faculty, that was  
16 what I did, research.

17 Q: And would that have been in the biology  
18 department at UGA?

19 A: No, it started off in the zoology department in  
20 the 1960s and '70s. Then it became the, what  
21 it is now, is the School of Ecology. That's  
22 where I retired from is the School of Ecology.

23 Q: Have you authored any -- I want to talk about  
24 publications, but let's start with books. Have  
25 you authored any books related to ---



1 A: I've been author, co-author of about 20 books  
2 on ecology, reptiles and amphibians.

3 Q: Reptiles and amphibians, okay. And turtles,  
4 are they a reptile?

5 A: Turtles are reptiles.

6 Q: And how about articles, how many articles have  
7 you published related to reptiles?

8 A: Probably close to -- around 200.

9 Q: Okay.

10 A: Scientific articles.

11 Q: And that means those are peer-reviewed  
12 articles?

13 A: Oh, yes.

14 Q: And have you written any other articles that,  
15 maybe not peer-reviewed, but on reptiles?

16 A: I write a newspaper column that is published  
17 weekly that, as I mentioned, talk about  
18 reptiles, and I've written several magazine  
19 articles on reptiles, including diamondback  
20 turtles.

21 Q: Okay. And I'm gonna hand you Exhibit Number 7  
22 and ask if you can identify that for me,  
23 please.

24 **(Petitioner's Exhibit Number 7 was introduced into**  
25 **the record at this time.)**



1 A: That is my CV or curriculum vitae, resume.

2 Q: Okay. And are your publications, books,  
3 articles and other publications listed in your  
4 CV?

5 A: Yes, they are.

6 Q: And how many publications do you have that  
7 involve diamond -- the study of diamondback  
8 terrapins?

9 A: I would have to count them to be sure, but  
10 certainly 15, 20 starting -- that mentioned  
11 them one way or another. Some specifically  
12 about terrapins, the whole article, certainly  
13 over a dozen. But, let's see, and the earliest  
14 one was that I'm -- is -- was in 1978 where it  
15 first mentioned the terrapins of barrier  
16 islands which included Kiawah. And the last  
17 one was -- well, actually a chap -- the  
18 introductory chapter of a book that's coming  
19 out -- should come out this year by Johns  
20 Hopkins Press on the ecology and conservation  
21 of diamondback turtles. And mine is the  
22 opening chapter.

23 Q: So you wrote your -- you finished drafting the  
24 first chapter, the introduction chapter to a  
25 book called Ecology and Conservation of the



1 Diamondback Terrapin?

2 A: Yes, I've written that, yes.

3 Q: And what kind of species are diamondback  
4 terrapins?

5 A: Diamondback terrapins are a -- they're in a  
6 family of turtles that include the common  
7 turtles, people that -- the spotted turtle that  
8 was mentioned earlier, slider turtles, but  
9 they're very -- they're exclusive in that they  
10 are in their own genus system. The -- a genus  
11 of turtles, there's no other species in the  
12 North America or the world that is in that  
13 taxonomic category. There's also no other  
14 species in the world of turtle, of the over 300  
15 species of turtles in the world, it's the only  
16 one that is exclusively in estuarine habitats.  
17 In other words the brackish water habitats  
18 between ocean and fresh water.

19 Q: And turning back to Exhibit Number 7, your CV,  
20 does that look like an accurate copy,  
21 representation of your CV?

22 A: Yes, best I can tell. Yes.

23 **MOTION TO ADMIT PETITIONER'S EXHIBIT NUMBER 7:**

24 **MS. ARMSTRONG:** Petitioners move Number 7 into  
25 evidence.



1     **THE COURT:** Any objection?

2     **MR. GRESSETTE:** No objection, Your Honor.

3     **THE COURT:** Mr. Churdar?

4     **MR. CHURDAR:** No objection.

5     **RULING OF THE COURT:**

6     **THE COURT:** It's admitted.

7     **(Petitioner's Exhibit Number 7 was admitted into**  
8     **evidence.)**

9     **Q:** And I think you referenced earlier that there  
10     were -- you were aware of some terrapins or  
11     done work with terrapins on Kiawah Island. Are  
12     you familiar with Kiawah Island?

13     **A:** Yes.

14     **Q:** And have you -- are you involved with or have  
15     you been involved with any research projects at  
16     Kiawah Island related to diamondback terrapins?

17     **A:** Yes. Since 1983 I've worked on diamondback  
18     terrapins every year since 1983.

19     **Q:** And can you tell -- describe for The Court a  
20     little bit about what the project entails?

21     **A:** The project, the purpose of the project was  
22     determine the ecology and population, what you  
23     call population dynamics and structure of --  
24     the demography of the terrapins in the Kiawah  
25     River and the tidal creeks, that's where they



1 live down there, in that area. How many are  
2 there, what -- how many males, how many  
3 females, what is their annual -- how do they  
4 behave, how they're -- general ecology and  
5 behavior of these animals.

6 Q: And what has been your role in that research  
7 project?

8 A: Well, I have -- involved a large number of  
9 people, I'm sure over a hundred different  
10 people, students, visiting professors from  
11 other universities, technicians, and I just  
12 initiated the project in, as I said, 1983 and  
13 we've did it every year since.

14 Q: And, Dr. Gibbons, have you ever testified in a  
15 court proceeding before?

16 A: I have.

17 Q: Have you ever -- were you qualified as an  
18 expert?

19 A: I was.

20 Q: And in what area were you qualified?

21 A: Herpetology.

22 Q: And how would you characterize your expertise?

23 A: I'm -- I've published lots of scientific papers  
24 on all of the reptiles which would be  
25 alligators, snakes, turtles and lizards and all



1 of the amphibians, frogs and toads and  
2 salamanders; have had -- supervised over 40  
3 students, graduate students in these role -- in  
4 their dissertations or theses; and been  
5 involved in a lot of projects; published a lot  
6 of papers and books on these animals.

7 **MOTION TO OFFER AS EXPERT:**

8 **MS. ARMSTRONG:** Your Honor, the petitioners offer  
9 Dr. Whit Gibbons as an expert in research  
10 ecology with the focus on herpetology to  
11 include -- encompasses diamondback terrapins.

12 **THE COURT:** Any objection with that qualification?

13 **MR. GRESSETTE:** I think only to the way it was  
14 phrased. Herpetology including diamondback  
15 terrapins?

16 **MS. ARMSTRONG:** Yes. Diamondback terrapins are a  
17 species of ---

18 **MR. GRESSETTE:** Okay.

19 **THE COURT:** I think when you say focus and all those  
20 added words, it's just I either qualify him or  
21 not. And so I would go with ---

22 **MR. GRESSETTE:** He's an expert, yes, Your Honor.

23 **THE COURT:** --- in herpetology and diamondback  
24 turtles.

25 **MR. GRESSETTE:** Yes, sir.



1 THE COURT: All right.

2 MR. CHURDAR: No objection.

3 RULING OF THE COURT:

4 THE COURT: All right, he's so qualified.

5 Q: Dr. Gibbons, are you familiar with a  
6 development project proposed for Captain Sam's  
7 Spit?

8 A: Yes.

9 Q: And generally, what's your understanding of  
10 what that project entails?

11 A: My understanding is that Captain Sam's Spit,  
12 there would be 25, 26 residences built and that  
13 there would be a wall between the river and the  
14 spit itself and that there would be a road down  
15 the -- maybe paralleling the river toward the  
16 end, from the mainland end of it.

17 Q: And did you -- where is that knowledge derived  
18 from; did you review the permits and the  
19 drawings?

20 A: Saw a permit, yeah.

21 Q: And when did you first learn about the project?  
22 When did you first ever hear about it?

23 A: I believe it was 2009. And I -- yes. That's  
24 roughly 2000- -- it could've been 2008 but I  
25 think 2009.



1 Q: And what did you first -- how did it come up;  
2 how did you first learn about it?

3 A: I was asked if I would be interested in being  
4 a consultant related to that project.

5 Q: And who asked you if you would be a consultant?

6 A: I do not know exact- -- the name of the person.  
7 I think it -- I don't know the name of the  
8 person, but I think it was called the Kiawah  
9 Development Company or something like that. I  
10 don't recall it.

11 Q: Was it your understanding that it was the  
12 developer of the proposed project that was  
13 asking you ---

14 A: Yes, yes. It was the developer for the project  
15 or a project.

16 Q: And did ---

17 A: Or a project.

18 Q: Did you accept that offer to be a consultant?

19 A: No.

20 Q: Why not?

21 A: I didn't -- it didn't sound like a project to  
22 me that would be of any value to the  
23 environment, the natural environment. It  
24 sounded like it would -- might be detrimental  
25 and I did not feel I could be supportive of



1 that.

2 Q: I want to talk a little more specifically about  
3 diamondback terrapins. You indicated earlier  
4 that they're a species that you've been  
5 conducting research on at Captain Sam's Spit in  
6 Kiawah Island since 1983, is that ---

7 A: That's correct.

8 Q: Would you consider the diamondback terrapins as  
9 a resource of the coastal zone?

10 A: Yes.

11 Q: And you may have been here for some arguments  
12 earlier, but are diamondback terrapins a  
13 threatened and endangered species?

14 A: They are not officially, not on the ESA list,  
15 they're not officially, but they're certainly  
16 a threatened and from many places endangered  
17 species in the generic sense, yes.

18 Q: In a generic sense. But when I asked you  
19 whether they were a threatened and endangered  
20 species, did you understand what that meant,  
21 what I was asking?

22 A: No.

23 Q: In other words, is threatened and endangered  
24 species, from your perspective a term of art?

25 A: Oh, yes. I'd say yes. That's what I meant.



1 In a generic sense, they are certainly a  
2 threatened species.

3 Q: But they're not a threatened and endangered  
4 species?

5 A: They're not officially listed in -- not  
6 federally, but they are in some states.

7 Q: Okay. But not in South Carolina?

8 A: Not South Carolina, not endangered or  
9 threatened officially in South Carolina.

10 Q: And you talked about generally that they're  
11 threatened. What are the existing threats to  
12 the terrapins?

13 A: Well, there are a lot of threats, other than  
14 natural ones, of course, but crab trapping is  
15 certainly a threat along the coast of South  
16 Carolina all the way to Massachusetts and  
17 Texas. It -- the crab pots, when they're set,  
18 crabs can live in them and because they can  
19 breathe under water, turtles cannot, terrapins  
20 cannot. And a second threat is roads are a  
21 threat in many, many areas to many -- all --  
22 nearly all species of turtles that encounter  
23 roads, roads are a threat.

24 Q: Why are they a threat?

25 A: One thing is a nesting of -- if a turtle of any



1 sort leaves one habitat to go to another over  
2 land, they often have to cross a road. That  
3 does not apply to terrapins, but other turtles  
4 it would. But terrapins have to cross roads  
5 often to nest. If they have to cross a road to  
6 nest, they can be run over. The second part of  
7 that threat is when they -- the eggs hatch  
8 because terrapins lay their -- they dig in the  
9 sand, lay six to eight eggs, the eggs hatch out  
10 in about three months, and then the babies come  
11 out and they have to cross that road again. So  
12 there's a double threat for a road. The female  
13 has to get across it and the babies have to get  
14 across it. Other treats are development of --  
15 coastal development has several different kind  
16 of threats that they -- it poses, that it poses  
17 in that when you have houses, you take up -- or  
18 any kind of pavement, parking lots, roads, you  
19 take up the habitat, the natural habitat where,  
20 in this case, terrapins would nest. The second  
21 thing, when you have people, you have pets.  
22 Dogs are a threat to small turtles for sure.  
23 And another thing that comes with people in  
24 coastal areas are -- and in urban areas, many  
25 places, are racoons. Major threat to terrapins



1 and other turtles, both to adults and to the  
2 eggs and the hatchlings.

3 **OBJECTIONS BY MR. CHURDAR:**

4 **MR. CHURDAR:** Your Honor, I would object on multiple  
5 grounds. First of all, the testimony regarding  
6 racoons is -- there's been nothing that would  
7 indicate that racoons would only be existing on  
8 the spit as a result of this development. A  
9 more foundational objection with regard to the  
10 testimony regarding habitat, Dr. Gibbons has  
11 testified, I think his words were these are not  
12 officially on the federal or state threatened  
13 and endangered species list, but they're  
14 unofficial. So that gets us to the point where  
15 Ms. Armstrong argued against my motion under  
16 Section 7 Wildlife and Fisheries Management,  
17 specifically on page -- chapter 3, page 51 of  
18 the Coastal Zone Management Program document,  
19 she put up on the Elmo the section that talks  
20 about A1(B), wildlife and fishery stocks and  
21 population should be maintained in a healthy  
22 and viable condition. And then the critical  
23 wildlife and fishery's habitat should be  
24 protected and enhanced to the extent possible.  
25 I know that Your Honor has ruled on that, but



1 since that ruling, I went back and I've looked  
2 at the request for contested case. I've looked  
3 at the prehearing statement and that section  
4 was not relied upon as a basis for overturning  
5 the staff's Coastal Zone Consistency  
6 Certification, if wasn't even mentioned, that  
7 section of the CZMP. And I think that's  
8 consistent with, as I mentioned in my argument  
9 originally that Mr. Joyner had not put anything  
10 in his technical review summaries specifically  
11 about this section. I don't think it's before  
12 The Court for The Court to be determining  
13 whether or not the habitats are being impacted  
14 or not if it's not part of an official  
15 threatened and endangered species habitat that  
16 was mentioned in the general area of particular  
17 concern section of the CZMP.

18 **THE COURT:** So, where I can be clear, your argument  
19 is basically in their prehearing statement they  
20 haven't set forth that this is an issue so it's  
21 not an issue before The Court?

22 **MR. CHURDAR:** Or the request for a contested case.

23 **THE COURT:** Okay.

24 **MS. ARMSTRONG:** I mean I -- we generally raised  
25 compliance with the Coastal Management Program.



1 We challenged the Coastal Zone Consistency  
2 Certification and the basis for the decision  
3 and whether it complies with it. And I think,  
4 you know, going back to the ---

5 **THE COURT:** When you say ---

6 **MS. ARMSTRONG:** --- going back ---

7 **THE COURT:** Let me -- when you say generally, I'm  
8 familiar with the case law on prehearing  
9 statements too. It basically sets forth -- it  
10 limits our jurisdiction, so did you say that in  
11 the prehearing statement?

12 **MS. ARMSTRONG:** I really -- I'd have to go back and  
13 look at our prehearing statement. What I do  
14 know, Your Honor, is we raised compliance with  
15 the Coastal Management Program and the Court of  
16 Appeals in Chem Nuclear said, you raised  
17 compliance with general provisions and that  
18 submission in a prehearing statement including  
19 presenting evidence and it -- at the hearing.

20 **THE COURT:** Did you ---

21 **MS. ARMSTRONG:** You don't have to lay it -- set  
22 forth with specificity every single provision  
23 you generally talked about compliance and  
24 raised issues with compliance with ---

25 **THE COURT:** But did you raise that in your



1 prehearing statement?

2 **MS. ARMSTRONG:** Yes. Yeah, we definitely raised it  
3 in our prehearing statement.

4 **THE COURT:** Okay, then show ---

5 **MS. ARMSTRONG:** We also raised that compliance with  
6 the Act in general, 150, Mr. Churdar argues,  
7 doesn't apply, certainly the legislative  
8 declarations of findings in the legislative  
9 directed declaration of state policy would  
10 absolute implicate terrapins because the  
11 General Assembly finds that the coastal zone  
12 and the fish, shellfish or other living marine  
13 resources and wildlife therein may be  
14 ecologically fragile and consequently extremely  
15 vulnerable to destruction by man's alterations.  
16 State policy includes to protect and where  
17 possible to restore or enhance these resources  
18 of the coastal zone.

19 **THE COURT:** All right. I found the prehearing  
20 statement where she set forth in there that  
21 statutory reasons confirming the subject matter  
22 jurisdiction.

23 **MR. CHURDAR:** What page number are you on, Your  
24 Honor?

25 **THE COURT:** The first page of her prehearing



1 statement. She said Coastal Zone Management  
2 Act, that was just inferring jurisdiction. But  
3 then when we get into Section -- whether the  
4 proposed violates the following provisions of  
5 it -- so she's narrowed it down to the Coastal  
6 Zone Management Act and CMP and listed specific  
7 provisions. So, you generally say that you  
8 made -- you took that general statement as the  
9 subject matter and then you gave the specific  
10 provisions that were violated. Was the  
11 provision that we're discussing or that Mr.  
12 Churdar referred to and that you referred to  
13 earlier, was that provision cited?

14 **MS. ARMSTRONG:** We cite the Coastal Management  
15 Programs. Is it cited in the -- under Section  
16 3? I'm not sure that I see, although Section  
17 30 that I just read is specifically cited.  
18 Also the section that talks about the  
19 significant long-term cumulative impacts, we  
20 would definitely argue that impacts to any  
21 species like the diamondback terrapin is  
22 something that the Department's required to  
23 consider in assessing the long-term and  
24 cumulative impacts of the project. And that's  
25 specifically listed under -- in the prehearing



1 statement.

2 **THE COURT:** Where is it listed?

3 **MS. ARMSTRONG:** 3(1)(a); 3(1)(d).

4 **THE COURT:** Okay, I see. Mr. Churdar?

5 **MR. CHURDAR:** Your Honor, I think it's a stretch to  
6 say that general character of the area would  
7 include turtles. I mean, I think that the ---

8 **THE COURT:** Yeah.

9 **MS. ARMSTRONG:** It's not the general character of  
10 the area. It's the long-range and cumulative  
11 impacts. And the Department's required to  
12 consider long-range and cumulative impacts ---

13 **MR. CHURDAR:** On the general character of the area.

14 **THE COURT:** Oh yeah.

15 **MS. ARMSTRONG:** Within the context of future  
16 possible development and the general character  
17 of the area. I mean there's gonna be testimony  
18 from the agency's witness later about what kind  
19 of ---

20 **THE COURT:** Okay. I'm going to take another quick  
21 break. I think what I'm leaning toward though  
22 is I agree with you, looking at the language of  
23 the prehearing statement, but I'm probably  
24 going to let her present this as an offer of  
25 proof until I am confident on my decision.



1 **MS. ARMSTRONG:** Your Honor, if you want to take a  
2 break, I can -- I'd ask that The Court read the  
3 Chem Nuclear -- the Court of Appeals decision  
4 in Chem Nuclear because this same issue was  
5 raised. The court ---

6 **THE COURT:** I disagree with that.

7 **MS. ARMSTRONG:** --- read that the ---

8 **THE COURT:** I disagree with that because you set  
9 forth in generality the subject matter of this  
10 case, but then you, with specificity, set forth  
11 whether the proposed -- under the issues  
12 presented for determination, including any  
13 claims or defenses expected to be raised. You  
14 listed specifically those issues for  
15 determination of which those were not listed.  
16 So, I -- right now I just respectfully disagree  
17 with you. I'm going to let you present an  
18 offer of proof.

19 **MS. ARMSTRONG:** Sure. I mean I was counsel in the  
20 Chem Nuclear case.

21 **THE COURT:** Right.

22 **MS. ARMSTRONG:** And the prehearing statement was  
23 crafted in the same way which it raised  
24 compliance generally with the provisions, the  
25 regulatory provisions that apply to radioactive



1 nuclear waste. And part of the reason that you  
2 do a broad raising of compliance with  
3 regulatory -- the applicable regulatory  
4 provision is because at the time we filed the  
5 prehearing statements we'd not even had any  
6 discovery. They're usually due 30 days after  
7 the order is issued. It's within a couple of  
8 months of the case even being filed. So I  
9 would say there's still a lot of investigation  
10 going on at that point and we -- that's how  
11 they were characterized in the Chem Nuclear  
12 case in the same way, general compliance. And  
13 then there was specific compliance with  
14 different regulatory provisions raised in the  
15 prehearing statement but the Court of Appeals  
16 did not interpret that as a limitation of  
17 overall compliance with the regulations.

18 **THE COURT:** I'll take a break and look at that real  
19 quick, but I'm familiar with the Chem Nuclear  
20 case, so -- and it's approach. But I pulled it  
21 up right now, so I can read it. I can go look  
22 at it in my office.

23 **(Off the record from 10:10 a.m. until 10:22 a.m.)**

24 **THE COURT:** I've read Chem which took me to Sierra  
25 Club, which is the one I remembered. And I'm



1 still sticking to my previous ruling. You  
2 specifically set forth the issues to be  
3 considered in this hearing. I am going to  
4 allow you to proffer it to give me the option  
5 to think about it down the road, but as it  
6 stands now, I don't consider that an issue  
7 before This Court regarding the Coastal  
8 Management ---

9 **MS. ARMSTRONG:** So I understand your ruling, what  
10 law, what is the -- what law are you -- is that  
11 based on?

12 **THE COURT:** What law?

13 **MS. ARMSTRONG:** I mean are you relying on -- is this  
14 issue proclusion, is it -- I mean I'm trying to  
15 understand ---

16 **THE COURT:** Well, you've raised to The Court ---

17 **MS. ARMSTRONG:** We're raising ---

18 **THE COURT:** --- one of the issues that we were going  
19 to consider, it's like a pleading. And they  
20 have set forth -- they've objected to it. And  
21 you've set forth that you did make it as an  
22 issue before The Court, but under your  
23 reasoning, I don't see that as an issue before  
24 The Court based on the prehearing statement.  
25 If you've got another argument you want to



1 enlighten me on, but ---

2 **MS. ARMSTRONG:** I would like -- I would like to  
3 revisit -- I mean I can't do research in five  
4 minutes like you can, Your Honor. The way I  
5 generally understand the issue of preclusion is  
6 that ---

7 **THE COURT:** Well, issue of preclusion is appellate.

8 **MS. ARMSTRONG:** Yeah.

9 **THE COURT:** What I'm saying, of course, is that it  
10 wasn't an issue raised for consideration.

11 **MS. ARMSTRONG:** I mean it's been raised throughout  
12 the proceeding so far, I mean we've taken the  
13 deposition, we've noticed, we've given  
14 opinions. I mean, all parties have been aware  
15 that this is an issue since we initiated  
16 discovery.

17 **THE COURT:** So you're taking the approach that  
18 you're -- that this issue has been tried  
19 therefore it should be an issue in the hearing?

20 **MS. ARMSTRONG:** I mean, the parties are all on  
21 notice ---

22 **THE COURT:** Okay.

23 **MS. ARMSTRONG:** --- that this was going to be an  
24 issue.

25 **THE COURT:** What's your position on that?



1 **MR. CHURDAR:** But, Your Honor, the specific section  
2 -- I mean, just to -- I think it's just a  
3 matter of fundamental fairness. I mean, when  
4 you look at what the technical review summary  
5 stated and what Mr. Joyner did consider and  
6 what he did not consider, he did consider  
7 Section 8, the geographic area of particular  
8 concern as it relates to threatened and  
9 endangered species. And so it would be,  
10 certainly when taking Dr. Gibbons' deposition,  
11 an obvious conclusion, I believe, that anything  
12 that he's talking about the diamondback  
13 terrapin and their habitat would be asking him  
14 in the context of a geographic area of  
15 particular concern that said -- where it said  
16 the endangered species, not something that was  
17 never mentioned in the prehearing statement.

18 **THE COURT:** So are you telling me you prepared your  
19 case under the limited scope of her prehearing  
20 statement, is that ---

21 **MR. CHURDAR:** Well, I'm saying that when a  
22 deposition is taken, you look at what she is  
23 answering in her interrogatory responses to  
24 what the scope of his testimony is going to be.  
25 But that is under the umbrella of what, as I



1 think you fairly described it, as a pleading  
2 with what the prehearing statement establishes.  
3 And so it is in that context that the  
4 Department prepared it's case.

5 **THE COURT:** All right. Which one of y'all -- go  
6 ahead.

7 **MR. GRESSETTE:** Your Honor, when the prehearing  
8 statement articulates the specific issues to be  
9 addressed by The Court we perceived and based  
10 our case accordingly. The petitioner's  
11 argument is in essence that it should not be  
12 limited by the prehearing statement because  
13 during discovery they produced a lot of  
14 witnesses' information about additional items  
15 and now we're on notice and so it's okay for us  
16 to try it, and that's just not the way I  
17 understand the law to work. The specific  
18 issues to be raised are to be articulated to  
19 the front end of the case through the  
20 prehearing statement, we then proceed on those  
21 limited issues. To file a petitioner's  
22 argument would require me then to, before we  
23 show up at the hearing, say, hey wait a minute,  
24 I don't think those issues are raised in your  
25 prehearing statement, let me go ahead and give



1 you some advanced notice about that so you can  
2 fix it. That's not my job. This is the time  
3 when these objections will be raised.

4 **THE COURT:** Do y'all suffer any prejudice? All  
5 right. Or maybe you said that but I just want  
6 to be clear on what prejudice do you suffer,  
7 both of you?

8 **MR. CHURDAR:** Well, Your Honor, to the extent that -  
9 --

10 **THE COURT:** And I know it's probably -- you may be  
11 having to say the same things, but I'm trying  
12 to understand from her perspective, she's  
13 saying, not specifically but I think you mean  
14 to be saying, that y'all aren't suffering any  
15 prejudice. And that's one of the components of  
16 my ruling that I have to make, or  
17 considerations I have to make.

18 **MR. CHURDAR:** Well, I will answer that. I would  
19 argue that this is a jurisdictional question.  
20 I mean in the sense that if an issue is not  
21 presented before The Court with particularity,  
22 then The Court should not allow testimony that  
23 goes beyond the four corners of the document.

24 **THE COURT:** Well, I disagree with you on that in  
25 that if this is a pleading type issue, then the



1 pleading is -- well, I -- I say -- you could  
2 say the jurisdiction on the general sense but  
3 not in the subject matter jurisdiction sense I  
4 guess is where you're getting in ---

5 **MR. CHURDAR:** Yes, sir.

6 **THE COURT:** And I see that element.

7 **MR. CHURDAR:** But to your question about prejudice,  
8 Your Honor, the section that was not included  
9 either in the technical review summary that Mr.  
10 Joyner will talk about or in the prehearing  
11 statement, it's natural that that section  
12 wouldn't be analyzed or wouldn't be included  
13 because it is talking about wildlife and  
14 fisheries management. And, I mean, this is a  
15 development that I don't think is even in the  
16 ballpark of that. I mean, the prejudice comes  
17 in that there is an assumption as to what Dr.  
18 Gibbons is going to be testifying to,  
19 deposition questions are prepared and asked  
20 based on the prehearing statement. You get one  
21 bite at the apple, so to speak, and to the  
22 extent that threatened and endangered species  
23 habitat was discussed, I believe that just as  
24 a matter of fundamental fairness, it should be  
25 limited to anything within the context of what



1 the prehearing statement says. So, to ---

2 **THE COURT:** I just feel like what is the prejudice  
3 to you.

4 **MR. GRESSETTE:** The prejudice, Your Honor, is to  
5 respond to a case that has been unexpectedly  
6 expanded by virtue of a general statement ---

7 **THE COURT:** Well, she's telling me that there was no  
8 expectation in that regard, that you should  
9 have been on notice. Is that correct?

10 **MR. GRESSETTE:** No, sir, not as to the particular  
11 section to which the petitioner has linked the  
12 testimony to today. I mean, we knew that the  
13 petitioner was going to attempt to present the  
14 testimony under the law related to critical  
15 area permits, which of course is inapplicable  
16 because we're not in the critical area.

17 **MS. ARMSTRONG:** Your Honor, I ---

18 **THE COURT:** I'm gonna ---

19 **MS. ARMSTRONG:** Just a couple of points. Mr.  
20 Churdar seems to be relying, basing a lot of  
21 his arguments on the Department's decision and  
22 what the Department's decision contained, but  
23 obviously The Court's role is to decide whether  
24 the Department considered all of the things it  
25 should've considered.



1 **THE COURT:** I agree with you on that.

2 **MS. ARMSTRONG:** And when we talk about fairness,  
3 both respondents, KDP noticed Dr. Gibbons'  
4 deposition. The Department was there and  
5 attended and participated in the deposition  
6 where Dr. Gibbons gave all of these opinions  
7 about the impacts on terrapins. So they've  
8 known that we've intended to raise issues with  
9 the impacts that will flow from this project on  
10 terrapins and dolphins and other wildlife. I  
11 mean, you don't have to ---

12 **THE COURT:** Well, raise it, but then in what context  
13 is what they're -- they're telling me that they  
14 knew you were gonna raise the issue ---

15 **MS. ARMSTRONG:** Right.

16 **THE COURT:** --- but not in the context of this  
17 particular provision of the CMP. As Mr.  
18 Churdar was saying, and I'm just gonna tell you  
19 as I understand it, I don't want to put words  
20 in your mouth, but as I understand his argument  
21 is when he said about the agency is that -- and  
22 how they made their decision, that was his  
23 concept of what he believed the issues before  
24 The Court and their decision. And unless he's  
25 notified to the contrary, he considered it to



1 be within those ranges. So ---

2 **MS. ARMSTRONG:** Your Honor, we've raised the impacts  
3 to ---

4 **THE COURT:** Terrapins.

5 **MS. ARMSTRONG:** Natural resources, a species. We've  
6 raised it in the terms of it being one of the  
7 cumulative, one of the many impacts that's  
8 gonna flow from the project, in other words, a  
9 cumulative impact, and an impact on the stocks  
10 and resource itself. Now, if the basis for  
11 KDP's case is that they based their whole case  
12 on our prehearing statement and they totally  
13 limited themselves to what was in their, then  
14 why have they called Dr. Folks as a witness and  
15 raised -- they're putting him forth -- they  
16 called Dr. Folks forth because they knew that  
17 it was an issue about diamondback terrapins and  
18 the impact on them. That's the only reason  
19 they called him. So they've got no prejudice  
20 here. They've been on plain notice. They've  
21 called a witness. He was here today.

22 **THE COURT:** Okay.

23 **MR. GRESSETTE:** The appropriate time for us to move  
24 to exclude the witness and to limit his  
25 testimony is now. We would be doing our



1 clients a disservice if we didn't attempt to  
2 have some sort of a backup plan. That doesn't  
3 make it fair that we were smart and planned  
4 over it or potentially planned over it. It  
5 doesn't mean we're not prejudiced by it. It  
6 simply means that we anticipated we would move  
7 to exclude this testimony and Your Honor might  
8 not agree and then we needed to be ready.

9 **MS. ARMSTRONG:** They called Dr. Folks an essential  
10 part of their case in responding to our motion  
11 to exclude, an essential part. That's not a  
12 responsive part, that's an essential part of  
13 the presentation of their case is what they  
14 told ---

15 **MR. GRESSETTE:** And as we talked about yesterday,  
16 Dr. Folk will testify about natural habitats  
17 and the impact upon species in those habitats.  
18 He will also talk about endangered and  
19 threatened species to the extent that they are  
20 endangered or threatened species that must be  
21 addressed under the appropriate sections of the  
22 CZMP, they need to be addressed for The Court.  
23 That is different than the species of  
24 popularity and concern, the diamondback turtle  
25 and the bottlenose dolphin who are neither



1 endangered or threatened. So, Dr. Folk was  
2 coming to testify. He was coming to testify to  
3 address the appropriate sections of the CZMP  
4 that were raised in the prehearing statement to  
5 the extent they attempted to expand those we  
6 would be prejudiced by that.

7 **RULING OF THE COURT:**

8 **THE COURT:** Well, I still at this point in time,  
9 I'll allow you to present his testimony as an  
10 offer of proof. And I may change my decision  
11 but as it stands now, I see the respondent's  
12 point, okay. James, step up here.

13 (Off the record discussion.)

14 **THE COURT:** Thank y'all. Proceed.

15 **PROFFERED TESTIMONY:**

16 **DR. GIBBONS - CONTINUATION OF DIRECT EXAMINATION BY**

17 **MS. ARMSTRONG:**

18 Q: All right, Dr. Gibbons, sorry for that  
19 interruption. I think where we left off you  
20 had described some of the threats facing  
21 diamondback terrapins. Do diamond -- and  
22 diamondback terrapins, they live around Kiawah  
23 Island ---

24 A: Yes, they do.

25 Q: And What do they do at Kiawah? Or actually,



1 let's be a bit more specific, at Captain Sam's  
2 Spit. Do the diamondback terrapins utilize  
3 Captain Sam's Spit for anything?

4 A: That would be a nesting area, the prime nesting  
5 area for terrapins in the Kiawah River and the  
6 tidal creeks.

7 Q: Okay. When you say prime nesting area, how do  
8 you know that it's the prime nesting area?

9 A: Based on having worked there for over 30 years  
10 with a lot of different people who have seen  
11 nesting actually on the spit by diamondback  
12 terrapins, observed turtles going onto the spit  
13 to nest including myself, I've seen them, this  
14 myself. And knowing that even though terrapins  
15 will nest in other areas in that region, that's  
16 the prime, prime habitat. They will nest on  
17 the small islands that are here and there, but  
18 those are not nearly as -- they're not good  
19 places for terrapins to nest.

20 Q: And why are they not good places for terrapins  
21 to nest?

22 A: Because of predators, that area in  
23 particularly, racoons and crows that can focus  
24 on a smaller area. Some of the -- some of  
25 those islands, many of them -- well, I think I



1 used that analogy before, are the size of this  
2 room, and in an area like that, a terrapin goes  
3 in, they nest in sandy areas, open areas mostly  
4 or sparse vegetation and so a predator can  
5 focus on a small habitat and they can find the  
6 nest.

7 **GUIDANCE REQUEST BY MR. CHURDAR:**

8 **MR. CHURDAR:** Your Honor, I would appreciate some  
9 guidance from The Court in light of your  
10 ruling. I don't want to be slowing things down  
11 or just objecting unnecessarily. I'm not quiet  
12 sure what to do. I mean, I -- Mr. ---

13 **THE COURT:** I'll explain it.

14 **MR. CHURDAR:** Thank you.

15 **THE COURT:** And then you can reply.

16 **MR. CHURDAR:** Thank you.

17 **THE COURT:** At this point in time, I said I might  
18 want to do some more research, but I agree with  
19 your points. I'm not -- this is a situation  
20 where as a judge I'm not entirely confident in  
21 my decision, but I agree with you. So I've  
22 allowed her to present this testimony as an  
23 offer of proof. So, at this stage of the game,  
24 it basically is just as any other offer of  
25 proof. It's just presented for appellate



1 purposes, of which I assume, if I -- you would  
2 make any objections you need to in addition to  
3 what you have already made in case I change my  
4 mind. Does that ---

5 **MR. CHURDAR:** It does. In light of that, I would  
6 object to the ---

7 **THE COURT:** Wait a minute. What ---

8 **MR. WALKER:** They're trying a liquor license case  
9 next door and somebody's claiming it's a  
10 nuisance, so I think they're playing a tape.

11 **THE COURT:** Well, at least it's not another type of  
12 hearing, but I'd be really worried about the  
13 music. Okay.

14 **MR. CHURDAR:** But my point is, or my objection is a  
15 renewal of the objection before, Dr. Gibbons is  
16 ---

17 **THE COURT:** You don't have to renew that. It's an  
18 offer of proof, unless it's a different one.

19 **MR. CHURDAR:** Oh. Well, I just want to make sure  
20 that I'm not objecting when I don't need to be  
21 and it's just obstructing kind of the flow of  
22 the testimony necessarily. Dr. Gibbons was  
23 just talking about racoons and other things  
24 that habitat would be impacted by this  
25 development presumably and I believe that in



1 order for that testimony to be admissible or  
2 not stricken, he has to show that but for the  
3 development there wouldn't be any racoons or  
4 other predators out there on Captain Sam's Spit  
5 and there hasn't been any foundation like that  
6 laid. And I'm just saying ---

7 **THE COURT:** I think he testified in opposite of  
8 that. He said, and maybe I'm wrong, but I  
9 thought he said that if an area is without  
10 racoons that it is more a problem as an area,  
11 but can you clarify that?

12 **MS. ARMSTRONG:** I'd rather have the witness clarify  
13 that.

14 **THE COURT:** Okay.

15 Q: Can you address what the judge just said about  
16 whether the habitat is better with or without  
17 the ---

18 A: The Captain Sam's Spit is a much larger area so  
19 you could have the same number of racoons but  
20 they would have a much greater problem trying  
21 to find a turtle nest. Turtles are very sneaky  
22 about where they put their nests. But on these  
23 smaller islands, they don't have any choice,  
24 they've got to put them in a small area so the  
25 racoons can focus on it.



1 **THE COURT:** Okay. I get your point now. All right,  
2 so your ---

3 **MR. CHURDAR:** And this is why I just want  
4 clarification with -- and I think you've given  
5 it to me, but to the extent that the witness  
6 has offered testimony regarding what  
7 development does. I believe that it would be  
8 beyond the scope of herpetology or diamondback  
9 turtles to have him testify. And I think he  
10 should be required to testify how much  
11 involvement or how much development would cause  
12 this to happen.

13 **RULING OF THE COURT:**

14 **THE COURT:** Well, if this indeed is an issue that  
15 The Court would consider, it's an offer of  
16 proof, I would think that would be a subject  
17 matter of cross-examination. So, I would  
18 overrule that objection under the -- a lot of  
19 area that we're in right now.

20 **MR. CHURDAR:** All right. Thank you.

21 **DR. GIBBONS - CONTINUATION OF DIRECT EXAMINATION BY**

22 **MS. ARMSTRONG:**

23 Q: All right, Dr. Gibbons, you were talking about  
24 what kind of habitat the terrapins nest in and  
25 what makes the habitat prime or not. What



1 distinguishes this Captain Sam's Spit from  
2 these smaller hammock islands that you  
3 described as maybe not bigger than the room  
4 that we're sitting in?

5 A: The major thing that's important to the  
6 terrapins from that consideration is that it's  
7 a larger but uninterrupted, unfragmented area.  
8 It's sparse vegetation, there's no big canopy  
9 cover or big trees, so it's an ideal nesting,  
10 it's just ideal nesting habitat. And there's  
11 a lot of it so a turtle can pick and choose  
12 where she wants to nest.

13 Q: And what kind of things do they look for,  
14 terrapin look for when they nest?

15 A: Well, soft soil. That's why sand is an  
16 excellent habitat. It's got to be above high  
17 tide. And preferably in areas that don't flood  
18 from high, very high tides or extensive  
19 rainfall.

20 Q: And you talked a little bit about vegetation.  
21 What kind of vegetation are they -- do they  
22 look for?

23 A: Well, the best kind of vegetation would be low-  
24 lying vegetation that maybe provides some cover  
25 but pretty much open to the sun for a great



1 part of the day just for eggs just to incubate  
2 better when they're out in the open.

3 Q: And you talked about them nesting, the prime  
4 nesting area you talked about the small hammock  
5 islands, will diamondback terrapins nest in and  
6 around where there's development?

7 A: They will. I mean they will -- an individual  
8 could lay eggs in a driveway. Now -- but,  
9 that's not ideal nesting habitat.

10 Q: And is -- so where else does that kind of  
11 habitat that they prefer exist in the Kiawah  
12 Island area?

13 A: The -- those are the -- those islands and the  
14 edges of some of the islands but not -- well,  
15 the small islands are the ones I've seen the  
16 most -- seen lots of terrapin nests that have  
17 been destroyed by predators. But they're not  
18 going to nest along the river beach because  
19 that's going to get flooded with high tide.  
20 They have to get up on higher habitat, mostly  
21 sandy areas. That would be the prime -- that  
22 whole stretch of the spit there is ideal kind  
23 of nesting habitat.

24 Q: And are you familiar with any studies looking  
25 at where diamondback terrapins' prime nesting



1 habitat is?

2 A: And Kiawah or other places or ---

3 Q: On Kiawah.

4 A: Kiawah. Oh, yes, I have.

5 Q: And what study is that?

6 A: Well, a master's thesis was done by Tim  
7 Zimmerman from College of Charleston back in  
8 1990- -- in the '90s. He looked at terrapins  
9 nesting on the spit, actually.

10 Q: And were you an advisor to ---

11 A: I was on his committee. He had -- through the  
12 -- I was with the University of Georgia, but  
13 they -- I was an outside faculty member on his  
14 committee.

15 Q: And were there any conclusions from that study  
16 that you have relied on in this assessment  
17 about nesting habitat?

18 A: I think it certainly demonstrated it's ideal  
19 nesting habitat. It also demonstrates  
20 important ---

21 Q: When you say it is ideal nesting habitat, what  
22 are you specifically referring to?

23 A: I mean the topography and the area, the large  
24 area, that's part of the important part of it,  
25 the large area is -- makes it ideal because



1 there are plenty of places to nest. A terrapin  
2 can walk some distance, pick out the right site  
3 and then go back to the river without any  
4 obstruction, so that makes it an ideal habitat.

5 Q: And you're referring to the banks along the  
6 Kiawah River where Captain Sam's Spit is  
7 located?

8 A: I'm saying they come from the -- out of the  
9 river up that bank or it's at high tide usually  
10 is when they next and they would just go up and  
11 then go inland, into the spit, 20, 30, 50, 100  
12 feet or more to find a nesting spot.

13 Q: Bear with me just a moment. Dr. Gibbons, I'm  
14 going to put an image up on the screen.

15 **THE COURT:** You can also turn that light to reduce  
16 glare.

17 **MS. ARMSTRONG:** Okay.

18 **THE COURT:** Not turn it off. You can just turn the  
19 light itself.

20 **MS. ARMSTRONG:** Well, I tried turning it and it ---

21 **THE COURT:** Oh, it ---

22 **MS. ARMSTRONG:** Oh.

23 **(Respondent's Exhibit Number 35 was introduced into**  
24 **the record at this time.)**

25 Q: Dr. Gibbons, I've got on the screen here



1 Respondent KDP's Exhibit Number 35. Are you  
2 able to tell what this is?

3 A: Yes. This is Captain Sam's Spit, Kiawah River  
4 and the Atlantic Ocean at the bottom.

5 Q: And can you use your finger and draw on the  
6 screen the location that you've been talking  
7 about as being the prime nesting habitat for  
8 diamondback terrapin?

9 A: It'd be in -- oh, I didn't know this would do  
10 that, okay. I'd say in here. Yeah, it's kind  
11 of varied in there (indicating). If this is  
12 still sandy down here, it would go down there,  
13 too.

14 Q: So they like -- they use the sandy, they climb  
15 up on the sandy areas, is that what you're  
16 saying?

17 A: They would climb out of the river and go into  
18 the sandy area, there's sort of small dune  
19 areas in there. And they're not gonna nest in  
20 an area that's above high tide. Whatever the  
21 highest tide would be, that's gonna be off  
22 limits. So they would -- it would be mainly in  
23 this area in here.

24 Q: Do they nest in salt marsh?

25 A: No.



1 Q: So they would only nest on the high ground in  
2 the dunes?

3 A: Right. They would not nest in the mud flaps.  
4 They would not nest in the salt marsh, spartina  
5 habitat itself.

6 Q: And do they access the prime nesting habitat  
7 from where the -- from the neck? Do you know  
8 where the neck is located?

9 A: Where the ---

10 Q: The neck of the spit?

11 A: Right here you mean (indicating)?

12 Q: Yeah.

13 A: Right.

14 Q: Would they utilize that area, is that part of  
15 what they utilize?

16 A: They would -- you mean would they nest in ---

17 Q: Do they access the spit and is that part of  
18 their nesting?

19 A: They might access from there. They would come  
20 in not -- they would -- they could come in from  
21 anywhere through the -- from the sand as long  
22 as it's accessible from the river to get to  
23 this area in here.

24 Q: Dr. Gibbons, if you would, there should be in  
25 that stack of documents, Exhibit Number Eight.



1           Could you lay your hands on Exhibit Number  
2           Eight?

3       **THE COURT:** I'm gonna clear all his markings at this  
4           point.

5       **MS. ARMSTRONG:** Yeah, that's fine.

6       Q:     Do you see that?     You've got the copy of that  
7           document?

8       A:     Number Eight.

9       **(Petitioner's Exhibit Number 8 was introduced into**  
10       **the record at this time.)**

11      Q:     And what is that a document showing?

12      A:     Oh, that's Tim Zimmerman's master's thesis.

13      Q:     And contained in that master's thesis, there's  
14           an image.    You can flip to it or you can look  
15           at the screen.   Do you recognize this image?

16      **MR. GRESSETTE:**    Your Honor, I am preliminarily  
17           objecting to be sure that this document nor  
18           it's contents comes in on direct.

19      **THE COURT:**    Well, he's referring to it so I don't  
20           think it's preliminary, I think it's the  
21           appropriate time.

22      **MR. GRESSETTE:**    Right. So, Your Honor, we object to  
23           the witness testifying, the expert witness  
24           testifying from this document as what he relied  
25           upon.    I think that's appropriate to be first



1 addressed in cross. If we were to do so, he  
2 could then respond.

3 **THE COURT:** The rule is he can rely on evidence  
4 that's not admissible in court, but he cannot  
5 -- you cannot introduce that, but they can  
6 introduce it in cross if they wish.

7 **MS. ARMSTRONG:** Yeah. I'm not planning to introduce  
8 it. I'm just asking Dr. Gibbons if it's  
9 something that he relied on in forming his  
10 opinion. I think it probably even falls under  
11 the learned treatise exception to hearsay,  
12 which means it could be published anyway. But  
13 he did form -- not draw or anything like that,  
14 relied on this ---

15 **THE COURT:** You can ask him if he relied upon it,  
16 you just can't introduce it.

17 **MR. GRESSETTE:** Right. And I don't think it should  
18 be displayed to the finder of fact.

19 **THE COURT:** I'm the judge and the finder of fact,  
20 that's an interesting corollary, but -- yeah,  
21 I would sustain that, at least at this point in  
22 time.

23 Q: Dr. Gibbons, you -- I think I did ask you and  
24 I think you said that you reviewed -- would  
25 rely on the Zimmerman study for the



1 identification for the location of diamondback  
2 terrapin nesting, is that ---

3 A: Yes.

4 Q: And based on the Zimmerman study and to refresh  
5 your recollection you've got a copy of that  
6 Exhibit and the drawing is -- what -- do you  
7 rely on the locations that Mr. Zimmerman  
8 identified as the prime nesting habitat based  
9 on his study?

10 A: Yes.

11 Q: And where does it indicate that the prime  
12 nesting habitat is -- where did he indicate  
13 that the prime nesting habitat is located that  
14 you relied on?

15 **MR. GRESSETTE:** Objection, Your Honor. I don't  
16 think she can ---

17 **THE COURT:** He can testify. He can use out of court  
18 -- out of court inadmissible documents in this  
19 instance that an expert would reasonably rely  
20 upon because he can't just do any of them, but  
21 I think he would say -- but he can use that to  
22 reach his expert opinion, but he can't  
23 piggyback the opinions reflected in one of  
24 those documents to publish that opinion, he can  
25 say his own opinion. Now, if you disagree with



1 me on that, Ms. Armstrong, tell me.

2 **MS. ARMSTRONG:** Okay.

3 Q: All right, Dr. Gibbons, I'm gonna put Exhibit  
4 8 back up here.

5 A: Okay.

6 Q: I gave you an extra sheet. You can hand that  
7 to me.

8 A: There's the extra sheet. There's this.

9 Q: Thank you. And I'm gonna hand you this big ole  
10 book now. And if you'll flip to the very  
11 beginning at like Exhibit Number 7.

12 A: (Witness complies.)

13 **(Joint Exhibit Number 7 was introduced into the**  
14 **record at this time.)**

15 Q: And this is the Joint Exhibit Number 7. Have  
16 you found Exhibit Number 7, Dr. Gibbons?

17 A: I have.

18 Q: If you flip to the very last, what does it  
19 indicate on the front of that document.

20 A: It says Kiawah Island Site Development of Cape  
21 Charles Phase 1.

22 Q: Could you please flip to the very last page in  
23 that document?

24 **THE COURT:** That's what's on the screen?

25 **MS. ARMSTRONG:** That's what's on the screen, Your



1 Honor.

2 A: All right. Have you seen this document before,  
3 Dr. Gibbons, the one that's on the screen, the  
4 last page of the development plans?

5 A: Yes.

6 Q: And are you familiar with that location?

7 A: The location?

8 Q: Yes.

9 A: Geographically, yes.

10 Q: Geographic location. And so do you understand  
11 where the sheet wall is proposed to be built?

12 A: Yes.

13 Q: And do you understand where the road was  
14 proposed to be built?

15 A: Yes.

16 Q: And where is the wall and the road in relation  
17 to the diamondback, the prime diamondback  
18 nesting habitat that you've been discussing?

19 A: The prime habitat would be -- well, if the wall  
20 is along here for 2,380 feet and the road over  
21 here, the -- well, it's between the river and  
22 the ocean. I mean, it's on the spit, the  
23 length of the spit, the wall and the road.

24 Q: So, would the wall be constructed in -- seaward  
25 of the nesting habitat?



1 A: No, it would be on the -- the wall would be  
2 between the river and the beach. The nesting  
3 -- the ocean beach. And it would be close  
4 enough to the river that the terrapins would  
5 have to pass that wall to get to the nesting  
6 area.

7 Q: And does that image that's shown on the screen  
8 now, could there be any diamondback terrapin  
9 nesting habitat on that, within that image?

10 A: Would there be any suitable habitat?

11 Q: Yes.

12 A: Yes.

13 Q: And where would that be, can you describe it or  
14 identify it on that drawing?

15 A: Well ---

16 Q: I know it's not all of the spit but it's ---

17 A: I mean the general -- uh, yeah.

18 **MR. GRESSETTE:** Objection, Your Honor, I don't think  
19 that was responsive.

20 **THE COURT:** The general, uh, yeah?

21 **MS. ARMSTRONG:** Well, he circled -- I think he  
22 circled it, but can you ---

23 **THE COURT:** General, uh, yeah doesn't make it, so.  
24 All right. You might want it for the record  
25 yourself.



1 Q: Can you maybe describe, in relation to the  
2 wall, where in this image the nesting habitat  
3 is located?

4 A: The nesting habitat in relation to the wall  
5 would be between the wall and the other side of  
6 the spit. The ocean side of the spit. So in  
7 the sandy dune areas between the river and the  
8 ocean, that would be the nesting areas.

9 Q: Okay. And can you say that with a reasonable  
10 degree of scientific certainty that that's part  
11 of the nesting area?

12 A: Yes.

13 Q: And you did say that you reviewed the permit  
14 and the project plans that we're looking at  
15 right now. Have you identified any problem  
16 with respect to the 2,780 foot long steel sheet  
17 pile wall?

18 A: If a turtle -- a terrapin is not going to go  
19 over a barrier that is out of the ground that's  
20 even a few inches high. It doesn't matter what  
21 the wall would be made of, they're not going to  
22 go over it if they encounter it. So they would  
23 not be able to go from the river to the nesting  
24 areas if there is a barrier.

25 Q: And then -- and what happens if they can't get



1 over the wall? What will they do next?

2 A: A turtle and terrapins would do the same thing,  
3 any turtle. All terrapins are turtles, but not  
4 all turtles are terrapins. But a turtle and a  
5 terrapin is going to encounter -- if they can't  
6 get across at first, they would -- might wander  
7 back and forth a few feet or a few yards, but  
8 -- and eventually they would turn around and go  
9 back into the river. And several things could  
10 happen at that point. They could try to come  
11 out and try again at another point. But  
12 they're not going to -- they're not going to  
13 recognize, oh, this is a wall and I will -- it  
14 must have an end somewhere and just keep  
15 walking. They're gonna go -- they might go  
16 back and forth a few times, but our experience  
17 is they generally turn around and go back and  
18 not lay the eggs.

19 Q: And what happens with the eggs?

20 A: Well, they could abort the eggs in the water  
21 itself. And sometimes that could be several  
22 days later if they can't find a suitable  
23 nesting spot.

24 Q: And do you have an understanding of -- I'm  
25 talking about the wall being somewhat limited,



1 do you know where the road is going to be  
2 located?

3 A: Right through here. Parallel to the river.

4 Q: I think there might be a drawing in that  
5 Exhibit 7 that you've got in front of you that  
6 shows the location of the road. Exhibit 7 on  
7 the second page, it's got a G1.1 down at the  
8 bottom. G1.1, second page. It's got this  
9 drawing on it. Do you see that, Dr. Gibbons?

10 A: I do see that.

11 Q: Can you draw your finger along the location of  
12 that road?

13 A: The ... (Witness complies.)

14 Q: And where is the turtle nesting habitat with  
15 respect to that, the road?

16 A: Let me see.

17 Q: And if you can maybe just describe it?

18 A: It's in the center, I'd say, of the -- where it  
19 begins to widen out to it's largest width  
20 before it gets to the salt marsh area down at  
21 the north upper left end.

22 Q: And can you say -- does the road go, run  
23 through sea turtle or diamondback terrapin  
24 nesting habitat?

25 A: Some of it runs through the habitat itself, the



1 nesting habitat.

2 Q: Can you say that with a reasonable degree of  
3 scientific certainty that it runs through  
4 terrapin nesting ---

5 A: Yes, I can.

6 Q: And have you identified any problems or  
7 concerns with respect to diamondback terrapin  
8 nesting in the road?

9 A: The road would have two or three, cause two or  
10 three problems for nesting terrapins. First it  
11 creates an open space where a terrapin is not  
12 going to be hidden by the vegetation in any way  
13 and it -- so it's got to get across that and  
14 avoid predators that might see it. It creates  
15 a problem in that they can't nest in the road  
16 because it's gonna be asphalt or the surface  
17 material won't be that a turtle can nest.  
18 Another problem is, if they cross the road it  
19 separates the habitat, it fragments the habitat  
20 into two different parts. If they cross the  
21 road, that means the babies, when they hatch  
22 out, they're not gonna go to the ocean, they're  
23 gonna go back to the river, they've gotta cross  
24 that road again. And they would definitely be  
25 very vulnerable to predators. That would



1 include crows as well as, you know, any mammal  
2 predators, and to, of course, vehicle traffic.  
3 Dogs. So, that -- those are some of the  
4 obvious kind of areas a road is going to  
5 create. It's a fragmentation and a passageway  
6 that an animal has to get across.

7 Q: And have you formed any opinions with a  
8 reasonable degree of scientific certainty about  
9 what the -- how the proposed project will  
10 impact the diamondback terrapin population at  
11 Kiawah Island?

12 A: I think it will definitely have a detrimental  
13 effect. It could be very serious because that  
14 is the prime nesting habitat, maybe the very --  
15 the -- new animals, the juveniles, babies, that  
16 are getting back into the population to keep  
17 the population viable, if they're -- if that's  
18 eliminated, you're not gonna have any way to --  
19 for the population to continue. The adults are  
20 gonna die off either naturally or from  
21 unnatural causes, but as adults die off, they  
22 have to be replaced by the juveniles. If there  
23 are no juveniles, your population will be  
24 extirpated eventually.

25 MS. ARMSTRONG: Thank you. I don't have any other



1 questions of this witness.

2 **THE COURT:** All right. Mr. Gressette or Mr.  
3 Churdar?

4 **MR. GRESSETTE:** Thank you, Your Honor. Just one  
5 minute.

6 **DR. GIBBONS - CROSS-EXAMINATION BY MR. GRESSETTE:**

7 Q: Good morning, Dr. Gibbons.

8 A: Good morning.

9 Q: How are you today?

10 A: How are you?

11 Q: Fine thanks. I appreciate your patience with  
12 us as we dealt with some legal issues through  
13 your testimony. And I have a few questions for  
14 you. It may be easier for me to proceed as the  
15 other wise lawyers were, over here by the Elmo  
16 where you can spread out. I'm going to jump  
17 around a little bit, but I think that will be  
18 a little more efficient. In your direct  
19 testimony, I believe you were asked some  
20 questions about Mr. Zimmerman's analysis of  
21 nesting sites at Kiawah, is that correct?

22 A: That is correct.

23 Q: And is it correct that that information was  
24 from 1991?

25 A: Yes.



1 Q: And is it correct that since 1991 there have  
2 been significant changes in the geography of  
3 Captain Sam's Spit?

4 A: Yes.

5 Q: And is it also correct that of the seven nests  
6 that Mr. Zimmerman found during 1990, all seven  
7 were destroyed by non-human predators?

8 A: I don't recall that -- I don't -- I can't say.

9 Q: Okay. You can't say one way or the other?

10 A: I can't say one way or another, no.

11 Q: What is the ---

12 A: But I can say this, that that -- I think he  
13 found -- over the two years, of course, over 14  
14 nests, but that he found tracks, turtles going  
15 out to nest, over a hundred. He only found 14,  
16 which makes the point, what a great nesting  
17 area it is because even he can't find the nests  
18 and neither can the predators. So what you do  
19 is you find the ones that have been predated.

20 Q: Okay. And when you say it's a great nesting  
21 area, compared to what?

22 A: Those small hammocks.

23 Q: And who has counted the turtle tracks on those  
24 small hammocks?

25 A: You can't really count the turtle tracks



1 because to reach those small hammocks you have  
2 to go through a mud flat, salt marsh grass and  
3 then suddenly you'll have a sandy area so there  
4 are no tracks to follow.

5 Q: So the only place anybody has counted the  
6 tracks is the easy place to count them, the  
7 sandy spot that you identified?

8 A: It would be the obvious place if you were a  
9 turtle biologist to know that that's where  
10 they're going to nest, and yes, that would be  
11 where we'd look.

12 Q: And so I'm trying to figure out what scientific  
13 methodology you have used to determine that  
14 that is a greater area compared to other areas  
15 for nesting when none of the other areas for  
16 nesting have been identified in the same  
17 manner?

18 A: The other areas have been identified. We've  
19 been to all of those other areas. There are --  
20 there's not enough space for nesting on those  
21 areas. And it's also based on experience  
22 working with thousands of turtles over the  
23 years.

24 Q: Wait, so the only actual data that you have  
25 about nesting sites being documented in the



1 area of Captain Sam's Spit includes two summer  
2 trackings by Mr. Zimmerman?

3 A: No. They're not -- no. There have been  
4 observations by other people. There've been,  
5 as I think I said, dozen, hundreds of people,  
6 students and others and lots of observations  
7 there. His was a focused study but the area's  
8 rivers, back there on the river often people  
9 are out in that area for other reasons, and  
10 certainly report, have reported when they see  
11 turtles, terrapins.

12 Q: Has anybody done a count?

13 A: The -- not -- his was a focused counting, so  
14 yeah, he did.

15 Q: So when you rely upon that focused counting to  
16 demonstrate that it is a great area for  
17 nesting, and you want us to believe that you're  
18 comparing it to some other area, there is no  
19 area that has been counted besides the one area  
20 from Mr. Zimmerman?

21 A: No, that's not correct. There ---

22 Q: Where else have there been ---

23 A: --- some of the small areas -- the hammocks,  
24 I've got the listings of the nests we found on  
25 those small hammocks, we counted them. And



1 those -- we have those numbers.

2 Q: Okay.

3 A: So there are numbers from other places. And  
4 yeah, that's where they are.

5 Q: But not applied in the same systematic manner  
6 that Mr. Zimmerman did, correct?

7 A: His was a focused study in that area. He  
8 looked at other places, but he -- but most of  
9 the nesting observed was on Captain Sam's Spit.

10 Q: Do diamondback terrapins live in other areas  
11 around Kiawah?

12 A: They do. There's -- I'm sure they're -- they  
13 continue- -- they occur in the Stono River,  
14 which is one direction. They occur in some of  
15 the areas around some of the creek, tidal  
16 creeks around Seabrook. If you go up and down  
17 the coast, they're going to be all the way to  
18 Massachusetts and all the way to Florida.

19 Q: I think we may have a map that will help us  
20 look at just the general description you gave  
21 us. It's a digital map with some shading on it  
22 from the ---

23 **THE COURT:** She's got to switch it.

24 **MR. GRESSETTE:** Oh, sorry.

25 **THE COURT:** It takes a second. There.



1 MR. GRESSETTE: There we go. And it should be a map  
2 of the country with some shading up and down  
3 the side. All right. Thank you.

4 Q: Sorry that took us a minute, Dr. Gibbons. So,  
5 is this an accurate representation of where the  
6 diamondback terrapins live?

7 A: That is the geographic legs of diamondback  
8 terrapin.

9 Q: And I know we talked about this at your  
10 deposition, that the diamondback terrapins that  
11 live the Ashley River and the Stono River and  
12 then Kiawah are of the same genetic species,  
13 correct?

14 A: They are all one species from Cape Cod to  
15 Corpus Christie, yes.

16 Q: So all of the diamondback terrapin inhabiting  
17 all of the yellow area on League00289 would be  
18 of the exact same species as those at Kiawah?

19 A: Yes, they would be the same species.

20 Q: Do you know how many terrapins are nesting at  
21 Captain Sam's?

22 A: These days, no, I do not.

23 Q: Do you know how many terrapins would nest at  
24 Captain Sam's if the project is completed as  
25 designed?



1 A: Probably close to none.

2 Q: So, is it your testimony that if the project is  
3 completed there will be no terrapins nesting on  
4 Captain Sam's?

5 A: Or close to none. There might be one that gets  
6 by once in -- one way or another from coming in  
7 from Beachwalker Park or something like that,  
8 but it probably would diminish the number  
9 greatly.

10 Q: It would probably diminish the number greatly.  
11 Upon what methodology do you rely for that  
12 assertion?

13 A: Well, my understanding is that there will be a  
14 wall, steel wall, and the terrapins will not be  
15 able to eventually get past that wall. If they  
16 can't get past that wall, they can't nest on  
17 the spit.

18 Q: And I believe when you testified a few moments  
19 ago, this may not be the best representation as  
20 we switch back, or maybe we just have a map,  
21 this one's a green map of the spit. That's  
22 okay. The green overhead photo. All right.  
23 Can you remember back to when you testified on  
24 direct about how the diamondback terrapins  
25 access the prime habitat? Do you remember that



1 testimony?

2 A: Yes.

3 Q: Okay. And if I remember correctly, you  
4 testified that the prime habitat includes --  
5 can you mark it on there again for me?

6 **THE COURT:** You can also mark it on the other screen  
7 if you want to.

8 **MR. GRESSETTE:** Oh, on this one?

9 **THE COURT:** Yeah.

10 **MR. GRESSETTE:** Oh, thank you.

11 Q: And ---

12 A: I just marked it.

13 Q: And didn't you also testify earlier that in  
14 order to access the prime habitat, the  
15 terrapins come in this way?

16 A: Yeah, from the river.

17 Q: Okay. Right there?

18 A: Well, not that spot. Another spot may be here,  
19 may be here.

20 Q: Okay. So all along that river side?

21 A: Yeah. There's probably -- mine -- there's  
22 probably two or four or 500 feet of it that are  
23 the easiest and most accessible. Like they're  
24 not going to come through right here because  
25 there's salt marsh grass right there.



1 Q: Okay. But on the other area where you have the  
2 arrows?

3 A: (No response.)

4 Q: I'm not trying to be tricky, it's your mark.

5 A: That -- yes.

6 Q: Okay.

7 A: Along that stretch of beach, yes.

8 Q: Yes, sir. I just wanted to be sure.

9 A: River beach, yeah.

10 Q: Yes, sir. I just wanted to be sure I was clear  
11 on the expanse. I have now a ---

12 **THE COURT:** Why wouldn't they come through the  
13 marsh?

14 A: I'm sorry?

15 **THE COURT:** Why wouldn't they come through the  
16 marsh?

17 A: Why wouldn't they?

18 **THE COURT:** Yeah.

19 A: No, they would not nest in the marsh. They  
20 will come through it.

21 **THE COURT:** To reach ---

22 A: To reach land but they're not going to nest in  
23 it.

24 **THE COURT:** All right. So where you've got the  
25 arrow and you've got the marking, where it's



1 kind of marked out, they would still go through  
2 that area, they just wouldn't ---

3 A: Yes, they would.

4 **THE COURT:** Oh, okay.

5 A: I meant they wouldn't nest down there.

6 **THE COURT:** Oh, okay.

7 **MR. GRESSETTE:** Thanks. Can we switch back over  
8 here? Sorry for the back and forth.

9 Q: Dr. Gibbons, I have a PowerPoint here that we  
10 were -- produced. Does that look familiar to  
11 you?

12 A: I believe it does, yes.

13 Q: What does that look like?

14 A: It's either an newspaper -- I mean an  
15 encyclopedia article or a book chapter. I  
16 don't recall which one that one was, but it was  
17 a publication, scientific publication.

18 Q: Okay. And I'm gonna show you what I believe to  
19 be some pages from that. And if you would, can  
20 you explain the importance to me as to why they  
21 would be included under this publication you  
22 wrote on conservation of diamondback terrapins.  
23 The first photo I want to ask you about is  
24 this. Can you identify that for me?

25 A: Yes. I think that was -- well, it was a -- the



1 president or first lady's recipe of how to cook  
2 diamondback terrapins.

3 Q: And so I assume ---

4 A: I think it was President Cleveland, I'm not  
5 sure though, but one of them.

6 Q: So one of the first ladies, maybe Mrs.  
7 Cleveland, had a recipe for terrapin soup. Do  
8 folks eat terrapins?

9 A: Do people eat terrapins?

10 Q: Yes, sir.

11 A: Some people do, yes.

12 Q: Do folks eat diamondback terrapins?

13 A: They do.

14 Q: Do folks in South Carolina around Kiawah eat  
15 diamondback terrapins?

16 A: I'm not aware of anybody these days that does,  
17 but certainly in the past they did.

18 Q: And is it still legal for folks to trap and eat  
19 diamondback terrapin in South Carolina?

20 A: The law in the state right now is that you can  
21 possess two terrapins. Whether -- what you can  
22 do with those terrapins, I'm not -- I don't  
23 know if you can eat them or not. I'm not  
24 eating them anymore, so I don't know.

25 Q: But there is no limitation on each day, one



1 person may, should they choose, go to Captain  
2 Sam's, and take possession of two diamondback  
3 terrapins and do with those terrapins as they  
4 please?

5 A: I can't say what the legal aspects or  
6 regulatory aspects would be.

7 Q: Okay. But you do see what we have in front of  
8 you there, which is South Carolina Code Section  
9 50-5-2300?

10 A: I see that.

11 Q: All right. And can you read the highlighted  
12 sentence into the record for me, please?

13 A: "A person may possess no more than two diamond-  
14 backed terrapin," terrapins it should be, "for  
15 a noncommercial purpose."

16 Q: Okay. Now, one of the things that you talked  
17 about earlier during your testimony was the  
18 things that impact the natural life of  
19 terrapin. And this is another page from that  
20 PowerPoint. Can you tell me why these  
21 creatures might have been included? I think  
22 it's because they kill diamondbacked terrapin,  
23 but I wanted to be sure.

24 A: Well, the boats, we have a publication on that,  
25 even in the Kiawah River, boats, propellers hit



1 the shell and, of course, damage them.  
2 Racoons, I've mentioned them, they kill both  
3 adults and dig up the eggs and eat babies.  
4 And, of course, sharks in the aquatic area  
5 would eat smaller -- or well, a big shark can  
6 eat a big terrapin. What are we looking at  
7 here? Is that a beaver or a mus- -- I'm not  
8 even sure -- did I write this paper?

9 Q: I think so, but it looks like that creature is  
10 eating a fish, so maybe we'll mark that one  
11 off.

12 A: Okay. Oh, well that's probably an otter. All  
13 right, that's supposed to be an otter.

14 Q: Do otters ---

15 A: But yes, they would.

16 Q: And are racoons currently present on Captain  
17 Sam's?

18 A: I would assume they are. They certainly have  
19 been. I've seen them there actually.

20 Q: Right. And we also talked about evidence that  
21 you have reviewed regarding articles  
22 documenting racoon predation on diamondback  
23 terrapin nests on the spit, correct?

24 A: Yes. There -- Zimmerman, some of the nests and  
25 others too that I know of, found from -- where



1 eggshells are on the sands, which means a  
2 predator -- well, a predator, you don't have to  
3 see it to be there for sure, because it could  
4 be something else, some other kind of predator,  
5 but that there've been predated nests on  
6 Captain Sam's Spit.

7 Q: And that is in it's current existence before  
8 any work on the project, correct?

9 A: Excuse me?

10 Q: The predation of diamondback terrapin nests  
11 occur on Captain Sam's currently which is ---

12 A: Oh, I'm sorry.

13 Q: --- of course, before any construction on the  
14 project.

15 A: I apologize. When you said project I thought  
16 you meant the terrapin project, but you mean  
17 this other, the development project?

18 Q: Yes, sir.

19 A: Yes, there would be -- natural predation's  
20 gonna occur.

21 Q: Okay. I'd like to talk to you about what you  
22 might classify as unnatural predation, is that  
23 maybe the boating?

24 A: I wouldn't call that predation. It causes  
25 injuries and probably some mortality but



1 usually it's a law -- it affects the health of  
2 the turtle, of the terrapin when it gets hit by  
3 a boat. Males, for instance, don't grow as  
4 fast after they've been injured by a propeller.  
5 But it's certainly a form of unnatural injury.

6 Q: And are there other natural causes of injury,  
7 other animals?

8 A: Yes.

9 Q: And what animals are ---

10 A: Blue crabs, small terrapins, they certainly --  
11 they can kill a small crab -- I mean a small  
12 terrapin, can bite their legs off. We  
13 mentioned otters. And mink actually which are  
14 sometimes in these areas and racoons could eat  
15 -- would be natural predators. Sharks. And  
16 I'm not sure if dolphins will eat -- probably  
17 they would probably eat a small terrapin, too.

18 Q: And are sharks ---

19 A: Seagulls and crows also.

20 Q: And are sharks, crows, dolphins and seagulls  
21 present at Captain Sam's?

22 A: Absolutely.

23 Q: Okay. What is the number one threat to  
24 diamondback terrapins around Captain Sam's?

25 A: Humans.



1 Q: And would you go one step further and say that  
2 it is humans and crab traps?

3 A: Yes. Crab traps, we have documented several  
4 situations, commercial and recreational crab  
5 traps are -- decimate terrapin populations.  
6 They can be very -- they kill terrapins.  
7 That's been demonstrated and documented many  
8 times.

9 Q: And you folks have devoted a lot of time and  
10 energy to documenting that issue in ---

11 A: Yes, we have.

12 Q: In terms of the terrapins at Captain Sam's, is  
13 that right.

14 A: That is correct.

15 Q: Sorry, I got distracted in the middle of that  
16 question because I was looking at these  
17 pictures. That's pretty rough.

18 A: Yeah.

19 Q: Tell me what happens to the terrapins with the  
20 crab traps?

21 A: They drown. They can't get out and they drown.

22 Q: And is there, in your opinion, a solution to  
23 the ongoing crab trap deaths of these  
24 terrapins?

25 A: Well, there are solutions which is -- but



1 whether they're economically and politically  
2 feasible, that's a -- obviously stop trapping  
3 crabs. That's one solution, but that's -- I'm  
4 not saying it's feasible.

5 Q: Is there another potential solution?

6 A: There are in -- for crab traps there are what  
7 they call excluder devices, which little  
8 gadgets or little bar you can put in the front  
9 of an opening of a crab trap that blue crabs  
10 can go into the trap but terrapins, large, most  
11 terrapins cannot go there, they're too bit. It  
12 makes the crab trap smaller, the entrance  
13 smaller for a terrapin getting in, but a crab  
14 can turn sideways and go in. There is that  
15 solution and that is a regulatory solution in  
16 some states.

17 Q: Is it a regulatory solution here in South  
18 Carolina?

19 A: Not in South Carolina and Georgia, not for  
20 fresh water turtles or, in this case, estuarine  
21 turtles.

22 Q: Would you, as a scientist, like to see  
23 excluders on all the crab traps in say the  
24 Kiawah River area?

25 A: Well, I think if that would be a first step to



1 keeping terrapins from going into crab traps.  
2 I'm not sure that's going to be the total  
3 solution, but that would be a -- certainly a  
4 meaningful step.

5 Q: And do you recall being on the telephone when  
6 my clients met with some folks including  
7 yourself by telephone and actually offered to  
8 fund putting crab trap excluders throughout the  
9 Kiawah River?

10 A: I don't recall that.

11 Q: Do you recall that my client offered to do this  
12 and even further offered to fund the manpower  
13 needed to accomplish the project?

14 A: I guess part of my problem is I'm not sure who  
15 your client is.

16 Q: My client is KDP and it is my understanding  
17 that you participated in a telephone conference  
18 wherein my client was at a meeting, I believe  
19 Mr. Clarkson, Townsend Clarkson, wherein the  
20 company offered to fund the manpower and the  
21 purchase of these excluders in order to benefit  
22 the diamondback terrapin population in the  
23 Kiawah River.

24 A: I have no recollection of that. I've been in  
25 many conference calls and other conversations,



1 and if that, you know, I'm probably -- but I --  
2 I'm not -- I don't recall this.

3 Q: Can you think of any reason why any pro  
4 diamondback terrapin group would refuse such an  
5 offer?

6 A: I can't speak for what other groups would do.  
7 I would -- myself, I would certainly consider  
8 the offer, but I don't know what the context --  
9 you'll have to explain to me the context. If  
10 I was involved in a single phone call or a  
11 conference call or something, and if it was a  
12 conference call, it's a good chance I wasn't  
13 listening too well, okay.

14 Q: That's all I have right now. Thank you, sir.

15 **THE COURT:** Mr. Churdar?

16 **MR. CHURDAR:** I have no follow-up to that.

17 **THE COURT:** Any re-direct ---

18 **MS. ARMSTRONG:** Yeah, I got ---

19 **THE COURT:** --- new matter raised?

20 **MS. ARMSTRONG:** Pardon me?

21 **THE COURT:** Or new matter raised?

22 **MS. ARMSTRONG:** Yes.

23 **THE COURT:** That's what I always say.

24 **DR. GIBBONS - RE-DIRECT EXAMINATION BY MS. ARMSTRONG:**

25 Q: Dr. Gibbons, do you know how many diamondback



1 terrapins an individual was allowed to possess  
2 before the limitation of two was passed that  
3 Mr. Gressette ---

4 A: I think it was unlimited as far as I know. I  
5 think you had to have a state permit for  
6 collecting animals, certain animals, but there  
7 wasn't a limit I'm aware of.

8 Q: And in your opinion, is the limit of two  
9 terrapins important for -- to the species for  
10 any reason?

11 A: I think it certainly limits commercial removal  
12 of the species and that's a very important  
13 aspect, and especially in the northeast where  
14 they're sold in markets still. But they have  
15 to get them from somewhere and I think this was  
16 part of an effort by the State of South  
17 Carolina not to let our natural resources be  
18 exported for use in -- by other -- because  
19 people would come in and just collect terrapins  
20 and other turtles. This applies to a lot of  
21 other turtles too, these kind of regulations.

22 Q: And in South Carolina, was that a problem  
23 before the law was passed, do you know?

24 A: It was a problem, yes. Oh, yes.

25 Q: And do you know -- you were on the advisory



1 committee when Zimmerman wrote his thesis, do  
2 you know why Zimmerman focused on Captain Sam's  
3 Spit in looking at nesting?

4 A: For one thing, after driving that river from  
5 the Kiawah to the Stono and to Seabrook and  
6 surveying the area, I'd been working on Kiawah  
7 in a research capacity since 1974, so I'd been  
8 there for -- working down there every year for  
9 years before we started the terrapin research,  
10 but I knew the habitats and I was  
11 unquestionably the turtle expert, that was  
12 where terrapins are -- that's where the  
13 terrapins were gonna nest and there were lots  
14 of other places they were obviously not going  
15 to nest. Now, he looked at those, and we did,  
16 those small islands, but the focus, cause his  
17 -- the purpose of this research was to  
18 determine how many eggs they laid and what --  
19 and compare that geographically to other areas.  
20 So that was his -- I think if we were doing a  
21 study today, somebody needs to look at what are  
22 the actual nesting patterns. But yes, the --  
23 well, I'm sorry. What?

24 Q: No, I wanted to -- finish your answer.

25 A: That -- would pick that area because that's



1 where the turtles are. You do the research  
2 where you can get the most data and you check  
3 to make sure that you're not going to get that  
4 data, those data anywhere else. And that's  
5 pretty true on Kiawah. You lose that spit and  
6 that's probably the death now for terrapins in  
7 that area.

8 Q: And when you say lose the spit, what do you  
9 mean?

10 A: Lose it by access, lose access to the spit,  
11 that's what I ---

12 Q: And how would the access be lost?

13 A: By a steel barrier that prevented the terrapin  
14 ---

15 **MR. CHURDAR:** Your Honor, I object. This has all  
16 been covered in the original direct.

17 **MS. ARMSTRONG:** I think that there was some clouding  
18 of his testimony in cross and so I'm just  
19 trying to clarify what was raised on cross.

20 **THE COURT:** Well, I can allow cross-examination in  
21 greater than new matter, but normally it's new  
22 matter raised, okay. Let's just stick to that  
23 perspective.

24 **MS. ARMSTRONG:** Okay. I'm not even sure what the  
25 question was, but I'll move on to my next



1 question.

2 **THE COURT:** Okay.

3 Q: And you talked about -- Mr. Gressette was  
4 asking you about where they like to go up and  
5 you said the stretch of beach. Are you talking  
6 about sandy, when you use the term beach, what  
7 do you mean by ---

8 A: Along the river ---

9 **MR. GRESSETTE:** Objection, Your Honor, I don't think  
10 that is new material. I think the issue is  
11 that the witness testified, I asked questions  
12 about the same thing in cross and now she's  
13 attempting to uncloud it because it got clouded  
14 in cross and I don't think that's proper.

15 **THE COURT:** Any response? I don't even remember the  
16 question to be honest with you.

17 **MS. ARMSTRONG:** I think he was asking him about what  
18 kind of -- where he goes, where they go up,  
19 like actually where on the ground they go up.  
20 And I didn't really get into that with him and  
21 so I'm just going back to make sure -- I mean,  
22 yeah, sure, I want to clear up things that were  
23 raised on cross but I didn't specifically ask  
24 him what it looked like when they were -- when  
25 they go out and walk up when they go up to nest



1 along the river bank, what it looked like.

2 **MR. GRESSETTE:** I don't think that's accurate.

3 **THE COURT:** I'll let her go ahead with this one.

4 Q: So you said they like the beach, do you  
5 remember saying that, was that your testimony?

6 A: The river. They come in from river, yeah, in  
7 that sandy area, go up.

8 Q: And so it's a sandy area that they usually ---

9 A: Onto the spit area, yes, uh-huh.

10 Q: And since 1992, have there been any changes in  
11 the characteristics of Captain Sam's Spit that  
12 make it prime nesting habitat?

13 A: I -- in my observation of it, it -- there's --  
14 some of it's eroded away from the river side,  
15 but I -- I'm not sure that there's any -- well,  
16 and the -- the thing is, I don't know when  
17 these kind of things happen, but there  
18 certainly was some construction down at the far  
19 end at one time after, I think, Hugo, maybe.  
20 I'm not sure. I don't -- I can't answer the  
21 questions without some more specifics.

22 Q: So you're not sure whether the qualities of the  
23 spit that make it prime nesting habitat are the  
24 same now as they were in 1992?

25 A: Oh, I would assume -- oh, they would be the



1 same. If that was -- if that's the question.  
2 I thought you meant had the spit changed. No,  
3 no. In terms of ecologically, it would be  
4 similar, ideal habitat now, the last time I was  
5 down there anyway, as it was back then.

6 Q: Thank you, I don't have any other questions.

7 **MR. GRESSETTE:** Nothing further, Your Honor.

8 **THE COURT:** I may have a question or two. You  
9 testified that the turtle's population would be  
10 decimated if Captain Spit, Captain Sam's Spit  
11 was taken away as a possible nesting area, but  
12 then you stated that nesting surveys need to be  
13 conducted. Do you remember saying that?

14 A: Oh, I remember saying that ---

15 **THE COURT:** Yeah.

16 A: --- to find out what the actual pattern of  
17 nesting is and then ---

18 **THE COURT:** Nesting patterns?

19 A: Yeah, you'd have to do the research to ---

20 **THE COURT:** That's what I was gonna ask you. How  
21 can you say that it would decimate it if you  
22 don't know the nesting patterns?

23 A: The patterns being where the distributions of  
24 nests would be on the spit, where they select.  
25 They nest on the spit, but where the pattern,



1 what the pattern of nesting is could vary -- is  
2 gonna vary. What are those ecological factors  
3 that make them vary? So if there's ---

4 **THE COURT:** So you were referring to nesting  
5 patterns on the spit as opposed to elsewhere?  
6 That's what I must've missed earlier.

7 A: Yeah, because it is such a large area they're  
8 gonna have a lot more choices of what they do.  
9 But if there is a barrier there, it won't  
10 matter what those patterns are because they  
11 won't be able to get there.

12 **THE COURT:** Right.

13 A: That's was the point.

14 **THE COURT:** Any follow-up on that?

15 **MS. ARMSTRONG:** No.

16 **MR. GRESSETTE:** No, Your Honor.

17 **MR. CHURDAR:** No, sir.

18 **THE COURT:** You may step down.

19 **(The witness was excused.)**

20 **THE COURT:** There endeth the proffer.

21 **PROFFERED TESTIMONY CONCLUDED.**

22 **MS. WHITE:** Your Honor, we have a witness that we  
23 don't anticipate to take too long. I don't  
24 know if everyone's all right with proceeding  
25 with another witness or if we need to take a



1 five minute break. We have a lot of witnesses  
2 that we're trying to get through today.

3 **THE COURT:** Okay. We're ready.

4 **MS. WHITE:** Trenholm, Tom, Brad, you guys ---

5 **MR. WALKER:** We're fine.

6 **MS. WHITE:** All right. The petitioners call George  
7 Finly to the witness stand.

8 **COURT REPORTER:** Step right here.

9 **MR. FINLY:** All right.

10 **COURT REPORTER:** State your full name for the  
11 record, please.

12 **MR. FINLY:** My name is George Finly.

13 **COURT REPORTER:** Finly, F-I-N ---

14 **MR. FINLY:** L-Y.

15 **COURT REPORTER:** Raise your right hand for me,  
16 please. Do you solemnly swear the testimony  
17 you're about to give in this matter is the  
18 truth, the whole truth and nothing but the  
19 truth, so help you God?

20 **MR. FINLY:** I do.

21 **COURT REPORTER:** Thank you.

22 **MR. FINLY - DIRECT EXAMINATION BY MS. WHITE:**

23 Q: Hey, Mr. Finly.

24 A: Good morning.

25 **COURT REPORTER:** I'm gonna need you to speak up,



1 please. Thank you, sorry.

2 Q: Would you start by telling The Court where you  
3 live?

4 A: I live in Clarksburg, West Virginia.

5 Q: And what is your occupation?

6 A: I was in the ready mix concrete and  
7 construction supply business for 30, 35 years  
8 and several years ago got out of that business.

9 Q: Did you retire?

10 A: I did.

11 Q: Are you enjoying your retirement?

12 A: I am.

13 Q: Do you own any other homes besides your home in  
14 West Virginia?

15 A: I do. I have a cottage on Kiawah.

16 Q: When did you purchase that property?

17 A: Late 2011.

18 Q: And why did you decide to purchase a home on  
19 Kiawah?

20 A: I think Kiawah is sort of a unique place in our  
21 coast, on our coast. We looked at Hilton Head  
22 and Beaufort and Bluffton. Kiawah, I think has  
23 a unique way about it. It's, you know, lots of  
24 trees, beautiful beaches. There's no sprawl,  
25 no malls, no fast food. It's just a -- it's a



1 nice spot.

2 Q: Is there anything in particular that you found  
3 appealing about it?

4 A: Sure. You know, I'm an outdoors sort of guy,  
5 as is my family, so we like the rivers, the  
6 beach, the tidal creeks. Play a little bit of  
7 golf but not much.

8 Q: All right, Mr. Finly, do you recognize this?

9 A: I do.

10 Q: What is that?

11 A: That's a map of the spit and the surrounding  
12 area.

13 Q: Are you -- where is your home in relation to  
14 the spit?

15 A: Do I need to mark it or do I just tell you?

16 Q: If you're able to mark it.

17 A: I am. So, we are right on the inlet. I guess  
18 this would be the inlet here. No, wait a  
19 minute. We're at the corner of the Kiawah and  
20 the inlet, which I guess would be here  
21 (indicating).

22 Q: Okay. So what is -- what is that part of  
23 Kiawah called?

24 A: Inlet Cove down Beachwalker Drive as you  
25 approach Sam's Spit and Beachwalker County



1 Park.

2 Q: So is it the closest neighborhood to  
3 Beachwalker Park?

4 A: It is presently. We're very close to it.  
5 There's a -- you know, there's another one  
6 called Duneside that's probably equally close,  
7 but yes, it's ...

8 Q: You pass Inlet Cove on your way to Beachwalker  
9 Park?

10 A: Correct, yeah.

11 Q: You said that you and your family enjoy being  
12 outdoors. Tell me about what you like to do on  
13 Kiawah, and in particular on the Kiawah River  
14 and the inlet?

15 A: Sure. So we've got kayaks and paddle boards,  
16 have a small fishing boat. So when we go down,  
17 we're on the river probably most every day.  
18 Also on the beach at the spit most every day.

19 Q: When you say on the beach at the spit, what  
20 area are you talking about?

21 A: All through down here (indicating).

22 Q: On the front beach?

23 A: Right. So we recreate on both, on both sides  
24 of the spit, in the Kiawah River and the  
25 surrounding tidal creeks as well as the ocean.



1 There's often times that we go down for a week  
2 or two and we're rarely even inside the first  
3 gate, we just pretty much stay on our little  
4 west end of the island, which is pretty nice.

5 Q: So you listed some recreational activities,  
6 kayaking, boating. Did you say that you fish  
7 at all?

8 A: I do a little bit of fishing, yes. So we do  
9 some surf fishing on the Atlantic side and do  
10 some river fishing on the Kiawah River side and  
11 in some of the tidal creeks.

12 Q: And how long have you been going down to Kiawah  
13 and recreating ---

14 A: So I'd say probably 20 years. We had friends  
15 that bought in Inlet Cove 20, 25 years ago, I'd  
16 say and we started visiting then. And off and  
17 on during those years, visiting. You know,  
18 summertime. Sometimes, you know, Easter, all  
19 the high times.

20 Q: And prior to the purchase of your home in Inlet  
21 Cove, did you enjoy those same recreational  
22 activities while you were visiting?

23 A: We did, we did. Our friends had a small  
24 fishing boat and big fishermen, so we were out  
25 on the river in both the Kiawah and the Stono



1 a fair amount.

2 Q: Do you plan to continue those recreational  
3 activities in the area around Captain Sam's  
4 Spit?

5 A: Well, I certainly hope so, yeah.

6 Q: Can you describe for me your experience in some  
7 of those recreational activities, what it's  
8 like, what you observed?

9 A: Sure. So, for instance yesterday morning, my  
10 wife and I were out on our kayaks. We were  
11 able to put in right near the cottage and so we  
12 took the kayaks down to the inlet at the spit.

13 Q: And could you mark on the map where that is?

14 A: Yeah. So we paddled basically down here, and  
15 we then cut -- and it's basically right there.  
16 Then we came back around and down these tidal  
17 creeks and then we waited to come back in here  
18 (indicating). So yeah, so it's a beautiful  
19 spot. It was high tide and we saw dolphin and  
20 there were other kayakers on the river, but  
21 pretty peaceful, you know, beautiful way to  
22 spend the morning.

23 Q: Is that characteristic of most of your  
24 recreational activities?

25 A: It is. I think that's why we like the area so



1 much is that it's unspoiled, peaceful. You  
2 know, you see wildlife. There's certainly  
3 people using it, but that's -- you know, but  
4 it's other people doing it the same way we do  
5 which is on kayaks and paddle boards. And you  
6 see small jon boats back and forth. Not too  
7 much of a big craft because it's not really a  
8 big craft sort of an area.

9 Q: Are you aware that DHEC has issued permits  
10 authorizing some development activity out here  
11 on Captain Sam's Spit?

12 A: I heard something about that, yes.

13 Q: What is your understanding of what those  
14 permits authorize?

15 A: Well, I think what they are trying to do is get  
16 a permit to build a wall along the Kiawah River  
17 and the bend in the neck which will then allow  
18 a -- the construction of a road to reach a  
19 development of homes. And the permitting, the  
20 permits, I guess it was NDPES permit,  
21 stormwater discharge permits all enabling  
22 development that will -- where there's going to  
23 be construction of homes and sewer, water,  
24 power, all the things that go along with that.

25 Q: I'm handing you this notebook here.



1 A: All right.

2 Q: Exhibit, Joint Exhibit Number 6.

3 **(Joint Exhibit Number 6 was introduced into the**  
4 **record for identification purposes.)**

5 Q: Have you seen those documents before?

6 A: I have.

7 Q: What are they?

8 A: I guess they're permit applications for  
9 stormwater, stormwater, wastewater.

10 Q: Are they the applications?

11 A: Yes, I guess.

12 Q: Can you read the -- are you looking at the  
13 first page?

14 A: I am. NDPES general permit coverage for  
15 stormwater for construction activities. Right.  
16 They issued the permits, is my understanding.

17 Q: If you flip through the remainder of Exhibit 6  
18 ---

19 A: Okay.

20 Q: --- could you determine whether the full --  
21 determine whether they're the application or  
22 not?

23 A: I think they're the permits if I look at --  
24 this says permission is hereby granted to KRA  
25 Development for the construction and



1 distribution in accordance with the  
2 construction plans, blah, blah, blah.

3 Q: Okay. So ---

4 A: Not application, permit.

5 Q: Okay. So you understand that those are the  
6 permits and you understand that those are the  
7 permits as you described, for the activity that  
8 you described?

9 A: Yes.

10 Q: Are you familiar with where the proposed wall  
11 is going to go?

12 A: I believe so, yes.

13 Q: Could you mark it on the exhibit that's in  
14 front of you?

15 A: Yes, I think it's roughly there (indicating).

16 Q: And what is that based on? What information is  
17 that based on?

18 A: My knowledge of that?

19 Q: Yes.

20 A: I saw some maps and -- with the permits that  
21 showed where the wall is proposed.

22 Q: Is this the drawing that you were referring to?

23 A: Yes.

24 Q: Is your understanding that's the drawing  
25 showing the wall as you marked it on a previous



1 map?

2 A: Correct. Three-quarters of the way down  
3 Beachwalker Park where the, I guess where the  
4 erosion is kind of happening and then on around  
5 through the neck and out, I don't know, a  
6 quarter-mile or something like that.

7 Q: And do you understand where the proposed road  
8 will be?

9 A: I do, on the ocean side of the wall, parallel  
10 basically -- roughly paralleling the river.

11 Q: And do you have an understanding of the purpose  
12 of that road?

13 A: Yeah, to allow access to the, to the proposed  
14 homes.

15 Q: Do you know how many homes?

16 A: I think around 50, like maybe there's two  
17 phases. First phase is half of that.

18 Q: So, would the proposed wall and road and that  
19 potential development as you've described  
20 affect your use and enjoyment of the area at  
21 all?

22 A: Yeah. I think -- you know, the nice thing  
23 about the area that we're in now is that it's  
24 sort of an unspoiled area so when you go down  
25 the river or down the beach you don't -- you



1 see very little structure. I think that, you  
2 know, construct- -- you know, building a bunch  
3 of houses on this spit, while they might be  
4 tastefully done, certainly takes away the  
5 natural pristine feel of the whole place. I  
6 think the wall would -- I guess it's supposed  
7 to be inland of the current sand so that it's  
8 driven into the sand, but as much as it's  
9 eroding now, I can't help but think that the  
10 continual tidal shifts and flow to the river  
11 would continue to cause erosion and eventually  
12 expose the wall, would be my uneducated guess.

13 Q: And why is that a concern of yours?

14 A: Well, I mean, if you're going up and down the  
15 river looking for, you know, enjoying what is  
16 currently an unspoiled, pristine area, and then  
17 all of a sudden you're looking at a rusty steel  
18 wall, I think that would take some of the  
19 enjoyment out of it.

20 **(Petitioner's Exhibit Number 1 was introduced into**  
21 **the record at this time.)**

22 Q: And I just put Petitioner's Exhibit 1 up on the  
23 screen. Do you recognize that?

24 A: I do.

25 Q: And what is that aerial?



1 A: Well, it's of the -- you've got the spit and  
2 the neck and the park and my little spot over  
3 here (indicating).

4 Q: Okay. I was going to ask if you could see  
5 Inlet Cove from this map?

6 A: Yeah.

7 Q: Do you, Mr. Finly, do you ever use the area  
8 between a mean high water and mean low water  
9 mark on the banks of the river?

10 A: Yeah, occasionally. So when you have a -- or  
11 kayak, really the only spot if you wanted to  
12 hop of and take a rest or stretch your legs or,  
13 you know, whatever, take a dip, would be in  
14 this area here. I mean effectively that's sort  
15 of one big dune, I guess. And so until you get  
16 down here where the mud banks and marsh is,  
17 this area here allows a little -- there's sort  
18 of a little small beach area (indicating).

19 Q: And do you ---

20 A: And that's a great spot. I've seen dolphin  
21 strand feed there. We've hopped off and, like  
22 I say, stretched our legs and taken a swim  
23 there. So, yeah, we do use it. You can't  
24 really use it at high, high tide, but maybe low  
25 you can.



1 **THE COURT:** That second area that you marked, the  
2 individual line ---

3 A: I'm sorry?

4 **THE COURT:** The single line.

5 A: Here?

6 **THE COURT:** That you marked, yeah. You said that's  
7 mud flats?

8 A: Well, I don't know if mud flat's not the --  
9 maybe not the right word, it's marsh area.

10 **THE COURT:** It's not a pristine beach?

11 A: That area?

12 **THE COURT:** Yeah.

13 A: No. I mean is pristine, but I wouldn't call it  
14 a beach.

15 **THE COURT:** Okay.

16 **(Petitioner's Exhibit Number 3C was introduced into**  
17 **the record at this time.)**

18 Q: Mr. Finly, a witness that was testifying  
19 yesterday took some of these pictures. Do you  
20 recognize where that might be?

21 A: I do. That's in the bend, in the bend or what  
22 I would call the neck of the spit.

23 Q: And we're looking at Petitioner's Exhibit 3C.

24 A: I've got a blue kayak, so that's not me, but it  
25 could be.



1 Q: And do you recognize the sandy area that you  
2 were describing?

3 A: I do.

4 Q: Could you identify that for The Court?

5 A: (Witness complies.)

6 Q: And does that sandy area extend all along the  
7 entire river side of the spit?

8 A: No. I think it turns into more sort of marsh  
9 as you go further down. I mean there might be  
10 a very small bit of sand but the further down  
11 you get you can't really get out of your boat  
12 and walk in it, no. But there's a good long  
13 stretch that you can.

14 Q: So, is that that primary or only sandy area on  
15 the river side on the back end of the spit?

16 A: It is, until you get to the very, you know, end  
17 of the spit.

18 Q: This doesn't quite show on this where we just  
19 talked about?

20 A: You mean the end?

21 Q: Yes, of it.

22 A: So, the new cut is, I don't know, roughly in  
23 here. So you can ---

24 **THE COURT:** What new cut? What do you mean by new  
25 cut?



1 A: So, a year or two ago they ---

2 **THE COURT:** Oh, that's what you're talking about.

3 A: --- came in and excavated and changed the  
4 channel.

5 **THE COURT:** Okay.

6 A: Which was disappointing because we lost, I  
7 don't know, half a mile of beautiful beach  
8 that's now on the other side of -- but Seabrook  
9 gained it.

10 Q: Could you just mark for me on that aerial on  
11 the screen here the sandy areas, sandy beach  
12 areas you were describing?

13 A: All right. So, if the cut were here, you can  
14 come clear around and it's clear to about  
15 there, you got sand. And then -- so you have  
16 sand roughly all through here (indicating).

17 Q: And is it your understanding that the wall, the  
18 proposed wall would be located inland of the  
19 area that you marked along the bend of the  
20 river side of the spit?

21 A: Yes. You know, like I said, it starts -- as I  
22 understand, it starts roughly here at  
23 Beachwalker and extends around -- I don't know  
24 the exact conclusion of it, but somewhere  
25 roughly where my line is (indicating).



1 Q: And, Mr. Finly, do you have a view of the river  
2 or Captain Sam's from your home in Inlet Cove?

3 A: I do. My orientation is a little more westward  
4 so more like this (indicating) than down the  
5 river.

6 Q: Are you directly on the river?

7 A: Not directly but a stone's throw. Got a great  
8 view of it, we're just a smidge back.

9 Q: Have you ever considered purchasing property  
10 closer to the river?

11 A: I have. We've looked at -- there's some units  
12 very near our's with the orientation with ---

13 Q: Let me slide this down here.

14 A: Yeah. So roughly, you know, oriented this way  
15 (indicating). And we've discussed it and we're  
16 interested. You know, it's a lot of money, a  
17 lot of time to buy and remodel and of course  
18 this project is out there and it's a little bit  
19 of an issue. Watching construction for the  
20 next 10 years, potentially what you're left  
21 with with the, potentially, steel wall.  
22 They're already constructing more condominiums  
23 and whatnot on Beachwalker Drive which would,  
24 you know, I think it's going to cause an  
25 increase in traffic both on the beach and on



1 the river. Just would obviously cause even  
2 more. So where we are on Beachwalker is  
3 already crowded by virtue or a lot of small  
4 homes, villas they're called on the Kiawah,  
5 some condominiums, new construction. And then  
6 you have Beachwalker County Park, so, you know,  
7 basically from May to September you get a lot  
8 of traffic, certainly on the weekends and a  
9 good bit during the week as well. So it's a  
10 very heavily trafficed road, Beachwalker Drive.  
11 So between proposed, more proposed construction  
12 and what it might mean for noise and driving  
13 pile all day long and -- you know, it's  
14 definitely a consideration as to whether we'd  
15 want to make another investment or not.

16 Q: Mr. Finly, are you a member of the Coastal  
17 Conservation League?

18 A: Yes, but virtue of having -- I guess if by  
19 virtue of making a contribution over the last  
20 few years because of the spit and your defense  
21 of it, yeah, I think so.

22 Q: So you've made donations to the League  
23 specifically because of their efforts in  
24 protecting Captain Sam's Spit?

25 A: Correct.



1 Q: Is there anything else that you'd like to share  
2 about your experiences with ---

3 **MR. WALKER:** Objection.

4 Q: --- again?

5 **THE COURT:** Sustained. You can't ask a narrative.

6 **MS. WHITE:** All right. I believe -- just one  
7 moment. No further questions.

8 **THE COURT:** Mr. Walker?

9 **MR. FINLY - CROSS-EXAMINATION BY MR. WALKER:**

10 Q: Hey, Mr Finly, I'm Trenholm Walker. Nice to  
11 meet you.

12 A: Yes, sir.

13 Q: You weren't by any chance on the river last  
14 Tuesday when Mr. Thomas was on the river, were  
15 you?

16 A: I don't know.

17 Q: All right. He was out there. We saw a picture  
18 of some kayaks. You didn't do any paddle  
19 boarding that day, did you?

20 A: No, I don't think so.

21 Q: Okay. That's all I have. Thank you.

22 **MR. CHURDAR:** I have no cross.

23 **THE COURT:** You may step down.

24 **(The witness was excused.)**

25 **MS. WHITE:** Your Honor, I think -- could we take a



1 quick break?

2 **MS. ARMSTRONG:** A five minute break?

3 **THE COURT:** Okay. We'll take a five minute break.

4 **MS. WHITE:** Actually, Your Honor, I'm sorry. Our  
5 next witness is a lay witness and he lives here  
6 in Columbia and I had told him probably to get  
7 here around 12:30, 1:00. And maybe if we break  
8 for lunch now, by the time we come back he'll  
9 be here and we can pick back up? If that works  
10 for everybody?

11 **MR. WALKER:** That's fine with us.

12 **THE COURT:** Is that fine with y'all? All right,  
13 we'll do that then. It's 12:15, we'll be back  
14 at ---

15 **MS. ARMSTRONG:** 1:30?

16 **THE COURT:** --- 1:30, yeah.

17 **MS. WHITE:** Great. Thank you.

18 (A break was taken from 12:17 p.m. until 1:32 p.m.)

19 **THE COURT:** I'm ready.

20 **MS. WHITE:** The petitioners call George Meriwether  
21 to the witness stand.

22 **COURT REPORTER:** Right here. Spell your last name  
23 for me.

24 **MR. MERIWETHER:** M-E-R-I-W-E-T-H-E-R.

25 **COURT REPORTER:** W-E-T-H-E-R?



1 MR. MERIWETHER: Right.

2 COURT REPORTER: Raise your right hand, please.

3 MR. MERIWETHER: (Witness complies.)

4 COURT REPORTER: Do you solemnly swear the testimony  
5 you're about to give in this matter is the  
6 truth, the whole truth, and nothing but the  
7 truth, so help you God?

8 MR. MERIWETHER: I do.

9 COURT REPORTER: Thank you. You may have a seat.

10 MR. MERIWETHER - DIRECT EXAMINATION BY MS. WHITE:

11 Q: All right. Good afternoon, Mr. Meriwether.

12 A: Good afternoon.

13 Q: Can you start by telling The Court where you  
14 live?

15 A: I live here in Columbia, 2326 Lincoln Street.

16 Q: And what is your occupation?

17 A: I'm a project manager. I work with Blue Cross  
18 Blue Shield.

19 Q: Have you ever been to Kiawah Island?

20 A: Yes.

21 Q: When did you go down there?

22 A: I actually went down and did some kayaking last  
23 weekend.

24 Q: Last weekend. And when was the first time that  
25 you went down there?



1 A: I've gone down to Kiawah since I was a child,  
2 well over 30 years, over 40 years.

3 Q: Have you always lived in Columbia?

4 A: Yes.

5 Q: And what do you do when you go down to Kiawah  
6 Island?

7 A: These days primarily, we enjoy the beach from  
8 Beachwalker Park and probably more than that,  
9 we kayak and boat, occasionally gather oysters  
10 during season.

11 Q: When you go down to Kiawah, do you usually  
12 access the beach from Beachwalker Park?

13 A: It depends. I mean, last weekend, we kayaked  
14 up to the beach, the spit there there, so we  
15 didn't even I guess technically go on  
16 Beachwalker Park. But it varies.

17 Q: And when you're going kayaking, where are you  
18 putting your kayak in?

19 A: The two places we put in are right under the  
20 bridge that goes over the Kiawah River, that's  
21 probably where we typically put in. But last  
22 week, we actually put in at Mingo Point, where  
23 they sometimes charge five dollars to put in.

24 Q: And I'm looking at this aerial here on the  
25 projector screen, do you recognize this?



1 A: Yes.

2 Q: What is it?

3 A: That's Captain Sam's Pit.

4 Q: And you were talking about going kayaking, are  
5 you able to identify areas where you kayaked on  
6 this aerial?

7 A: Yeah, I mean, you've got ---

8 Q: You can actually touch the screen.

9 A: Okay. I mean, all of this is the Kiawah River.  
10 We, you know, again, put in either under the  
11 bridge, which I don't really -- it's up north,  
12 but we kayak up -- I mean, sometimes we've gone  
13 all the way to the ocean, but often we, you  
14 know, beach the boats -- just doing what's  
15 recently in memory from last week, we beached  
16 roughly there and just got out and enjoyed a  
17 swim.

18 Q: And how often do you go down to Captain Sam's?

19 A: Probably on average once a month; more during  
20 the cooler months, less during the months when  
21 it's close to 100. Yeah, at least once a  
22 month.

23 Q: And other than kayaking and spending time on a  
24 beach, are there other recreational activities  
25 you engage in while you're down there?



1 A: Beach combing, I mean, again, in season,  
2 sometimes we will gather oysters, biking, but  
3 just enjoying the, you know, nature watching  
4 extensively. That's the appeal, those types of  
5 activities.

6 Q: And you said you've been going down to Kiawah  
7 since you were a kid. Why do you -- why did  
8 you go there and why do you continue to go  
9 there?

10 A: Growing up, you know, my parents had an  
11 interest in a house on Kiawah, that's been many  
12 decades ago. But I was introduced to the area  
13 as a child. You know, the family hasn't owned  
14 property in 20, 30 years, but I got to know the  
15 area, you know, as a child. That particular  
16 tidal creek and area has just been -- has  
17 always been one that's special to me and a  
18 number of friends and family members.

19 Q: And do you feel the same way about it today?

20 A: I do. I mean, it's been an awful lot of  
21 changes over the years with development being,  
22 you know, the dramatic change, but it's still  
23 a very special place and anybody can access it  
24 right now.

25 Q: What kind of changes are you referring to?



1 A: The development. You know, when I was growing  
2 up, Kiawah had 17 or 18 houses and a dirt road.  
3 You know, it's not completely recognizable now.  
4 The development is -- it's just transformed it.  
5 So this particular spit is, you know, one of  
6 the few places left that's not dramatically  
7 developed.

8 Q: And could you describe for me your experience  
9 of kayaking or recreating around the inlet and  
10 Captain Sam's Spit, what it's like?

11 A: Yeah, it's beautiful. You know, hopefully,  
12 everybody agrees with that. But you can count  
13 on seeing bottlenose dolphins playing, shore  
14 birds, aquatic birds are always present, so  
15 it's kind of a nature lover's paradise of  
16 sorts. But it's, you know, obviously, you need  
17 to be aware of what the tides are doing. It's  
18 changed over the years, you know, erosion comes  
19 and goes, but the wildlife has always been  
20 consistent and something that my wife and I,  
21 our family and friends have always enjoyed. We  
22 go there and just enjoy a kind of serene little  
23 paddle up and down the river.

24 Q: And do you observe any other people out on the  
25 river or on Captain Sam's Pit while you go down



1 there?

2 A: Oh, yeah. I mean, it's very attractive to the  
3 kayak and paddling and boating community. We  
4 saw, you know, 20 or more kayaks, plus paddle  
5 boards, just, you know, this weekend before  
6 last -- last weekend, so on the beach, you  
7 know, it's a very popular destination to beach  
8 going, shelling, that kind of activity.

9 Q: When you said it's an attractive place for  
10 kayakers and the kayaking community. Why is  
11 that, do you think?

12 A: Kind of the unspoiled nature. It's just harder  
13 and harder to find a place that's not got a  
14 dramatic amount of development and, you know,  
15 there's not a lot of fear of pollution. You  
16 can time it with the tides. You know, it's not  
17 as easy to find a waterway where you can go and  
18 have public access and enjoy a very nice kayak  
19 stretch. You know, if you time it right,  
20 you've got the tide going with you and, you  
21 know, you can picnic or something on the beach  
22 and then come back. And, again, it's something  
23 where you've got a lot of unusual wildlife  
24 activity. So if you are interested in paddling  
25 and wildlife, it's got a combination of appeal



1 that's hard to find.

2 Q: What kinds of unusual wildlife activities do  
3 you observe?

4 A: The bottlenose dolphins are particularly active  
5 in that waterway and I've, you know, explored  
6 different ones. They strand feed and that's --  
7 that's kind of an unusual activity that's not  
8 -- that's restricted to the region and very  
9 prevalent there and, you know, on many  
10 occasions I've watched and kind of social  
11 behavior of where they work together to herd  
12 fish to the shore. There's a lot of activity  
13 and there's been few, almost no times when I  
14 haven't gone to see the dolphins (sic) on the  
15 creek. And a good third of the time I've  
16 probably witnessed them strand feeding, so  
17 that's a big deal. But there's also a myriad  
18 of shorebirds, herons, plovers, that always  
19 frequent the area and it's kind of keen with  
20 the life, so.

21 Q: When you see dolphins strand feeding, are you  
22 able to mark on the map where you've seen them  
23 doing that?

24 A: I've seen them many ---

25 Q: Generally.



1 A: --- times. I mean, once we were actually on  
2 shore and saw them up here. I would probably,  
3 you know, again, sometimes it's a little bit  
4 hard to translate maps to, but I mean, I've  
5 seen them many times. Dozens, just because  
6 I've been going there for many years. Mostly,  
7 it's been on the -- kind of the southeast side,  
8 but, you know, all up and down this stretch  
9 and, you know, a couple times right -- they go  
10 all the way out to the Atlantic Ocean, so  
11 (indicating).

12 Q: You've marked a couple of Xs along, is there a  
13 place marker that you can identify where this  
14 first X is up at the top?

15 A: I'm sorry?

16 Q: Are you able to ident- -- or explain or  
17 describe where this first mark is up at the top  
18 or what's around there, specifically that white  
19 looking?

20 A: Yeah, it's a sandy stretch. I mean, this is my  
21 recollection of when a group were strand  
22 feeding earlier this year. That probably is  
23 the entrance to Beachwalker Park. I'm not  
24 sure.

25 Q: That's fine. This one might be a little easier



1 to orient yourself with. Are you able to  
2 identify what this is an aerial of?

3 A: Now my Xs are confusing. Yeah, I mean, this is  
4 the ---

5 Q: Oh, sorry.

6 A: --- spit. I mean, this is the spit here  
7 (indicating).

8 Q: And if you could just mark again where you've  
9 seen strand feeding generally.

10 A: Again, I've witnessed them on many occasions,  
11 you know, upward going down here toward the  
12 Atlantic Ocean, so it's not an infrequent  
13 occurrence.

14 Q: And what does the shore look like in those  
15 areas where you see the dolphins strand  
16 feeding?

17 A: Well, again, it's varied on the occasions, but  
18 I've seen them strand feeding literally right  
19 on the beach; I've seen the strand feeding, you  
20 know, on this narrow area, sometimes it's a  
21 little bit like a combination of beach and  
22 marsh. My understanding, not being a marine  
23 biologist or anything, is that they're often  
24 herding fish, you know, up onto the -- an area  
25 that they can kind of be trapped and then feed



1 on them.

2 Q: Are you aware that DHEC has issued permits  
3 authorizing some development activity out on  
4 Captain Sam's Pit?

5 A: Yes, I am.

6 Q: What is your understanding of what those  
7 permits authorize?

8 A: So, I gather it involves a good bit of  
9 infrastructure for building something on the  
10 order of 50 houses eventually and maybe in  
11 phases on the spit itself, but -- and a  
12 combination of it sounds like sewer lines, a  
13 road to go along -- it's a very narrow stretch,  
14 and a steel retaining wall to try to, I gather,  
15 combat the effects of erosion or make it more  
16 structurally sound to put a road and build.

17 **(Joint Exhibit Number 6 was introduced into the**  
18 **record at this time.)**

19 Q: I'm going to hand you this Joint Exhibit  
20 Notebook, specifically Exhibit Six, if you  
21 could flip through those documents right there  
22 and tell me if you recognize them.

23 A: Yes. Yeah, I do.

24 Q: What are they?

25 A: I believe this is a response to a request for



1 a permit to do the infrastructure construction  
2 that I was just describing.

3 Q: Okay. Do you understand that the Department  
4 has issued permits authorizing that  
5 infrastructure and development?

6 A: I do.

7 Q: Do you know the approximate location of the  
8 steel wall?

9 A: Yeah, I gather it extends 23, 2,400 feet and,  
10 again, would be used to shore up the road, you  
11 know, so you could build houses on the spit,  
12 so, you know, I mean, you can see this whole  
13 area ---

14 Q: And ---

15 A: --- is pretty -- gets pretty narrow. I've  
16 watched it over the years, it kind of grows and  
17 shrinks and changes and I gleaned that, you  
18 know, it's -- there's an effort with this  
19 revetment wall to shore it up.

20 Q: When you say this area and talking about it  
21 narrowing, what area in particular are you  
22 talking about?

23 A: What area am I talking about ---

24 Q: Right.

25 A: --- that the -- I mean, this whole, I mean,



1 area is kind of subject to a lot of erosion.  
2 I assume that's what they are trying to offset.

3 Q: So are you ---

4 A: I don't know if I'm answering your question.

5 Q: Are you referring to the area where the --  
6 where Captain Sam's Pit connects to the  
7 mainland ---

8 A: Right.

9 Q: --- of Kiawah Island? And is your  
10 understanding that the wall would be  
11 approximately in the area that you've marked on  
12 Petitioner's Exhibit One?

13 A: That's my impression, that's my understanding.

14 Q: Have you seen this drawing before?

15 A: I have reviewed some of these documents. I --  
16 I'll just be honest with you, I'm not sure if  
17 this is one that I've seen or not.

18 **(Joint Exhibit Number 7 was introduced into the**  
19 **record at this time.)**

20 Q: Okay. And this is Joint Exhibit Seven, the  
21 last page, are you able to make out what it  
22 says down there at the bottom of the page?

23 A: Steel sheet pile wall layout, you know, it's  
24 obviously, that table with the station,  
25 distance wall to toe of escarpment, station,



1 distance wall to toe of escarpment. I don't  
2 know if it's my eyes or not, but I can't make  
3 out the actual numbers in the table.

4 Q: Oh, no, it's okay. Does this -- what does this  
5 appear to represent?

6 A: It looks like it's representing lots in a path  
7 of the proposed or permitted revetment wall we  
8 were talking about.

9 Q: Does this appear consistent with your  
10 understanding of the wall?

11 A: Yeah, yeah, I believe it is.

12 Q: Would the construction of this wall and the  
13 road and infrastructure for the lots on Captain  
14 Sam's Spit affect your use and enjoyment of the  
15 area at all?

16 A: Oh, without question.

17 Q: In what ways?

18 A: I mean, what appears to be being proposed or  
19 pursued is an awful lot of construction with  
20 the end result being, you know, 22 to 2,400  
21 feet of a steel wall, you know, the  
22 construction alone is obviously a process  
23 that's going to disturb wildlife, but, you  
24 know, the attempts I've seen to combat the  
25 effects of erosion up and down our coast have



1 almost inevitably been problematic. I am very  
2 worried that, you know, the appeal of this as  
3 a kayaker or somebody who likes to just walk  
4 along the beach and observe nature is going to  
5 be changed negatively and permanently. You  
6 know, the construction alone is obviously very  
7 destructive, but to have a wall and a road and  
8 50 houses on a piece of property of exposed  
9 land to storms, just doesn't make sense to me  
10 and yeah, it would no longer be as appealing.

11 Q: Do you ever pull up between the mean high water  
12 and low water marks on the sandy banks on the  
13 river side?

14 A: Yeah, yeah, I do occasionally pull up. I  
15 pulled up last weekend.

16 Q: And when you pull up, is it generally in that  
17 area where the Captain Sam's Spit is connecting  
18 to the mainland that you were talking about  
19 previously?

20 A: On some occasions, it has been, yeah.

21 Q: Do you generally know of that area as being  
22 referenced as the neck?

23 A: That's the perception I've got, just looking at  
24 the materials, that that's one of the areas  
25 where the road would cross and the wall would



1 be constructed.

2 Q: And are you a member of the Coastal  
3 Conservation League?

4 A: I am.

5 Q: How long have you been a member?

6 A: I've supported the cause for years. I've  
7 recently formally joined as a member. I think  
8 they've got an interest in this, as well.

9 Q: And why have you supported the cause for years?

10 A: I think their pursued protection of the  
11 environment and sustainable activity, which is  
12 something that I think's important.

13 **MS. WHITE:** Hold on a second, Your Honor. No  
14 further questions.

15 **MR. WALKER:** No questions.

16 **MR. CHURDAR:** None from the Department.

17 **THE COURT:** You may step down.

18 A: Do I bring this with me?

19 **COURT REPORTER:** No, please, leave that. Don't take  
20 the Exhibit. You can just leave the exhibit on  
21 the desk.

22 A: Okay.

23 **COURT REPORTER:** Thank you.

24 **MS. WHITE:** The Petitioners would call Chad Hayes to  
25 the witness stand.



1 COURT REPORTER: H-A-Y-E-S?

2 MR. HAYES: Yes, ma'am.

3 COURT REPORTER: Raise your right hand. I'm sorry,  
4 raise your right hand, please.

5 MR. HAYES: (Witness complies.)

6 COURT REPORTER: Do you solemnly swear the testimony  
7 you're about to give in this matter is the  
8 truth, the whole truth, and nothing but the  
9 truth, so help you God?

10 MR. HAYES: Yes, I do.

11 COURT REPORTER: Thank you.

12 **MR. HAYES - DIRECT EXAMINATION BY MS. WHITE:**

13 Q: Good afternoon, Mr. Hayes.

14 A: Good afternoon.

15 Q: Could you start by telling us where you live?

16 A: I live on John's Island, South Carolina, and  
17 I've been a resident of Charleston for the last  
18 18 years now.

19 Q: And where were you before you lived in  
20 Charleston?

21 A: I was at school, Presbyterian College for  
22 undergrad, but originally was born and raised  
23 in Dillon, South Carolina.

24 Q: And what is your occupation?

25 A: I'm a high school marine biology teacher and



1 I'm also a licensed charter captain.

2 Q: And you said you went to Presbyterian College?

3 A: I did.

4 Q: What was your degree?

5 A: Biology.

6 Q: And did you do any further education after  
7 college?

8 A: I did. A few years ago, I completed my  
9 master's at The Citadel, also in biology.

10 Q: If you could, just walk me through your work  
11 history since graduating and getting your  
12 master's.

13 A: I actually went back to get my master's degree  
14 because I wanted to teach. I worked in the  
15 field as a biologist for many years, both as a  
16 charter captain and as a fisher's biologist for  
17 our Department of Natural Resources; also  
18 worked as an environmental technician for an  
19 environmental consulting firm. Wanted to get  
20 my master's so I could go back and teach high  
21 school. I figured I had a mass of pretty cool  
22 knowledge that I wanted to give back to the  
23 community.

24 Q: So when did you graduate from PC?

25 A: 1999.



1 Q: So how about walk me through your work history  
2 since -- from graduating.

3 A: My first job actually I got before I even  
4 graduated. I came down to Charleston to visit  
5 my brother on spring break and went on an  
6 interview with Kiawah Island Golf Resort and I  
7 was offered a position as a naturalist working  
8 for their nature program and I began doing that  
9 the first summer right after I graduated,  
10 guiding canoe trips, kayak trips, interpretive  
11 nature walks, biking tours, you name it, I did  
12 a little bit of everything.

13 Q: Your position was naturalist?

14 A: Uh-huh, I was a naturalist. And then I left  
15 from there and began to work with the  
16 Department of Natural Resources, which I had  
17 done several internships with while I was in  
18 college, but took several years to finally get  
19 a paid position when I moved to Charleston, and  
20 I began working with the Shellfish Research  
21 Lab, studying oysters and clams, and then I  
22 actually moved over to the Office of Fisheries  
23 Management, where I began to work with the  
24 shellfish recycling program. During my tenure  
25 there at the Department of Natural Resources,



1 I was also the host of the South Carolina  
2 Wildlife TV show, so I got to travel around the  
3 State and see not only work being done here in  
4 Charleston, but work being done all over the  
5 state, all over the State by biologists and  
6 scientists, so pretty cool.

7 Q: What kind of things did you observe while you  
8 were doing that?

9 A: Literally all the research that was going on in  
10 the state from fish hatcheries to creation of  
11 the striped bass, South Carolina State Fish,  
12 the monitoring of migratory species, through  
13 hydroelectric dams, fish lifts, you know,  
14 nuisance animal control, wildlife habitat  
15 management, just pretty much everything the  
16 Department has their hands in.

17 Q: And how long were you with the Department of  
18 Natural Resources?

19 A: Four, just about four years.

20 Q: And what did you do after that?

21 A: I actually left the Department. I wasn't able  
22 to make a living working as a state biologist,  
23 so I had to find another source of income, but  
24 I actually started a charter boat company doing  
25 guided eco tours and shore fishing charters,



1 near shore fishing charters, and I was under  
2 contract with Kiawah Island Golf Resort. It  
3 was a program that I had kind of designed  
4 several years before, but when the Sanctuary  
5 opened, they needed to upgrade their activities  
6 and they felt like a charter boat program would  
7 be a good amenity to offer for the type of  
8 clientele the Sanctuary was going to be  
9 recruiting, so I began to do that in 2004 and  
10 worked for the Resort through 2008 running the  
11 charter boat program as a subcontractor.

12 Q: So you were subcontracted to work for the  
13 Kiawah Resort?

14 A: Correct. I provided the captains, the boats,  
15 all the equipment, and the resort just  
16 basically booked people for the trips, which  
17 they were doing already for canoe and kayak  
18 trips and things of that nature.

19 Q: And so was it your company, the charter  
20 company, that was contracted?

21 A: Uh-huh. It was. The Kiawah Charter Company.  
22 And it was a fairly small operation. We were  
23 designed initially just for Sanctuary  
24 clientele, so we weren't offering our services  
25 to everyone at the Resort. It's a real small



1 operation, but with a high emphasis on quality.

2 Q: And what kind of charters or tours were you  
3 doing while you were working with the Resort?

4 A: Primarily inshore fishing, although I focused  
5 more on the eco tour side of things. I had  
6 some of my other captains that were better  
7 fishing guides than I was, so I focused mostly  
8 on eco tours, dolphin watching and sunset  
9 cruises, all interpretive and educational in  
10 nature, but primarily inshore and near shore  
11 fishing charters in addition to eco tours.

12 Q: So eco tours, does that encompass I think you  
13 said dolphin watching ---

14 A: Yep.

15 Q: --- and sunset ---

16 A: Most certainly. The apex predator that lives  
17 in the salt marsh that surrounds Charleston is  
18 a dolphin, one of the most popular animals that  
19 people come to Charleston to see. And  
20 definitely if you're on vacation and you're out  
21 on the water, you want to see a dolphin, so  
22 dolphin watching was always an integral part of  
23 the eco tours. But basically an eco tour is  
24 just an overall view of the processes that are  
25 happening in the salt marsh, second most



1 productive eco system on the planet. So I  
2 wanted all of our guests on our tours to have  
3 a better understanding for this area and  
4 hopefully respect it a little bit more, as  
5 well. So that was kind of the emphasis on the  
6 eco tours.

7 Q: And how often were you doing those tours?

8 A: When I was running full-time, I was on the  
9 water 300 days a year, it was a very, very busy  
10 endeavor. The resort had not only seasonal  
11 tourist guests, you know, during the typical  
12 tourist season, but they had corporate groups  
13 that would come down during the fall and the  
14 winter, so we had -- we were running, we were  
15 wide open.

16 Q: And how long were you working as a  
17 subcontractor with the Resort?

18 A: For four years.

19 Q: And what did you do after that?

20 A: I actually left the Resort and began to work  
21 for Briars Creek and I still kept my company,  
22 but it was just pretty much a solo endeavor  
23 after that. I began to do some work on the  
24 property as far as habitat and wildlife  
25 management for Briars Creek, as well as doing



1 eco tours and fishing charters for their  
2 membership. So basically the same thing I was  
3 doing at the Resort, but with a little smaller  
4 audience. A more permanent audience, I should  
5 say.

6 Q: And how many tours were you doing at that time?

7 A: I was averaging at least about 140 a year at  
8 that point, and that wasn't even really running  
9 full-time because I was doing other activities  
10 for Briars Creek other than charters.

11 Q: And when you were running charters -- let me  
12 back up. When you were running the charters  
13 for and with the Kiawah Resort, were you  
14 primarily going around the Kiawah Island area?

15 A: Yeah, we'd stay exclusively in the Kiawah River  
16 and all my travels with work in the Department  
17 of Natural Resources, I'd never come across an  
18 area that had so much diversity as far as  
19 wildlife and it literally was like being in the  
20 middle of a wildlife documentary each and every  
21 day out there, so there was never a need to go  
22 anywhere else to find anything, because all the  
23 cool stuff was happening right there in that  
24 river.

25 Q: And what about when you went to the Briar ---



1 A: Still -- Briars Creek actually accesses the  
2 Kiawah River, but on the backside of the  
3 island, which you would call the north side of  
4 the island, so I still did most all my charters  
5 in the same water.

6 Q: And are you still doing charters ---

7 A: Uh-huh.

8 Q: --- through there?

9 A: I do them during the summer months when I'm not  
10 in school and, obviously, afternoons until the  
11 time changes, I can do cruises after school and  
12 on the weekends.

13 Q: So how often would you say you're doing  
14 charters now?

15 A: Charters now, this summer I did a little over  
16 100 actual charters, but even if I'm not  
17 chartering with clients, I'm on the water  
18 everyday. I just -- I love it that much, so I  
19 spend time out there even on my own. So I'm  
20 still probably in the neighborhood of 300 days  
21 a year on the water, but I'm just not getting  
22 paid for all that time.

23 Q: And when you go out on the water on your own,  
24 where do you typically go?

25 A: Right, here, this picture that we're still



1 looking at on the screen. That's such a  
2 wonderful area. It's -- you know, it's  
3 shallow, but not too shallow. You don't see a  
4 whole lot of boat traffic or used to not see a  
5 whole lot of boat traffic, but just the  
6 potential to see something wonderful as a  
7 biologist, you know, there's no place else I'd  
8 rather go.

9 Q: And you referred to something on the screen.  
10 Can you describe for me what that is?

11 A: Yeah, I'm looking at Captain's Sam Spit, the  
12 western most tip of Kiawah Island and the  
13 Kiawah River and oyster creek right there. And  
14 this is Mr. Jerry King's house, I believe,  
15 right at the end.

16 Q: So how often do you go out towards Captain  
17 Sam's Spit?

18 A: Daily until time changes to where I lose that  
19 valuable couple of hours after school. I have  
20 a hunting dog that's very energetic and we like  
21 to go out to the beach down here on the  
22 Seabrook side and throw the tennis ball and try  
23 to wear him out, so I'm out there everyday.

24 Q: What else have you observed when you are going  
25 along the river around Captain Sam's Spit?



1 A: Tons of birds, a lot of baitfish, just fish  
2 species in general, but as, you know, the  
3 gentleman before me said, strand feeding's one  
4 of the coolest things you get to see and I  
5 typically try to time my visits down around a  
6 tide I know that's going to be suitable for  
7 that. I love taking photographs and video of  
8 them; I'm just really fascinated by the  
9 technique and that's one of the most prominent  
10 things that I see. But kayakers are out doing  
11 the same thing, people paddle boarding, people  
12 fishing along the bank where they can get out  
13 to the bank at least and some folks biking down  
14 at the inlet coming down from the beach,  
15 handful of commercial crabbers on occasion.

16 Q: Are you able to identify areas where you've  
17 seen dolphins strand feeding on that aerial  
18 that's on the computer in front of you?

19 A: Absolutely. Previously, when I first started  
20 and I've been watching these dolphins for the  
21 last 15 years, and strand feeding was kind of  
22 the focal point of my volunteer or independent  
23 research. I wanted to learn as much as I could  
24 about it, so I figured out that as a biologist,  
25 when you study a group of animals, if you can



1 figure out where they're feeding, how they're  
2 feeding, and who all was there feeding, pretty  
3 much the rest of their behavior's going to fall  
4 in the gaps.

5 **MR. GRESSETTE:** Objection, Your Honor, to the extent  
6 the witness is beginning to testify as his  
7 perceptions and opinions as a biologist. He's  
8 not qualified as an expert.

9 **THE COURT:** Any response?

10 **MS. WHITE:** I think -- well, he's already -- he's  
11 already explained that he has an educational  
12 background in biology and has ---

13 **THE COURT:** Doesn't grant him the right to be an  
14 expert ---

15 **MS. WHITE:** Right.

16 **THE COURT:** --- unless he's qualified.

17 **MS. WHITE:** I don't think he's testifying as an  
18 expert. I think he is testifying that his  
19 rational perception as someone who also just  
20 happens to have that background. I don't think  
21 -- we are not offering him as an expert.

22 **THE COURT:** Now, I can't remember what he -- exactly  
23 what he -- what was it specifically you said  
24 that you were concerned about?

25 **MR. GRESSETTE:** Most recently, the sentence that



1 began as a biologist, and began to discuss his  
2 analysis of the food chain, behaviors, et  
3 cetera.

4 **MS. WHITE:** I don't believe he was discussing any  
5 analysis. I think he was identifying why he  
6 began to pay closer attention to strand feeding  
7 behavior. He found -- I think what he said was  
8 that he found it interesting.

9 **THE COURT:** Yeah, I'll overrule -- I'll overrule the  
10 objection. If he goes any further, I'll  
11 sustain it, but I overrule the objection.

12 **MS. WHITE:** Thank you, Your Honor.

13 Q: If you could speak mostly from your personal  
14 observations ---

15 A: Sure.

16 Q: --- and knowledge.

17 A: Sure. Main point, been watching them for a  
18 very long time, so I've seen some changes in  
19 the spots that they actually do feed more  
20 frequently. For years down around -- and you  
21 can't really see it on this particular picture,  
22 the lower portion of the spit was primarily  
23 where most all of the strand feeding activity  
24 occurred. The width of the inlet there was  
25 kind of a natural bottle neck, so the dolphins



1 basically had a buffet line, so you saw a lot  
2 of strand feeding activity on both sides of the  
3 inlet there. But as time progressed, I noticed  
4 that the dolphins began to feed more further up  
5 the river and the primary reason was because  
6 more people began to get out to the inlet. It  
7 got a little more crowded ---

8 **MR. GRESSETTE:** Objection, Your Honor.

9 A: --- so that's why ---

10 **THE COURT:** I sustain that. He can't -- I'll strike  
11 his testimony as to why the dolphins did what  
12 they did.

13 **MS. WHITE:** Thank you, Your Honor.

14 Q: So, Mr. Hayes, you were testifying that you'd  
15 noticed an increase in strand feeding activity  
16 around the neck on the river side ---

17 A: Correct.

18 Q: --- of the spit?

19 A: Correct. They have a little more room to work  
20 there and not as much interference.

21 **MR. GRESSETTE:** Objection, Your Honor.

22 **MS. WHITE:** I know ---

23 **THE COURT:** I have to strike that, too. I'm sorry.  
24 I'll sustain the objection.

25 Q: Have you observed other changes in activity



1 level other than increase of strand feeding on  
2 the river side of the neck of the spit?

3 A: Yes, I've seen tremendous amounts of erosion  
4 along that bank, as well.

5 Q: And have you noticed any differences in  
6 activity level of other species?

7 A: There are a lot more birds on the lower end of  
8 the spit, seems to be, than the previous years,  
9 so a lot more bird activity.

10 Q: Have you noticed any changes in human activity?

11 A: A lot more people than there used to be.

12 Q: Where are you seeing more people?

13 A: More people walking down the beach front,  
14 ultimately to the inlet itself, the banks of  
15 the inlet, as well as an increase in paddle  
16 traffic in the river kayakers, paddle boarders,  
17 things of that nature.

18 Q: If I could get the court reporter to hand you  
19 Petitioner's Exhibit Nine.

20 **COURT REPORTER:** They're out there. They're stacked  
21 with the yellow tabs.

22 **MS. WHITE:** Thank you.

23 **(Petitioner's Exhibit Numbers 9A through 9F were**  
24 **introduced into the record at this time.)**

25 Q: All right. Mr. Hayes, I've handed you a stack



1 of photographs. Could you identify those for  
2 me?

3 A: Yes, these are strand feeding photographs taken  
4 from the banks of the Kiawah River almost right  
5 in front of what we call the neck at the top  
6 part of the spit.

7 Q: If you would bear with me for one second.

8 **MS. WHITE:** Your Honor, I just want to make sure, I  
9 believe the original exhibits are labeled 9A  
10 through -- 9A through F.

11 Q: Okay. Mr. Hayes, I want to talk about 9A,  
12 which is the first in this series. You started  
13 to talk about it, but what is going on in this  
14 picture?

15 A: It's a group of four bottlenose dolphins strand  
16 feeding on mullet.

17 Q: Do you know who took this picture?

18 A: This is one of my photographs. I took this  
19 photograph.

20 Q: And where was this photograph taken?

21 A: It was taken from the river side of Captain  
22 Sam's Spit very close to what we call the neck,  
23 the top portion of it where it connects to the  
24 island.

25 Q: And when was this picture taken?



1 A: This picture was taken in 2012, I believe it  
2 was.

3 Q: And this is Petitioner's Exhibit 9B, what is  
4 going on in this photograph?

5 A: This is the conclusion of the strand -- this is  
6 actually a second shot from that previous shot,  
7 and in a series after the dolphins had already  
8 beached themselves and are now actually eating  
9 the fish.

10 Q: So this is in the same location as 9A?

11 A: Uh-huh.

12 Q: Which was on the neck of the ---

13 A: Yeah.

14 Q: --- sandy banks? And you took this photograph,  
15 as well?

16 A: I did.

17 **THE COURT:** Was that at low tide?

18 A: Not ---

19 **THE COURT:** I see the escarpment there.

20 A: It's fairly low. Based on the width of the  
21 bank there, it's probably actually incoming  
22 tide because it looks like the bank's got a  
23 little more water on it than it would be at  
24 dead low tide.

25 **THE COURT:** Where would the water be at high tide?



1 A: It would go all the way up to the top up here,  
2 that's actually dune meadow grass, so that's  
3 pretty much -- it can't handle pure salt, so  
4 that's about as high as the average high tide  
5 goes (indicating).

6 Q: This is Petitioner's 9C, can you tell what's  
7 going on there?

8 A: Yeah, this is another strand feeding event, a  
9 little bit further towards the inlet from the  
10 neck.

11 **THE COURT:** What is that in the background?

12 A: That's the bank.

13 **THE COURT:** Okay.

14 Q: It's clearer on the exhibit; it's harder to  
15 see.

16 A: Yeah, it looks better on the actual picture.

17 **THE COURT:** I would hope so.

18 A: There you go.

19 **THE COURT:** Oh, okay.

20 Q: So, you said that was a little bit further down  
21 from the neck?

22 A: Uh-huh, just a little bit further down.  
23 Probably 30, 40 yards from the first shot.

24 Q: And did you take this picture, as well?

25 A: I did.



1 Q: This is Petitioner's 9D, what is going on in  
2 this picture?

3 A: This is another strand feeding event. I think  
4 it was pretty much on that same day, but a  
5 different session from Exhibit A, but the  
6 dolphins are stranding right around the neck  
7 there again.

8 Q: And you took this picture, as well?

9 A: I did.

10 Q: This is Petitioner's 9E, what is going on here?

11 A: This is a conclusion of a strand feeding event  
12 from four dolphins. Two of the other dolphins  
13 had already slid back in the water, whereas  
14 these two were still grabbing fish off the bank  
15 and this is also right by where the neck is.  
16 You can see the prickly pear cactuses washed  
17 out off the eroding bank in the background.

18 Q: And you took this picture, as well?

19 A: I did.

20 Q: This is 9F, what is this picture depicting?

21 A: The beginning stages of a strand feeding event,  
22 right there on the neck of Captain Sam's Spit,  
23 four dolphins once again.

24 Q: Are you able to point out the four dolphins?

25 A: Yeah, there's one right here; we've got one



1 here; one there; and one on the outside here  
2 (indicating).

3 Q: And where is this photo taken?

4 A: It's on -- right by the neck of Captain Sam's  
5 Spit.

6 Q: And by you?

7 A: Yes, ma'am.

8 **MOTION TO ADMIT PETITIONER'S EXHIBIT NUMBERS 9A**  
9 **THROUGH 9F:**

10 **MS. WHITE:** I'd like to move Petitioner's Exhibit 9  
11 into evidence.

12 **MR. GRESSETTE:** No objection, Your Honor.

13 **RULING OF THE COURT:**

14 **THE COURT:** It's admitted.

15 **(Petitioner's Exhibit Numbers 9A through 9F were**  
16 **admitted into evidence.)**

17 Q: Mr. Hayes, are you familiar with a development  
18 project that's proposed for Captain Sam's Spit?

19 A: I am.

20 Q: What is your understanding of that project?

21 A: That the lower portion of the spit, what we  
22 call the teardrop, the lower wider portion,  
23 Phase 1 and Phase 2 development with a total of  
24 50 home sites and then, obviously, a seawall to  
25 preserve the connection point, which is



1 necessary for utilities and a road access to  
2 the home sites.

3 Q: Are you aware that DHEC has issued permits for  
4 that project?

5 A: I am.

6 **(Joint Exhibit Number 6 was introduced into the**  
7 **record at this time.)**

8 Q: If you flip in the notebook that's in front of  
9 you to the Exhibit Number 6, at the very front  
10 ---

11 A: Uh-huh.

12 Q: --- do you recognize those documents?

13 A: Yes, the permit application for what looks like  
14 water utilities.

15 Q: I'll have you flip through it. What else is in  
16 there?

17 A: Water supply construction, that's a water line  
18 wastewater construction permits of a water  
19 treatment facility, a waste treatment facility,  
20 stormwater prevention plan, just basically  
21 outlining impervious cover and how that  
22 stormwater should be handled.

23 Q: Have you seen these documents before?

24 A: I have actually.

25 Q: You understand that those are the DHEC permits



1 for authorizing the development project on  
2 Captain Sam's Spit?

3 A: Correct.

4 Q: Do you know the approximate location of the  
5 steel sheet pile wall that's included in that  
6 project?

7 A: It's -- I'll draw it right here. It should be  
8 running along the outside curve of the  
9 riverbank here, about 2,400 feet, I think, so  
10 just under a half a mile (indicating).

11 Q: And do you have an understanding of the purpose  
12 of that wall?

13 A: The wall is to prevent some of the erosion or  
14 try and slow down the erosion process to  
15 preserve a piece of high ground for an access  
16 point to be able to drive down to the home  
17 sites on the lower portion of the spit.

18 Q: In the years that you've been going down to  
19 Captain Sam's Spit and the inlet and the Kiawah  
20 River, have you observed changes to the area?

21 A: A lot of changes. If you talk about the actual  
22 geography or the topography of the land, a lot  
23 of erosion, just a natural process. The  
24 river's moving towards that curve. The bank's  
25 washed away. There was a pine tree that you



1 showed in one of the other shots that was a  
2 really good example of just about how much sand  
3 has washed away since I've been visiting the  
4 river. I don't know if you've got that handy.  
5 There you go. This is right by Beachwalker  
6 Park with the -- kind of back up the bank here  
7 and this is what's left of the remass of a pine  
8 tree that in 1999 sat about 60 feet from the  
9 edge of the water and now it's about, you know,  
10 roughly 60 feet in the water. So that's about  
11 how much bank has washed away since I've been  
12 visiting that part of the island.

13 Q: So in 1999, you observed that tree 60 feet back  
14 from where the water's edge is?

15 A: Correct.

16 **(Petitioner's Exhibit Number 3A was introduced into**  
17 **the record at this time.)**

18 Q: We're looking at Petitioner's Exhibit Four --  
19 excuse me, 3A. And when did you observe --  
20 what were you doing when you observed that  
21 tree?

22 A: This particular spot of the bank is where our  
23 canoe trips used to launch from. We kept all  
24 of our canoes stored right here on this part of  
25 the beach, so we walk by that tree everyday



1 taking clients down and guests, and we were out  
2 there pretty much everyday. That was my first  
3 summer that we used that site.

4 Q: And you say we?

5 A: The naturalists for the Resort. Me and the  
6 other guides.

7 Q: Have you observed any other changes in the  
8 years that you've been going down to this area?

9 A: Quite a few. The one that really sticks out is  
10 just the amount of people that you see down on  
11 that end of the island now compared to the way  
12 it was 18 years ago. More people in boats,  
13 kayaks, paddle boards; people on the beach  
14 biking down. You could go for months, you  
15 know, years ago and not see another soul out  
16 there. It really was quite impressive.

17 Q: And did the changes that you've observed cause  
18 you any concern?

19 A: They did, especially in regards to the  
20 dolphins. A lot more -- I witnessed a lot more  
21 harassing events of the animals, people trying  
22 to get too close to take a picture, or just to  
23 paddle with them. I've watched people climb in  
24 the water to try and swim with them down at the  
25 inlet and so that was one of the most



1 disturbing things that I actually saw was, you  
2 know, this group of animals that was basically  
3 being harassed.

4 Q: Have you done any additional -- you said you're  
5 a biology teacher at a high school?

6 A: Uh-huh.

7 Q: And you run charter boat tours, do you have any  
8 other extra curricular activities that relate  
9 to ---

10 A: I do.

11 Q: --- your interest in dolphins?

12 A: I do. A few years ago, I started a non-profit,  
13 501(c)(3) called the Lowcountry Dolphin  
14 Alliance, and we're an education organization  
15 where we basically go out to schools and civic  
16 groups and churches and teach people about our  
17 lowcountry dolphins.

18 Q: And why did you start that non-profit?

19 A: I noticed after years of doing eco tours and  
20 pattern questions I asked over and over about  
21 dolphins, that people really didn't understand  
22 dolphins that well, especially the ones that  
23 live in our waters around Charleston. They're  
24 resident dolphins and they behave a lot  
25 differently than the ones out in the open ocean



1 do and people just weren't really aware of  
2 that, so I saw a gross -- a really huge need  
3 for more education about what our local  
4 dolphins were doing versus the ones out in the  
5 ocean.

6 Q: Do you know of a Mr. Elliot Hillock?

7 A: Yeah, I know Elliot. He's a captain. We've  
8 done some trips together before.

9 Q: When was that?

10 A: We actually did one about two weeks ago  
11 together with a large family that we had to  
12 break up into two separate boats to  
13 accommodate. We've done a few over the last  
14 few years. But I see him in the river just  
15 about everyday, as well.

16 Q: Is he a charter boat operator, as well?

17 A: He is a licensed charter captain and he's  
18 really an avid fisherman. He fishes tournament  
19 circuits and things like that and he's a really  
20 good fisherman.

21 Q: And you said you did a tour together?

22 A: Uh-huh.

23 Q: Why is that?

24 A: We were doing basically a dolphin watching trip  
25 and he wanted me along because of my knowledge



1 to help teach the guests a little bit about the  
2 dolphins.

3 **MR. GRESSETTE:** Objection, Your Honor, to the extent  
4 that the witness is testifying as to hearsay.

5 **THE COURT:** I don't quite get what the hearsay is.

6 **MR. GRESSETTE:** He's testifying about what another  
7 person wanted.

8 **MS. WHITE:** I think he -- yeah, I think he was  
9 speaking to his understanding or perception of  
10 why he was invited to join the tour.

11 **THE COURT:** Well, that doesn't get it. That doesn't  
12 get it in, but I don't believe he was offering  
13 it for the truth of the matter asserted, it was  
14 just more of a background, but I'll sustain it.

15 **MR. GRESSETTE:** Captain Hillock is listed as one of  
16 our witnesses, so I suspect I'll have an  
17 objection shortly on character assassination of  
18 a witness who hasn't shown up yet.

19 **THE COURT:** Well, I'll sustain the objection. I  
20 don't think it's -- was it that important one  
21 way or the other?

22 **MS. WHITE:** I -- I do not believe there's going to  
23 be any assassinating, Your Honor.

24 **THE COURT:** Well, I'm not talking about the  
25 testimony, I'm not worried about that. Was



1 that -- is there anything -- did you believe  
2 that that testimony was pertinent to your case?

3 **MS. WHITE:** Sure, yes.

4 **THE COURT:** In what regard?

5 **MS. WHITE:** I will -- I think the ---

6 **THE COURT:** His comment.

7 **MS. WHITE:** --- the witness was trying to give a  
8 response as to why he was asked to join Mr.  
9 Hillock and do a tour together.

10 **THE COURT:** Well, he can't speak to Mr. Hillock's  
11 state of mind, so I sustain the objection to  
12 Mr. Hillock. He can't speak to his state of  
13 mind. I'll sustain that. Any further argument  
14 you want to make?

15 Q: Have you ever done tours together with Mr.  
16 Hillock?

17 A: Yes, several over the years.

18 Q: And what have you done on those tours?

19 A: I have lead my group and interpreted dolphin  
20 behavior that we were witnessing.

21 Q: When you say you lead your group, were there  
22 separate groups?

23 A: There were two boats and just lead them to an  
24 area where I knew we were going to experience  
25 some dolphin activity and interpreted what we



1 saw when we got there so that both boats, the  
2 entire group, could hear.

3 Q: So you were addressing both boats?

4 A: Correct.

5 Q: And you were specifically talking about  
6 dolphins?

7 A: Yes.

8 **MS. WHITE:** Just one second, Your Honor.

9 Q: Mr. Hayes, what is your understanding of what  
10 your role was in going out with Mr. Hillock?

11 A: It was to basically provide information that I  
12 had learned and gathered over my years of  
13 watching the dolphins in the river to help  
14 enhance the experience of the group of guests  
15 that we had.

16 Q: Thank you.

17 **MS. WHITE:** No further questions.

18 **MR. HAYES - CROSS-EXAMINATION BY MR. GRESSETTE:**

19 Q: Good afternoon, Mr. Hillock (sic), my name's  
20 Tom Gressette. You testified about several  
21 photographs marked collectively as Exhibit 9.  
22 I think you testified that A was taken in 2012.  
23 Were they all taken in 2012?

24 A: I'm not exactly sure without looking back on  
25 the original files.



1 Q: Okay.

2 MR. GRESSETTE: That's all I have, Judge.

3 THE COURT: Mr. Churdar?

4 MR. CHURDAR: No questions.

5 THE COURT: You may step down.

6 (The witness was excused.)

7 MS. WHITE: Your Honor, could we take a quick five  
8 minutes before our next witness?

9 THE COURT: Yes. Take a five minute break. Y'all  
10 be at ease.

11 (A break was taken from 2:38 p.m. to 2:48 p.m.)

12 COURT REPORTER: All rise.

13 THE COURT: Y'all be seated. Thank you. All right.  
14 Call your next witness.

15 MOTION TO EXCLUDE/SEQUESTER WITNESS, TRAVIS FOLK:

16 MS. ARMSTRONG: Your Honor, before we call our next  
17 witness, who is an -- we're gonna seek to have  
18 him qualified as an expert, we are again going  
19 to raise a rule -- evidentiary rule 413 motion  
20 to sequester a witness. Again, Dr. Travis Folk  
21 is in the courtroom. Counsel indicated that  
22 they had intent to qualify him as an expert and  
23 give opinions very broadly on all kinds of  
24 wildlife species. Again, their discovery  
25 responses identify him as testifying about



1 threatened and endangered species and in just  
2 kind of looking back over the different pieces,  
3 I've -- that's very specifically discussed and  
4 identified in the Coastal Management Program  
5 document, the Act, and so now we've got a  
6 witness that we have to -- we can only presume  
7 based on statements that counsel ---

8 **THE COURT:** Well, is this some ---

9 **MS. ARMSTRONG:** --- made that he's going to be  
10 testifying more broadly on wildlife, that  
11 there's going to be that kind of testimony, so  
12 for the same basis that we sought to exclude  
13 him from hearing Dr. Gibbons' testimony, all of  
14 those same reasons ---

15 **THE COURT:** Because it'll still be more broad as a  
16 result of his ---

17 **MS. ARMSTRONG:** Of their new characterization of the  
18 witness' testimony, which is inconsistent with  
19 the discovery responses that we relied on.

20 **THE COURT:** Well, actually, I think your witness has  
21 pretty well solved that issue for me. The --  
22 the witness that -- I can't -- the one that  
23 testified about the general -- used the phrase  
24 general threatened and to endanger and then  
25 called it -- what was the other phrase he used



1 for when he was talking -- statutorily,  
2 wouldn't that be specialized or something like  
3 that? But he accepted that concept. The very  
4 concept that you said doesn't exist, and I  
5 remember you asked him about that and -- but  
6 his answers to me very clearly supported a  
7 general threatened and endangered versus what  
8 he considered to be a more statutory type  
9 approach.

10 **MS. ARMSTRONG:** I -- Your Honor, the first ---

11 **THE COURT:** Because I listened carefully to that  
12 testimony.

13 **MS. ARMSTRONG:** And the first question I asked him  
14 is are these terrapins threatened and  
15 endangered ---

16 **THE COURT:** Yeah.

17 **MS. ARMSTRONG:** --- and he said no.

18 **THE COURT:** Yeah.

19 **MS. ARMSTRONG:** He said no. And then I asked him  
20 about what that meant, what that language meant  
21 to him and we talked about that a little bit.  
22 And then he did say yeah, I mean, in a very  
23 general sense, that there's threats to these.  
24 That's what he said.

25 **THE COURT:** Well, you're paraphrasing it a little



1 bit better, but ---

2 **MS. ARMSTRONG:** Well, that's what I understood his  
3 testimony to be and it would be consistent with  
4 how the Department itself, as a state agency,  
5 how its laws that apply in this case talk about  
6 threatened and endangered species and what it  
7 means. The whole geographic area of particular  
8 concern says habitats for threatened and  
9 endangered species, or GAPCs, and that -- and  
10 it defines it as -- defines threatened and  
11 endangered species as those that are designated  
12 by statute as threatened or endangered.

13 **THE COURT:** Well, I understand all that. I'm just -  
14 --

15 **MS. ARMSTRONG:** Yeah.

16 **THE COURT:** --- referring to your ---

17 **MS. ARMSTRONG:** I mean, I hope that you're not  
18 relying on my expert in terrapins as an expert  
19 in the law on ---

20 **THE COURT:** No, I'm relying upon your expert as to -  
21 - you said what the -- when we started all this  
22 out, you said what the environmental community  
23 considers to be endangered and threatened and  
24 that the environmental community relies --  
25 considers that to be a term of art, and I



1 listened to a man who reflects the  
2 environmental community very well, who did not  
3 treat it as a term of art.

4 **MS. ARMSTRONG:** He said it was a term of art. I  
5 asked him was it a term of art and he said yes.  
6 And I said the legal practitioners in  
7 environmental law because it is -- it's the  
8 law, it's a legal requirement, and it's a term  
9 of art used in the practice of law to describe  
10 a certain class of species that are designated  
11 and given special protections under state law  
12 and under federal law.

13 **THE COURT:** Okay.

14 **MR. WALKER:** But, just -- I have some notes here and  
15 everybody can have different notes, he said  
16 although they're not on the endangered species  
17 list ---

18 **THE COURT:** Yeah.

19 **MR. WALKER:** --- they are considered threatened, not  
20 officially, not listed, but ---

21 **THE COURT:** That was the word he used. He kept  
22 using officially.

23 **MR. WALKER:** He said not officially, not listed  
24 federally, but it is listed as threatened in a  
25 few other states, but not South Carolina hasn't



1 yet listed it. And I think ---

2 **MS. ARMSTRONG:** I agree with that, yeah, I think  
3 that's the characterization. That's ---

4 **MR. GRESSETTE:** I think there was some discussion  
5 about the use of the word in its generic term.

6 **THE COURT:** Yeah.

7 **MR. GRESSETTE:** I think he asserted that they were  
8 not threatened under a particular list or  
9 formal definitions, but certainly in the  
10 generic use of the word, they are correct and  
11 they are endangered.

12 **MS. ARMSTRONG:** I don't think he said endangered and  
13 I asked him specifically what do you mean by  
14 threatened and we talked about the threats and  
15 talked about crab traps and talked about the  
16 threats to the species when he was using that  
17 term threatened. They're threatened by these  
18 things.

19 **THE COURT:** Okay. Well, she proposes to sequester -  
20 - was it Rule 413 to exclude ---

21 **MS. ARMSTRONG:** 615.

22 **MR. WALKER:** 615.

23 **THE COURT:** 615, yeah. What is your response to  
24 that?

25 **MR. GRESSETTE:** Your Honor, I think we'd rely on the



1 same arguments presented for the other witness.

2 **THE COURT:** All right.

3 **MOTION TO EXCLUDE WITNESS, DR. ROBERT F. YOUNG:**

4 **MR. GRESSETTE:** We don't think it's necessary.

5 Also, we do have a motion to exclude the  
6 witness pending.

7 **THE COURT:** You have a motion to what?

8 **MR. GRESSETTE:** To exclude the witness they're  
9 planning to call, Dr. Young.

10 **THE COURT:** Oh, oh. Well, Mr. Churdar, your  
11 position?

12 **MR. CHURDAR:** I would concur with the prior argument  
13 that Mr. Walker made in the earlier witness'  
14 testimony.

15 **RULING OF THE COURT ON MOTION TO SEQUESTER DR. FOLK:**

16 **THE COURT:** Well, I will say I'm going to stick with  
17 what I've already done since you've got the  
18 same arguments, although, like I said earlier,  
19 after listening to the testimony of the expert  
20 witness concerning the terrapins, you know, to  
21 me it makes y'all's point. But if Ms.  
22 Armstrong disagrees with me, I'm sorry, but I'm  
23 still -- since I've taken that path already,  
24 I'm going to stick with the path. So, Mr.  
25 Folk, away you go.



1 MR. FOLK: Yes, sir.

2 MR. CHURDAR: Thank you, Judge.

3 (Mr. Folk was excused from the courtroom.)

4 THE COURT: All right. Your next witness?

5 MS. WHITE: Your Honor, I'm not sure about -- as Mr.  
6 Gressette indicated, he did file a motion. I'm  
7 not sure if you want to address that first or  
8 if we -- I'm happy to put the witness up and we  
9 can ---

10 THE COURT: Well, who is the witness?

11 MS. WHITE: Dr. Rob Young.

12 THE COURT: Say his name again.

13 MS. WHITE: Dr. Rob Young.

14 THE COURT: Oh, Rob Young. I thought you said  
15 Robbie Yawn.

16 MS. WHITE: He's present in the courtroom right now.

17 THE COURT: All right. And that is the one that  
18 y'all have made a motion to exclude?

19 MR. GRESSETTE: Yes, Your Honor.

20 THE COURT: All right. Well, I'll hear your  
21 arguments.

22 ARGUMENT ON MOTION TO EXCLUDE WITNESS BY MR.

23 GRESSETTE:

24 MR. GRESSETTE: Thank you, Your Honor. Dr. Young  
25 was disclosed as an expert to and did testify



1 in his deposition about bottlenose dolphins.  
2 The analysis I think that we would suggest The  
3 Court follow begins with Rule 702 to determine  
4 first if the expert plans to offer any  
5 testimony that will assist the trier of fact in  
6 understanding some technical or expert  
7 question. Based upon the deposition ---

8 **THE COURT:** Scientific, technical, or specialized  
9 knowledge.

10 **MR. GRESSETTE:** Yes, sir, specialized knowledge.  
11 Based upon the deposition, the witness has no  
12 reliable information about what occurs at  
13 Captain Sam's.

14 **THE COURT:** Right. I've read your arguments. I  
15 agree with you that he has no reliable  
16 knowledge, so the next issue is he can receive  
17 knowledge if that is knowledge that is commonly  
18 relied upon -- is it reasonably? I think it's  
19 reasonably relied upon in the field of which is  
20 expertise lies, so. And then also there's two  
21 ways to accomplish that and it also would be --  
22 they could present a witness via hypothetical  
23 questions if there's evidence in the record, so  
24 with those two thoughts in mind, what's your  
25 position pertaining to that, those particular



1 issues?

2 **MR. GRESSETTE:** Yes, sir. Your Honor, first, with  
3 regard to reasonable reliance upon hearsay, I  
4 think that the South Carolina Supreme Court in  
5 the Graves case has specifically addressed  
6 reliance upon conclusory information hearsay  
7 provided to an expert and found it unreliable  
8 and, therefore, excluded the experts.

9 **THE COURT:** Okay.

10 **MR. GRESSETTE:** In this instance, additionally,  
11 there is a layer of additional hearsay as the  
12 information is coming through counsel, which I  
13 believe makes it suspect ---

14 **THE COURT:** Yes.

15 **MR. GRESSETTE:** --- and then finally, with regard to  
16 ---

17 **THE COURT:** Well, it doesn't -- it also makes it  
18 hearsay upon hearsay.

19 **MR. GRESSETTE:** Yes, sir. Yes, Your Honor. And  
20 with regard to the hypothetical, in fact, I  
21 don't know that there has been a sufficient  
22 basis provided, kind of thought about this, I  
23 don't think there's been a sufficient basis  
24 provided, although I would say that his entire  
25 testimony was a hypothetical. If a wall is



1 built, that takes away an area where a dolphin  
2 strand feeds; the dolphin cannot strand feed  
3 there any more. I have no opinion about the  
4 impact on population; I have no information  
5 about the population, which brings me back to  
6 702, which is I don't think you need an expert  
7 for that.

8 **THE COURT:** Okay. Mr. Churdar?

9 **MR. CHURDAR:** Well, Your Honor, I ---

10 **THE COURT:** One second. You don't think -- I'm  
11 sorry, you don't need an expert to testify to  
12 that, finish that.

13 **MR. GRESSETTE:** Yes, sir, yes, Your Honor. If the  
14 conclusion of his testimony and all he has  
15 testified at deposition that he is prepared to  
16 offer, because he has no factual information,  
17 no opinions about the impact of the wall upon  
18 the population of dolphins, his testimony as I  
19 understand it from the deposition is that ---

20 **THE COURT:** What is -- whether strand feeding is  
21 occurring?

22 **MR. GRESSETTE:** No, sir, I think his opinion is if  
23 there is strand feeding ---

24 **THE COURT:** Okay.

25 **MR. GRESSETTE:** --- at this location, and if a wall



1 is built and if that wall interferes with  
2 strand feeding ---

3 **THE COURT:** Okay. Because ---

4 **MR. GRESSETTE:** --- a dolphin cannot strand feed  
5 there.

6 **THE COURT:** Okay. Which logically I can make that -  
7 --

8 **MR. GRESSETTE:** You can conclude yourself, Your  
9 Honor.

10 **THE COURT:** Okay. All right. Now, Mr. Churdar?

11 **ARGUMENT ON MOTION TO EXCLUDE WITNESS BY MR. CHURDAR:**

12 **MR. CHURDAR:** Your Honor, I also have a motion to  
13 exclude, but for a different reason than what  
14 Mr. Gressette said, but it is the same reason  
15 that I had articulated this morning with regard  
16 to Dr. Gibbons, and particularly the issue of  
17 the -- of Section 8 of the -- one of the policy  
18 assessments is the general area of particular  
19 concern as it relates to threatened or  
20 endangered species' habitats and the bottlenose  
21 dolphin is not a threatened or endangered  
22 species. I don't know what Ms. Armstrong or  
23 Ms. White would say in terms of what other area  
24 under the CMP that they would propose, but if  
25 it is -- if it is also with regard to the



1 wildlife and fisheries management, again, it's  
2 the same problem that we ran into this morning,  
3 that that was not articulated in the pre-  
4 hearing statement.

5 **THE COURT:** All right. Okay.

6 **REPLY TO MR. GRESSETTE'S MOTION BY MS. WHITE:**

7 **MS. WHITE:** Sure, Your Honor. First, I believe that  
8 Mr. Gressette is mischaracterizing Dr. Young's  
9 opinions in that the extent of his deposition  
10 testimony he testified at length that his  
11 opinion went to impacts to the dolphins at  
12 their -- the population of dolphins that he  
13 knows independently of what I communicated to  
14 him and based on his 20 years of experience of  
15 studying dolphins in the South Carolina  
16 estuarine system and his 25 years of being a  
17 professor of marine biology at Coastal Carolina  
18 University, his Ph.D. in oceanography, just the  
19 fact that he testified that strand feeding is  
20 a unique behavior that's only observed in South  
21 Carolina and Georgia and possibly north  
22 Florida, but based on the literature and the  
23 reports, it is only found in South Carolina and  
24 Georgia, known to be found there. And so he  
25 did already know that there was strand feeding



1 that occurred. Now, as counsel for the League,  
2 we are ---

3 **THE COURT:** Well, he knew about strand feeding; he  
4 just said he couldn't say this was strand  
5 feeding because he hadn't observed it himself  
6 and he even said the lay witnesses often -- or  
7 lay people often misunderstand what strand  
8 feeding is.

9 **MS. WHITE:** He did say that, but we don't ---

10 **THE COURT:** I mean, he can -- are you going to offer  
11 him -- is he going to testify based on what he  
12 has been told through you or is he going to  
13 testify via a hypothetical of what he has  
14 heard or what testimony has been presented in  
15 this case?

16 **MS. WHITE:** He's going to testify as an expert  
17 witness and he does not have to have personal  
18 knowledge in order to do so. In rule 703, the  
19 facts or data in which the expert bases his  
20 opinion does not -- may be those perceived by  
21 the expert as long as they're the type  
22 reasonably relied upon and ---

23 **THE COURT:** Well, that's the question, in the case  
24 law I read it, it's not reasonable to rely upon  
25 hearsay upon hearsay.



1 **MS. WHITE:** Your Honor, I would like to just  
2 explain. I think it was a little bit unusual  
3 for counsel for KDP to accuse counsel for the  
4 League of doing anything untoward and ---

5 **THE COURT:** I don't think anybody -- at least I  
6 didn't take it as untoward ---

7 **MR. GRESSETTE:** No, sir. No, Your Honor.

8 **MS. WHITE:** Sure.

9 **THE COURT:** I didn't -- I'm just addressing -- I  
10 didn't perceive it from him that way and I --  
11 certainly, I can tell you, I don't perceive it  
12 ---

13 **MS. WHITE:** I'm sorry; I can explain.

14 **THE COURT:** --- is the statement made by you ---

15 **MS. WHITE:** Sure.

16 **THE COURT:** --- of someone else, so that is hearsay  
17 on hearsay, is it not?

18 **MS. WHITE:** I -- yes, sir, and I'm just trying to  
19 explain from our perspective and from I think  
20 any attorney's perspective who handles  
21 witnesses, you always have to talk to your  
22 witnesses and communicate what you know to be  
23 the facts based on the other witnesses that you  
24 have and that you will be putting forth as fact  
25 witnesses. And so in order to determine



1 whether or not you want to bring someone on as  
2 an expert in order to provide expert opinions  
3 based on those facts, you have to be able to  
4 communicate with your expert about those facts  
5 and Mr. Young -- Dr. Young testified at length  
6 that his opinions were to the impacts that  
7 would occur to dolphins as a result of the  
8 installation of this sheet pile wall, and he  
9 testified that he tried to communicate with  
10 people that had personal knowledge  
11 independently of what I had already  
12 communicated to him at the time of the  
13 deposition on multiple occasions and I can  
14 refer, Your Honor, to the citations, but ---

15 **THE COURT:** Well, you said he tried. Was he able  
16 to?

17 **MS. WHITE:** He wasn't able to before the deposition,  
18 but since then he has, in fact, confirmed with  
19 the -- he had indicated during his deposition  
20 multiple times that he was trying to and  
21 intended to confirm with a boat charter  
22 operator and he did, in fact, he spoke with Mr.  
23 Hayes, who just testified before Your Honor.  
24 And so to the extent that he's -- Dr. Young is  
25 relying on Mr. Hayes' personal observations,



1 Mr. Hayes just testified and so there's no  
2 hearsay problem with regard to reliance on his  
3 testimony. And Dr. Young has also followed up  
4 independently on his own with folks that are --  
5 with NOAA, the National Oceanic Atmospheric  
6 Administration, doing research, conducting  
7 research specifically on Captain Sam's Spit of  
8 bottlenose dolphins that are strand feeding and  
9 he has ---

10 **THE COURT:** So is he going to testify that it is  
11 reasonable to rely upon -- or in his area of  
12 expertise, that experts rely upon the hearsay  
13 statement of others to reach his conclusion?

14 **MS. WHITE:** I believe, yes, absolutely, Your Honor,  
15 he's going to testify to the conversations he's  
16 had with the NOAA researchers, who have been  
17 conducting studies on dolphins that are strand  
18 feeding in this exact area, in addition to his  
19 conversations with Mr. Hayes as a charter boat  
20 operator who has extensive, 15 years of  
21 personal knowledge going out and witnessing  
22 dolphins strand feeding in this area. And his  
23 ---

24 **THE COURT:** I still think that would have to be a  
25 hypothetical. I just think if this is true,



1 then -- because -- I mean, if he can reasonably  
2 rely upon -- I'll have to think about that one  
3 because you're saying that he's going to rely  
4 -- one thing is relied upon research that is  
5 outside of the courtroom and that research  
6 allows me to reach an expert opinion. It's  
7 another thing to rely upon a fact that is at  
8 issue in the case and say this fact, even  
9 though it's an issue in the case, I'm going to  
10 take a hearsay statement of someone else, bring  
11 it into my expert opinion, and reach an  
12 opinion. When the proper approach should be  
13 that that -- the evidence should be in the  
14 record and even ---

15 **MS. WHITE:** I believe, Your Honor, that's exactly  
16 what experts are entitled to do under the rules  
17 is rely on evidence that is not necessarily  
18 reasonable.

19 **THE COURT:** I agree with you. I agree with you.

20 **MS. WHITE:** So ---

21 **THE COURT:** I'm just saying if it's a fact in  
22 dispute, you know, in the record, then that is  
23 when an expert would need -- there would need  
24 to be evidence in the record to support it.

25 **MS. WHITE:** Sure, well, I think that ---



1     **THE COURT:**     Because it's not just relying upon  
2                   something to reach his opinion ---

3     **MS. WHITE:**     I understand.

4     **THE COURT:**     --- this is a fact in dispute.

5     **MS. WHITE:**     I understand.

6     **THE COURT:**     I think, I don't know.

7     **MS. WHITE:**     And I think that ---

8     **THE COURT:**     Do y'all concede that strand feeding  
9                   occurs in this area?

10    **MR. GRESSETTE:**    No, Your Honor.

11    **THE COURT:**     Mr. Churdar?

12    **MR. CHURDAR:**    I don't know.

13    **THE COURT:**     Okay.

14    **MS. WHITE:**     Your Honor, they did not cross Mr. Hayes  
15                   on whether or not strand feeding occurs and if  
16                   there was a ---

17    **THE COURT:**     Well, there again, that's what I said,  
18                   you can ask a hypothetical about based on that  
19                   which is in the record because you've --  
20                   there's been evidence in the record where  
21                   people have made statements to that effect, but  
22                   ---

23    **MS. WHITE:**     Are you talking about -- I think that in  
24                   addition to Mr. Hayes testifying that -- to his  
25                   personal observations, there's been several



1 witnesses that have testified to their personal  
2 observations and none of those personal  
3 observations have been challenged or contested.  
4 The credibility of them has not been challenged  
5 by either the Department or KDP and I'm not  
6 sure what the basis would be to say that  
7 relying on those personal observations is  
8 insufficient. But in addition ---

9 **THE COURT:** Wow, you're missing my point entirely.

10 **MS. WHITE:** Okay.

11 **THE COURT:** I mean ---

12 **MS. WHITE:** Please, please, inform me again. I  
13 apologize.

14 **THE COURT:** Do you know how hypothetical -- I mean,  
15 I know you do, but you do know how hypothetical  
16 questions work ---

17 **MS. WHITE:** Sure.

18 **THE COURT:** --- when you present an expert witness?  
19 You say ---

20 **MS. WHITE:** Yes.

21 **THE COURT:** --- presuming that a witness has said  
22 this and another witness has said this, and  
23 another witness has said this, what is your  
24 expert opinion based on those presumptions.

25 **MS. WHITE:** Yes.



1 **THE COURT:** Okay. Could you not take that approach?

2 **MS. WHITE:** Sure, I -- I don't think I was arguing  
3 that I couldn't. I was just ---

4 **THE COURT:** You just want to take another approach.

5 **MS. WHITE:** Well, I believe that he is going to  
6 offer an -- I would like the opportunity to lay  
7 a foundation to establish that his opinions are  
8 reliable and that in addition to speaking to an  
9 individual -- at least one individual with  
10 extensive personal knowledge, he's consulted  
11 with NOAA researchers who are conducting  
12 scientific surveys of the dolphins strand  
13 feeding in this exact area. And that -- I  
14 mean, that's a -- that is absolutely the type  
15 of information that an expert would rely upon  
16 in forming an opinion.

17 **THE COURT:** You don't see that this is following --  
18 what you're asking to do now follows the same  
19 path as Graves?

20 **MS. WHITE:** (Shakes head.)

21 **THE COURT:** And why not?

22 **MS. WHITE:** I do not because it's just based on the  
23 -- the excerpt that was provided in Mr.  
24 Gressette's motion, it's talking about this is  
25 a products liability case and it's talking



1 about -- it's going to an ultimate issue,  
2 whether or not the experts are talking about  
3 whether a product failed or not, that's an  
4 ultimate issue in a products liability case.  
5 What we're talking about here is not the  
6 ultimate issue of the case. We're providing an  
7 expert to give opinions about one of the many  
8 impacts that we are ---

9 **THE COURT:** But that wasn't the issue that we were  
10 discussing. In Graves, the issue was whether  
11 the witness could testify to hearsay, to a  
12 hearsay statement -- this is the one where --  
13 the component of the case we're discussing is  
14 that the witness relied upon a hearsay -- or  
15 the expert, excuse me, relied upon a hearsay  
16 evidence to support their conclusion and the  
17 Court disagreed with allowing that.

18 **MS. WHITE:** It's -- the way I read it was that the  
19 hearsay was relied -- the hearsay was from the  
20 plaintiff who hired the expert, and that was  
21 why it was excluded. And what I would like the  
22 opportunity to be able to show is that our  
23 witness has information -- the underlying  
24 factual information independent of what I had  
25 discussed with him prior to his deposition over



1 -- I'm pretty sure it was over a year ago  
2 before we had -- you know, we were in that --  
3 we were making efforts to make that -- connect  
4 that link independently of me just explaining  
5 to him what facts I know to be true based on  
6 the testimony of my other witnesses. At the  
7 time of the deposition, we were not able to do  
8 that. Since then, we have been able to do that  
9 and I feel that Dr. Young could ---

10 **THE COURT:** Okay.

11 **MS. WHITE:** --- could explain that to Your Honor.

12 **THE COURT:** Okay. We're going around in circles.  
13 Do y'all wish to respond to that, especially  
14 the -- my understanding of Graves, would you  
15 explain your perception of that?

16 **MR. GRESSETTE:** I'm in agreement with the Court's  
17 analysis of that case. Additionally, if there  
18 is information that the expert obtained from  
19 whatever source since the time he has been  
20 deposed, I would ask the Court not to allow him  
21 to rely upon it because it hasn't been  
22 disclosed to us.

23 **THE COURT:** All right. I'm going to take another  
24 break and go look at that. I mean, I just ---

25 **MS. WHITE:** Your Honor, I ---



1 **THE COURT:** I don't get your point, but -- and I see  
2 that there's another avenue you can take rather  
3 than -- but I'll take a break.

4 **MS. WHITE:** Your Honor, if I may just point out  
5 there are several instances, I have them  
6 written down right here, I can point you to the  
7 page numbers where Dr. Young indicated that he  
8 wanted to follow-up with people with first-hand  
9 knowledge, so the fact that ---

10 **THE COURT:** Well, did you inform them that he had --  
11 -

12 **MS. WHITE:** Yes.

13 **THE COURT:** --- followed up with that first-hand  
14 knowledge?

15 **MS. WHITE:** No, we didn't inform them that he had  
16 followed up on it.

17 **THE COURT:** No, informed the other side because, I  
18 mean, what -- this is the same scenario I've  
19 got where I've got -- I'm allowing y'all to  
20 take a deposition in an area that I think is  
21 ambiguous about whether they needed to inform  
22 you, but I'm still allowing you to take a  
23 deposition. But in this area, it's not as  
24 ambiguous. And he hadn't consulted with anyone  
25 other than his counsel about facts and since



1           then, he's done that and you haven't informed  
2           ---

3           **MS. WHITE:**   The witness ---

4           **THE COURT:**   --- you haven't informed the witnesses  
5           that he -- or informed the other parties that  
6           the witness is now relying upon someone else.

7           **MS. WHITE:**   I -- I don't believe -- well, I'm not  
8           sure that we have an obligation to inform them  
9           of who our experts speak to in between the  
10          deposition, but my point was that the witness  
11          himself notified counsel for KDP that he wanted  
12          to and intended to follow-up and confirm this  
13          information and I think that -- I think that  
14          Dr. Young could explain why this information is  
15          such that an expert in his field would  
16          reasonably rely upon it.

17          **THE COURT:**   Well, since you're making the motion,  
18          one last ---

19          **MR. GRESSETTE:**  Your Honor, if it would move things  
20          along, we're happy to let the objection remain,  
21          but let the witness proceed.  If, at such time  
22          after the testimony, Your Honor determines that  
23          it is, in fact, admissible as expert testimony  
24          under 702 and is reliable under 703 and the  
25          case is ---



1 THE COURT: Okay. I'll just withhold ruling on it.

2 MR. GRESSETTE: --- yes, sir, then if ultimately it  
3 does come in, then, of course, Your Honor,  
4 would still have the option for its ---

5 THE COURT: To determine it's unreliable.

6 MR. WALKER: Yes, sir.

7 THE COURT: All right.

8 MR. CHURDAR: Your Honor, I think that still leaves  
9 my motion outstanding.

10 THE COURT: Right. Can you respond to that real  
11 quick?

12 REPLY TO MR. CHURDAR'S MOTION BY MS. WHITE:

13 MS. WHITE: Sure.

14 THE COURT: Well, not real quick, but ...

15 MS. WHITE: In our numerous policies and the Coastal  
16 Zone Management Act that the Department is  
17 required to consider, in looking at Section 48-  
18 39-30 ---

19 THE COURT: Let me get Westlaw back up.

20 MS. WHITE: --- so ---

21 THE COURT: Hold on a second. I'm trying to get  
22 Westlaw back up. All right, you said 48-39 ---

23 MS. WHITE: 30.

24 THE COURT: I'm there.

25 MS. WHITE: So I'm looking at section (b)(1) first.



1 This policy specifically talks about promoting  
2 economic and social improvement, encouraging  
3 development of coastal resources in order to  
4 achieve improvement with due consideration for  
5 the environment and within a framework of  
6 coastal planning that's designed to protect the  
7 sensitive and fragile areas from inappropriate  
8 development. And we specifically cited to --  
9 I just want to confirm that we did specifically  
10 cite to 48-39-30 in our pre-hearing statement,  
11 also, subsection (2) to protect and where  
12 possible to restore or enhance the resources of  
13 the state's coastal zone. We would argue that  
14 the bottlenose dolphins that live and feed in  
15 this area are resources of the state's coastal  
16 zone. Again, we would argue that impacts to  
17 bottlenose dolphins that live and feed in this  
18 area go to long range and cumulative impacts.

19 **THE COURT:** All right. Mr. Churdar?

20 **REPLY BY MR. CHURDAR:**

21 **MR. CHURDAR:** Well, Your Honor, this is the same  
22 problem as citing 48-39-150 in that 48-39-30(b)  
23 that Ms. White references says specific state  
24 policies to be followed in the implementation  
25 of this chapter. This chapter is dealing with



1 critical area permitting.

2 **THE COURT:** Yeah.

3 **MR. CHURDAR:** And what I am -- what I am saying is  
4 that in the Coastal Zone Consistency  
5 Certification decision, the issue that was  
6 considered with regard to species would be a  
7 general area of particular concern with regard  
8 to threatened an endangered species, of which  
9 the bottlenose dolphin is not in that category.

10 **RULING OF THE COURT:**

11 **THE COURT:** All right. This was not as -- the last  
12 time I thought I really agreed with you and I'm  
13 going to wait and withhold my -- I did it  
14 proper and I'm going to decide all that. But  
15 on this one, it's less clear for me, but I'm  
16 going to -- I'm still -- when we get to that  
17 point of your testimony, I'm going to have you  
18 present it as proffer and let me let y'all  
19 brief it in your proposed orders and I'll  
20 decide it.

21 **REPLY BY MS. WHITE:**

22 **MS. WHITE:** Your Honor, if I may just add one point,  
23 sorry to interrupt your ruling. I just wanted  
24 to allow direct your attention to the CMP  
25 document. It cites the exact same language



1 that I just read from the Act.

2 **THE COURT:** Is it a CMP document that y'all ---

3 **MS. WHITE:** Yes, the guidelines for all the  
4 projects. It's section -- guidelines for  
5 evaluation of all projects in our CMP  
6 documents, page 314.

7 **THE COURT:** All right. Mr. Churdar, can you -- do  
8 you need a moment?

9 **REPLY BY MR. CHURDAR:**

10 **MR. CHURDAR:** I'm sorry?

11 **THE COURT:** Can you respond to that and if you need  
12 a moment, I'll give you a moment?

13 **MR. CHURDAR:** She was citing to which specific  
14 particular evaluation guideline for ---

15 **THE COURT:** I think ---

16 **MR. CHURDAR:** --- all projects, which one in  
17 particular? Well, if it's 1(a), is that -- is  
18 that what you're relying on, 1(a)?

19 **MS. WHITE:** I was pointing out that that's the exact  
20 same language that the Department just took the  
21 position of only applies to critical area  
22 permits and it's specifically identified in the  
23 CMP document.

24 **MR. CHURDAR:** Well, I mean, when I look at -- when I  
25 look at the language of what is to guide the



1 evaluation of all projects in making the CZC  
2 certification decision, I still would -- do not  
3 believe that the testimony that Dr. Young will  
4 be presenting would fall within subsection  
5 (1)(a), and I don't -- I don't ---

6 **RULING OF THE COURT:**

7 **THE COURT:** That is a very general provision. I  
8 will -- I'm going to allow you to make your  
9 objection at the appropriate time during his  
10 testimony and I'll probably just do an offer of  
11 proof on that and decide it later. All right?

12 **MR. CHURDAR:** Yes, sir.

13 **MR. GRESSETTE:** Thank you, Judge.

14 **THE COURT:** Call your witness.

15 **MS. WHITE:** The petitioners call Dr. Rob Young to  
16 the witness stand.

17 **COURT REPORTER:** There's not much to be spelling  
18 issues, but just to be sure, Rob, R-O-B, Young.

19 **DR. YOUNG:** Robert, either.

20 **COURT REPORTER:** Robert Young. Raise your right  
21 hand.

22 **DR. YOUNG:** (Witness complies.)

23 **COURT REPORTER:** Do you solemnly swear the testimony  
24 you're about to give in this matter is the  
25 truth, the whole truth, and nothing but the



1 truth, so help you God?

2 **DR. YOUNG:** I do.

3 **COURT REPORTER:** Thank you.

4 **DR. YOUNG - DIRECT EXAMINATION BY MS. WHITE:**

5 Q: Good afternoon.

6 A: Good afternoon.

7 Q: Could you just start by telling the Court where  
8 you live and what your occupation is?

9 A: Sure. I live in Horry County. I'm a marine  
10 science professor at Coastal Carolina  
11 University and also the director of  
12 undergraduate research there.

13 Q: And tell me about your educational background.

14 A: I have a bachelor's in biology from University  
15 of Virginia, oceanography degree from the  
16 University of Rhode Island, I guess that's a  
17 quick summary.

18 Q: What is oceanography?

19 A: Oceanography is a multi-disciplinary study of  
20 the ocean and marine environments and so it  
21 includes marine biology, which is my  
22 specialization, but I have graduate course work  
23 in the other pillars of oceanography, which  
24 would include marine geology, physical  
25 oceanography, chemical oceanography, and marine



1 chemistry, and marine biology.

2 Q: And you said you went to graduate school to get  
3 a degree in oceanography?

4 A: Yes, I have my Ph.D. from the University of  
5 Rhode Island.

6 Q: Okay. And what was the topic of your  
7 dissertation?

8 A: My focus was on a -- I don't remember the exact  
9 title at this point. But it was a study of  
10 resource partitioning between two species of  
11 moray eels in Belize. It was hard work.

12 **THE COURT:** Yeah, you picked that location on  
13 purpose.

14 Q: And when did you graduate with your Ph.D.?

15 A: I graduated in fall of '92. I would add, too,  
16 since I'm talking about marine animals today,  
17 that I was in a lab that did both marine mammal  
18 work and fish work and I also participated in  
19 several research cruises with right whales,  
20 studying right whales off of Cape Code.

21 Q: And this was during your graduate studies?

22 A: Yes.

23 Q: And after you graduated with your Ph.D. in  
24 oceanography, what did you do next?

25 A: My next stop was Coastal Carolina University.



1 I took a position first as an instructor. I  
2 actually finished my degree that fall and  
3 defended that fall. And have been at Coastal  
4 Carolina ever since. I have -- I'm now a full  
5 professor at Coastal Carolina University and in  
6 recent years I've also had other administrative  
7 duties that sort of not replaced, but  
8 supplemented my faculty duties. I've served in  
9 its interim associate provost for grants and  
10 sponsored research, so for two years I was  
11 basically in charge of the grants office. And  
12 I'm now director of undergraduate research for  
13 several years and also director of what's  
14 called the quality enhancement plan. It's an  
15 accreditation requirement that is a five year  
16 program and we have a university-wide program  
17 on experiential learning.

18 Q: Experiential learning?

19 A: Yes.

20 Q: What is that?

21 A: That is learning in somewhat non-traditional  
22 settings outside the traditional classroom,  
23 includes things like internships, undergraduate  
24 research, study abroad, service learning  
25 courses, and a number of sort of special



1 projects to see what you can think of sort of  
2 things.

3 Q: And you said you were the director of that  
4 program?

5 A: Yes.

6 Q: Do the focus areas extend beyond marine  
7 biology?

8 A: That's university-wide, yes, so that's all --  
9 all disciplines.

10 Q: And are you teaching at Coastal?

11 A: Yes.

12 Q: What classes do you teach?

13 A: Started this week. I teach marine -- I do  
14 mostly marine biology and marine biology labs  
15 this year. I teach typically introductory  
16 marine science, marine biology, marine mammals,  
17 and fishery science, certainly, I guess are my  
18 four most common classes. And what classes  
19 have you taught throughout your career as an  
20 educator?

21 A: Number of other ones, we have a second semester  
22 intro marine science, which is largely marine  
23 geological. We have -- which I've taught  
24 several times. We have a -- I've taught at a  
25 graduate seminar. I've taught a number of



1 teacher courses. I've taught at Earth Systems  
2 Science for the National Guard's new teaching  
3 program. I've taught a climate change course.  
4 I've taught the non-majors marine science  
5 course. There might be others.

6 Q: And have you authored any written works?

7 A: Yes. I've authored a number of papers with  
8 dolphin in particular. I've got I guess four  
9 publications that deal primarily with the  
10 dolphins in South Carolina, coastal and  
11 estuarine. We've got one actually that's  
12 submitted and currently under peer-review. Got  
13 two really close that if they're not done by  
14 the end of the year, my co-author probably  
15 won't be happy with me. I've got several  
16 papers that are related more to fish, including  
17 the moray eel one that I've done and also some  
18 in coastal estuarine settings in South  
19 Carolina, and some other non peer-reviewed  
20 papers from earlier in my career.

21 Q: So the first half of your response when you  
22 were talking about several articles that you've  
23 written, were you speaking all to peer review  
24 articles?

25 A: Yes.



1 Q: And would that information be reflected on your  
2 CV?

3 A: Yes.

4 **(Petitioner's Exhibit Number 10 was introduced into**  
5 **the record at this time.)**

6 Q: I'm handing you ---

7 A: Thank you.

8 Q: --- what's marked Petitioner's Exhibit 10. Can  
9 you identify that for me?

10 A: That's my CV.

11 Q: Does it appear to be accurate?

12 A: Yes.

13 **MOTION TO ADMIT PETITIONER'S EXHIBIT NUMBER 10:**

14 **MS. WHITE:** Your Honor, Petitioners would move to  
15 admit Exhibit 10.

16 **MR. GRESSETTE:** No objection, Your Honor.

17 **RULING OF THE COURT:**

18 **THE COURT:** It's admitted.

19 **(Petitioner's Exhibit Number 10 was admitted into**  
20 **evidence).**

21 Q: Dr. Young, have you ever been asked to serve on  
22 a review panel for a journal or other  
23 publications?

24 A: Yes, I've done a number of -- hum, good  
25 question. Review panel or -- that's typically



1 not how the journals work. Usually you get a  
2 paper or two at a time, so I've reviewed papers  
3 for a number of journals, Copeia, Coasts and  
4 Estuaries, Journal of Marine Mammal Science,  
5 Journal of Cetacean Management in Biology,  
6 Southeastern Naturalist, others. I'm not sure  
7 I have a complete list for you. I have served  
8 on multiple grant panels, so in terms of  
9 proposals and grants, those usually are more  
10 likely to have a panel. I have served on  
11 several National Science Foundation panels for  
12 grants. I served on the North Carolina Sea  
13 Grant panels. One for NIH, one for the Gulf of  
14 Mexico Research Initiative, which handles the  
15 BP money for the deep water horizon spill. So  
16 a number of those sorts of things.

17 Q: And I apologize, you're the expert, so do  
18 correct me if I'm mischaracterizing. So when  
19 you have reviewed for journals, can you explain  
20 to me what that process is?

21 A: Sure, well, the peer review process, you submit  
22 your manuscript. The editor then distributes  
23 it to people in the field to review and make  
24 comments and so if you are reviewing it, you're  
25 receiving a request from an editor to review a



1 manuscript in a field that you're -- that you  
2 have expertise in and you critically review it.  
3 You typically respond that you either approve  
4 it or that you approve it pending a number of  
5 corrections, which is probably the most common,  
6 or that you reject it.

7 Q: And do you have to apply to be considered for  
8 that type of review process?

9 A: No. Oftentimes in some -- oftentimes people  
10 may submit with suggestions for reviewers or  
11 editors will send it around to reviewers based  
12 on their expertise in the field through their  
13 own publications.

14 Q: So when you were submitted articles and  
15 publications to review, what was the area of  
16 expertise that you were reviewing them in?

17 A: That I've reviewed. I've reviewed several for  
18 marine mammals and I've reviewed several for  
19 moray eels. I reviewed probably more marine  
20 mammals. It's been primarily marine mammals,  
21 especially dolphin research and moray eel  
22 research.

23 Q: And are you still conducting research yourself?

24 A: Yes, yes. We were -- we've been quite active  
25 in the last couple of years.



1 Q: Tell me about that activity.

2 A: Well, our last few years, we've focused a lot  
3 on management applications on coastal -- on  
4 bottlenose dolphins in the southeast, so we  
5 just actually focused on those in South  
6 Carolina and North Carolina. Bottlenose  
7 dolphins are managed under the Marine Mammal  
8 Protection Act, they're a protected species.  
9 National Marine Fishery Service oversees that  
10 and National Marine Fishery Service defines  
11 stocks, which are basically groups of  
12 reproductively interacting groups, so they  
13 share a gene pool that -- on a broad sense that  
14 are sort of the management level. And so in  
15 South Carolina, for example, there are three  
16 estuarine dolphin stocks. There's one called  
17 Northern South Carolina estuarine stock;  
18 there's the Charleston estuarine stock, which  
19 extends a good ways on either side of  
20 Charleston; there's a -- the southern stock  
21 actually is shared with northern Georgia.  
22 There's a number of stocks as you go down the  
23 coast. There's also several -- two to three  
24 coastal stocks that inhabit our waters,  
25 depending on the season. So there are



1 different groups that sort of claim different  
2 areas. Some of them are very wide ranging and  
3 migratory. Most of the estuarine ones are more  
4 of a resident group within a defined range.  
5 And so we have done a lot of research in recent  
6 years to get abundance estimates for these to  
7 -- from that you get estimates of potential  
8 biological removal. How many animals could be  
9 lost in addition to natural mortality and that  
10 gets the management, for example, if they -- if  
11 individuals are getting entangled in nets. You  
12 have a number that well, we better not get more  
13 than, you know, three animals or beyond the --  
14 beyond our biological limit. That triggers a  
15 number of management responses. So we have --  
16 the paper that's in -- that's submitted right  
17 now, is an abundance estimate for the southern  
18 North Carolina estuarine system stock, so we  
19 surveyed from basically the state line of South  
20 Carolina up to about Beaufort, North Carolina  
21 and then Cape Lookout. We have done extensive  
22 surveys of some of the coastal waters in  
23 northern South Carolina and southern North  
24 Carolina. We -- last fall we did a survey of  
25 the northern South Carolina estuarine system



1 stock, which basically is from Georgetown down  
2 to about the top of Isle of Palms and we have  
3 an estimate -- an estimated population for that  
4 and that's one of our papers that is next in  
5 line. Hopefully, by the end of the year. It's  
6 pretty much written up but needs a little  
7 cleaning up. And this summer, we have been  
8 trying to nail down better because they're a  
9 little suspect, the boundaries of the estuarine  
10 dolphins in South Carolina, the three stocks.  
11 And so we have been doing the surveys from  
12 basically Winyah Bay, Georgetown area, all the  
13 way down to Ace Basin this year.  
14 Unfortunately, we have not been able to do  
15 Kiawah River near Sam's inlet. It's a very  
16 long river, it's a big detour for us and we're  
17 carrying -- we're covering a lot of water. We  
18 do dip into the Kiawah River this summer at the  
19 other end, but we don't get it close to Captain  
20 Sam's.

21 Q: And I think there's two questions I wanted to  
22 ask you. First, I think I heard you identify  
23 they were estuarine stocks? And it sounded you  
24 like you said coastal stocks?

25 A: Yes. So the estuarine dolphins and the coastal



1 dolphins don't mix very much, but they do mix  
2 a little bit. The estuarine dolphins will move  
3 out along the course, but stay typically very  
4 close. More often than not, within a half  
5 kilometer to kilometer or so, but they spend  
6 most of their time in the estuaries. A lot of  
7 these are resident dolphins that get to know  
8 their areas very well. Some of the coastal  
9 stocks will occasionally come in shore on a big  
10 body of water, such as a large harbor or sound,  
11 but they usually will not venture into a small  
12 creek system. That's a risky place for them,  
13 tides rising and falling and sand bars and  
14 things like that. So you have some very I  
15 guess split and -- I'm searching for the word  
16 and I don't have it, but your -- the dolphin  
17 groups are compartmentalized, that's what I'm  
18 after, in a number of scenarios. There's also  
19 if you get out towards the shelf edge, there's  
20 an offshore stock of dolphins that doesn't  
21 interact much with the near coastal ones.  
22 These are all bottlenose dolphins we're talking  
23 about. And this is kind of a pattern. You  
24 have -- you have year-round dolphins along the  
25 southeast coast basically from the bottom of



1 Florida up to about Hatteras. And in the  
2 summertime, when things get warmer, they'll  
3 move all the way up to Long Island or so.

4 Q: And you were speaking in terms of we ---

5 A: Yes.

6 Q: Who is the we?

7 A: The we, so I -- so it's typically my students  
8 and I. For the last year, I've been able to  
9 hire actually one of my master's students who  
10 just -- who just graduated who's been an  
11 enormous help, but it's -- well, for example,  
12 this coming fall, I have I think six  
13 undergraduates doing honors projects, honors  
14 undergraduate research projects. I have one  
15 graduate student who is finishing up her field  
16 work and another two that are just starting and  
17 we'll see what they end up doing. So there's  
18 usually a group that's going through with --  
19 mostly students and at this time, at least,  
20 also a research tech, who was a recent student.  
21 And is this through your position as the  
22 director of undergraduate research?

23 A: No, this is really more through my position  
24 just as a faculty member, so a faculty members  
25 -- faculty are expected to conduct research and



1 scholarship in their field and so this is --  
2 this is some of my research. My role as  
3 director of undergraduate research is more of  
4 a facilitator, helper to get students connected  
5 to faculty and any discipline on campus, to  
6 organize and host an annual undergraduate  
7 research symposium and competition at Coastal.  
8 We had over 100 presenters last spring doing  
9 undergraduate research projects in twenty-some  
10 disciplines, and overall promote undergraduate  
11 research at Coastal.

12 Q: Your focus area as a faculty staff professor is  
13 in the area of bottlenose dolphins, is that  
14 correct?

15 A: Yes. So I would say my -- my research focus,  
16 I would say that I'm -- on a broad sense, a  
17 marine ecologist, and a slightly finer sense,  
18 what we would call a nekton ecologist. And  
19 nekton are swimming organisms, so things like  
20 fish and marine mammals and that sort of thing.  
21 And so I have traditionally done research on  
22 both marine mammals, dolphins, and fish. It's  
23 been pretty heavy on the dolphins the last few  
24 years, but traditionally there's been a pretty  
25 good mix. I guess I would add one more thing.



1 I'm also the coordinator for the Marine Mammal  
2 Stranding Network in South Carolina. And  
3 honestly, the -- the main effort and response  
4 there is out of Charleston. We have a NOAA  
5 grant from the Prescott Association. Again,  
6 National Marine Fishery Service also receives  
7 marine mammal strandings, so we have a grant,  
8 an annual grant, so I'm able to fund a research  
9 technician as a stranding technician, and they  
10 typically work out of the NOAA National Ocean  
11 Service lab in Charleston, who we coordinate  
12 with on -- for both research and strandings.  
13 And that's centrally located in the state and  
14 also most of the strandings are central and  
15 southern in the state, so running that out of  
16 Coastal Carolina doesn't make a lot of sense.  
17 But I am -- I am the coordinator and help to  
18 fund that position. And those are about 50 to  
19 60 typically strandings a year on average.

20 Q: And could you explain what you mean by  
21 stranding?

22 A: Marine mammals washing up on the beach, usually  
23 dead, and in our place. The vast majority of  
24 them are bottlenose dolphins because that's our  
25 common one, but we do get a number of other



1 species and the occasional whale or the  
2 humpback whale or right whale or something like  
3 that.

4 Q: So all together, how long have you been  
5 studying bottlenose dolphins?

6 A: So over 20 years. We -- we started with some  
7 simple coastal surveys in 1995, and fall 1997  
8 we really started photo ID efforts. Photo ID is  
9 tracking individuals by photographs of their  
10 dorsal fins using the nicks and marks  
11 essentially as fingerprints so you can keep  
12 track of who's who, where and when and who's  
13 hanging out, that sort of thing. And that's  
14 been going on for 20 years. Our additional  
15 focus and continued -- and we continue to check  
16 in was in a north inlet and Winyah Bay, so  
17 closer towards Coastal. And in recent years,  
18 we've really expanded to broader areas. A lot  
19 of our early studies, although a lot of our  
20 studies right now are management studies, a lot  
21 of our early studies were more broad,  
22 ecological studies. The bioenergetic studies,  
23 how much -- you know, what's the role of  
24 dolphins in the salt marsh systems or on the  
25 coast, how much -- what piece of the pie,



1 basically the food, whatever they're taking,  
2 and one of our -- one of my favorite studies  
3 really was on strand feeding dolphins. And  
4 that was not up our way. We really don't see  
5 strand feeding as far north as Winyah Bay, but  
6 we did -- we've done a couple studies in --  
7 near Bluffton in May River and Bull Creek,  
8 especially, which is a well-known area for  
9 strand feeding. Although there are a number of  
10 places where strand feeding occurs, that's  
11 probably an area that's been studied the most,  
12 so it's a good place to go back to and we did  
13 an extensive study there. Looking at the  
14 interaction between strand feeding dolphins and  
15 birds, the great egrets that basically feed on  
16 all those fish that come flying out of the  
17 water and free food for them. And that was a  
18 -- that was a fun study.

19 Q: Could you explain what strand feeding is?

20 A: Sure, strand feeding is a -- is a fascinating  
21 and kind of unique behavior. Groups of --  
22 well, it seems consistent across studies,  
23 anywhere from two to seven dolphins will rush  
24 a bank. These are -- these are resident  
25 estuarine dolphins who tend to strand feed in



1 the same sort of salt marsh creek systems  
2 repeatedly so they know their system. They'll  
3 rush a bank typically within two hours of low  
4 tide, sometimes within three hours of low tide  
5 on either side. And their bow wave will  
6 essentially throw the fish out of the water and  
7 onto the shore. They will, in the process,  
8 strand themselves up on the bank. Sometimes  
9 -- usually at least halfway out, sometimes  
10 completely out, and then pick the fish off the  
11 banks and then slither back in. So it's a  
12 pretty entertaining and interesting behavior.  
13 You also sometimes see single individuals do  
14 something like this, but it's not the bow wave  
15 strategy, it's more of a they were chasing an  
16 individual prey item and the end of their speed  
17 run ended on the bank, so they come out and  
18 sort of fishtail out onto the bank. So we  
19 don't call that strand feeding technically and  
20 that's pretty rare amongst the strand feeders.  
21 You usually see them at least two to seven.  
22 The most common numbers are three to four  
23 animals at a time.

24 Q: And where in the U.S. does strand feeding  
25 occur?



1 A: It's only been reported in South Carolina and  
2 Georgia. And so from conversations I've had  
3 with people, I've heard people tell me they've  
4 seen it as far north as in Cape Romain. I've  
5 seen some of those sort of one individual beach  
6 hunting sort of events happen in Winyah Bay,  
7 but never strand feeding. It seems to be quite  
8 common from Charleston down through the rest of  
9 the State and at least the northern half of  
10 Georgia, but -- and I only got that from  
11 talking with a few people at conferences from  
12 Georgia. I've never seen it in Georgia and I  
13 couldn't put it on a map where the boundary is  
14 for Georgia.

15 Q: Do you consider the conversations that you had  
16 with folks in Georgia to be the type that you  
17 would reasonably rely upon in your expertise?

18 A: That there is strand feeding there? Yeah, so  
19 I'm talking with other dolphin researchers.  
20 We've all seen video of strand feeding, so when  
21 we talk about strand feeding, we know what it  
22 is. And it's also actually one of the earliest  
23 records describes it in Georgia, as well.

24 Q: You mentioned something called a resident  
25 estuarine group or dolphin, what did you mean



1 by that?

2 A: So, strand feeding dolphins -- well, I'll give  
3 you an example from the Bull Creek area down  
4 near Bluffton where we've -- where we've done  
5 the most of our work. But this seems to be  
6 consistent across multiple studies. There are  
7 a couple other papers in the literature about  
8 strand feeding dolphins. And -- a few. And  
9 they are residents of the salt marsh, meaning  
10 that they are there typically in some cases  
11 where they've been studied more, they're known  
12 to be there year-round. They've seen them in  
13 sort of all four seasons. You see this sort of  
14 strand feeding behavior happen year-round,  
15 although it's seasonally a little bit -- there  
16 are some seasonal peaks, more in summer and  
17 fall, but it does occur year-round. And by  
18 residents -- how far residents extend varies.  
19 If I can now fall back on some studies that we  
20 have in North Inlet, we have a few resident  
21 dolphins that literally only use a couple miles  
22 of creek. There's others that easily range,  
23 you know, ten, fifteen miles. But they're not  
24 going up and down the state or the coast. They  
25 have an area that's pretty local. They tend to



1 have favorite strand feeding locations, so  
2 there are -- there may be whole creek systems  
3 that are favorite creeks and within those,  
4 you'll see pockets of muddy bank at low tide.  
5 They obviously aren't gonna strand on the  
6 oyster reefs. And they might get this one and  
7 move over and hit the next one that's, you  
8 know, just 100 feet, 50 feet down the creek,  
9 and the next one, next one, so they undergo  
10 what are sometimes called strand feeding bouts,  
11 a series of -- they sort of get in the mood and  
12 they strand feed for a while and move their way  
13 down. Sometimes repeating in the same area.  
14 Probably what I would consider the longest most  
15 extensive and best study on strand feeding was  
16 a Ph.D. dissertation by Rick Petricig in '95,  
17 and he -- he also did some mapping and surveys.  
18 People often describe it as herding fish to the  
19 bank and it's not really because they're not  
20 pushing the fish until they get there. The  
21 fish -- they know their area and they know  
22 where the fish are. They know where the fish  
23 are shoaling up close to -- close to shore, and  
24 so they hit an area -- they come to an area and  
25 they -- and they strand feed and then the fish



1 are there, they come exploding out. Sometimes  
2 they strand feed and don't see any fish. So  
3 these are animals that know it. Rick Petricig  
4 actually did some bathymetric or bottom surveys  
5 on the areas and found that there are often  
6 times some small areas where there might be a  
7 small drainage rivulet coming out and might set  
8 up enough of an eddy to encourage fish to shoal  
9 there and so an association with the bottom  
10 feature seems to be a -- seems to be one of the  
11 things that he saw. And so I guess the point  
12 is these are animals that know their area,  
13 they're very predictable about when and where  
14 they show up in certain places. In our data  
15 set, we've had -- we've seen individuals strand  
16 in the low tide periods on 40 -- and I say  
17 hour, Adam Fox was my co-author on that  
18 particular study. 40-some times in a day. He  
19 has -- he has, you know, hundreds and hundreds  
20 and hundreds of strandings in his data set,  
21 so...

22 Q: You said 40 -- I'm sorry, you said 40 times at  
23 the same location then?

24 A: 40 times within a day. So within a -- within  
25 a low tide window, you know, two hours plus or



1 minus or so where they might -- not necessarily  
2 the same location. Oftentimes that sort of --  
3 bouts moving down, you know, moving over and  
4 hitting another -- next little beach along a  
5 stretch of creek.

6 Q: And what is the significance of being on either  
7 side of the tide?

8 A: The low tide is when those banks are exposed,  
9 so at high tide, you don't have any banks, the  
10 strategy wouldn't work. At high tide, the  
11 water's right up to the end of the grass.  
12 There'd be nothing to land on. So if your  
13 strategy is to chase a lot of -- or push a lot  
14 of fish out of the water onto a bank and pick  
15 them off, you'd have to do that within a window  
16 around low tide.

17 Q: So have you -- you mentioned also a behavior in  
18 passing, I think you referred to it as beach  
19 hunting. Can you explain what that is?

20 A: Beach hunting?

21 Q: Yes.

22 A: So there are -- there are other examples of  
23 dolphins that feed close to -- that feed close  
24 to shore or come out, so there's a -- I think  
25 beach hunting originally comes from Australia.



1 I believe it started in the early 2000s, I  
2 think is when that came out. But it had a lot  
3 of nice video that went with it, but it talked  
4 about, you know, individual dolphins pursuing  
5 individual prey near a beach and sometimes  
6 coming out of the water as I described earlier.  
7 So it's not a cooperative foraging technique,  
8 it's not a group effort. It doesn't rely on  
9 that bow wave sort of approach. It doesn't  
10 rely on fish coming out of the water and then  
11 picking them off the bank. It really is  
12 pursuit of an individual prey item and the end  
13 of the run sort of ends with the animal coming  
14 out of the water, but it's catching it in that  
15 process. And so that's been described in a  
16 couple different places. I haven't seen  
17 anything for a bottlenose dolphin that fits  
18 anything like strand feeding. There's  
19 something a little bit similar in Mexico, but  
20 it's -- the paper does not not very well --  
21 doesn't describe it very well. There is --  
22 there's another species of dolphins, humpback  
23 dolphins that there's one paper from Mozambique  
24 that sounds a lot like strand feeding. But  
25 even that's a little bit different, doesn't



1 sound like they have a regular place or regular  
2 times they like to hunt between sand bars and  
3 sometimes as a group will chase a group of fish  
4 up, so it sounds like something a little bit in  
5 between beach hunting and strand feeding. But  
6 the only thing that I'm aware of that's really  
7 like strand feeding is South Carolina, Georgia.

8 Q: And is strand feeding specific to bottlenose  
9 dolphins?

10 A: Here it is, yes.

11 Q: Do all bottlenose dolphins engage in strand  
12 feeding?

13 A: No, in fact, even in a strand feeding area, you  
14 typically -- you might have a group of resident  
15 dolphins there and some of them are strand  
16 feeders and some aren't. So if you had, you  
17 know, 40 dolphins, it wouldn't be unusual to  
18 have 40 that you see a lot, 40 or 50 that you  
19 see a lot, and maybe 20 of them or 15 of them  
20 are strand feeders. And probably ten of them  
21 are especially strand feeders. So no, it's --  
22 most bottlenose dolphins are not strand  
23 feeders.

24 Q: For those that do engage in strand feeding, do  
25 you have an idea of what portion of their diet



1 -- does it forms a portion o their diet or is  
2 it the entire feeding behavior that they engage  
3 in?

4 A: I think you'll ever have a 100 percent answer  
5 for that because it's especially murky waters  
6 like ours, you won't see -- you can't account  
7 for all the feeding. What we often will do is  
8 assume that there is some correlation between  
9 effort and how much food you get. And so if  
10 you have dolphins that are strand feeding let's  
11 say plus or minus two to three hours at a time,  
12 so, you know, they're putting in four to five  
13 hours probably of strand feeding. They also do  
14 that on the other tidal cycle, so there's two  
15 tidal cycles a day. In fact, Rick Petricig did  
16 night vision -- night surveys and found that  
17 they were much more on the tidal cycle than any  
18 sort of day/night cycle in their learned  
19 behavior in strand feeding. So if you figure  
20 that some of these that are heavy strand  
21 feeders are putting in easily ten hours a day  
22 on strand feeding, they've got to put in rest  
23 time on top of that, they're probably snacking  
24 occasionally, but that's a big effort for  
25 strand feeding, I'm going to assume that



1 they're getting a half or potentially well more  
2 than half of their diet from strand feeding  
3 based on correlation of the effort.

4 Q: Is that because strand feeding takes a lot of  
5 effort, is that what you're ---

6 A: It's a -- it's a -- it's an energetic behavior  
7 definitely.

8 Q: I think you mentioned earlier that strand  
9 feeding dolphins have favorite spots.

10 A: Uh-huh.

11 Q: How do you know that?

12 A: From -- so one of -- typically, when you're  
13 doing strand feeding work, you do what are  
14 called focal follows, you get on a group and  
15 you follow them, and the more you sort of hang  
16 back and follow them and they get used to, hey,  
17 there's a boat over there, the more they go  
18 about their regular business and you can  
19 observe their regular behavior. And so  
20 essentially, what we've found is that most  
21 strand feeding dolphins, they might strand feed  
22 in a number of places, but they have their go-  
23 to places. It's pretty predictable where  
24 you're most likely to find them and when you're  
25 most likely to find them in terms of they might



1 cover a system; they might go many, many miles  
2 in traveling around in a system in a day, but,  
3 you know, this little stretch of half a mile of  
4 creek or something is where you want to be at  
5 low tide and we knew specifically enough to --  
6 for which little sections of the bank that they  
7 might likely hit that we were doing a study on  
8 birds, we were trying to mark birds. So we  
9 knew where they were going. We would actually  
10 -- sounds kind of crazy, but we would try to  
11 paint -- I mean, we wouldn't paint ball, but we  
12 would paint squirt with squirt guns and things  
13 like that birds to try to get a mark on them so  
14 that we could keep track of how many times the  
15 birds are coming back and attending these  
16 strand feeding events. And so we knew well  
17 enough where to go that we could lie in wait  
18 basically for the next strand feeding event.

19 Q: And in knowing where to go, did it have -- were  
20 you looking at the conditions on -- the  
21 physical conditions of the area or were you  
22 just primarily following the birds?

23 A: I cannot tell you why they pick a specific  
24 creek. I do get a sense sometimes when I get  
25 in and I said this feels like a strand feeding



1 creek. But I won't put any great stock on my  
2 ability to predict that. So I can't tell you  
3 why one creek versus another. They will strand  
4 on very steep muddy banks. They don't want --  
5 they don't want any oysters on them. They will  
6 strand sometimes on the very shallow muddy  
7 banks. They will strand sometimes on more  
8 sandy -- sandy banks. So I can't look at the  
9 substrate or even the pitch of the shore and  
10 tell you why they pick a particular spot. I  
11 can tell you that I assume since they're  
12 foraging, that some how they know that this is  
13 a hot spot for fish and if it's successful,  
14 they're going to repeat it there. I can't tell  
15 you -- wish I could. Can't tell you exactly  
16 why they pick a particular spot as their  
17 favorites.

18 Q: Have you observed what appears to be a  
19 connection between a reliable fish shoal and  
20 where the dolphins are strand feeding?

21 A: I can -- I have inferred that in that if they  
22 -- in that most of their strand half probably  
23 north -- actually more than half of their  
24 strand feeding events we have fish flying out  
25 of the water, so they are picking spots where



1 they have fish. Also adding to my  
2 understanding of that from the Petricig study  
3 which also did some work with sonar with  
4 mapping and also with the fish schools and  
5 actually he did some cast netting in those  
6 areas demonstrating that the fish were shoaling  
7 there and the dolphins are hitting places here  
8 they know the fish are rather than anywhere  
9 herding them to the shore.

10 Q: And you mentioned that dolphins can strand feed  
11 on a steep muddy bank or a gradual muddy bank  
12 or a sandy bank ---

13 A: Yes.

14 Q: --- is that correct?

15 A: Yes.

16 Q: Do they require there to be a bank in order to  
17 strand feed?

18 A: Almost entirely. I've seen one or two events  
19 that were either early or late in the tide that  
20 were -- that didn't see much bank and was  
21 almost in the grass. I don't know anything  
22 about their success. But those are rare. So  
23 essentially, the bank is a requirement for them  
24 to pursue strand feeding. There -- there --  
25 although they might be catching some fish



1 during the rush up and we can't really see that  
2 under water at the time, what we do see and  
3 what seems to be the primary purpose, is  
4 knocking fish onto a bank, which are then  
5 stranded and then they work their way up to  
6 them and pluck them off the bank, so without a  
7 bank, you're not going to have a very good  
8 strand feeding.

9 Q: Are you a member of any professional  
10 organizations?

11 A: Yes, I'm a member of the Society for Marine  
12 Mammologists. I am -- I don't know if I'm  
13 active right now, a little bit off and on,  
14 depending on when I've renewed for the latest  
15 -- for the latest conference, but also the  
16 Southeastern Estuarian Research Society. And  
17 I know that I'm not active right now but have  
18 been -- historically been very active in South  
19 Carolina Marine Educators Association.

20 Q: Have you held any officer positions with those  
21 -- any of those groups?

22 A: I'm a former president of the Marine Educators  
23 Association. I have not had an officer  
24 position in the other ones.

25 Q: Have you received any awards or honors or



1 recognitions in your work?

2 A: Yes, I -- last year -- well, I guess two years  
3 ago, I received the Distinguished Teacher  
4 Scholar/Lecturer Award at Coastal Carolina  
5 University, which is for a faculty member who  
6 has distinguished themself -- distinguished  
7 themselves through research and teaching and  
8 linking the two with the research and education  
9 together. And, I also received a sort of long-  
10 term service award from the South Carolina  
11 Marine Educators.

12 Q: Have you ever been asked to offer your  
13 expertise in a professional setting?

14 A: Yes. Can you clarify what you mean,  
15 professional setting?

16 Q: Well, I was trying to leave it broad to ask the  
17 question whether or not you had.

18 A: Okay.

19 Q: It could be testifying as a witness in court or  
20 serving on a con-, contracts or ---

21 A: Right. Okay. So I was on a panel or I guess  
22 a workshop sort of, representing South Carolina  
23 and marine mammals at the Duke Green Lab last  
24 summer, two summers ago I guess. And that had  
25 to do with crafting a white paper related to



1 the seismic testing related to off-shore  
2 drilling and the impacts, potential impacts on  
3 marine mammals and fish. And so I was sort of  
4 representing South Carolina marine mammals and  
5 a little bit of South Carolina fish on that  
6 one. I've been on a, sort of, marine education  
7 advisory panel with South Carolina Sea Grants.  
8 One of -- one of the primary coordinators for  
9 the Southeast -- for SEAMAMS, which is the  
10 Southeast and Mid-Atlantic Marine Mammal  
11 Symposium, it's the primary sort of southeast  
12 regional marine mammal meeting and I've been  
13 involved in that for a number of years. We've  
14 hosted it a couple of years. We'll actually be  
15 hosting it again at Coastal Carolina this  
16 spring. I'll stop there.

17 Q: And what kinds of -- what were the areas of  
18 expertise that you were providing in those  
19 circumstances?

20 A: For -- well, for the -- for the seismic testing  
21 one, my primary expertise was knowledge of the  
22 species that might be impacted in South  
23 Carolina. I won't pretend to be an expert on  
24 seismic testing, but basically what are some  
25 species, which ones are stranding in South



1 Carolina, which ones are about to be present in  
2 South Carolina, and basically who would be in  
3 harm's way for that sort of thing. For the  
4 marine education one, I think that was broad  
5 about marine education in general. We've had  
6 a number of marine education programs. I've  
7 received a number of grants over the years from  
8 National Science Foundation from Sea Grant,  
9 from NOAA, for various marine education  
10 programs and teacher courses and teacher  
11 programs. We had a five-year award at Coastal  
12 Carolina supporting the graduate students in  
13 our graduate program and putting them in the  
14 classroom of the local teachers and that was a  
15 -- that was a neat one. So -- I don't know if  
16 that answers ...

17 Q: What kinds of information do you typically rely  
18 on when you're forming an opinion? Is it based  
19 on research you've conducted?

20 A: Well, it certainly can be. It's going to be  
21 based on a lot of things. It would be  
22 certainly any research I've conducted, well to  
23 very direct first-hand knowledge. Certainly  
24 anything that's in the scientific literature or  
25 what -- or respected publications as



1 appropriate. Certainly, conversations or --  
2 well, certainly information from presentations  
3 at scientific and professional conferences,  
4 conversation with research and professional  
5 colleagues are all helpful. Sometimes  
6 interviews and information from non-researchers  
7 who have extensive experience or backgrounds or  
8 citizen scientist type people who may have  
9 collected valuable information from their  
10 first-hand experiences, using -- using aerial  
11 imagery, using maps, graphs, all those sorts of  
12 things.

13 Q: Do you need to personally observe -- do you  
14 have to make your own observations in order to  
15 form opinions?

16 A: No, I don't have to see everything first-hand.  
17 I think there's a lot of -- I'd be in trouble  
18 if I did, I would think, because I don't think  
19 any of us could see all of these things first-  
20 hand. I think there are many reliable sources  
21 of information, certainly. Certainly a lot of  
22 what any researcher learns comes from  
23 scientific literature or from presentations and  
24 conversations with colleagues and other  
25 researchers and certainly beyond the research



1 community there are many people with valuable  
2 and useful and in many cases reliable insights.

3 Q: And is that the kind of information that others  
4 in your field of expertise would typically rely  
5 on?

6 A: Yes, I think so.

7 Q: Your Ph.D. was in oceanography. Could you  
8 explain how oceanography relates to marine  
9 biology?

10 A: Sure. Marine biology is basically a subset of  
11 oceanography. Oceanography -- actually, you  
12 get a bit of a technical debate sometimes of  
13 whether oceanography has to be more sort of  
14 broad scaled and global or ocean wide in its  
15 focus. But most people would include any sort  
16 of marine biology within oceanography.  
17 Usually, if somebody classifies themselves  
18 primarily as a biological oceanographer, they  
19 may be working on some larger scale processes  
20 and, as a marine biologist, they might be  
21 working on a smaller scale processes or  
22 individuals or physiology or that sort of  
23 scale. But really they get used pretty  
24 interchangeably, so I would -- I would simply  
25 say that marine biology is the biological



1 subset of oceanography.

2 Q: Dr. Young, how would you characterize your area  
3 or areas of expertise?

4 **THE COURT:** You've asked that.

5 A: What's that?

6 **MS. WHITE:** I'm sorry?

7 **THE COURT:** You've already asked that, I think. I'd  
8 like this to move along a little quicker  
9 because I'd rather not just do the same  
10 questions over and over.

11 **MS. WHITE:** I'm pretty certain I have not asked him  
12 that exact question.

13 **THE COURT:** Well, I'll let the record speak for  
14 itself. Go ahead and ask it again. Do you  
15 remember her asking that question?

16 A: I don't know if it was the exact words, but we  
17 did talk about marine ecologists, nekton  
18 ecologists, and specialization on ---

19 **THE COURT:** Yes.

20 A: --- on dolphins and fish ecology.

21 **THE COURT:** Yes, sir.

22 **MOTION TO QUALIFY AS EXPERT:**

23 **MS. WHITE:** All right, at this point, I'd like to  
24 move to qualify Dr. Young as an expert in  
25 oceanography and marine ecology with an



1 emphasis in marine mammals, particularly  
2 dolphins and fish.

3 **MR. GRESSETTE:** Subject to our pervious objections.

4 **THE COURT:** Okay. Same thing?

5 **MR. CHURDAR:** Yes, sir.

6 **RULING OF THE COURT:**

7 **THE COURT:** All right. He's so qualified subject to  
8 my consideration of reliability down the road.

9 **MS. WHITE:** Thank you.

10 Q: Dr. Young, are you familiar with Kiawah Island  
11 and Captain Sam's Spit, in particular?

12 A: Yes.

13 Q: What do you know about it?

14 A: I -- I know some of the -- the proposed --  
15 well, I know the -- some of the procedures  
16 related to this case in terms of what has been  
17 proposed for developments along the neck. In  
18 terms of my knowledge of the dolphins and the  
19 natural system, I have not been there or  
20 observed them myself, so I have -- I have  
21 ascertained a fair bit by looking at the  
22 overall -- the aerial imagery and being  
23 familiar with just coastal South Carolina to  
24 have a decent sense of what's likely to be  
25 there. To follow that up, I have -- therefore,



1 to follow that up, I have spoken with  
2 researchers at the National Oceanic and  
3 Atmospheric Administration, National Ocean  
4 Service Lab in South Carolina. Again, these  
5 are folks that we work with for stranding.  
6 Also that we work with for our -- for our photo  
7 ID and dolphin survey work. We have catalogs  
8 of dorsal fins we share and match between us  
9 and so we work with a group of dolphin  
10 researchers down there and marine mammal  
11 researchers in various capacities. They shared  
12 that for the last two summers they have been  
13 doing interviews and surveys in the Captain  
14 Sam's inlet area, specifically related to the  
15 dolphins and strand feeding. These have been  
16 ten weeks of surveys each summer. They are  
17 going to continue year-round starting this  
18 September with a new award and they have  
19 reported that they do ---

20 **THE COURT:** When you say they have been doing  
21 interviews and surveys ---

22 A: Yes.

23 **THE COURT:** --- they're interviewing other  
24 individuals?

25 A: They have a ---



1 **THE COURT:** Or are they surveying it themselves?

2 A: They have a project where they are -- they have  
3 people for four to six hours around low tide  
4 everyday. I don't know if it's everyday, but  
5 most days in the summer for ten weeks. And  
6 they are not out in the boat doing dolphin  
7 surveys. They are at the areas that are strand  
8 feeding areas and they are using that as a time  
9 to survey the people that are there, the local  
10 tourists and residents, and also to use that as  
11 an educational opportunity about how they  
12 should behave around strand feeding dolphins.

13 **THE COURT:** So is your testimony based upon -- so I  
14 can be clear, NOAA individuals who are getting  
15 information from other individuals about the  
16 behavior of the dolphins?

17 A: They are also observing it themselves.

18 **THE COURT:** That's what I was asking.

19 A: Yes.

20 **THE COURT:** Okay.

21 A: Yes.

22 **THE COURT:** And ---

23 A: They're there so they see it, but they're also  
24 talking to the individuals that are there  
25 educating them.



1 **THE COURT:** Oh, educating them, okay.

2 A: Yes, yes. So remind me, where were we?

3 Q: I think you were just -- you were describing  
4 that you have a working relationship with some  
5 of these researchers down on Captain Sam's  
6 Spit.

7 A: Right, right. So we -- so they reported that  
8 they have that kind of effort for the last two  
9 years, that they observe strand feeding  
10 regularly, that it's usually ---

11 **THE COURT:** Wait a second. I've got a gate keeping  
12 role at this point in time and I'm struggling  
13 with it because, number one, he's not even  
14 given -- he's gone beyond his opinion and now  
15 he's telling me what other individuals are  
16 telling him. This is really getting way beyond  
17 an expert opinion. You haven't objected, but  
18 honestly, I hesitate to even do what I'm about  
19 to do because y'all haven't objected, so  
20 apparently you don't have a problem with it,  
21 but I've got a role as a gate keeper as to my  
22 understanding of the law, so you need to  
23 explain to me how this is admissible because  
24 this seems very far afield.

25 **MS. WHITE:** I believe this is exactly the type of



1 testimony that counsel for KDP objected to that  
2 Dr. Young didn't have a reliable basis for ---

3 **THE COURT:** But not only are you -- you've moved  
4 beyond whether he had a reliable basis, you're  
5 going into what they said. So you're trying to  
6 introduce their hearsay into this courtroom.

7 **MS. WHITE:** I believe he's testifying to information  
8 that he used in order to form the opinions that  
9 he has in this case.

10 **THE COURT:** Let me review the rule. Let's see.

11 **MS. WHITE:** He specifically testified that ---

12 **THE COURT:** One second.

13 **MS. WHITE:** --- he relies on this type of -- this is  
14 the type of information ---

15 **THE COURT:** The facts -- let me read the rule. The  
16 facts or data in the particular case upon which  
17 the expert bases an opinion or inference may be  
18 those perceived by or made known to the expert  
19 at or before the hearing. It doesn't mean he  
20 can testify to that. It just means he can rely  
21 upon that to reach his opinion. And only if  
22 it's the type reasonably relied upon experts in  
23 a particular field in forming their opinions or  
24 inferences upon the -- upon the subject, the  
25 facts or data need not be admissible into



1 evidence. But I -- the Supreme Court's added  
2 a second layer upon this is I have to determine  
3 if this is reliable and -- but this is -- what  
4 I'm talking about is even secondary to this, is  
5 you're trying to get the hearsay testimony  
6 statements that he relied upon into evidence  
7 and I don't think that's admissible. I'm not  
8 even sure his opinion's admissible based upon  
9 -- as I read Graves a while ago, I don't --  
10 it's very similar to that in Graves, it was  
11 actually the plaintiffs giving their -- giving  
12 their version of what happened and this is --  
13 so it was factual comments of the case. And in  
14 this instance, it's very similar even ---

15 **MS. WHITE:** Your Honor, I'm struggling, as well,  
16 because I think part of why I'm enlisting this  
17 testimony is because of counsel's motion  
18 objecting to the fact that he didn't have any  
19 of this knowledge, and so if we don't want to  
20 hear about the knowledge, the facts, underlying  
21 facts, then we don't have -- I will move on,  
22 but that was where this was coming from.

23 **THE COURT:** All right. So her position is she's  
24 presenting this not for the truth of the matter  
25 asserted, I assume, but to establish ---



1 **MS. WHITE:** Well ---

2 **THE COURT:** --- whether his ---

3 **MS. WHITE:** --- counsel was ---

4 **THE COURT:** --- underlying knowledge was reliable.

5 **MS. WHITE:** That's correct. Counsel's main -- as I  
6 understood it.

7 **THE COURT:** All right. So my standpoint then at  
8 this point in time, I'll allow him to testify  
9 about what they said, but not for the truth of  
10 the matter asserted, only as to support the  
11 basis of his opinion.

12 **MS. WHITE:** Thank you, Your Honor.

13 **THE COURT:** Do y'all have a position on that?  
14 Because you're objecting to the basis of his  
15 opinion, so she's offering this in response to  
16 that.

17 **MR. GRESSETTE:** That's correct, Your Honor. And,  
18 first of all, that's being offered post-  
19 deposition, post pointing out the unreliability  
20 of his testimony, so that's one issue that we  
21 have ---

22 **THE COURT:** Okay.

23 **MR. GRESSETTE:** --- to deal with. The second is  
24 again, the reliance upon hearsay restating it  
25 for the fact of the matter, but if The Court is



1 only going to take it for the information that  
2 was relayed to the expert and then determine  
3 whether it's reliable ---

4 **THE COURT:** Okay. Well, I'm going to let it in.

5 **MR. GRESSETTE:** --- basis for his opinion.

6 **THE COURT:** I'm going to let it in under the caveat  
7 I presented earlier. All right.

8 **MS. WHITE:** Thank you, Your Honor.

9 Q: Dr. Young, if we could maybe step back for a  
10 second and look at what's on the screen here.  
11 This is Petitioner's Exhibit One. Are you able  
12 to identify what this is depicting?

13 A: Yeah, is that Kiawah River and the spit on the  
14 western side and the neck.

15 Q: And you indicated that you had some familiarity  
16 with a development project that was proposed  
17 for this area?

18 A: Yes, my understanding is that there's a  
19 proposal to -- for development on the spit,  
20 some homes and roads that requires a road to  
21 connect it to the rest of the island and that  
22 there's a -- well, not a proposal, but a permit  
23 at this point to build a wall on the erosional  
24 curve -- on the erosional bank of the curve,  
25 which is in the top left in this -- in this



1 picture.

2 Q: If you look up at the witness stand with you  
3 there should be a document that's marked ---

4 A: This one?

5 Q: Yes, it's Exhibit ---

6 A: Uh-huh.

7 Q: --- Joint Exhibit 6. Have you seen those  
8 documents before?

9 **(Joint Exhibit Number 6 was introduced into the**  
10 **record at this time.)**

11 A: Yes, at -- I believe these are the same ones we  
12 saw at the deposition.

13 Q: What is your understanding of what those  
14 documents are?

15 A: The permit to move forward with the  
16 construction related to this development and  
17 the wall.

18 Q: And you indicated that you had an understanding  
19 of the proximate location of the sheet pile  
20 wall?

21 A: Yes.

22 Q: Are you able to mark on the aerial photograph  
23 that's on the screen where your understanding  
24 of that wall would be located?

25 A: Sure. Approximately it begins very close to



1 where the picture starts on the screen and ---

2 **THE COURT:** Well, somebody's changed your ---

3 Q: You're on a different setting here.

4 A: That's okay, I'll do it this way, how's that?

5 Something like -- something like that, a little

6 bit close to or maybe past where that larger

7 side tree comes in across the river

8 (indicating).

9 **(Joint Exhibit Number 7 was introduced into the**  
10 **record at this time.)**

11 Q: Now, I'm looking at Joint Exhibit Number 7 ---

12 A: Uh-huh.

13 Q: --- have you seen this document before?

14 A: Yes.

15 Q: What is your understanding of what this is?

16 A: This is a little more detailed plot of what

17 some of the plots in the development -- on the

18 development site is and also the extent of the

19 wall that goes around the outside curve of that

20 bend.

21 Q: And on the previous aerial we were just looking

22 at you mentioned a creek, are you able to

23 identify that creek on this drawing?

24 A: It's right across from where the walls are --

25 where the -- can I draw? This creek here ---



1     **THE COURT:** I switched it again.

2     A: That's okay.

3     **THE COURT:** Well, now, you can just point to  
4     whatever you want though.

5     A: I was saying this creek that comes -- that's  
6     across from where the -- it looks like the wall  
7     ends.

8     **THE COURT:** And you can just move that pointer  
9     around now.

10    A: This creek (indicating).

11    Q: Okay.

12    **THE COURT:** Yeah.

13    Q: Thank you.

14    **THE COURT:** I told you it does different things. I  
15    just hadn't figured it out.

16    A: I'm a teacher, I know what happens when these  
17    things break down.

18    Q: Do you have an understanding of where on the  
19    ground the wall would actually be located?

20    A: My understanding is it would be set back a  
21    little bit from where the current shoreline is,  
22    I don't know how far exactly.

23    Q: And do you have an understanding of the purpose  
24    of the wall?

25    A: Yes, I believe it's to prevent further erosion



1 to protect the road that they want to build.

2 Q: You mentioned that you form opinions based on  
3 looking at aerial photography, photographs and  
4 maps, did you form an opinion about the Captain  
5 Sam's Spit area based on aerial photography in  
6 this case?

7 A: Well, I guess my opinion was confirmed that  
8 where they were building a structure to stop  
9 erosion is an area that you would expect to see  
10 erosion, the outer -- and the outer curve of  
11 any strong bend is the erosional side.

12 Q: And when you say the outer curve of the bend,  
13 could you just mark where you're talking about?

14 A: Sure, right where the wall's being built.  
15 Well, I've got arrows again, but that's -- that  
16 whole stretch there where the wall's being  
17 built is that outer curve.

18 Q: And how do you know that?

19 A: Couple ways. Partly from first-hand  
20 experience, many, many years in salt marsh  
21 systems, the outer curve is always the high  
22 energy erosional bank. Also, basic  
23 understanding that if all of this is about --  
24 that if it was an erosional bank, there  
25 probably would be no permit for a wall there



1 and probably we all wouldn't be here today. So  
2 the purpose is to stop that. But, in addition  
3 to that, some pictures that we've seen today  
4 earlier that I received from you of that area  
5 shows an escarpment, something of a cliff along  
6 those banks, and trees and roots exposed and  
7 it's -- yes. And so you've got an area that  
8 shows many visual signs of erosional cuts.  
9 Also the basics of physical oceanography and  
10 marine geology that those outer edges are going  
11 to be receiving more energy and a stronger  
12 current. And that makes sediment move and  
13 erode. That makes sediment move and erode.

14 Q: So, what would you expect to happen to the  
15 sediment over time if the wall was installed as  
16 proposed?

17 A: I would expect it to continue to be erosional  
18 and even if the wall was a little bit further  
19 back, eventually it would probably expose the  
20 wall.

21 Q: Why are you using that?

22 **MR. GRESSETTE:** Your Honor, we object to this line  
23 of testimony. It's outside of is expertise and  
24 hasn't been testified to to a reasonable degree  
25 of ---



1     **THE COURT:**    Certainty?

2     **MR. GRESSETTE:**    Whatever certainty would apply,  
3                    which is not the certainty to which I believe  
4                    he was qualified.

5     **THE COURT:**    Well, he hasn't been qualified as an  
6                    expert in erosion.

7     **MS. WHITE:**     He was qualified as an expert in  
8                    oceanography and maybe the witness could  
9                    explain how ---

10    **THE COURT:**    Well, if you could just -- I'll tell you  
11                    what I'll do.    I'll sustain the objection,  
12                    strike the testimony, and allow you to lay the  
13                    foundation.

14    **MS. WHITE:**    What -- I'm sorry, what testimony are  
15                    you striking?

16    **THE COURT:**    What he just testified about erosion,  
17                    I'm gonna strike that.    I'm not going to keep  
18                    you from asking about it.    I'm just going to  
19                    say lay the foundation for us to have the  
20                    evidence come in.

21    **Q:**     Dr. Young, could you describe the pillars of  
22                    oceanography again?

23    **A:**     Typically, the four are physical oceanography,  
24                    marine geology, marine chemistry, and marine  
25                    biology.



1 Q: And do those pillars encompass an understanding  
2 of coastal processes?

3 A: The marine geology and physical oceanography  
4 both typically cover physical processes and  
5 coastal processes, so that includes things like  
6 coastal erosion, interaction with structures  
7 like seawalls, groins, jetties, et cetera. And  
8 certainly in South Carolina that's part of our  
9 basic teaching in an introductory to marine  
10 science course.

11 Q: Teaching about erosion is part of a basic ---

12 A: Because we have barrier island systems and soft  
13 sediment systems and erosion and sediment  
14 movement is a -- is a foundational thing that  
15 we live with here in South Carolina on the  
16 coast and so, yes, those are -- those are parts  
17 of an introductory marine science course.

18 **MS. WHITE:** I guess I would ask the Court ---

19 **THE COURT:** If you want to ask the question, ask it.

20 Q: Well, I can't remember the original question  
21 now. What would you expect to occur over time  
22 to the sediment in front of the proposed wall?

23 A: Well, sediment -- the type of shoreline you  
24 have is a reflection of the energy of the  
25 system. So this particular area, which is more



1 sandy, the reason it's not more muddy is  
2 because it's a high energy system and any of  
3 the small grains like clays and muds will never  
4 settle out there. They are carried away  
5 leaving the larger grains like sand. That sand  
6 also moves with the energy of the currents.  
7 And so as it moves away, as it erodes, sediment  
8 cannot -- sandy sediments, muddy sediments,  
9 they will not hold a straight up and down sort  
10 of wall. As you undercut them a little bit, a  
11 little bit will erode from upland and fall down  
12 on it. So it'll maintain a fairly consistent  
13 slope because it keeps getting sort of undercut  
14 and then replaced or slumping down. But that  
15 whole thing will move back and erode over time.  
16 I assume that if they weren't worried about --  
17 if there was no concern about this area eroding  
18 towards the seawall, then you wouldn't need a  
19 seawall or a -- not a seawall, but a -- the  
20 sheet pile wall.

21 Q: And why do you say that?

22 A: Because it's very expensive and if you don't  
23 need it, I don't think you would want to build  
24 it. That's separate ---

25 **THE COURT:** Not necessarily ---



1 A: --- that's separate than the scientific  
2 argument for why you get erosion.

3 **THE COURT:** I was going to say not necessarily an  
4 expert opinion, but more of a logical one?

5 A: Yes. The first half of that was a science one,  
6 the second half was the logical, I guess.

7 Q: And so the scientific assumption is just based  
8 on what? What -- could you restate that?

9 A: The scientific assumption?

10 Q: You said there was a scientific and a logical  
11 assumption, what was the scientific?

12 A: The scientific was talking about the  
13 interaction of currents with the sediment and  
14 how, as it's undercut and new material slumps  
15 in, it maintains the basic shape, but the whole  
16 shape migrates ---

17 **THE COURT:** Logical knowledge ---

18 A: --- the whole shape migrates. The part that  
19 was logical was if we're not worried about  
20 erosion, why are we here.

21 Q: So the process, the natural erosional process  
22 that you just described, who does that take  
23 place if there's a vertical hard structure  
24 that's placed in that system?

25 A: Once it -- typically, whenever there's a



1 seawall or any sort of wall like this in a high  
2 energy environment, once you hit that -- once  
3 the wall's not protected by a slope of sediment  
4 in front of it, that means none of that energy  
5 is dissipated by the -- by the slope. As it  
6 starts to cut away, you can no longer have what  
7 would be upland sediments sloughing down and  
8 maintaining that slope, which helps to mitigate  
9 the energy. And so once you have a wall there,  
10 that same energy is going to come through and  
11 it's going to be just as strong, but it's not  
12 going to get replaced from new sediment coming  
13 down. It's going to start scouring out deeper  
14 and deeper and accelerate erosion. So though  
15 things like seawalls and revetments in high  
16 energy areas tend to protect an area, they also  
17 accelerate erosion in front of the area.

18 Q: And so with accelerated erosion, would you  
19 anticipate that that would resolve in any  
20 additional losses to the sandy banks that are  
21 depicted on the exhibit that's on the aerial?

22 **(Petitioner's Exhibit Number 3A was introduced into**  
23 **the record at this time.)**

24 A: I think you would very likely lose most of your  
25 low tide beach.



1 Q: And you're looking at Exhibit 3A. You said  
2 that you think that most of the low tide beach  
3 would be lost?

4 A: Right, the area that's currently exposed at low  
5 tide, that accelerated erosion would deepen and  
6 you wouldn't have the same low tide beach there  
7 on that high energy curve.

8 Q: Can you -- is that opinion based on a  
9 reasonable degree of scientific certainty?

10 A: That is based on -- yes, that's based on my  
11 understanding of basic coastal processes,  
12 interaction of soft sediment shorelines and  
13 currents.

14 Q: Would you expect any impacts to the -- to --  
15 excuse me. Are you aware of where dolphins  
16 strand feed in the area of Captain Sam's Spit?

17 A: I am.

18 Q: Where do you understand that they strand feed?

19 A: The primary strand feeding areas for dolphins  
20 on Captain Sam's inlet are this -- this curve  
21 at the neck. A lot of the area that would be  
22 directly adjacent to that -- to the proposed  
23 wall and also at the inlet, the actual inlet to  
24 the ocean. So at the end of the spit on both  
25 sides. And has been observed in the last two



1 summers primarily along the curve, but also  
2 substantial -- like most of it has been on the  
3 curve, but also substantially towards the  
4 inlet. The ---

5 **THE COURT:** You're basing that upon?

6 A: I am basing that based on my conversation with  
7 the principle investigator of the Marine Mammal  
8 Assessments Program of the NOAA in Charleston.

9 **THE COURT:** All right. So we're back to that  
10 evidence that is not offered for the truth of  
11 the matter, so with that upon which you base  
12 your opinion from, okay.

13 A: Correct. I asked if there was a report yet and  
14 there isn't one yet, so I was limited to  
15 conversation with the principle investigator at  
16 NOAA.

17 Q: And is that the type of information you would  
18 reason that -- someone in your field would  
19 reasonably rely on in forming their opinion?

20 A: I believe so. I certainly would. I have 25  
21 years of experience with that individual,  
22 working with marine mammals in South Carolina.

23 Q: And do you have an opinion regarding what  
24 impacts, if any, would result to strand feeding  
25 dolphins as a result of this development



1 project?

2 A: If they lost their stranding beach in this  
3 area, and since it's commonly -- since they're  
4 observed to regularly strand feed in this area,  
5 I think it would be significant. I think they  
6 could potentially be losing a significant  
7 portion of their diet and quite possibly could  
8 be impacted to a level where they have to  
9 completely change their foraging tactics or  
10 move to a new location.

11 Q: Do you anticipate the loss of the sandy banks  
12 to impact the strand feeding dolphins?

13 A: I think they would lose what apparently is  
14 currently their most common stranding area,  
15 strand feeding area.

16 Q: And are you basing that opinion to a reasonable  
17 degree of scientific certainty?

18 A: I am.

19 Q: In your opinion, why would it -- why would it  
20 matter if these dolphins were no longer able to  
21 strand feed in this location at the riverbend?

22 A: Well, I think there's probably a couple levels  
23 to answer that. On the level of the dolphins,  
24 if you are impacting their basic ability to  
25 forage and find the food that they need to



1 survive, they need to adapt. If they're able  
2 to adapt, they can survive. If they're not  
3 able to adapt, they may not. More than likely,  
4 on a good year, it might be okay. We certainly  
5 have had years in the past where we've had the  
6 cold snaps in the winter and the prey  
7 population's dropped and we have some  
8 starvations and increased strandings and deaths  
9 towards the end of winter, so that anyone who's  
10 compromised and not getting the amount of food  
11 that they would normally expect to get, might  
12 not survive that. Currently, the stock  
13 assessment report for the Charleston estuarine  
14 stock of bottlenose dolphins has a minimum  
15 population estimates of 281 and a potential  
16 biological removal of 2.8 dolphins above  
17 natural mortality. And so that's not a big  
18 window to play with.

19 Q: To a reasonable degree of scientific certainty,  
20 if the dolphins are no longer able to strand  
21 feed on the riverbend, the banks of the neck of  
22 the spit, will it impact them?

23 A: If they're no longer able to strand on the neck  
24 of the spit, yes, I think it will impact them  
25 as the current indication from the last two



1 years is that that's their primary strand  
2 feeding area. So yes, I believe it would  
3 impact them, negatively impact that group of  
4 dolphins.

5 Q: Do you believe that impact would be  
6 significant?

7 A: Significant in the sense that I had spoke about  
8 that they are going to have to adapt to a new  
9 location and new lifestyle, or if they can't,  
10 then they -- if they can't adapt to it, they  
11 probably will not survive.

12 Q: One second.

13 **MS. WHITE:** I think that's all the questions I have.

14 A: All right.

15 **THE COURT:** Do you want to take a break or are we  
16 going to keep going?

17 **MR. GRESSETTE:** I'm happy to do whatever The Court  
18 would like.

19 **THE COURT:** All right. Then let's keep going.

20 **MR. GRESSETTE:** Let's keep going.

21 **THE COURT:** Well, hold on a second, let me ask my  
22 court reporter. You all right?

23 **COURT REPORTER:** (Nods head.)

24 **THE COURT:** All right.

25 **DR. YOUNG - CROSS-EXAMINATION BY MR. GRESSETTE:**



1 Q: Good afternoon, Dr. Young.

2 A: Good afternoon.

3 Q: How are you?

4 A: Good.

5 Q: We met several months ago during your  
6 deposition. Do you recall that?

7 A: Yes.

8 Q: And do you recall the testimony you provided  
9 during that deposition?

10 A: Yes.

11 Q: In the courtroom today, you have provided some  
12 testimony that I'd like to also ask you about.  
13 Maybe we'll start sort of in reverse and I may  
14 jump around a little bit because my notes are  
15 kind of scattered. But when you talk about,  
16 just a few months ago, an impact on dolphins,  
17 a couple of times you said an impact on them.  
18 Who is them?

19 A: Good question. The strand feeding group of  
20 dolphins and that are resident to Captain Sam's  
21 in the area.

22 Q: And how many dolphins did you say were in that  
23 group?

24 A: I -- the number that I have comes from Captain  
25 Hayes in discussions with him. And there -- he



1 says there are 27 dolphins in this area, not  
2 all are strand feeders. Probably half are --  
3 roughly half are strand feeders and, on any  
4 given day, about five to eight or so will  
5 probably be seen strand feeding.

6 Q: Okay. So let me back up a minute. The  
7 information that you just testified about from  
8 Captain Hayes, when did you obtain that  
9 information?

10 A: I don't know exactly, probably a week or two  
11 ago, with a phone call. So I called up Captain  
12 Hayes, was provided that he had information,  
13 called him up. We had a conversation. I was  
14 very impressed actually by the sort of careful  
15 note taking he's taken for 15 years and numbers  
16 and he's seen a lot more strand feeding events  
17 than I have in that time. And has kept very  
18 good records over the years, so I knew that his  
19 numbers were reliable.

20 Q: Okay. And that is information you did no have  
21 when we took your deposition, correct?

22 A: That is correct.

23 Q: Okay. And why did you obtain that information  
24 from Captain Hayes?

25 A: When we first met for our deposition, I think



1 we were speaking more in the hypotheticals that  
2 you were talking about in terms of ---

3 Q: Well, if you recall during the deposition, I  
4 talked to you a lot about how reliable the  
5 information was and the dearth of information  
6 that you had, is that why you ---

7 **MS. WHITE:** Objection, Your Honor.

8 Q: --- got the information?

9 **THE COURT:** Wait a second.

10 **MS. WHITE:** Mr. Gressette did not let the witness  
11 finish his answer before interrupting him.

12 **THE COURT:** Oh, I didn't -- I'm sorry.

13 **MR. GRESSETTE:** I didn't mean to do that.

14 A: That's okay. I'll continue. We were -- we  
15 were speaking in the hypotheticals because I  
16 did not have all that information and you were  
17 very clear. And so I was brought in I think as  
18 somebody who had experience -- expertise with  
19 strand feeding dolphins and dolphins, estuarine  
20 dolphins in this area. But without direct  
21 experience in Kiawah. And so some of your  
22 questions lead to the fact of do you -- do you  
23 know how important this strand feeding is --  
24 area is here, how much strand feeding, and I  
25 indicated that I would have to go find those



1 things out. And so the primary places that I  
2 found that out were, I put the most stock  
3 probably in my conversations with researchers  
4 of NOAA and that was -- that has been a  
5 scientific study where they have been looking  
6 at that and also an outreach and educational  
7 program. And I also followed up with Captain  
8 Hayes because he had extensive long term  
9 experience and wanted to get his insights, as  
10 well. And his -- the information I received  
11 from him served to sort of corroborate what I  
12 was hearing from the NOAA researchers.

13 Q: Okay. So after your deposition you obtained  
14 information from the NOAA researchers and  
15 Captain Hayes so that you could offer more  
16 reliable opinions than what you were able to  
17 offer during the deposition?

18 A: Yes, I thought that the thing that I most  
19 needed to know was whether or not -- although  
20 there's been some talk today about whether we  
21 even knew strand feeding existed there, I felt  
22 pretty confident about -- comfortable about  
23 that. Of course, that's been confirmed since  
24 then. But what I most wanted to know was how  
25 much strand feeding is and where, right, so is



1 this -- is it occasionally seen? Is it seen  
2 daily? Are many bouts seen daily? Is this a  
3 minor area where strand feeding sometimes  
4 occurs, or does this seem to be one of those  
5 important hot spots, one of the major stranding  
6 areas where, for many hours a day you'd expect  
7 them to be focusing their strand feeding. And  
8 the feedback I got from both of those areas is  
9 that this -- this bend and the inlet are  
10 important strand feeding areas.

11 Q: And if I understood ---

12 A: Highly important.

13 Q: Sorry.

14 A: Go ahead. I said highly important.

15 Q: Highly important?

16 A: For those dolphins, yes.

17 Q: For those dolphins. So those dolphins, being  
18 the 13 or so dolphins that Captain Hayes ---

19 A: And I won't swear to that number, I'm saying  
20 roughly half of the 27, but yes, of those --  
21 those dolphins that are the primary strand  
22 feeders for this little stretch of the Kiawah  
23 River.

24 Q: Okay. So when we talk about impacting dolphins  
25 by the project, dolphins that strand feed,



1 we're talking about whether or not the project  
2 is going to impact approximately 13 dolphins?

3 A: Most directly, sounds like that's a good  
4 approximation.

5 Q: Okay.

6 A: Whether -- whether the other ones are seen with  
7 them also move with them, I can't say.

8 Q: Okay. So based on your estimation of about 13  
9 dolphins included in that group that strand  
10 feed at Captain Sam's, if I understand you  
11 correctly, there are three locations that those  
12 dolphins use?

13 A: There are three locations that are apparently  
14 -- well, I'd almost say two because both sides  
15 of the inlet, it's kind of the same thing. But  
16 yes, those appear to be their primary stranding  
17 areas. And that Captain Hayes had indicated  
18 that for years and years he is up and down that  
19 river and really doesn't see strand feeding  
20 appreciably anywhere but those areas.

21 Q: Did Captain Hayes or anybody else talk to you  
22 about strand feeding in any of the other rivers  
23 close by?

24 A: He did not. I've seen it myself in -- in North  
25 Edisto River. It certainly occurs in a number



1 of locations.

2 Q: And isn't it possible that the dolphins that  
3 strand feed in Captain Sam's that you've  
4 described as the 13 or so also strand feed in  
5 other locations, other rivers, specifically?

6 A: Those particular dolphins? So part of the  
7 basis of those numbers are from the photo ID  
8 that -- and pictures that Captain Hayes has  
9 taken over the years, and so he's seen the same  
10 animals day in, day out. Is it possible that  
11 sometimes they go outside and hit some areas,  
12 yes, absolutely. Does it sound like from what  
13 have been ascertained that other areas are a  
14 major component of their foraging areas?  
15 Doesn't sound like it.

16 Q: But the dolphins that strand feed in Captain  
17 Sam's are able to and you would presume do  
18 venture out to other areas to eat?

19 A: Yes, I assume sometimes they -- they go on an  
20 adventure.

21 Q: Okay. And the information that Captain Hayes  
22 was giving you that you found reliable was  
23 relaying his observations of particular  
24 dolphins that he recognized by their fins,  
25 marks on them?



1 A: He keeps track of how many emitters there are  
2 on by recognizing individuals based on their  
3 fins.

4 Q: Okay. So I'm not trying to trip you up. It is  
5 reliable in your field to rely on peoples'  
6 sightings of dolphins in particular areas when  
7 they recognize those dolphins by fin marks?

8 A: That is -- that is -- so that's basically photo  
9 identification, that is standard practice --  
10 that's a standard research method. I would say  
11 that I haven't met very many people that are  
12 non -- not research scientists that I would say  
13 have sort of a reliable long-term record of  
14 that. My conversation with Captain Hayes is  
15 that he's taken meticulous data for about 15  
16 years and knows his dolphins well and that he  
17 does -- he does have a good record of his  
18 dolphins.

19 **THE COURT:** Did you see ---

20 A: I say his dolphins, but the dolphins in the  
21 Kiawah River.

22 **THE COURT:** Did you see any of that data?

23 A: No, no, I have not looked at any of his photos  
24 or no, I've not seen ---

25 Q: So you haven't done a review of anything he's



1 done; you've just taken everything he said at  
2 face value?

3 A: I wouldn't say I've taken it at face value. I  
4 followed up with a number of questions to see  
5 what made sense and the patterns that he gave  
6 are typical patterns that we see for strand  
7 feeding dolphins in other areas. So I guess  
8 what he did was sort of confirm what I would  
9 have expected from -- if there as a strand  
10 feeding group in the Kiawah.

11 Q: So if I understand the history correctly,  
12 counsel for the League contacted you to see if  
13 you had any opinions about what would happen to  
14 strand feeding dolphins if this project was  
15 completed and during that conversation, you  
16 offered an opinion, correct?

17 A: When -- when counsel first contacted me? No,  
18 I offered that I could -- I offered that I  
19 could speak with expertise about dolphins and  
20 strand feeding.

21 Q: Okay.

22 A: At the time, I didn't know much about the  
23 system and had some concerns that there could  
24 potentially be problems.

25 Q: I'm going to read to you from your deposition.



1 I asked, and during that conversation,  
2 referring to your telephone conversation with  
3 Ms. White ---

4 **MS. WHITE:** Excuse me, can you give the page and  
5 line ---

6 **MR. GRESSETTE:** Sure. It's page 33.

7 Q: During that conversation, did you offer any  
8 opinions about those issues. And you answer  
9 was, I offered the opinion that if this area  
10 was bulkheaded, that would remove any stranding  
11 beach there and if dolphins are strand feeding  
12 there, that they will no longer be able to. Is  
13 that the opinion you offered her that first  
14 call?

15 A: I don't recall that, but I -- I guess I said  
16 that. I wouldn't have thought that was our  
17 first conversation, but when she -- if she --  
18 if she did tell me that they're bulkheading  
19 that area and I'm looking at the image right  
20 here and I know that's an erosional bank, that  
21 would have been an opinion I would have given,  
22 yes. I just didn't think that was our first  
23 conversation.

24 Q: All right. So after you offered that opinion,  
25 I took your deposition and raised questions



1 about what you relied upon. Then you contacted  
2 Captain Hayes, he provided you some information  
3 that you found confirmed your opinion, and so  
4 you took it at face value?

5 A: No, I first talked to the NOAA researchers  
6 because that's -- that was the one that I felt  
7 was the most trustworthy in scientific study.  
8 What I found from Captain Hayes confirmed what  
9 they were saying in terms of the primary  
10 stranding areas and also confirmed my  
11 understanding of the system there.

12 **THE COURT:** Where I can understand, what did NOAA  
13 give you versus Captain Hayes? What -- maybe  
14 NOAA gave you information and Captain Hayes ---

15 A: So -- so the biggest -- so Captain Hayes gave  
16 me the number of individuals, which ---

17 **THE COURT:** Individuals being the dolphins?

18 A: The 27 dolphins, which is -- which is a factor  
19 in this, but I wouldn't say a major one.  
20 Probably the thing that I -- that I asked  
21 Captain Hayes particularly was do you see  
22 strand feeding commonly in other areas of the  
23 Kiawah River. That's the one thing I really  
24 didn't get from NOAA and he said no, that's  
25 their -- that's their primary -- that's their



1 primary strand feeding area. So that also  
2 reinforced my opinions that this is -- what  
3 already looked to be an important strand  
4 feeding area from the NOAA data, seems to be an  
5 important strand feeding area.

6 Q: And you defined important ---

7 A: Uh-huh.

8 Q: --- as the area that you confirmed dolphins  
9 strand feeding occurred by talking to NOAA and  
10 that Captain Hayes said was the only place in  
11 the Kiawah River that they strand feed?

12 A: So in our deposition, one of the things I  
13 pointed out is that if -- wish we had, you  
14 know, two years to do a focal follow study and  
15 I could see everywhere they go at the different  
16 times and we're not going to get that. And so  
17 from NOAA's information, it confirmed that  
18 these are two primary strand feeding areas that  
19 are seen, then that whole strand feeding window  
20 -- strand feeding doesn't happen outside of  
21 that window, so if there are other places  
22 during the day, they're not strand feeding. It  
23 has to be near that -- you know, around that  
24 low tide window. And however it's possible  
25 that they could do that sometimes, which is why



1 I followed up with Captain Hayes and said do  
2 you see it, and, you know, is it common, do you  
3 see it anywhere else. And his answer was no.

4 Q: And his answer was no to anywhere else in the  
5 Kiawah River, correct?

6 A: Correct.

7 Q: So you didn't ask him about outside of the  
8 Kiawah River?

9 A: No, he indicated that primarily the only place  
10 he's really in is the Kiawah River.

11 Q: Correct. And so he testified while you were  
12 sitting here today, I believe, that he doesn't  
13 go to the other rivers, correct?

14 A: I believe he did.

15 Q: Okay. And so if I understand correctly, the  
16 information he related to you was that he had  
17 knowledge of what goes on with dolphins in the  
18 Kiawah River only and that is what you related  
19 to?

20 A: Correct. Now, the -- the size of the Kiawah  
21 River and the range of it is sort of consistent  
22 with the kind of range you would expect from  
23 strand feeding dolphins. They're going to do  
24 a number of miles, I'd expect they go a little  
25 ways up the Kiawah River. They usually don't



1 spend a lot of time going in and out of the  
2 inlets and coastal areas. And so I would bet  
3 that sometimes they go and visit. I would also  
4 -- it's also my opinion -- my professional  
5 opinion that they -- that this group is  
6 unlikely to spend a lot of time in neighboring  
7 systems since they're sighted so frequently in  
8 the Kiawah River.

9 Q: Do you know about strand feeding bottlenose  
10 dolphins in Cape Romain?

11 A: I have -- people have told me about it. I  
12 don't have a name for you, just in passing over  
13 the years people have told me.

14 Q: And you have information that bottlenose  
15 dolphins strand feed in the creeks around  
16 Charleston?

17 A: In some of the areas around Charleston, yes.

18 Q: Okay. And can you identify any of those areas?

19 A: So, as I said, I've seen it in -- in the North  
20 Edisto -- or tributaries off the North Edisto  
21 River. I have -- I've heard people talk about  
22 it in the Charleston area, but I really  
23 couldn't put a location on it. Most of the --  
24 most of the accounts that I've heard are in  
25 various places a little further south, areas



1 off of the Broad River, various rivers and  
2 tributaries off that way. There's a place near  
3 Spring Island. I'm not as familiar with a lot  
4 of the geography down there, but suffice to  
5 say, I've, you know, had, over the years,  
6 probably at least ten to fifteen different  
7 places where people have said they've seen  
8 strand feeding.

9 Q: Okay. And that's ten or fifteen places within  
10 the range you described earlier from Cape  
11 Romain south down into Georgia?

12 A: That's specifically South Carolina. I really  
13 haven't talked to -- very much about Georgia at  
14 all.

15 Q: Okay. Has anybody ever published a peer review  
16 study on the impact of erosion control devices  
17 and strand feeding?

18 A: No, not that I am aware of.

19 Q: And if someone were to ask you to,  
20 hypothetically, write an article about the  
21 impact of this project on strand feeding  
22 dolphins, would you do that based on the  
23 information you have available today or would  
24 you engage in additional research?

25 A: I would engage in additional research. I think



1 you can have your professional opinions and if  
2 you want to -- If you want to then publish it,  
3 then you better back it up with observations --  
4 empirical research and observations.

5 Q: And why is that empirical research and those  
6 observations important if you want to publish  
7 your notes?

8 A: That's the -- that's the final confirmation  
9 that the data is the standard and so while  
10 researchers gain information and will offer  
11 opinions and hypotheses based on their  
12 experience, a publication is going to require  
13 confirmation.

14 Q: Okay. So has the process you've used in this  
15 case been subjected to peer review in any other  
16 instance?

17 A: The process, could you clarify?

18 Q: Yeah, sure. The process of gathering anecdotal  
19 information from other sources about what goes  
20 on in a particular litigation -- in a  
21 particular location and an animal in that  
22 location?

23 A: There are a number of publications which use  
24 this in science which use input from  
25 individuals, so, yes, there are a number of



1           them that take collected information and it  
2           sort of hits a critical mass and they put it  
3           out there.

4           Q:     And is ---

5           **THE COURT:**   His question was -- because I'd like to  
6           understand it.

7           A:     Okay.

8           **THE COURT:**   Peer review.  It wasn't were there other  
9           publications, it was are there peer-reviewed  
10          publications that we rely upon, the data in  
11          this case?

12          A:     Citizen's Science or general surveys like that  
13          make it into peer review, yes.

14          Q:     Are you aware of any peer review study of the  
15          impact of change in habitat impacting  
16          particular animal species that is published in  
17          peer-reviewed literature based solely on the  
18          type of information you gathered here?

19          A:     So the type of information I gathered here  
20          meaning ---

21          Q:     What did you call it before, citizen science?

22          A:     Citizen science is when non-scientists provide  
23          data or information that might be of interest  
24          and there are -- there are cases where people  
25          have collected -- I guess some famous examples



1 are things like astronomy where there's many  
2 amateur astronomers out there collecting all  
3 kinds of information, but you get this in all  
4 sorts of things. If you are referring to --  
5 would you do a peer review publication about  
6 the impact -- are you saying you would -- if I  
7 do a peer review publication about the impact  
8 of this wall on a dolphin species based on what  
9 I've done so far?

10 Q: Yes, sir.

11 A: No, I would not. I think, as I said, that's a  
12 professional opinion, based on my experience  
13 and facts. I wouldn't try to publish it until  
14 I followed up and -- with observations to have  
15 the data for the publication.

16 Q: Okay. And so following up with those  
17 observations to have the data would ensure  
18 reliability?

19 A: It depends on what your paper -- what your  
20 hypothesis or your objective is. The objective  
21 is what do you and why.

22 Q: Well, you said you would go and get some  
23 additional information. Why would you do that?  
24 Why would that data be useful?

25 A: If I wanted to know what the impact was on the



1 dolphins -- if I could publish what the impact  
2 was on these dolphins, then the procedure would  
3 have to go forward and we'd have to see the  
4 impacts. So I think you've got a case there  
5 where this is why you bring in people with  
6 expertise for their opinions, because if you  
7 make the wrong decision, then you follow the  
8 impact, and it's a disastrous one, you have a  
9 lovely publication giving you the details of  
10 how that worked, but nobody liked the result.  
11 So I think that's the difference, I think,  
12 between an empirical study where you're  
13 published and you're getting somebody's  
14 professional opinion about whether or not to  
15 move forward on a project.

16 Q: Okay. So your testimony is not based on any  
17 empirical data?

18 A: My testimony is based on some empirical data  
19 from the NOAA study, which suggests that there  
20 are certain important stranding areas and  
21 frequency of stranding in those areas. I would  
22 also say that Captain Hayes, though not a  
23 scientist, has collected a lot of very good  
24 empirical data that I have not fully reviewed,  
25 but with some certain details, it seems



1 reliable.

2 Q: Okay. And if I understood your testimony, in  
3 order for the opinions that you've offered here  
4 today to be suitable to a peer review journal  
5 for publication, you would need more support  
6 for them, correct?

7 A: If -- if I'm giving my recommend -- if I'm  
8 giving my professional opinion on what might  
9 happen if a -- if a wall is built at this  
10 point, I'm comfortable giving that opinion  
11 right now. If I'm going to publish a peer  
12 reviewed paper on what happened when the wall  
13 was built, obviously, that's something  
14 different.

15 Q: But you wouldn't publish a paper on what might  
16 have happened if the wall is built based on  
17 what you know now, would you?

18 A: My -- I don't think that would be a peer-  
19 reviewed publication to say what would ---

20 Q: Well, I guess my point is ---

21 A: --- my prediction about what would happen if a  
22 wall was built.

23 Q: I'm just trying to determine whether in your  
24 business the opinion that you're offering here  
25 today is of one level of reliability and then



1 there is another higher level of reliability  
2 that is a technique used and accepted in peer-  
3 reviewed publications?

4 A: So I think this gets back -- gets back to the  
5 -- I guess the reason why I almost wasn't  
6 called today, I had very little information to  
7 begin with and I was able -- I have no first-  
8 hand experience in the Kiawah River. I went  
9 and collected as much what I thought was  
10 reliable information as possible, enough in my  
11 opinion to give with reasonable certainty an  
12 opinion that -- that the building of that wall  
13 could lead to increased erosion, the lost of  
14 the stranding beach, and the loss of a primary  
15 feeding habitat for the strand feeding dolphins  
16 in this area so that they wouldn't have to  
17 change, adapt or move. So I -- within a  
18 reasonable certainty, I feel very comfortable  
19 making that comment. Would I like to, as a  
20 scientist, have more -- been able to collect  
21 more information, yes.

22 Q: You have been very patient, but I need to check  
23 with my partner. Isn't it correct that there  
24 are no peer-reviewed articles that indicate  
25 dolphins cannot adapt their behavior to find



1 new strand feeding sites?

2 A: Bottlenose dolphins are certainly known as an  
3 adaptable coastal species, so is it possible  
4 that if they had to move, they could find  
5 another site? Yes, it is a possibility.

6 Q: And, in fact, don't they engage in that same  
7 behavior as erosion changes the areas in which  
8 they live?

9 A: The natural system will change on a usually  
10 short time -- long time scale, and they can  
11 make adjustments. There are certainly  
12 catastrophic events which cause dramatic  
13 changes, which are oftentimes not benign to the  
14 local species. But I think one of the -- one  
15 of the tenants of any sort of a sustainable  
16 development is to do your best to avoid those,  
17 those kinds of large changes whenever expected.

18 Q: And isn't it correct that you cannot say to a  
19 reasonable degree of certainty whether these  
20 dolphins can adjust their feeding behavior or  
21 compensate in some other manner?

22 A: I cannot predict exactly how much they are able  
23 to adapt, if they are presented with the loss  
24 of an important feeding habitat. I cannot --  
25 no, I cannot quantify that.



1 Q: And if I understood you correctly earlier that  
2 if assuming hypothetically the entire area that  
3 you've described as the important eating area,  
4 generally around here, it would still leave the  
5 dolphins with their substantial feeding area  
6 around here, right (indicating)?

7 A: They -- if that happened, they would still have  
8 presumably the area on both sides of the inlet.  
9 Interestingly, the -- I think maybe this is a  
10 side thing, but the -- the NOAA study found  
11 that on the Kiawah side where they were  
12 educating the people to stand further back, the  
13 dolphins were stranding there. And where they  
14 were on the -- on the Seabrook side where they  
15 were close to the edge, the dolphins were not  
16 stranding as much. That said, with the right  
17 educational approach, you might still have a  
18 good stranding area there. However, I still go  
19 back to the fact from their study that most of  
20 the stranding occurred on the neck and so I  
21 would still say that they're taking a large  
22 enough hit to their foraging grounds that they  
23 would have to adapt or move.

24 Q: And did I understand you correctly that if we  
25 were to apply the same techniques that have



1           been used on the Kiawah side of the river to  
2           the Seabrook side, by teaching people to back  
3           off from the shore, that we would increase,  
4           following your logic, the feeding that occurs  
5           over there by dolphin?

6           A:    It's possible you might get a small increase  
7           there, yes.

8           Q:    Well, would there be a smaller increase than  
9           occurred when people were taught to step back  
10          on the Kiawah side or should you expect it to  
11          be the same?

12          A:    I don't -- I can't quantify that.    I don't  
13          think I have enough background information to  
14          approach that.    It's still -- both of those in  
15          combination are still less than the -- than the  
16          curve area and the stranding area.

17          Q:    Does more strand feeding occur during  
18          particular times of the year?

19          A:    There is a seasonal component.    The heaviest  
20          strand -- the most frequent strand feeding is  
21          in summer and fall.    It's pretty good in the  
22          winter; it's probably lowest in the spring.  
23          You've got a lot of juvenile fishes that have  
24          moved in and a lot of them really aren't up to  
25          eating size very well just quite yet.



1 Q: And so during that period of time do the  
2 dolphins adapt the amount of strand feeding  
3 they're doing and feed in other manners?

4 A: Undoubtedly, they are -- they are feeding in  
5 other ways. I would never assume that any  
6 dolphin was feeding 100 percent on the strand  
7 feeding. They're in a -- they're in a  
8 environment where they can -- where they can  
9 certainly try other techniques, but what tells  
10 me that strand feeding is important for them  
11 for a large part of the year is the amount of  
12 time that they are devoting to strand feeding,  
13 the portion of their day. There's only so  
14 much, so many hours in a day. And so it -- oh,  
15 I just lost my train of thought.

16 Q: I was just confirming that the dolphins adapt  
17 their feeding behaviors during different times  
18 a year as things change around them.

19 A: Ah, I know my train of thought. And correct,  
20 they will make a -- they will make adaptations.  
21 There will be some seasonal changes. I think  
22 you also have to think in terms of dolphins, or  
23 marine mammals in general, in terms of feeding  
24 of not necessarily the daily requirement, but  
25 monthly or seasonal or yearly requirements,



1 because these are species that are able to  
2 store fat in their blubber and lipid layers and  
3 blubber thickness changes seasonally. And so  
4 typically, at least our dolphins in South  
5 Carolina, the estuarine dolphins, come out at  
6 sort of the end of the winter a little bit  
7 depleted of food and so they may be able to  
8 overeat in one season to make up for another  
9 season.

10 Q: Okay. And just so I'm clear before we leave,  
11 there's not a single peer reviewed article  
12 examining the impact of a structure, like the  
13 one proposed in this project, upon a dolphin  
14 population, correct?

15 A: Well, before you said strand feeding  
16 population. Upon a dolphin population, I don't  
17 -- I'm not instantly aware of one, but so there  
18 may be.

19 Q: Is there such an article that has analyzed the  
20 impact of a structure like the one proposed in  
21 this project, upon strand feeding dolphins?

22 A: No, to my knowledge, there are -- well, there's  
23 several -- a number of earlier papers that  
24 mentions strand feeding essentially in the  
25 descriptive capacity. To my knowledge there's



1 really only four papers that have done any sort  
2 of experimental work, really actually one  
3 wasn't even published. Petricig's paper was a  
4 Ph.D. dissertation which he never published and  
5 -- which I feel was probably the best work  
6 done. Ours and two other studies have sort of  
7 asked hypotheses, so there's really only about  
8 four studies on -- that they're experimental  
9 on strand feeding dolphins.

10 Q: And so none of those four studies address the  
11 impact of a structure like the one in this  
12 project on strand feeding dolphins, correct?

13 A: That is correct.

14 Q: And there are no citizen science articles  
15 addressing the impact of a structure like the  
16 one in this project upon strand feeding  
17 dolphins, correct?

18 A: None that I'm aware of.

19 Q: I think that's it. You've been very patient.  
20 Thank you so much.

21 A: Thank you.

22 **THE COURT:** Mr. Churdar?

23 **MR. CHURDAR:** Mr. Gressette covered it all.

24 **THE COURT:** Any re-direct on new questions, new  
25 issues?



1 MS. WHITE: Very briefly, Your Honor.

2 DR. YOUNG - RE-DIRECT EXAMINATION BY MS. WHITE:

3 Q: Dr. Young, you were talking about the  
4 possibility that dolphins -- the strand feeding  
5 dolphins in the Kiawah River could adapt or  
6 move, is that an impact to have to adapt or  
7 move?

8 A: Yes, that would be considered an impact.  
9 Certainly, ecologically it's an impact.  
10 Whenever anything has to adapt or move, as I  
11 said before, they either succeed or they don't.  
12 And if they don't, they won't survive. And if  
13 they do, they will. Also, from a legal  
14 standpoint this being a protected species,  
15 probably another level if you are causing a  
16 change to a local population and their behavior  
17 and location.

18 Q: Is it possible that -- is it possible that a  
19 strand feeding group wouldn't be accommodated  
20 into a new strand feeding group?

21 A: I don't know that I can speak to that  
22 specifically. I think that they don't have to  
23 be accommodated into another group. They can  
24 set off and still try to do their own thing  
25 somewhere. They can try to join up with other



1 dolphins. They could abandon strand feeding  
2 and take on something else or all of which are  
3 cases where they might succeed or not succeed.  
4 I think if -- in terms of other interactions,  
5 if, you know, the Marine Mammal Protection Act  
6 talks about if a dolphin is caught in a crab  
7 pot line or gear or something like that, that  
8 is a take ---

9 **MR. GRESSETTE:** Your Honor ---

10 **THE COURT:** One second, I'm sorry.

11 A: --- and so ---

12 **MR. GRESSETTE:** He's about to give us a legal  
13 conclusion. I also think it is outside the  
14 scope of cross. I never talked to him about  
15 any laws or legal protection.

16 **MS. WHITE:** That's fine, Your Honor. I don't ---

17 A: That's fair. I won't make a legal proclamation  
18 of their steps.

19 Q: Other than speaking about the Marine Mammals  
20 Protection Act, were you finished with your  
21 response to that question? I don't want to  
22 interrupt you if you weren't done.

23 A: I was just saying that in an entanglement  
24 setting or something like that, that would be  
25 a take. When we do photo ID, I have a federal



1 permit to approach these dolphins because  
2 otherwise it's harassment, so I have a federal  
3 permit to harass dolphins and follow them  
4 around and take pictures. Technically  
5 reported, one of those is a take. So it gives  
6 you sort of a sense of the attention on messing  
7 with dolphins at the level of the Marine Mammal  
8 Protect Act, then ---

9 **MR. GRESSETTE:** Your Honor, again ---

10 **THE COURT:** I sustain that.

11 **MR. GRESSETTE:** I move to strike the answer.

12 **THE COURT:** Any response?

13 **MS. WHITE:** I guess I would just ask that the only  
14 portion that would be struck would be  
15 specifically related to ---

16 **THE COURT:** Marine Mammal Protection Act?

17 **MS. WHITE:** Or once he started getting into the  
18 testimony about a take, I think.

19 **THE COURT:** Okay.

20 **MS. WHITE:** We kind of crossed that line.

21 **THE COURT:** Okay. I'll strike from that point on.

22 Q: So the original question was backing up to  
23 adapting and moving and whether or not strand  
24 feeding -- a group, a resident group that  
25 strand feeds in a particular area might be able



1 to move and be accommodated in another area.

2 **MR. GRESSETTE:** Asked and answered, Your Honor.

3 **THE COURT:** Asked and answered? The question is or  
4 the issue is is it a new issue or -- are you  
5 saying she's already asked?

6 **MR. GRESSETTE:** I'm saying that's the same question  
7 she just asked him and he answered it.

8 **THE COURT:** Oh, oh, I'm sorry. I missed that.

9 **MR. GRESSETTE:** I apologize. And it probably is  
10 also outside the cross.

11 **MS. WHITE:** I mean, I specifically wrote down adapt  
12 or move based on questions that Mr. Gressette  
13 was asking, but.

14 **THE COURT:** Well, have you already asked that  
15 question?

16 **MS. ARMSTRONG:** Yes.

17 **THE COURT:** Okay. The answer is -- the objection's  
18 sustained.

19 **MS. WHITE:** That's all I have.

20 **MR. GRESSETTE:** Nothing further, Your Honor.

21 **THE COURT:** All right. You may step down.

22 A: Thank you.

23 **(The witness was excused.)**

24 **THE COURT:** Are we through for the day?

25 **MS. ARMSTRONG:** I mean, it's 5:27. I presume that



1 we are through for the day.

2 **THE COURT:** Okay. Well, with me, you shouldn't have  
3 to presume that. It looks like a good breaking  
4 point.

5 **INSTRUCTIONS BY THE COURT:**

6 **THE COURT:** I will tell y'all, I hate to -- this is  
7 the worst I've ever been on asking people to  
8 brief evidentiary issues, but on this one, as  
9 it stands now, I just don't under- -- I mean --  
10 well, let me just put it this way. It appears  
11 to me that it would not be proper from a gate  
12 keeping standpoint to allow the experts to rely  
13 upon -- not NOAA, but who's the other person?

14 **MS. FAIR:** Captain Hayes.

15 **THE COURT:** Who?

16 **MS. FAIR:** Hayes.

17 **THE COURT:** Yeah. Captain Hayes. That -- as far as  
18 NOAA, I'm not so sure. I'll have to -- I need  
19 to think about that more. But I will say the  
20 struggle for me was and I think I went to the  
21 -- I even told the petitioners how you could go  
22 about getting this evidence in via a  
23 hypothetical by relying upon that which was  
24 already in evidence and you chose not to. But  
25 that was your choice. I mean, I recognize



1 that. But certainly, I think I would have  
2 taken a different tact in this regard if you'd  
3 done that, but that's -- if y'all could, in the  
4 proposed order, brief that, this issue,  
5 regarding whether this was reliable in light of  
6 what I said. And Mr. Churdar I'll hear your  
7 position, too. All right. Thank y'all very  
8 much. What time are we going to resume  
9 tomorrow? Ms. Armstrong?

10 **MS. ARMSTRONG:** I'm sorry, we just -- I guess we  
11 understood that his testimony -- since Chad  
12 Hayes testified and was in the courtroom and  
13 you referred to Chad Hayes and what he said he  
14 saw and observed, we believe that we got that  
15 link, was there. I mean, it's in -- it is in  
16 evidence.

17 **THE COURT:** Well, you can look at the record. I  
18 listened for it and I never heard it, via  
19 questioning in a hypothetical standpoint, which  
20 is the normal procedure for that to be done.  
21 And much of what he relied upon Captain Hayes  
22 was not that which Captain Hayes testified to,  
23 but he did not -- I never heard -- he said he  
24 relied upon conversations with Captain Hayes.  
25 So y'all look at the record and brief that, but



1           how about tomorrow, what time? 9:00?

2   **MS. ARMSTRONG:** Can we start at 9:30? We've got a  
3           witness that's coming in from a distance.

4   **THE COURT:** Well, are we still on path to ---

5   **MS. ARMSTRONG:** Yeah, I think we're fine. I don't  
6           think half an hour's going to ...

7   **THE COURT:** Okay. Are y'all okay with that?

8   **MR. WALKER:** Sure, Your Honor.

9   **THE COURT:** All right, so 9:30, it is. Thank you.

10   **MR. GRESSETTE:** Thank you, Judge.

11   **(DAY TWO of the hearing adjourned at 5:30 p.m.)**

12   **DAY THREE - WEDNESDAY, AUGUST 23, 2017. The hearing**  
13   **reconvened at 9:34 a.m.)**

14   **COURT REPORTER:** All rise.

15   **THE COURT:** Be seated. Thank you. Y'all ready?

16   **PRELIMINARY MATTERS/ISSUES:**

17   **MS. WHITE:** Good morning, Your Honor. The  
18           petitioners would like to take care of a  
19           preliminary issue.

20   **COURT REPORTER:** Please speak up. I'm sorry, I can  
21           barely hear you.

22   **MOTION TO ADMIT PETITIONER'S EXHIBIT NUMBERS 30 AND**  
23   **31:**

24   **MS. WHITE:** Petitioners would like to take care of a  
25           preliminary issue to admit a couple of original



1 copies of depositions. They're Petitioner's  
2 Exhibit Numbers 30 and 31. They are the  
3 30(b)(6) depositions of the Department's  
4 witnesses, Rheta DiNovo and Shannon Hicks.

5 **THE COURT:** Rheta DiNovo?

6 **MS. WHITE:** DiNovo, D-I-N-O-V-O.

7 **THE COURT:** Oh, okay. It's a de novo hearing.

8 **MR. WALKER:** She reinvented herself.

9 **THE COURT:** She could be re-heard over and over.  
10 Okay. Any objection?

11 **MR. WALKER:** We'd like to know why they're being  
12 admitted. These individuals are going to be  
13 testifying as I understand it. Are they going  
14 to testify?

15 **MR. CHURDAR:** Well, I think Shannon Hicks probably  
16 will, but I had not intended to call Rheta  
17 DiNovo.

18 **MR. WALKER:** Was she taken as a 30(b)(6) deponent or  
19 an individual?

20 **MS. WHITE:** They were both 30(b)(6) deponents and  
21 under Rule 32(a)(2), it allows an adverse  
22 party to use 30(b)(6) deponent depositions for  
23 any purpose.

24 **MR. WALKER:** So you are putting in Ms. DiNovo and  
25 Ms. Hicks' deposition in their entirety?



1 MS. WHITE: Yes.

2 MR. WALKER: All right. Well, if they are -- was  
3 Ms. DiNovo's taken as a 30(b)(6), too?

4 MS. WHITE: They were both 30(b)(6), yes.

5 MR. WALKER: We're just checking that, Your Honor.  
6 Is it your intent to publish portions of it now  
7 or just to put them in the record now?

8 MS. WHITE: We're just moving them into evidence.

9 MR. WALKER: Okay.

10 MS. ARMSTRONG: I can tell y'all, I will read a  
11 portion probably during Mr. Joyner's  
12 examination.

13 MR. WALKER: Well, that's fine. You're entitled to  
14 cross-examine him on it. I just didn't know if  
15 you were going to separately publish portions,  
16 in which event we may want to publish other  
17 portions. But if you're just going to examine  
18 him on it, we don't -- that's your work  
19 product, whatever you want to do.

20 THE COURT: I've seen all kinds of ways on  
21 30(b)(6)s.

22 MR. WALKER: I'm sorry, Ms. -- Jessie, could you  
23 tell me again which is the Rule you're  
24 referring to that it can be used for any  
25 purpose?



1 MS. WHITE: 32(a)(2).

2 MR. WALKER: And that's an admission?

3 MS. WHITE: It's the use of depositions in court  
4 proceedings.

5 MR. GRESSETTE: Civil Rules.

6 MS. WHITE: Civil Rules of Procedure.

7 THE COURT: Yeah, 32(a)(2).

8 MR. WALKER: All right. The only reservation or  
9 objection we have is that it is subject to any  
10 objections that were lodged ---

11 THE COURT: Correct.

12 MR. WALKER: --- at the time of the deposition and  
13 we have not been through -- we assume that The  
14 Court would be aware of those and we would like  
15 the chance -- we're not then objecting to their  
16 entry into evidence, but we would like to  
17 reserve an opportunity to go through and see if  
18 we want to bring to The Court's attention any  
19 of the objections made in the deposition.

20 THE COURT: And that's proper.

21 MR. WALKER: Thank you, Your Honor.

22 **RULING OF THE COURT:**

23 THE COURT: So they're admitted subject to your  
24 review of the objections and bringing that to  
25 my attention?



1 MR. WALKER: Correct.

2 THE COURT: Any problem with that?

3 MS. WHITE: No, none whatsoever.

4 THE COURT: Mr. Churdar?

5 MR. CHURDAR: That's fine.

6 THE COURT: Okay. Are they already marked?

7 MS. WHITE: They are not marked. 30 and 31.

8 (Petitioner's Exhibit Numbers 30 and 31 were marked  
9 for identification purposes and admitted as  
10 evidence.)

11 MS. WHITE: She's finished.

12 THE COURT: Proceed.

13 MS. ARMSTRONG: Thank you, Your Honor. We have a  
14 couple other preliminary matters that we'd like  
15 to address before we put our first witness up.

16 MOTION TO INTRODUCE PROFFERED TESTIMONY OF DR. WHIT  
17 GIBBONS:

18 MS. ARMSTRONG: And the first is the petitioners  
19 move to introduce the testimony of Dr. Whit  
20 Gibbons that was proffered yesterday. The  
21 basis of that motion is that there is no  
22 limitation on pre-hearing statements. A  
23 party's not limited to claims prevented in pre-  
24 hearing statements. The only case in South  
25 Carolina discussing pre-hearing statements and



1 the Administrative Law Court and construing  
2 them is the Sierra Club, Chem Nuclear v. Sierra  
3 Club. I went back and read that case  
4 yesterday. I was counsel on that case and  
5 argued it. What DHEC argued to the Court was  
6 that ---

7 **THE COURT:** Can you hold on a second and let me pull  
8 that up?

9 **MS. ARMSTRONG:** Sure.

10 **THE COURT:** All right. Give me the cite so I can  
11 just get a quick look.

12 **MS. ARMSTRONG:** The cite for that case?

13 **THE COURT:** Yes, ma'am.

14 **MS. ARMSTRONG:** I'll have to pull it up on my phone.

15 **THE COURT:** Well, I can ---

16 **MS. ARMSTRONG:** Because I didn't actually write the  
17 site down. Let's see ---

18 **THE COURT:** Well, I'm already there.

19 **MS. ARMSTRONG:** Okay.

20 **THE COURT:** Sierra Club v. Kiawah Resorts ---

21 **MS. ARMSTRONG:** No.

22 **THE COURT:** No, no, no, that's not it.

23 **MS. ARMSTRONG:** 387 S.C. 424. 387 S.C. 424.

24 **MR. CHURDAR:** 484?

25 **MS. ARMSTRONG:** 424.



1 THE COURT: 24.

2 MR. CHURDAR: Okay.

3 MS. ARMSTRONG: And in that case, Your Honor, may I  
4 proceed?

5 THE COURT: One moment. Give me a second to get it.

6 MS. ARMSTRONG: Okay.

7 THE COURT: All right. You can proceed. I will  
8 tell you, I was going to have y'all brief this  
9 in your proposed orders, but, I mean, if you  
10 want to go ahead and address it now, I'll see  
11 if I can make a decision.

12 MS. ARMSTRONG: I mean, the problem that that leaves  
13 us with is that Dr. Gibbon's testimony is not  
14 in evidence, it's still a proffer.

15 THE COURT: Okay.

16 MS. ARMSTRONG: And we'd like to have it in  
17 evidence.

18 THE COURT: I understand that.

19 MS. ARMSTRONG: Yeah, and so, if I may go ahead and  
20 argue my motion.

21 THE COURT: Yeah.

22 MS. ARMSTRONG: What happened in the Chem Nuclear  
23 case is that DHEC argued that Sierra Club could  
24 not advance arguments under two specific  
25 regulatory provisions because they were not



1 raised in Sierra Club's pre-hearing statements,  
2 section 7.11 and 7.23 of the radioactive waste  
3 regulations, the entire regulation. I don't  
4 know if Your Honor recalls this because you did  
5 hear the case on remand ---

6 **THE COURT:** Yeah, yeah.

7 **MS. ARMSTRONG:** --- those regulations are dense.  
8 They are long; there's lots of them. They're  
9 similar to the Coastal Management Program.  
10 Sierra Club raised generally compliance with  
11 those regulations. The Court of Appeals  
12 rejected the notion that a party is limited to  
13 claims raised in its pre-hearing statement.  
14 The Court of Appeals rejected the notion that  
15 there needs to be an extreme level of  
16 specificity in raising issues in a pre-hearing  
17 statement the petitioner brings to the  
18 Administrative Law Court. And The Court said  
19 that he raised overall compliance, that that's  
20 to be construed broadly if you raise a question  
21 of overall compliance, which has been done in  
22 this case, we've raised overall compliance with  
23 the Coastal Management Program. Now, that  
24 being the only case that construes pre-hearing  
25 statements, we looked a little bit further to



1 see if we could find any other cases that would  
2 be relevant and what we found is that there are  
3 two ALC cases that were heard by the Court of  
4 Appeals, Myers v. DHHS, that's 418 S.C. 608,  
5 and Stogsdill v. ---

6 **THE COURT:** Wait a second. Let me make sure Harvin  
7 gets those. Do it again, Myers ---

8 **MS. ARMSTRONG:** Myers v. Department of Health and  
9 Human Services, 418 S.C. 608.

10 **THE COURT:** Okay.

11 **MS. ARMSTRONG:** And Stogsdill v. DHHS, Department of  
12 Health and Human Services, 410 S.C. 273. Now,  
13 those cases are different from agency appeals  
14 of DHEC approvals. They're under the statute,  
15 DHHS has a statutory requirement that whenever  
16 they reduce a Medicaid award, which is what  
17 these two cases both involve, a reduction in a  
18 Medicaid award to a petitioner, and the statute  
19 requires that in order for DHHS to initiate  
20 that Medicaid reduction, the Court -- DHHS is  
21 required to cite specific regulations under  
22 which the reduction decision is made. In both  
23 of those cases, DHHS did not provide notice in  
24 either case, did not identify the specific  
25 regulatory provisions which it utilized in



1 reducing the Medicaid awards, and despite the  
2 fact that DHHS did not provide that notice and  
3 petitioners argued that the failure to cite  
4 those specific provisions as required by  
5 statute, which we don't have here, prejudiced  
6 them. So they asked the Court to reject the  
7 reduction in award for failure to cite specific  
8 provision -- provisions. And the Court of  
9 Appeals in both cases rejected that DHHS'  
10 failure to identify with specificity the  
11 regulatory provisions it relied on, it  
12 concluded that petitioners had received  
13 significant notice of the basis of the  
14 reduction in awards and allowed the cases to  
15 proceed. Chem Nuclear is certainly specific to  
16 the Administrative Law Court procedures, but  
17 it's also consistent with what courts, South  
18 Carolina courts have held more broadly in civil  
19 procedure cases, that a plaintiff need only  
20 provide enough detail to give fair notice of  
21 his claims. And I would note for the Court as  
22 far as fair notice of the claims, we've been --  
23 the petitioner has been very forthcoming in  
24 identifying the witnesses that are going to  
25 testify and what they're going to testify on



1 and there's been extensive discovery on those  
2 issues. There is -- there has been plenty of  
3 notice and opportunity for discovery. That  
4 part is met. The Court in -- I've got another  
5 cite, I don't know that they're all necessary,  
6 but the purpose of the pleading is fair notice  
7 to the opponent in a court. In Patton v. --  
8 well, let' see, Russell -- I've got a lot of  
9 different cases that interpret the Rules of  
10 Civil Procedure. Russell v. City of Columbia,  
11 305 S.C. 86, the Court talked about -- did you  
12 get that, Harvin? The Court talked about the  
13 purpose of the pleadings is to ensure  
14 substantial justice to a party and, in doing  
15 so, the pleadings must be liberally construed.  
16 More recently, in Patton v. Miller, the Court  
17 noted that there's been a change in the  
18 pleadings such that we operate now under a more  
19 flexible pleading provision of the Rules of  
20 Civil Procedure. And quoting, Professor  
21 Flannagan said the purpose of the rules is to  
22 secure justice and, consequently, they reduced  
23 the formalities and technicalities. Now, while  
24 that -- the Rules of Civil Procedure don't  
25 apply because pre-hearing statements aren't a



1 pleading, they haven't been interpreted by any  
2 appellate court to be a pleading. They're  
3 still instructive, but the courts have  
4 interpreted and, in particular, the Court of  
5 Appeals in Chem Nuclear, as that requirement in  
6 -- of pre-hearing statements to identify issues  
7 has been construed very broadly. And for those  
8 reasons, we assert the compliance with the  
9 Coastal Management Program raises a lot of the  
10 different issues. There's been plenty of  
11 notice with these witnesses and the scope of  
12 their testimony has been fully disclosed.  
13 They've been deposed on the impacts that we  
14 have -- are attempting to present.

15 **THE COURT:** One second.

16 **MS. ARMSTRONG:** Okay.

17 **THE COURT:** Go ahead.

18 **MS. ARMSTRONG:** Basically, in sum, we believe Chem  
19 Nuclear is controlling, directly on point, but  
20 the other cases that I cited also provide  
21 plenty of support for the notion that our  
22 courts are treating pleadings with flex --  
23 great flexibility in how issues are raised and  
24 the specificity that's needed.

25 **THE COURT:** The order for pre-hearing statements ---



1 **MS. ARMSTRONG:** Uh-huh.

2 **THE COURT:** --- it sets forth as number two and  
3 three. Two is the statutory provisions  
4 conferring subject matter jurisdiction, which  
5 you set forth. And then it says number three,  
6 the issues presented for determination.  
7 Including any claims or defenses expected to be  
8 raised. Therefore, there is an order of the  
9 Court telling the parties to present whatever  
10 issues that you -- that you believe are  
11 necessary for determination. And what brought  
12 forth my concern when they were setting forth  
13 this is you were very specific in your -- so I  
14 ordered that that occur and then pursuant to  
15 that order, you start a section that says  
16 issues -- issues presented for determination,  
17 you're basically quoting my order. And then  
18 you say whether the proposed project violates  
19 the following provisions of the South Carolina  
20 Coastal Zone Management Act and CMP. So you  
21 refer to both the Management Act and CMP and  
22 you list in specific instances. And that's  
23 where I was -- why I wanted to do research.  
24 And the Court ordered specific issues and so  
25 actually, I analogized the pleadings because I



1 thought that was -- but in this instance, it's  
2 probably a little more specific than that. But  
3 so can you respond to all that?

4 **MS. ARMSTRONG:** Yeah, absolutely. There is nothing  
5 -- the word specificity is certainly not in the  
6 Court's -- in the order for pre-hearing  
7 statements.

8 **THE COURT:** Okay.

9 **MS. ARMSTRONG:** That's not -- word's not there. And  
10 there's no requirement to identify the specific  
11 provisions that we're utilizing. It's  
12 generally the issues that are presented. And  
13 that's generally what we've done. I mean, the  
14 fact that we have listed some specific  
15 provisions and some general provisions isn't --  
16 I mean, what the Court said is you don't --  
17 you're not -- you construe them broadly. You  
18 don't require ---

19 **THE COURT:** Well, I agree with that.

20 **MS. ARMSTRONG:** You don't require the specificity  
21 and so -- and the Court hasn't asked for  
22 specificity. There's nothing that says that  
23 there are specific provisions that need to be  
24 presented to the Court, nothing about any sort  
25 of specificity or any particular provisions



1 that we're relying on. We -- that's why we set  
2 them forth in the provisions that are  
3 conferring jurisdiction to the Court.

4 **THE COURT:** Okay. All right. Any response?

5 **MR. CHURDAR:** Your Honor, I did not realize we were  
6 going to be addressing this this morning, so  
7 I'm ---

8 **THE COURT:** Well, if you're not prepared, I'll -- I  
9 think you're the one that made the objection to  
10 begin with, so you started the ball rolling.  
11 But I ---

12 **MR. CHURDAR:** That's ---

13 **THE COURT:** But, I mean ---

14 **MR. CHURDAR:** I'm just saying to the extent that she  
15 is quoting cases that I'm trying to read as  
16 she's talking ---

17 **THE COURT:** Okay. Well, do y'all wish to take a  
18 break, because I wouldn't mind doing a little  
19 bit of -- I mean, I don't want to put you ---

20 **MS. ARMSTRONG:** No, that's fine. It's just Mr.  
21 Churdar made a motion and we didn't know about  
22 it.

23 **THE COURT:** I know that.

24 **MS. ARMSTRONG:** And we had to respond to it, so ---

25 **MR. CHURDAR:** Okay. I'll respond.



1 **THE COURT:** I was going to take a break for my own  
2 benefit.

3 **MS. ARMSTRONG:** I'm fine taking a break, Your Honor.

4 **THE COURT:** Go ahead. Go ahead.

5 **MR. CHURDAR:** Well, a couple of things. Your Honor,  
6 the technical review summary that Mr. Joyner  
7 presented with regard to the section on  
8 Wildlife and Fisheries Management has no  
9 analysis in it and that's the section that Ms.  
10 Armstrong is trying to say that provides a  
11 basis for Dr. Gibbons to be testifying to.  
12 That issue has not been brought up by either  
13 party in this case. It's not really an issue  
14 that's -- that is encompassed in the CZC  
15 certification.

16 **THE COURT:** All right. So I can understand. Your  
17 objection was (a) to not being told about it,  
18 as I remember; but (b) you're also arguing that  
19 it's -- that even if you were told, it's not an  
20 issue before the Court?

21 **MR. CHURDAR:** That's correct.

22 **THE COURT:** Okay.

23 **MR. CHURDAR:** That's correct. And to the extent  
24 that I'm going to address Chem Nuclear, first  
25 of all, I was not one of the counsel in that



1 case as Ms. Armstrong was and I have just  
2 briefly looked at it so I would just -- I  
3 probably should not even jump into addressing  
4 cases because I was not expecting that this  
5 would be the hearing started.

6 **THE COURT:** Well, I know, I said otherwise, but I'd  
7 like -- I do want to hear from you at this  
8 point.

9 **MR. CHURDAR:** Okay. So, I mean, so that -- I mean,  
10 that's the first issue that the scope in which  
11 she is trying to shoehorn his testimony as  
12 being relevant is not even an issue that's  
13 before the Court, the Wildlife and Fisheries  
14 Management policy analysis or assessment. So,  
15 you know, I would continue to argue the  
16 position that I made yesterday. Specifically  
17 regarding Chem Nuclear, it appears to me in  
18 looking at page 432 of that opinion, when the  
19 Court says chem Nuclear and DHEC argue Sierra  
20 Club's first issue is not preserved for review.  
21 It appears that they're talking about appellate  
22 review. It says specifically, respondents  
23 maintain that Sierra Club failed to raise in  
24 those sections that Ms. Armstrong mentioned,  
25 7.11 and 7.23 in its pre-hearing statement and



1 never amended it. In support of its assertion,  
2 Chem Nuclear cites McNeeley. And then they go  
3 on to say the only pertinent section of the  
4 McNeeley opinion states that the estoppel issue  
5 argued by appellate in its brief was not made  
6 by the pleadings, nor raised in the exceptions  
7 accordingly. The issue is not before the  
8 Court. I'm sorry, I just -- I had a citation  
9 that I was wanting to give the Court. Okay.  
10 And then it goes on in the next paragraph, top  
11 of -- bottom of page 432 citing Brown v. DHEC,  
12 issues not raised to rule on by the ALC are not  
13 preserved for appellate consideration.  
14 Therefore, we must determine whether this issue  
15 was properly before the ALC. I mean, that's my  
16 initial take as I'm reading it is this is an  
17 issue on preservation before the appellate  
18 courts, not before -- for this Court. But ---

19 **THE COURT:** Well, you went to the point, just my  
20 interpretation of Sierra Club is they're  
21 addressing issue preservation, but in order to  
22 preserve the issue, you have to bring it before  
23 The Court. So there is a sub issue of whether  
24 that issue was properly placed before The  
25 Court. If you don't place it before The Court,



1 you can't bring it up on appeal. So both  
2 issues are going on at the same time because  
3 they are necessarily to be -- under the  
4 necessary nexus, I'll go with that phrase, in  
5 order for it to occur. Now, Ms. Armstrong is  
6 arguing that there is much greater latitude to  
7 presenting the issues both here and in the pre-  
8 hearing statements and therein lies her  
9 argument.

10 **MR. CHURDAR:** Right, and Your Honor, to the extent  
11 that -- I mean, my belief is that the Court's  
12 suggestion is to briefing this and proposed  
13 final orders would be the, legally the sound,  
14 most sound way to do it and that way the -- I  
15 don't believe that there would be any prejudice  
16 one way or the other. The Court has already  
17 heard it, so you can make your evaluations as  
18 you read the proposed orders, so.

19 **THE COURT:** Yeah. I'll hear from y'all. I don't  
20 know who's going to argue this.

21 **MR. GRESSETTE:** Your Honor, I think that our  
22 position echoes that of DHEC, which is when the  
23 case began by DHEC analysis, this fishery  
24 section was not mentioned, was not analyzed.  
25 When this case was presented to the Court, that



1 section was not mentioned. When we came to  
2 court to address the sections that were  
3 mentioned, in order to get the evidence in,  
4 petitioner needed to rely on a specific  
5 section, which they're attempting to do by a  
6 broad sweeping generalization to the entire  
7 program document. To follow that argument  
8 would be that anything's fair game. And so it  
9 seems logical that the issue be -- that the  
10 specific provision be articulated. To that  
11 extent, we want the record to be as clean and  
12 clear as it possibly can be for future issues.  
13 So I am not stringently asserting our position.

14 **THE COURT:** Okay. Well, Ms. Armstrong, my struggle  
15 now is even if I were to agree with you on the  
16 pre-hearing statement issue, you have made no  
17 argument regarding the second issue. Mr.  
18 Churdar's raising two issues. One is whether  
19 it was -- if it's been an issue raised before  
20 the Court and, secondly, his argument is that  
21 this issue that you're raising now or the claim  
22 by which you believe that the evidence may come  
23 in is not a legal claim that can be before the  
24 Court. And that is still an issue that I would  
25 like briefing on. I agree, I'd like to keep



1 the record clean, but I think the record can be  
2 clean in this regard and it's proper. If  
3 something else comes in regarding this same  
4 subject matter, I can treat it in the same  
5 proper manner and then I can ultimately make a  
6 determination in my final order. I don't  
7 understand where you're -- I mean, I intend --  
8 if I find in your favor, that all this will  
9 come in and will be considered, so I'm not  
10 attempting to preclude consideration of this  
11 issue by any means. I very well may find in  
12 your favor. I'm just trying to -- Mr.  
13 Churdar, I think he said, the sound -- I think  
14 the better word would be I'm trying to be wise.  
15 But I'm throwing all that out ---

16 **MS. ARMSTRONG:** Sure.

17 **THE COURT:** --- for you to respond.

18 **MS. ARMSTRONG:** No, I thank you, Your Honor, I  
19 appreciate that. And I think that -- let me  
20 just back up to one of your first comments. I  
21 mean, you noted exactly the way we perceive the  
22 issues in Chem Nuclear. There are two different  
23 issues, right, there's the appellate review  
24 preservation issue and there's also was it even  
25 properly before the ALC.



1 **THE COURT:** Yeah.

2 **MS. ARMSTRONG:** And the Court of Appeals' ultimate  
3 holding on that matter is that a party's not  
4 limited to claims in its pre-hearing statement.  
5 And if that's true on appeal, then that's true  
6 in the Administrative Law Court. So I'm going  
7 to move on to the next part.

8 **THE COURT:** No, I want to stop you because I want to  
9 -- before you move onto the next part. One of  
10 the considerations that I had when I read  
11 Sierra Club is that I agreed if a party's going  
12 -- and just stated general what the issues for  
13 determination are, and the individuals on this  
14 side don't make a motion and -- we've had these  
15 motions now, since then, where lawyers are now  
16 making motions for more specificity in pre-  
17 hearing statements. And we've dealt with those  
18 motions. So I see Sierra Club in the light  
19 that you just said because if you make that  
20 general statement and they just sit on it and  
21 allow a broad sweeping determination and don't  
22 do anything, you know, that's their problem.  
23 And I certainly agree with that. But when you  
24 make it sufficiently specific and then they  
25 rely upon that specificity, then I view that



1 differently. I throw that out for you to  
2 respond.

3 **MS. ARMSTRONG:** Sure. Well, the facts show that  
4 they didn't rely on it, that's the point,  
5 because there were depositions taken. We  
6 disclose that there would be witnesses  
7 testifying about wildlife impacts specific to  
8 those policies that we pointed the Court to on  
9 Monday. I mean, that's the whole idea. They  
10 can't say that they relied on this strict -- a  
11 strict limitation because we've raised a lot of  
12 issues that have been discussed in cross --  
13 done discovery on and depositions on multiple  
14 witnesses. So, I mean, that's -- that would be  
15 my response. I mean, you're trying to prevent  
16 -- trying to ensure that there's no guess to  
17 the heart of what the issues are and I don't  
18 think there can be any argument that there was  
19 no notice about what the issues are. There  
20 have been issues all along about impacts to  
21 terrapins, impact to dolphins, impacts to  
22 wildlife as a result of this project. So there  
23 hasn't been a reliance on some sort of strict  
24 limitation and I think that would have been  
25 improper anyway under Sierra Club. Department



1 had already tried to do that one time and  
2 restrict a party to a pre-hearing statement and  
3 read it very narrowly and the Court said no.  
4 The Department should have been aware of that  
5 because they were the party that was trying to  
6 strictly construe the pre-hearing statement  
7 themselves. Now, with respect to Mr.  
8 Gressette's arguments that this is a  
9 generalization, I mean, raising compliance with  
10 the Coastal Management Program, I don't call  
11 that a generalization because it's a specific  
12 certification decision and it's the same thing  
13 as what happened with the radioactive nuclear  
14 waste regulations. And we are raising overall  
15 compliance and there are a whole lot of  
16 policies that apply, just like there were a  
17 whole lot of regulations that apply. Not every  
18 single one of them was raised in Sierra Club  
19 and not every single one of them was raised in  
20 the pre-hearing statement. There are  
21 definitely issues that we intend to try before  
22 the Court. This is a de novo review. I  
23 understood Mr. Churdar's other part of his  
24 argument to be that the Court is constrained to  
25 only look at the policies that the Department



1 raised in their decision document. And this  
2 Court, you know full well, Your Honor, you've  
3 issued many opinions that talk about the de  
4 novo review that this Court has. So this Court  
5 doesn't look just at what DHEC did, the Court  
6 looks at everything. That's why we're here and  
7 we have a full blown trial. We present  
8 evidence that maybe the Department wasn't aware  
9 of, maybe the Department did consider, didn't  
10 consider, all of those issues are now before  
11 you to decide whether there was compliance.  
12 The problem that we have with waiting ---

13 **THE COURT:** Yeah, I want to hear that.

14 **MS. ARMSTRONG:** --- to brief this is that how -- or  
15 to submit proposed orders is that, you know, we  
16 would like -- we would want to know when we're  
17 writing the proposed order whether that  
18 testimony is in evidence or not. I mean, it's  
19 really hard to write a proposed order if you've  
20 got -- you're unsure about how the Court's  
21 going to be treating that testimony. It puts  
22 us in a really unusual awkward position to try  
23 and draft a proposed order not knowing what the  
24 evidence is.

25 **THE COURT:** Wouldn't that be true with any proposed



1 order? I mean, wen you submit a proposed  
2 order, you do not know if the Court is going to  
3 find your witnesses' testimony credible.

4 **MS. ARMSTRONG:** We don't know ---

5 **THE COURT:** So let me finish that up. I interrupt  
6 you a lot, so I understand you trying to  
7 interrupt me ---

8 **MS. ARMSTRONG:** I'm sorry, Your Honor.

9 **THE COURT:** No, no, you get a brownie point for that  
10 one. But just from the perspective of  
11 presenting any proposed order, you never know  
12 what the Court is going to -- how the Court's  
13 credibility determinations are going to come  
14 down upon any witness or any testimony. So I  
15 don't see that as a distinction in any -- that  
16 is any different than any other proposed order.

17 **MS. ARMSTRONG:** I think the distinction between  
18 admissibility and weight is chasms large. I  
19 mean, you're right, we don't know how much  
20 weight you're going to give a piece of evidence  
21 that is in evidence.

22 **THE COURT:** Well, weight can go from ---

23 **MS. ARMSTRONG:** Zero to 100.

24 **THE COURT:** I know that, and the zero part is the  
25 part in my mind, but go ahead.



1 **MS. ARMSTRONG:** Sure. So it's certainly true that  
2 the Court can give it a lot of weight or no  
3 weight. But if it's not in evidence, then we  
4 can't argue about what weight to even give it  
5 because it's not in evidence. I mean, from our  
6 perspective, it's prejudicial to preclude, to  
7 basically exclude, you're exclude -- to make a  
8 decision to exclude testimony before we -- when  
9 we're in the process of writing a proposed  
10 order trying to argue to this Court why the  
11 Court should give a lot of weight to testimony  
12 that's not even in evidence.

13 **THE COURT:** All right. I'll have to take a break  
14 and think about this. You still never argued  
15 the other point.

16 **MS. ARMSTRONG:** Which other?

17 **THE COURT:** That Mr. Churdar set forth that this is  
18 not even an issue before the Court even if it  
19 was raised.

20 **MS. ARMSTRONG:** I thought that I -- I thought there  
21 was an argument that it wasn't because it  
22 wasn't contained in the Department's decision  
23 document, that's why it's not before the Court.  
24 Did I misunderstand?

25 **THE COURT:** I thought -- maybe I'm combining what he



1 said today and what he said earlier, but I  
2 remember he argued that the reg that you cited  
3 was one that was in another aspect of the CMP  
4 that is not a part of the CMP that would be  
5 considered. Can you refresh my memory on that?  
6 Maybe I'm wrong ---

7 **MR. CHURDAR:** That's correct.

8 **THE COURT:** Okay.

9 **MR. CHURDAR:** No, I mean, when the Coastal Zone  
10 Consistency Certification decision was being  
11 made, Mr. Joyner ---

12 **THE COURT:** Well, I will tell you, I'm not so much  
13 concerned about when it was being made. What  
14 I -- if he didn't consider it, that's one  
15 issue. Is it an issue that the Court can  
16 consider? I thought that was your argument  
17 that the -- that which he utilized to defend  
18 her offering of Mr. -- what's the expert  
19 witness's name?

20 **MR. CHURDAR:** Gibbons.

21 **THE COURT:** Gibbons, okay. Was not something that  
22 was an element of consideration. Is that  
23 correct?

24 **MR. CHURDAR:** Correct. What I'm saying is the issue  
25 of considering the policies regarding Wildlife



1 and Fisheries Management was not considered in  
2 this decision.

3 **THE COURT:** Could it have been?

4 **MR. CHURDAR:** I'm sorry?

5 **THE COURT:** Could it have been?

6 **MR. CHURDAR:** Well, that is driven by the  
7 application. And in making the decision, the  
8 Department did not consider that.

9 **THE COURT:** I mean, I get Ms. Armstrong's point on  
10 that simply because you did not consider it,  
11 does not mean it's something that cannot be  
12 considered here.

13 **MR. CHURDAR:** Well, what's the argument going to be?  
14 I mean, Dr. Gibbons did not talk about Wildlife  
15 and Fisheries Management. I mean, you know,  
16 what would be the decision that -- I mean, the  
17 basis, the relevance of the testimony would be  
18 that this is -- has an aspect of a fish --  
19 Wildlife and Fisheries Management component to  
20 it that the Department didn't consider? He  
21 didn't say that.

22 **THE COURT:** All right.

23 **MR. CHURDAR:** He was just generically talking about  
24 diamondback terrapins.

25 **THE COURT:** All right. Any last thing before I take



1 a break?

2 **MS. ARMSTRONG:** I guess just on that very last  
3 point. Dr. Gibbons isn't a lawyer. He's not  
4 making legal arguments and he's not arguing  
5 what the law is. He's arguing -- he's  
6 presenting facts for this Court to consider.  
7 When the Court applies the laws that apply to  
8 Coastal Zone Consistency Certifications,  
9 including all the policies that would be  
10 contained in this document.

11 **THE COURT:** Okay. Thank you.

12 **(A break was taken from 10:15 a.m. until 10:40 a.m.)**

13 **COURT REPORTER:** All rise.

14 **RULING OF THE COURT:**

15 **THE COURT:** Y'all be seated. Sorry it took me a  
16 while. All right. What I've determined to do  
17 is at this point in time after this hearing's  
18 over, but before the parties issue the proposed  
19 orders, hopefully even before you ever even get  
20 the transcript, I'm going to ask you to brief  
21 this issue and I'll make a determination before  
22 you issue proposed orders so therein you will  
23 not have the burden that you referred to. I  
24 will tell you, I've gone and looked at the --  
25 I've pulled the pre-hearing statements in



1 Sierra Club and I recognize in this instance we  
2 have the pre-hearing statements where they ask  
3 for statutory provisions and Sierra --  
4 statutory provisions conferring the subject  
5 matter jurisdiction to this division because it  
6 was a division back then I guess, and I think  
7 we have similar language now. Statutory  
8 provision -- yeah, and other applicable  
9 statutes or regulations. So that's asking  
10 about jurisdiction. So what I think is the  
11 pertinent provision is the one that follows and  
12 it says the issues presented for determination,  
13 including claims or defenses expected to be  
14 raised, and that has similar language. In  
15 Sierra Club, it was a specific statutory or  
16 regulatory provisions giving rise to this  
17 controversy. Because we've amended three after  
18 Sierra Club to make it more specific. We, the  
19 Court, did. I think almost all our pre-hearing  
20 statements have this language. So I lived all  
21 this, I remember what we did and why we did it.  
22 But in Sierra Club, one more time, it said the  
23 specific statutory and regulatory provisions  
24 giving rise to the controversy is what Judge  
25 Gathers set forth in his pre-hearing statement,



1 and then the petitioners' pre-hearing  
2 statement, and I've got a copy I can give to  
3 all of y'all, it set forth very general  
4 provisions. There was nothing specific -- or  
5 I wouldn't say nothing; it wasn't nearly as  
6 specific as the pre-hearing statement at issue  
7 in this case. So, I would -- I say all that  
8 because I would have decided in your favor if  
9 Sierra Club had gone the other way. But I,  
10 therefore, want it briefed. And also I will  
11 say we were talking about all this this  
12 particular way, I'm not so sure if I agree with  
13 the Department on the inapplicability of 48-39-  
14 150. I'm not -- although since I'm going to  
15 get it briefed, I feel comfortable doing this  
16 and not having a burden in this situation, but  
17 -- I don't know why 49-39-150 would necessarily  
18 apply only to permits and not this type of  
19 determination because it is a permitting type  
20 -- it's permitting an activity, but I'll hear  
21 your arguments in the briefs after the hearing  
22 on that. So I want both of y'all to be clear,  
23 I'm not just considering reg -- the regs you  
24 cited, I'm also considering whether 48-39-  
25 150(a), because you argued that.



1 MS. ARMSTRONG: We did.

2 THE COURT: Okay, just don't want nothing to get  
3 lost in the shuffle.

4 MS. ARMSTRONG: Oh, it won't, Your Honor.

5 THE COURT: Okay. Okay. Is everybody clear on what  
6 I want to do?

7 MR. GRESSETTE: Yes, sir.

8 THE COURT: Away we go.

9 MS. ARMSTRONG: And one more matter that we need to  
10 take care of.

11 THE COURT: Oh. Am I going to have to leave the  
12 courtroom again?

13 MS. ARMSTRONG: I sure hope not, Your Honor.

14 THE COURT: Okay.

15 **RENEWED MOTION IN LIMINE/MOTION TO EXCLUDE TESTIMONY**  
16 **OF DR. TRAVIS FOLK:**

17 MS. ARMSTRONG: The respondents (sic) are renewing  
18 their motion in limine, the motion to exclude,  
19 and respectfully request that the Court issue  
20 an order on -- specifically on the portion of  
21 the motion that seeks to exclude Dr. Folk's  
22 testimony on diamondback terrapins, dolphins or  
23 other wildlife that are not threatened and  
24 endangered species. I think I want to clarify  
25 a point. I think that the Court misunderstood



1 something that I said yesterday.

2 **THE COURT:** Okay.

3 **MS. ARMSTRONG:** Which was that the environmental ---

4 **THE COURT:** I don't doubt that after everything we  
5 were going through.

6 **MS. ARMSTRONG:** So, but the argument isn't that the  
7 environmental community understands what those  
8 words threatened and endangered species mean.  
9 I think -- I feel pretty certain that the words  
10 ---

11 **THE COURT:** Well, I think you said that, but I might  
12 have misunderstood the implication.

13 **MS. ARMSTRONG:** So what I think I'm pretty sure I  
14 said was environmental practitioner.

15 **THE COURT:** Oh, okay.

16 **MS. ARMSTRONG:** And when I use that term, I meant  
17 environmental lawyers ---

18 **THE COURT:** Okay.

19 **MS. ARMSTRONG:** --- who practice environmental law.  
20 And the reason I use that term specifically is  
21 because Mr. Walker is a lawyer who practices  
22 environmental law. He's a very sharp, astute  
23 lawyer. He's the one who signed the  
24 supplemental responses and he is the one who  
25 used that terminology that Dr. Folk was going



1 to give expert opinions analyzing the  
2 relationship between the permitted activity and  
3 any threatened or endangered plant and animal  
4 species. I think we both -- it's hard for me  
5 to imagine that the intent wasn't, and if Mr.  
6 Walker says that was not what he meant at all,  
7 then I would take him at his word, but as ---

8 **THE COURT:** Can I stop you?

9 **MS. ARMSTRONG:** Sure.

10 **THE COURT:** Because -- let me take you through the  
11 logic of this. Your argument is this is what  
12 the environmental practitioners perceive, how  
13 they would perceive it. This lawyer over here  
14 that you just said is an experienced, smart and  
15 astute lawyer in the environmental practice is  
16 perceiving it differently so does that not hurt  
17 your argument?

18 **MS. ARMSTRONG:** I haven't -- that's not what --  
19 that's not what I heard. I mean, I heard Mr.  
20 Gressette kind of trying to think on his feet  
21 about maybe a different interpretation of that  
22 -- of the language that Mr. Walker wrote. I  
23 mean, that's what I heard. I didn't hear Mr.  
24 Walker ---

25 **MR. GRESSETTE:** That's not ---



1 MS. ARMSTRONG: --- specifically ---

2 MR. GRESSETTE: My thinking was out loud.

3 MS. ARMSTRONG: It was palpable, Tom. So I mean, I  
4 think that it wouldn't -- that's not quite how  
5 this all came about which is why I pointed out  
6 who actually signed the -- drafted this and who  
7 signed the discovery responses.

8 THE COURT: From the logic of what you just said  
9 also, I'll say that being in a wheelchair also,  
10 that's kind of like reverse discrimination to  
11 say that -- to slam him for thinking on his  
12 feet and ---

13 MS. ARMSTRONG: We can't do that.

14 THE COURT: But we can never be accused of that.  
15 Oh, well. Keep on going.

16 MS. ARMSTRONG: So, and just really I guess, again,  
17 what we -- we make real very calculated  
18 decisions. We are trying to approach every  
19 case thinking it through very carefully well in  
20 advance of the hearing. We have the letter  
21 that Dr. Folk wrote many years ago and can  
22 actually be an old case that specifically  
23 talked about threatened and endangered species.  
24 That's -- his whole analysis was about species  
25 that were listed as threatened or endangered



1 under the Federal Endangered Species Act. So  
2 we had the one document from him, we have the  
3 statement in their discovery responses, and  
4 we've made the calculated decision that we were  
5 not going to present an expert witness on  
6 endangered -- threatened and endangered species  
7 and we weren't going to take this witness'  
8 deposition because if that's what he was  
9 testifying about, we didn't need to depose him.  
10 Now, when we found out on the eve of trial that  
11 he had been given all these new documents  
12 related to terrapins. Now, whether or not he  
13 relies on them, the point is that's when we  
14 first were alerted to the fact that it could be  
15 something beyond just threatened and endangered  
16 species. And that's why we raised the motion  
17 to the Court. It caused us a great bit of  
18 concern to have a trial strategy prepared,  
19 making strategic decisions about how we were  
20 going to do discovery and how we're going to  
21 present this case based upon reliance on what  
22 was presented. Well, what KDP told us. And we  
23 think it's entirely appropriate to limit Dr.  
24 Folks' testimony. Certainly, him testifying on  
25 threatened and endangered species is --



1 pursuant to the Endangered Species Act, legally  
2 threatened and endangered species, we don't  
3 have any problem with that.

4 **THE COURT:** Well, that would be very limited  
5 testimony, wouldn't it?

6 **MS. ARMSTRONG:** Well, no, I think that there's a lot  
7 of testimony. There's the Department's  
8 decision document says that there are  
9 endangered piping plovers that use this area;  
10 there are threatened red knots; there are a lot  
11 of bird species; there are sea turtles that  
12 nest in this area. He could testify about a  
13 lot of different things. And we wouldn't have  
14 any beef with that. The problem comes in in  
15 new testimony, new information, that was never  
16 disclosed to us and for that reason, we're  
17 asking the Court to exclude his -- limit his  
18 testimony to those issues for which he was  
19 identified, the federally listed Threatened and  
20 Endangered Species Act. Ms. White reminded me  
21 of one other thing that we did with respect to  
22 Dr. Folks. We looked at his website, Folk Land  
23 Management. Of course, we did -- tried to find  
24 out as much as we could. We saw that he -- as  
25 the title suggests, land management, we've



1 talked to people that know him and his work and  
2 what he does. All of the research on his  
3 website's related to bobwhite quail and ducks,  
4 game species. Not any of the species that  
5 we're dealing with from our -- on these new  
6 issues. And no indication whatsoever that  
7 those were areas that he would apply them.  
8 Now, if you look on Dr. Gibbons, you'd see that  
9 obviously, but that was just another piece of  
10 what we had done to make the determination of  
11 whether we would depose this witness or not.

12 **THE COURT:** All right.

13 **MR. WALKER:** Thank you, Your Honor.

14 **THE COURT:** Mr. Churdar? Is he -- is he still --  
15 oh, okay. Oh, you were leaning over.

16 **MR. CHURDAR:** I'm sorry.

17 **THE COURT:** I just thought you were gone for a  
18 second. You were leaning over and you were ---

19 **MR. WALKER:** He's still over here.

20 **THE COURT:** Yeah.

21 **MR. WALKER:** We believe that ---

22 **THE COURT:** Everybody's switching sides.

23 **MR. WALKER:** We believe our disclosure amply covered  
24 his ability to testify to the relationship  
25 between habitats and wildlife species. Every



1 time Ms. Armstrong talks about this, she adds  
2 something along to the last sentence. And her  
3 last characterization of it was that she relied  
4 on the description he was going to testify to  
5 any threatened or endangered plant and animal  
6 species under the federal act. That's not what  
7 we said. The petitioner also ignores the first  
8 sentence -- the second sentence, Dr. Folk will  
9 testify based on his training and experience in  
10 wildlife sciences and his research history and  
11 the relationship of wildlife species to  
12 habitat. And you're going to hear from him  
13 about the relationship, how you look at a  
14 species like anything they're talking about, it  
15 can be federally endangered or personally  
16 threatened, whatever, but the question for the  
17 Court is whether an alteration of the habitat  
18 is going to occur and whether that has an  
19 adverse effect, a demonstrable adverse effect  
20 on some population. And then you can weigh  
21 that with everything else. And that's what  
22 he's going to testify to. The question -- we  
23 think it was adequately disclosed. They made  
24 a calculated decision. If they went on the  
25 website and said man, he doesn't have a thing



1 to say about diamondback terrapins, yes,  
2 bottlenose dolphins, that's because I don't  
3 think there's anybody running around saying I  
4 manage diamondback terrapin and dolphin  
5 populations. That's -- there's not a big  
6 demand for that. That is something that  
7 experts get retained to testify to in cases  
8 like this. And, ultimately, it's a question of  
9 prejudice. They decided not to take his  
10 deposition. You've offered to them to take his  
11 deposition. We keep trying to set it and it  
12 gets postponed because they want to keep  
13 renewing it everyday we've covered it. There's  
14 no prejudice. We disclosed it, so I think the  
15 Court has already ruled on this. I hope we  
16 don't have to keep jumping up everyday and  
17 doing it. They can have a conversation with  
18 him if they don't want to depose him. If they  
19 don't want to go to the expense, we can bring  
20 him in and they can talk to him. Whatever they  
21 want to do is fine with us. And there's no  
22 prejudice by the fact that he's going to say  
23 that between -- that scientifically speaking  
24 analyzing a habitat and whether alteration of  
25 the habitat affects the species in some way,



1 he's going to tell this Court exactly what that  
2 analysis is from a scientific standpoint ---

3 **THE COURT:** Okay.

4 **MR. WALKER:** --- and that includes all these  
5 populations. So we're not running from  
6 anything. We think we disclosed it and we're  
7 happy to accommodate the Court.

8 **THE COURT:** Okay. Mr. Churdar, anything?

9 **MR. CHURDAR:** No, sir.

10 **THE COURT:** Any response?

11 **MS. ARMSTRONG:** Sure, I mean, first what I just  
12 heard sounds like he's an expert in everything.  
13 Every species. Now, and that's pretty much  
14 what they're going to present him as. And as,  
15 Your Honor's aware, we have approached it with  
16 people that really are experts and if you do go  
17 on the website, you're going to find  
18 information about what the topic that they're  
19 testifying on. But I'm going to set that aside  
20 for just a moment and I want to address what  
21 Mr. Walker pointed out, the second sentence.  
22 When we -- this is what Dr. Folk will testify  
23 based upon his training and experience in  
24 wildlife sciences, and his research history and  
25 the relationship of wildlife species to



1 habitats. That's how you do the work. That's  
2 how he undertakes his determination, that's how  
3 he forms his opinions. What methodology he  
4 uses, the basis, the methodology, the basis  
5 that he uses for making his assessments, that's  
6 -- he's going to lay that out and that's the  
7 foundation and then he's going to be offered to  
8 provide expert opinions on threatened or  
9 endangered species. I mean, it's hard for us  
10 to read that ---

11 **THE COURT:** Can y'all give me that language? Is  
12 that in ---

13 **MR. WALKER:** I have it right here, Your Honor.

14 **THE COURT:** Huh?

15 **MR. WALKER:** The language of the disclosure?

16 **THE COURT:** Yeah.

17 **MR. WALKER:** May I approach?

18 **THE COURT:** Yeah.

19 **MS. ARMSTRONG:** Or we could put it on the screen,  
20 too. I would except I've got a lot of writing  
21 on mine.

22 **THE COURT:** I just want to read it. I can give it  
23 back to you, I've got it. I think I've been  
24 through this before, but let me make sure.  
25 I'll look at it. All right. The struggle, I'm



1 looking at it is, Dr. Folks will testify. Next  
2 sentence, Dr. Folk will offer expert opinions.  
3 Both of them are presenting testimony. So ---

4 **MS. ARMSTRONG:** One is specific to his expert  
5 opinions and what he's going to be providing  
6 opinions on. The other is talking about what  
7 his testimony's going to be based upon. And  
8 it's going to be based upon the methodology he  
9 uses, his experience, his training, how he  
10 undertakes that. I mean, if it was both expert  
11 opinions, then why would it be treated  
12 differently in those two sentences?

13 **THE COURT:** I mean, if I read this, it would make me  
14 think well, maybe I'd want to take his  
15 deposition and find out.

16 **MS. ARMSTRONG:** I would have liked ---

17 **THE COURT:** If you present it as a question, I agree  
18 with the question and I would want to answer  
19 the question.

20 **MS. ARMSTRONG:** Well, I didn't have a question. I  
21 mean, that's the thing. I looked at it and I  
22 was like clearly, he's going to -- they're  
23 presenting him to offer expert opinions related  
24 to threatened and endangered species. That's  
25 how I read it and understood it. There wasn't



1 any question in my mind about what that  
2 actually meant. I mean, it's not very  
3 descriptive, but it's pretty pointed. And it's  
4 not broad to let somebody know that he would be  
5 testifying about any possible animal species or  
6 any habitat or anything at all related to this  
7 case, which seems to be what the argument is  
8 being made now.

9 **THE COURT:** Do you want to respond to that last  
10 sentence?

11 **MR. WALKER:** I'm sorry; I was talking to my partner  
12 and I apologize to the Court. The last  
13 sentence was?

14 **THE COURT:** Dr. Folk will offer expert opinion --  
15 Ms. Armstrong is setting forth that will  
16 testify is your general statement and it's kind  
17 of similar to the issue we've got in the other  
18 area, and then this one makes it more specific,  
19 the second sentence.

20 **MR. WALKER:** Well, we were not suggesting in the  
21 second sentence he wasn't going to offer any  
22 opinion. When we said he will testify, we  
23 certainly meant ---

24 **THE COURT:** No, I'm talking about what I said, I'll  
25 look at the second sentence is what I



1 highlighted. Dr. Folk will offer expert  
2 opinion. Does that sentence limit that which  
3 you set forth in the previous sentence.

4 **MR. WALKER:** No, I don't think it does.

5 **THE COURT:** Why not?

6 **MR. WALKER:** Because we disclosed before that he was  
7 going to testify and, obviously, he's disclosed  
8 as an expert. And I think that what we  
9 described is in the nature of opinion testimony  
10 and it's not just qualifications. So I think  
11 we describe it before. And I also believe that  
12 the description that we use is inclusive and  
13 not limited under the Federal Endangered  
14 Species Act. I'd also point out that the  
15 disclosures -- using two sentence disclosures  
16 in discovery, which is what the parties were  
17 doing, I think to say well, you can't now allow  
18 somebody to testify to anything is a little  
19 broad. When they, they being petitioner,  
20 disclosed their experts, they're doing the same  
21 thing, such as with Dr. Porcher, you stated  
22 here today, he has expertise in vegetation  
23 found on Captain Sam's and its relationship to  
24 the existing conditions of the area. It  
25 doesn't even mention that he's been to the



1 site; he's done all this work that you're going  
2 to hear about, but we understand that that's --  
3 this is really a jump-off point and it's up to  
4 us to find out what this person's going to say.

5 **THE COURT:** I agree. I've heard enough.

6 **MS. ARMSTRONG:** We are only allowed three  
7 depositions under the Administrative Law Court  
8 Rules, we have to move for more. And I  
9 understand that that's ---

10 **THE COURT:** Well, that's ---

11 **MS. ARMSTRONG:** It's also ---

12 **THE COURT:** --- commonly opened up.

13 **MS. ARMSTRONG:** --- we've taken a lot of depositions  
14 in this case already.

15 **THE COURT:** Yeah, it's commonly ---

16 **MS. ARMSTRONG:** It's been pretty ---

17 **MR. WALKER:** And to that, we allowed them to take  
18 every deposition they wanted and there've been  
19 way more than three and nobody said we can  
20 only take three.

21 **THE COURT:** I understand that. I don't think --  
22 we've hardly ever limited anybody in that area.  
23 I just -- I still view it, and Ms. Armstrong,  
24 as respectfully as I can tell you and I mean  
25 that, I read this and it's sufficiently



1 general, that I think that it would certainly  
2 -- if it didn't call to question for an  
3 attorney to go take a deposition to find out  
4 specifically what it meant, it certainly would  
5 promote a phone call to say okay, can we narrow  
6 this down or something to be sure. And that's  
7 the way I view it at this point in time. This  
8 is just -- well, here, I'll take one quick  
9 break, just -- I want to ask about one thing.  
10 I'll be right back. This won't be nearly as  
11 long as the last one.

12 (A break was taken from 11:02 a.m. until 11:04 a.m.)

13 COURT REPORTER: All rise.

14 RULING OF THE COURT:

15 THE COURT: Thank y'all, be seated. I have  
16 cogitated, as my father would say, I just  
17 respectfully deny the motion. I just don't  
18 agree.

19 MS. ARMSTRONG: I understand that, but we wanted to  
20 have that issue ---

21 THE COURT: Reserved.

22 MS. ARMSTRONG: Yeah, resolved, so that we could  
23 move forward ---

24 THE COURT: Okay.

25 MS. ARMSTRONG: --- and not need to continue to



1 raise it and know how this is going to be  
2 handled for ---

3 **THE COURT:** Well, I just -- I perceive he'll testify  
4 to include expert -- he's a designated expert,  
5 so when you say an expert will testify, you're  
6 talking about expert testimony. But with that  
7 said, let's move on. Okay. Any more issues to  
8 send me out?

9 **MS. ARMSTRONG:** Well, I think I just need to real  
10 briefly ---

11 **THE COURT:** Oh, I didn't know you weren't in here.  
12 You missed it ---

13 **MR. CHURDAR:** I didn't realize when you said it was  
14 short ---

15 **THE COURT:** --- I ruled against you.

16 **MR. CHURDAR:** --- that you would be that short.

17 **THE COURT:** Okay.

18 **MR. CHURDAR:** So.

19 **THE COURT:** I ruled against you, so you're okay,  
20 though. I'm just picking.

21 **PETITIONER'S RESPONSE TO OFFER TO TAKE DEPOSITION:**

22 **MS. ARMSTRONG:** I just want to address the offer to  
23 take the deposition in the middle of trial and  
24 while we certainly appreciate the Court's  
25 attempt to find a solution that the Court



1 believes would be helpful for us, we actually  
2 -- from our perspective, it makes things a lot  
3 more difficult for us because we -- this is a  
4 long trial and there are a lot of witnesses.  
5 We got confirmation last night that there would  
6 be twelve witnesses that KDP's calling, in  
7 addition to the multiple other witnesses that  
8 we've got. We're in a trial mode now. There's  
9 a lot of moving parts as it is without having  
10 to stop trial mode and revert back to discovery  
11 mode. And when I realized and thought about my  
12 duty as an attorney for the Coastal  
13 Conservation League to adequately represent my  
14 client and realizing that the time that it  
15 would take away from being in trial mode and  
16 making sure that we're presenting this case to  
17 this Court in the most effective manner for our  
18 clients, having to take time away to prepare  
19 for a deposition, take a deposition, and then  
20 figure out how I'm going to incorporate that  
21 deposition transcript and cross-examination  
22 into our case, I can't knowingly agree to do  
23 that when I know it's going to compromise my  
24 ability to represent -- zealously represent my  
25 client. And that's why the deposition solution



1 that's been proposed is just not tenable. And  
2 so if the ruling is denying our motion and  
3 that's an issue that we'll certainly have for  
4 an appeal.

5 **THE COURT:** I've been there. Been a trial lawyer  
6 and tried plenty of murder cases and, boy,  
7 we're in the middle of a case -- with criminal  
8 prosecutions, you don't even have all the  
9 discovery. You talk about switching from trial  
10 mode to discovery mode to trial mode to  
11 discovery mode, man, if that is not how the  
12 system works, the criminal prosecution system  
13 should be pretty well shut down. We pretty  
14 well -- we moved through that concept all the  
15 time. So what I'm saying is I just don't think  
16 that's something that's untenable. And I still  
17 offer it to you again. I will work with you  
18 whether you want to take a break when you  
19 finish your case in chief and then do it, but  
20 -- you make your decisions in that regard, but  
21 I'm offering it however ---

22 **MS. ARMSTRONG:** I appreciate that. I mean, I think  
23 there's a pretty big difference between  
24 Administrative Law Court proceedings and the  
25 rules of the Administrative Law Court rules



1 actually require discovery to be finished 90  
2 days after ---

3 **THE COURT:** Yeah.

4 **MS. ARMSTRONG:** --- the request for a contested  
5 case, which I think makes a lot of sense,  
6 because then the parties have absolutely  
7 completed discovery and aren't left in this  
8 kind of a situation. In some ways, it's  
9 difficult to navigate which is, you know,  
10 better obviously, I think more time for  
11 discovery, but for us -- and I think the  
12 Administrative Law Court rules mirror the  
13 federal rules in the way that they set forth a  
14 very specific procedure for discovery so that  
15 it flows in an orderly fashion. So I  
16 understand your work as a criminal -- I think  
17 in Administrative Law Court the rules to me are  
18 a lot different.

19 **THE COURT:** Well, I'm an Administrative Law judge, I  
20 know about that. All right. So then anything  
21 else? At least I don't get -- I don't have to  
22 send myself out this time.

23 **MS. ARMSTRONG:** Thank you. Your Honor, at this  
24 point, the petitioner calls Alan Wood to the  
25 witness stand.



1     **THE COURT:** Mr. Wood.

2     **COURT REPORTER:** Right here. A-L-L ---

3     **MR. WOOD:** A-L-A-N.

4     **COURT REPORTER:** A-L-A-N. W-O-O-D?

5     **MR. WOOD:** Yes, ma'am.

6     **COURT REPORTER:** Raise your right hand, please.

7     **MR. WOOD:** (Witness complies.)

8     **COURT REPORTER:** Do you solemnly swear the testimony  
9           you're about to give in this matter is the  
10          truth, the whole truth, and nothing but the  
11          truth, so help you God?

12    **MR. WOOD:** I do.

13    **COURT REPORTER:** Thank you. Be seated.

14    **THE COURT:** Mr. Wood, you're taking the stand and we  
15          haven't argued about you at all.

16    **MR. WOOD:** Not yet.

17    **MR. WOOD - DIRECT EXAMINATION BY MS. ARMSTRONG:**

18    Q: Mr. Wood, can you tell the Court a little bit  
19          about -- well, first, where are you from?

20    A: I'm from Greenwood, South Carolina.

21    Q: Okay. Where do you live now?

22    A: I live in Myrtle Beach.

23    Q: And can you tell the Court about your  
24          educational background?

25    A: I have a bachelor's in biology from Lander



1 University in Greenwood, South Carolina. And  
2 I don't hold a master's, but I've completed all  
3 of the master's course work at Coastal Carolina  
4 University in Conway in the Coastal Marine and  
5 Wetlands Science Program.

6 Q: And after you finished your course work in your  
7 master's, what did you do next?

8 A: Actually, while I was finishing it, I was  
9 contacted by the Earthworks Group to  
10 potentially start a job there and I started  
11 working and finishing the last couple class  
12 work I had and I have worked with Earthworks  
13 since April of 2008.

14 Q: And what was your position when you started at  
15 Earthworks?

16 A: Just I guess project scientist.

17 Q: And what is your current title?

18 A: Environmental professional project manager.  
19 We're not big on like titles titles, but, you  
20 know, it's a step above -- you know, a project  
21 scientist would be more of an entry level and  
22 now I'm more of a management. I have an  
23 employee that works for me, works with me and  
24 I do manage projects and just this -- discreet  
25 project management on a lot of things. Some I



1 work with high level project managers and some  
2 are just myself and one other employee.

3 Q: Can you talk about some of your duties and  
4 responsibilities at Earthworks? You indicated  
5 you had one employee that worked under you.  
6 What kinds of things are you tasked with doing  
7 on a regular basis?

8 A: Day-to-day, we do a lot of wetland  
9 delineations, that includes critical area  
10 delineations and freshwater level. Usually  
11 when I refer to a wetland, I'm referring to a  
12 freshwater wetland and critical area wetland  
13 being -- I probably use a couple words  
14 interchangeably. Critical area wetland, tidal  
15 wetland, saltwater wetland, or estuarine, all  
16 to me are kind of the same thing. The salt  
17 marsh, so to speak. Do delineations for both  
18 of those, coordinating with the Army Corps, SC  
19 DHEC, OCRM.

20 Q: Coordinating with them on what kinds of things?

21 A: On approvals of the delineations. We do a lot  
22 of dock permitting, seawalls, dredging.  
23 Generally smaller projects, some medium-sized  
24 projects, as far as docks, dredge, marinas.  
25 And then the other day-in-day -- do other day-



1 in-day-outs is impact permitting, wetland and  
2 critical area impact permitting through both  
3 the federal with the Army Corps of Engineers  
4 and DHEC OCRM. Impact permitting meaning once  
5 we've delineated a wetland and had that  
6 approved, then if the client needs to, you  
7 know, fill in some small areas of wetland,  
8 coordinate with them on trying to get permits  
9 to do those under the regulations. Then  
10 lastly, my other big task is management of a  
11 wetland mitigation bank. Wetland mitigation  
12 bank would be management of the operations and  
13 the credit -- mitigation credit sales  
14 coordinations.

15 Q: If you could, just look at -- when you use the  
16 word delineation, what does that mean?

17 A: I guess in the real world, it would mean  
18 flagging a line. So I would go out to a site  
19 and determine where the upland is, and what is  
20 definitely wetland, discretely wetland and find  
21 that line where the wetland stops and the  
22 upland begins, or vice versa. And I would flag  
23 that line.

24 Q: And what kinds of -- you said wetlands impact  
25 application, so do you represent clients in



1 trying to obtain permits from the regulatory  
2 agencies?

3 A: In general, almost -- almost exclusively, we  
4 would, yeah, represent a client that is  
5 interested in either purchasing and/or has a  
6 piece of property already and they are wanting  
7 to develop it. And when I work at -- overall,  
8 the Earthworks Group is an engineering company,  
9 planning and design engineering company. So a  
10 lot of -- sometimes, clients come just to me  
11 for delineations at first and then we segue  
12 into more of the planning and engineering  
13 phases. And sometimes they come in with a  
14 piece of property that they're going to -- they  
15 would like to develop and the first steps being  
16 delineations and in the early planning is  
17 environmental planning. So sometimes they come  
18 to me; we segue to development. Sometimes they  
19 come in wanting to do development, but we have  
20 to back up and work with me first.

21 Q: And what kinds of clients do you represent?

22 A: Mostly developers and some -- to some degree --  
23 well, the docks -- small docks and dredging  
24 projects would be homeowners, residential  
25 homeowners, and developers and just property



1 owners. Not necessarily developers, but they  
2 have property that they just want to know  
3 what's there, what they can do with it. Again,  
4 not necessarily developers in and of  
5 themselves, but -- with the engineering, we  
6 have a lot of developers. Mostly residential  
7 and some small commercial stuff.

8 Q: And are there -- you talked about what it meant  
9 to delineate a wetland, is there a difference  
10 between delineating freshwater wetlands versus  
11 saltwater wetland in your experience?

12 A: I would -- I guess the methodology of finding  
13 that line is a little different between tidal  
14 wetlands and freshwater wetlands, but the act  
15 is -- the act that I conduct is pretty much the  
16 same as far as finding that line and then  
17 flagging it. Either hanging flags or placing  
18 pin flags in the ground. And, again, the  
19 methodology between how you determine in a  
20 freshwater system what's wetland and what's  
21 upland, it's a little different with the tidal,  
22 but ...

23 Q: Can you describe how they're different? What  
24 are the different methodologies that you  
25 utilize?



1 A: So, with freshwater wetlands, you're  
2 coordinating primarily with the Army Corps of  
3 Engineers. And they have a guidance --  
4 guidance manual out that in regional  
5 supplements that describe the methodology.  
6 They describe the methodology pretty well as  
7 far as three factor components you're looking  
8 at, vegetation, soil conditions, and hydrology.  
9 And without going into a lot of detail, you  
10 fill out -- you evaluate a site, assess it.  
11 You have data sheets that you're going to fill  
12 out and once you -- you know, that's how you  
13 find that line that you're flagging and then  
14 you'll submit that to the Army Corps of  
15 Engineers. They'll come -- a lot of times,  
16 they'll come out. Sometimes they won't  
17 necessarily come out and look at it. A lot of  
18 times they'll come out and look at it and  
19 approve your line or have you change it if they  
20 don't necessarily agree. Critical area  
21 delineations, you're going through OCRM.  
22 That's considered a state -- water of the state  
23 versus the Army Corps, it's waters of the U.S.  
24 With that, you're really primarily looking at  
25 hydrology and vegetation. They don't have a



1           discreet manual like the Army Corps does that  
2           puts forth a really almost black and white  
3           methodology to -- of how to do a delineation,  
4           critical area delineation, but a lot of that  
5           just comes with experience. And, again, it's  
6           more vegetation and hydrology driven.  
7           Vegetation is a really good indicator because  
8           there's typical plant species that are found in  
9           our state and in our area that are -- they're  
10          either salt tolerant or they're not salt  
11          tolerant, so you're going to find vegetation.  
12          And there's some -- very little bit of gray  
13          area, but for the most part, if you see some  
14          salt tolerant species, you know that that's a  
15          critical area well.

16       **MR. GRESSETTE:** Objection, Your Honor, to the last  
17          statement as being expert opinion. He hasn't  
18          been qualified or admitted as an expert yet.

19       **THE COURT:** I guess I have to -- he hasn't been  
20          qualified yet, but ---

21       **MS. ARMSTRONG:** I'm trying to remember exactly what  
22          he said.

23       **THE COURT:** Salt tolerant -- what was it? What was  
24          your objection specifically?

25       **MR. GRESSETTE:** I believe he was explaining the



1 difference between types of vegetation, what  
2 they're tolerant of and how they are then  
3 included and evaluated by someone determining  
4 critical line. I'm fine if he wants to give  
5 opinions, I just would like him qualified as an  
6 expert.

7 **MS. ARMSTRONG:** Yeah, I didn't think it went that  
8 far, but I'll withdraw that question and we'll  
9 back up a little bit.

10 **THE COURT:** I'll strike that for right now.

11 **MR. GRESSETTE:** Okay.

12 **THE COURT:** I've got a feeling we're going to get  
13 there anyway.

14 **MR. GRESSETTE:** Yes, sir.

15 Q: Are you able to distinguish between salt  
16 tolerant and freshwater vegetation?

17 A: Yes.

18 Q: And you were describing the methodology  
19 delineating critical area lines as making  
20 assessment as to whether there's salt tolerant  
21 vegetation?

22 A: Yes.

23 Q: I just was basically trying to get at the  
24 different methodologies that you would apply.

25 A: With freshwater wetland ---



1 Q: And I think -- let's -- I think we can just  
2 focus -- I didn't mean to interrupt you, but I  
3 thought that you explained with freshwater and  
4 I just want to make sure you completed your  
5 answer with the methodology that you utilize  
6 without developing any opinions yet, but how --  
7 what methods you use when you're out in the  
8 field to determine whether a wetland is a  
9 critical area wetland.

10 A: What's the question? Can you repeat the  
11 question?

12 Q: The methodology.

13 A: The methodology.

14 Q: Yeah. I think you may have -- if you feel like  
15 you've answered, that's fine.

16 A: Yeah, I think I answered it. I can repeat what  
17 I said.

18 Q: And with respect to delineations, how did you  
19 learn to conduct a wetland delineation?

20 A: So through some of the graduate course work at  
21 Coastal Carolina, we went over regulatory,  
22 again, with some of the regulatory precedent,  
23 filling out the data sheets, the Army Corps'  
24 delineation manual and regional supplement --  
25 there's a regional supplement that covers the



1 Atlantic Gulf Coastal Plain, which is the lower  
2 part of the state. And then from there, post  
3 school, schooling, post academic, several years  
4 working under another consultant delineator,  
5 Reid Hilliard, who was employed at Earthworks.  
6 I worked under him and went on many  
7 delineations with him and just like an  
8 apprentice program almost.

9 Q: And are there other -- any other information or  
10 knowledge that you gained to assist you in  
11 conducting delineations of freshwater or  
12 critical area wetlands?

13 A: Other than just trying to keep current with  
14 some of the regulatory changes with the Army  
15 Corps, DHEC has a little less changes. The  
16 Army Corps every few years will have a little  
17 bit of -- they come up with some change of some  
18 definitions and a little bit of different  
19 guidance on this and that, some of the minor  
20 stuff. Keeping up with that, but aside from  
21 that, experience and academic education and  
22 personal development, I guess you would call  
23 that, just keeping up with current regulations.

24 Q: And I think you got into it a little bit, but  
25 with respect to the Corps of Engineers'



1 approval of freshwater wetland delineation  
2 lines, have you submitted critical area  
3 delineation to OCRM?

4 A: Yes.

5 Q: And approximately how many times have you  
6 conducted freshwater wetland delineations?

7 A: Freshwater delineations, probably -- I'm going  
8 to say -- I'm bad at this, but in nearly ten  
9 years either been a part of early on or  
10 personally myself been the lead, delineated on  
11 100 I think. At least ten -- about ten a year  
12 is a rough estimate.

13 Q: And approximately how many times have you  
14 conducted a critical area delineation?

15 A: Probably the neighborhood of, conservatively  
16 speaking, 40, maybe 50.

17 Q: And how many times have you submitted those  
18 critical area line delineations to OCRM for  
19 certification or approval?

20 A: Almost all of them I'd say.

21 Q: How many of those critical area lines that you  
22 delineated and submitted to OCRM has OCRM  
23 approved or verified?

24 A: All of them.

25 Q: And do you possess any professional



1           certifications?

2           A:     I do.

3           Q:     What are those?

4           A:     PWS, professional wetlands scientist.

5           Q:     And what did you have to do in order to obtain  
6           that certification?

7           A:     So it's not like an official engineer; it's not  
8           state regulated, state certification, but it is  
9           -- it's organized through the Society of  
10          Wetland Scientists, which is a pretty big  
11          organization and it -- to gain that  
12          certification, you -- it's a combination of  
13          post-graduate course work, which I had from  
14          Coastal Carolina, and experience, along with a  
15          statement of expertise essay that you would  
16          send in to apply for that's all graded and --  
17          before you can get your certification. There  
18          is an EIT program, which is kind of like a --  
19          I'm sorry, it's a wetland professional in  
20          training, WPIT, which I was able to forego  
21          already having the professional experience when  
22          I applied. You can apply right out of school  
23          if you have the education. You can apply for  
24          it if you don't have the work experience. You  
25          can get that wetland professional in training



1 certification for five years. You work under  
2 someone. But at the time that I applied, I had  
3 already well surpassed the five-year  
4 requirement of professional experience.

5 Q: And are there regular requirements that you  
6 need to keep up with in order to maintain your  
7 PWS certification?

8 A: There are. We have to pay your annual  
9 maintenance and, don't hold me to this, I think  
10 it's every three -- it might be five years, it  
11 might be five years, you have to renew your  
12 qualification. And that is again, it's a  
13 combination of full-time employment and/or  
14 professional development hours type things,  
15 class work or conference type things where  
16 you're just continuing education. Continuing  
17 education item.

18 Q: And in your work, I want to -- well, I guess we  
19 can talk gen- -- more generally about the  
20 different kinds of delineations. What kind of  
21 -- do you produce any kind of product, a  
22 physical product, for your clients in the  
23 course of your work?

24 A: Of course, yeah. They want to -- so, we kind  
25 of -- we kind of offer two different general



1 services when someone calls and they're --  
2 especially when they're unfamiliar with the  
3 process and even the people that are familiar,  
4 offer a couple different services. One is what  
5 we call a wetland approximation. Because a lot  
6 of times somebody -- either they have a piece  
7 of property or they're looking at purchasing a  
8 piece of property and they just want to know  
9 hey, you know, is this property wet or is this  
10 property good. And in general, how much  
11 useable land. If I have ten acres, how much  
12 land can I use, what kind of shape of, you  
13 know, wetland is potentially there that's not  
14 going to be useable. So to save them a little  
15 money, so to speak, we can do just a -- an  
16 approximation, which involves my fieldwork, go  
17 out, flag the line, just as I would any other  
18 wetland line, and use our in-house GPS, which  
19 is, it's just a mapping grade and, you know,  
20 three to probably even -- it could be as bad as  
21 ten, but if it's three foot accuracy -- but  
22 it's good enough for approximations. It's for  
23 me to give a client a map that gives them a  
24 pretty good idea of what is there, if there's  
25 wetlands, and the shape. Beyond that, we offer



1 the full jurisdictional determination through  
2 the Army Corps of Engineers. And that again  
3 either -- sometimes when we do the  
4 approximation, I go out, I hang my flags,  
5 produce that map, and then if they want to move  
6 forward, we can do the rest with paperwork to  
7 prepare and have it surveyed, have everything  
8 prepared and sent to the Corps for an official  
9 determination. Sometimes they come and they  
10 know they want an official determination from  
11 the get-go, and then we would forego the in-  
12 house GPSing of, you know, producing a quick  
13 map for them just to get an idea. They --  
14 sometimes they know what they have and we just  
15 go full-on to the accurate jurisdictional  
16 determination.

17 Q: So you're the one -- you actually go out in the  
18 field and flag the line?

19 A: Correct.

20 Q: And so when you do that, do you do it  
21 differently depending on whether it's a wetland  
22 approximation or you're submitting a wetland  
23 delineation?

24 A: No, I always flag. It was a habit that I got  
25 in early on when I was working with Reid, he



1 said, you know, flag every line like the Army  
2 Corps would come out and look at it in detail  
3 -- or OCRM. Flag every line as if they're  
4 going to come out and scrutinize it. So, you  
5 know, I'll flag my line, you know, just -- I  
6 flag it the same way, what I see. Same way  
7 whether it's approximation or determination.  
8 The only difference is the accuracy of the  
9 lines on the map that I produce, whether it's  
10 produced with our in-house GPS the mapping  
11 grade, or if it's survey.

12 Q: And what's the survey? What's the difference  
13 if it's a survey?

14 A: So, a survey -- a traditional, you know,  
15 surveyor, land surveyor, come out and either  
16 run the old school rod and level type thing or  
17 they have much more expensive GPS technology.  
18 It's come around in the last few years. They  
19 have GPSes that are much more accuracy, usually  
20 decimeter or less accuracy. So you're talking  
21 three inches or less. Their GPS accuracy is  
22 that they're taking those points and they have  
23 a high enough confidence in it with whether  
24 they do it conventional with a rod and gun or  
25 with a GPS. But they're going to shoot it at



1 -- to a level of accuracy that they're  
2 comfortable signing off on as being -- you  
3 know, with their accuracy certification.

4 Q: And so do you work with surveyors in producing  
5 maps that should delineate the boundaries  
6 between upland and wetland areas?

7 A: Yes.

8 Q: Do you utilize survey data when you're creating  
9 those maps?

10 A: I do. Sometime -- sometimes they'll just --  
11 the surveyor will go out and do their job,  
12 prepare and send me a plat -- a survey plat.  
13 Everybody's familiar with survey plat, do you  
14 need me to explain that? Do I need to explain?  
15 You know, a survey that shows where those lines  
16 are, the property boundary and where those  
17 wetland lines are, where my flags are to their  
18 accuracy certification. Sometimes they will  
19 send me their CAD work. They use AutoCAD, we  
20 use AutoCAD.

21 Q: What is AutoCAD?

22 A: AutoCAD is computer aided design. It's a  
23 pretty industry standard for planning and  
24 design, engineering software. They'll send me  
25 the CAD work, the digital files, so that I can



1 bring it in and use it somewhat interchangeably  
2 with mapping software that we have, it's called  
3 ArcGIS, Geographical Information System.  
4 AutoCAD is used for -- any time you see surveys  
5 and things that are just black and white lines  
6 for the most part, that's going to be an  
7 AutoCAD drawing and then we have -- we call  
8 them pretty pictures with nice aerial imagery  
9 behind them or maybe they've got nice colors --  
10 color coordinating the zones or different  
11 things. A lot of times that's done in ArcGIS.  
12 So we have cross-compatibility. We can do  
13 things in both that will go from one piece of  
14 software to the other, depending on what the  
15 final product -- the intended final product to  
16 be. Do they -- do we want it to look pretty or  
17 do you want to show -- do we want to highlight  
18 just certain lines and accuracy of these  
19 certain lines and things. So a lot of times  
20 the surveyors, I'll have them send me the  
21 AutoCAD lines, line work and I'll just put that  
22 into -- the accurate AutoCAD line work and I'll  
23 put that into GIS and overlay that over a  
24 pretty aerial so that the clients can, you  
25 know, people -- a lot of people are visual and



1 they can see lines on paper, a square with the  
2 circle in it, but when they see it over some  
3 property that they know, their hunting field or  
4 their, you know, their -- where their house is  
5 and see kind of how far that line is where a  
6 critical line wetland might be, where they will  
7 have to start their dock or something like  
8 that, a lot of times we like to provide pretty  
9 pictures, so to speak, to clients with those  
10 AutoCAD lines put on it.

11 Q: And is that something that you do?

12 A: Yes.

13 Q: And so you have a working familiarity with  
14 AutoCAD and ArcGIS?

15 A: Yeah, I'm -- I would say more than familiar.  
16 I'm comfortable doing it and I guess I'll just  
17 interject that there have been times where  
18 environmental work has been slow, I've helped  
19 do, you know, drafting, CAD drafting for some  
20 of the land development type stuff. So I'm  
21 very comfortable using AutoCAD and ArcGIS.  
22 Matter of fact, there's times where I've  
23 probably been one of the best people in the  
24 building at using those softwares.

25 **MOTION TO QUALIFY AS EXPERT:**



1 **MS. ARMSTRONG:** Your Honor, at this point, the  
2 petitioner moves to qualify Alan Wood as an  
3 expert in wetlands science and critical line  
4 delineations.

5 **THE COURT:** Wetland science and critical line  
6 delineation. Your thoughts?

7 **MR. GRESSETTE:** Your Honor, I'm not sure what  
8 wetland science is. I would think he is an  
9 expert in critical line delineation, but I  
10 don't think he's defined the term wetland  
11 science.

12 **MS. ARMSTRONG:** He said he was an expert and he had  
13 a professional wetland science certification.

14 **MR. GRESSETTE:** I'll agree that he has a  
15 professional wetland certification from an  
16 organization. It's not recognized by any  
17 state, federal government or agency.

18 **THE COURT:** Well, the purpose of the wetland science  
19 certification is to certify him in the ability  
20 to delineate critical lines in the -- all  
21 right.

22 **MS. ARMSTRONG:** Now, the professional wetland  
23 science -- scientist certification isn't about  
24 delineating critical lines, but I can ask Mr.  
25 Wood to explain a little bit about what ---



1       **THE COURT:**   Okay.

2       **MS. ARMSTRONG:**   --- a wetland scientist ---

3       **THE COURT:**   That was on me.

4       **Q:**     Can you explain what a -- maybe you can tell  
5               the Court -- well first, what is a wetland  
6               scientist?   What does that mean to you, a  
7               wetland science?

8       **A:**     I think it can be -- in the industry you would  
9               know what that means, but I understand the need  
10              to clarify that here.   Wetland scientist, so  
11              again, it involves not just delineation, so it  
12              doesn't pigeon hole you as a certified wetland  
13              delineator.   It also involves knowing the  
14              regulations in your working area that reg- --  
15              you know, that govern submitting for  
16              delineation approvals to state or federal  
17              agencies.   Also having a good familiarity with  
18              regulations that involve impact permitting and  
19              such.   Does that answer that question?   So it's  
20              not just, again, pigeon holing you as a  
21              certified wetland delineator.   And I'll add  
22              that I think there's maybe only two states in  
23              the country that have a state recognized  
24              licensing arm that covers wetland delineations.  
25              I think that, you know, it's not as cut and dry



1 as in engineering, so to speak. The science  
2 behind it is -- it would require a lot of  
3 manpower to certify a few people, because  
4 there's only -- you know, there's only a few  
5 people -- a handful of people I think in the  
6 state that even have a PWS, so ...

7 Q: Does that wetland science, that encompasses  
8 delineating freshwater wetlands?

9 A: The freshwater and saltwater.

10 Q: And saltwater, I was going to ask about salt.  
11 And the ability to generate drawings and maps  
12 depicting those delineations?

13 A: None of the language specifically points out  
14 generating maps and drawings, but that's part  
15 of -- it's a day-in day-out job, so it might  
16 not -- I don't know that there's any language  
17 again that specifically says producing maps,  
18 but that -- I don't know that you could do any  
19 wetland related job really without doing some  
20 form of mapping.

21 **MS. ARMSTRONG:** So we're moving to qualify Mr. Wood  
22 in wetland science as he just described it. I  
23 believe that encompasses critical line  
24 delineations ---

25 **THE COURT:** Said it encompasses critical line



1 delineation and the regulations -- and knowing  
2 the regulations I assume thereto.

3 **MS. ARMSTRONG:** Correct.

4 **THE COURT:** Which, again, brings us back to critical  
5 line delineation.

6 **MS. ARMSTRONG:** Right, it does, Your Honor.

7 **THE COURT:** But what's your positions?

8 **MR. GRESSETTE:** No objection, Your Honor.

9 **THE COURT:** To wetland science and critical ---

10 **MR. GRESSETTE:** That's correct, Your Honor.

11 **THE COURT:** All right.

12 **MR. CHURDAR:** The Department would concur, no  
13 objection.

14 **RULING OF THE COURT:**

15 **THE COURT:** All right. So qualified.

16 **MS. ARMSTRONG:** Thank you.

17 Q: Mr. Wood, now I'm going to move into the  
18 discussion about the project, the work here in  
19 court over today and this week and part of next  
20 week. Are you -- have you done any work with  
21 respect to delineating boundaries between  
22 upland and critical area wetlands at Captain  
23 Sam's Spit on Kiawah Island?

24 A: I have.

25 Q: And how did your involvement arise?



1 A: It's a little -- it was kind of put on my desk,  
2 so to speak. Our company president, Steve  
3 Strickland, I believe you and he had the  
4 initial discussions of a need to contract  
5 Earthworks to perform the service. Steve more  
6 or less handed me a map that depicted I think  
7 I was a roughly 2,400 linear foot of this --  
8 you know, the project site, we'll call that,  
9 for my intents and purposes, the project site  
10 was a box. It incorporated about 2,400 linear  
11 foot on the back side, on the marsh side of  
12 Captain Sam's Spit along the banks of the  
13 Edisto River.

14 Q: The Edisto River?

15 A: Is it the Edisto? No, I'm sorry, which river  
16 is it? The Kiawah River?

17 Q: So you're not sure ---

18 A: I'm not sure of the river name. Anyway, so I  
19 was given the project area, delineate a  
20 critical line here. And essentially I knew it  
21 was for Amy Armstrong and SCELP and I -- just  
22 from watching and seeing the news, I knew that  
23 there had been some back and forth litigation  
24 with trying to develop it. That was the extent  
25 of my familiarity with the project going in.



1 I picked a good day with some good weather. I  
2 think it was -- it was either at the end of  
3 March or -- I think it was the end of March  
4 maybe, might have been the beginning of March.  
5 It was in March. A week or two later I found  
6 a good day where the weather was going to be  
7 nice. Grant Gibson, I mentioned earlier, works  
8 with me. We went down and spent the majority  
9 of an afternoon down there conducting the  
10 critical line delineation.

11 Q: Do you remember what the tide was like the day  
12 that you went?

13 A: I -- it doesn't stick out in my -- it wasn't  
14 high. It wasn't up up, but it wasn't down low  
15 either. It must've been a mid tide. Tidal  
16 range that day -- I remember it was a little  
17 higher when we started and was ebbing back out,  
18 going back out as the day progressed. And then  
19 it might have started just to come back up just  
20 a hair, might have dug in just a turn when we  
21 were getting ready to leave.

22 Q: And can you describe what it looked like to  
23 you, that 2,400 foot stretch that you -- on the  
24 day that you went out?

25 A: Mostly sandy and sporadically vegetated here



1 and there, batches of vegetation, sandy. Some  
2 areas were higher sand embankments; some areas  
3 were lower depressional areas and with a lot  
4 less elevation change from what we would I  
5 guess refer to as the upland down to the edge  
6 of the water. Some places were up high, high  
7 sand ridges that were, you know, discreet  
8 embankments along the river.

9 Q: You said you -- I wanted to get a little bit  
10 more specific with about how long -- how many  
11 hours you think that you were -- spent at  
12 Captain Sam's Spit?

13 A: So, got down -- I think we left Murrells Inlet  
14 at 7:30, 7:45, took probably a good two hours  
15 to get down there, so we were there, boots on  
16 the ground, no later than 10:00. When we left  
17 and got back, we were back maybe ten minutes  
18 till 5:00 if I recall correctly. So that put  
19 us leaving at 3:00. So we were there four and  
20 a half hours. Is that right? Is my math  
21 right? From 10:00 to 3:00, almost five hours.  
22 Maybe just shy of five hours because we did  
23 stop and grab some food on the way.

24 Q: And what did you do when you were on site?  
25 Walk me through what your process involved that



1 day.

2 A: So, we grabbed a bundle of pin flags. I used  
3 pin flags out here because usually critical  
4 lines, there's not a -- not as much high  
5 vegetation to hang flags on. You want it to be  
6 visible for a surveyor to come by and pick up.  
7 So pin flags will -- kind of like irrigation  
8 flags in your yard, pink ones. We grabbed  
9 bundles of those and I tend to like to -- I  
10 like to start as far away from the car as  
11 possible and work my way back rather than do a  
12 bunch of work and have to work back to the car.  
13 So I started from the far end of the project  
14 area. I found what I determined to be the  
15 critical line and worked my way, again, back  
16 from what would be southwest to northeast, back  
17 to the parking lot of -- well, I guess is  
18 currently the Charleston County Park, the  
19 parking area. So I went away from the parking  
20 area and worked my way back, putting flags in  
21 the ground at what I determined to be the  
22 critical area line.

23 Q: And what -- how did you determine where it was?

24 A: So, to kind of expand on the -- not necessarily  
25 describe the difference between freshwater and



1 upland, but to expand on what we do with a  
2 tidal critical area delineation, a lot of times  
3 you can -- you use the elevation, signs of  
4 tidal inundation, so anywhere you see a rack  
5 line -- do I need to describe what a rack line  
6 is?

7 Q: Yeah, go ahead.

8 A: Like a dead vegetation that kind of -- it's the  
9 cord grass, dead cord grass that's kind of  
10 pushed up. When the tide comes up, it brings  
11 it up. The tide goes out slow and it doesn't  
12 always necessarily go out with it. So that's  
13 a rack line and there's a lot of trash in there  
14 and stuff, too, sometimes. So any dark spots,  
15 water staining, that would be a sign of regular  
16 inundation, so you usually notice what the  
17 signs of hydrology, the signs of elevation.  
18 So, again, you use your judgment to know that  
19 obviously low spots, water's going to be able  
20 to get a low spot. But that's almost always  
21 going to be accompanied by some either  
22 vegetation or sign of a hydrologic residence,  
23 but again, using vegetation and those signs of  
24 hydrology, I was able to determine where the  
25 tidal waters get onto the land at a high enough



1 occurrence frequency that would classify it as  
2 a tidal -- a critical area, critical area  
3 wetland, tidal wetland.

4 Q: And do you have any doubt and with a reasonable  
5 degree of scientific certainty that the  
6 locations where you placed those pink flags  
7 represent the critical area line delineation?

8 A: I do not. I did it just -- again, I wasn't  
9 really very familiar with what -- I'll say I  
10 wasn't familiar with what I was getting myself  
11 into here.

12 Q: What do you mean by that?

13 A: I didn't realize I was -- again, I wasn't super  
14 familiar with what was going on. I was just  
15 tasked with delineating a critical line. It  
16 was a little later after that I realized oh,  
17 I'm going to probably have to go to court and  
18 testify to this. But, again, early on, I read  
19 every line I do, I would stand by in a court of  
20 law. So again, I didn't realize I was going to  
21 have to, but I did it just as if I would and I  
22 stand by what I did. Does that answer the  
23 question?

24 **(Petitioner's Exhibit Number 11 was introduced into**  
25 **the record at this time.)**



1 Q: It does. Mr. Wood, I'm going to hand you just  
2 -- I forgot to do this earlier, but  
3 Petitioner's Exhibit Number 11. Can you  
4 identify that document for me?

5 A: That is my curriculum vitae, CV.

6 Q: Is that an accurate representation of the  
7 contents of your CV?

8 A: It is.

9 **MOTION TO ADMIT PETITIONER'S EXHIBIT NUMBER 11:**

10 **MS. ARMSTRONG:** I move to admit Petitioner's Exhibit  
11 Number Eleven.

12 **THE COURT:** Any objection?

13 **MR. GRESSETTE:** No, Your Honor.

14 **MR. CHURDAR:** No, sir.

15 **RULING OF THE COURT:**

16 **THE COURT:** It's admitted.

17 **(Petitioner's Exhibit Number 11 was admitted into**  
18 **evidence).**

19 Q: Mr. Wood, I want to go back to what you were  
20 doing that day.

21 **(Petitioner's Exhibit Number 1A was introduced into**  
22 **the record at this time.)**

23 Q: Looking at Petitioner's Exhibit Number 1, are  
24 you able to identify what's depicted in that --

25 -



1 A: Yes.

2 Q: --- that?

3 A: That's -- looks like taken from a plane or  
4 helicopter, I guess. A picture of Captain  
5 Sam's Spit, looking -- I guess it's looking  
6 generally north.

7 **THE COURT:** Hold on one second, Ms. Armstrong.  
8 Okay.

9 Q: This is a copy of Petitioner's Exhibit 1A, I  
10 think is what it's marked. Is this the image  
11 that you were just describing?

12 A: Uh-huh, yes.

13 **(Petitioner's Exhibit Number 1C was introduced into**  
14 **the record at this time.)**

15 Q: What I've put on the screen here is  
16 Petitioner's Exhibit 1C. Are you able to  
17 identify the location of this? It's a little  
18 bit more difficult to see I think on the  
19 screen. If it's easier for you, I can bring  
20 over a copy.

21 A: No, I mean, I know where your fingers are on  
22 the bottom. It was at the beach, back side,  
23 would be the river side. This is probably in  
24 the area where I guess can we describe it as  
25 where the spit gets most narrow.



1 Q: And can you tell me what -- does anything -- is  
2 this part of the area that you delineated? Are  
3 you able to tell?

4 A: Yeah, yes, yes, I definitely delineated that  
5 area.

6 Q: And is there anything in particular of note in  
7 this Petitioner's Exhibit 1C?

8 A: You know, vegetation, one thing that sticks out  
9 to me, any time I'm looking at wetland aerials  
10 or this is more of a low altitude, you know,  
11 photograph, but one thing that sticks out to me  
12 is some dead vegetation. Can I point?

13 Q: Yeah, you can touch the screen actually if you  
14 want. You can draw on it or ---

15 A: Oh, that's fancy.

16 **THE COURT:** Hang on a second. Let's get a better  
17 one than that. I'm gonna do this last one.

18 A: Go freehand?

19 **THE COURT:** Well, there's ---

20 **MS. ARMSTRONG:** Should we do the drawing on it?

21 **THE COURT:** I think if you use this one.

22 **MS. ARMSTRONG:** Yeah.

23 A: Freehand?

24 Q: Yeah, I think that ---

25 A: Oh, yeah.



1     **THE COURT:**   There you go.

2     A:       There we go.

3     Q:       Okay.

4     **THE COURT:**   But you can pick different ones, so ---

5     A:       Okay.  Yeah, I see the menu now.  We can change  
6            colors, all right.  This is -- this is cool.  
7            I noticed some dead vegetation in this -- the  
8            lighter color, doesn't have any green, looks  
9            like stems.  It looks like dead vegetation.  
10          There's maybe a dead bush there.  And it would  
11          -- I believe, and maybe something there, but  
12          definitely here you see some leaf off  
13          vegetation and I -- and I'm calling it dead  
14          because, again, it's leaf off stems and I'm  
15          assuming it's dead because everything around it  
16          has leaf on and it's nice and green, lush  
17          vegetation.

18    Q:       And do you have any opinions about what caused  
19            that vegetation to die?

20    A:       Having been there ---

21    **MR. GRESSETTE:**  Objection, Your Honor.

22    **THE COURT:**    Grounds?

23    **MR. GRESSETTE:**  I'm not sure that that's within his  
24            expertise.  Also ---

25    **THE COURT:**    What causes plants to die?



1 **MR. GRESSETTE:** Yes, sir.

2 **THE COURT:** Okay. Can you respond?

3 **MS. ARMSTRONG:** Okay. Sure. I'll be glad to lay a  
4 little bit more foundation for that.

5 Q: Mr. Wood, do you have any experience  
6 determining the boundaries between freshwater  
7 and saltwater with vegetation?

8 A: I do. In particular, probably of relevance  
9 would be I mentioned I managed the wetland  
10 mitigation banks in Charleston County. It's in  
11 Awendah. Particularly on the banks of and  
12 adjacent to the Wando River. And it's the  
13 Congaree-Carton's mitigation bank, that's for  
14 the record. We at Congaree-Carton were able to  
15 provide the first viable tidal wetland  
16 mitigation credits in the State of South  
17 Carolina. And by we, I mean it was mostly me.  
18 By -- and how we were able to do that was  
19 converting an area of -- there's two different  
20 areas. There's an area of wet -- that were  
21 stressed tidal wetlands so they weren't in very  
22 good shape, I guess is the layman's term. They  
23 were not in very good shape tidal wetlands. We  
24 were able to enhance those so that they became  
25 much better fully functioning tidal wetlands.



1 And taking converse on the area that was  
2 freshwater wetland and converting it to tidal  
3 wetlands by introduc- -- by allowing basically  
4 the tide to come back into areas that had been  
5 previously cut off from through a series of  
6 tidal flapper valves and ditches and such. So  
7 we allowed the tide to get back to areas that  
8 it once occupied. And I saw firsthand tidal --  
9 or freshwater wetland vegetation die and  
10 determined the succession to go from freshwater  
11 wetland vegetation die-off and tidal vegetation  
12 start to establish itself back in those areas.

13 Q: And so was part of -- what was the goal to ---

14 A: Oh, the goal was to produce tidal -- we wanted  
15 to make more tidal wetland areas because -- so  
16 a little quick background in mitigation banking  
17 is we're enhancing and restoring wetlands on a  
18 site so that we can sell credits for that  
19 enhancement and restoration to offset impacts  
20 to wetlands into other areas in similar  
21 watershed and ecosystems. So Charleston  
22 County, when you want to fill in a bunch of  
23 wetlands to put up your condos or hospital or,  
24 you know, whatever it may be, you have to  
25 offset those impacts, so no net loss is kind of



1 the goal. You need to have some wetlands  
2 restored and/or enhanced somewhere else to  
3 offset those impacts and in the same  
4 watersheds. And we do that by selling credits  
5 that come through a series of formulations to  
6 determine how many credits you need to impact.  
7 This one acre here, how many credits you need  
8 to offset that impact. So we sell offsets, so  
9 to speak, and the goal there was to create a  
10 tidal wetland to offset impacts to tidal  
11 wetlands in the Charleston area.

12 Q: And did you need to utilize your expertise in  
13 wetlands science to determine whether those  
14 freshwater wetlands were being converted to  
15 saltwater wetlands?

16 A: Yes.

17 Q: And what kinds of factors did you utilize in  
18 making that determination of whether the  
19 freshwater wetlands were converting to  
20 saltwater or critical area wetlands?

21 A: Again, a lot of times with critical area  
22 wetlands, you're keying in on vegetation. I'll  
23 circle back to most vegetation is going to --  
24 it's either going to survive in saltwater  
25 inundation, so when you drive over the bridge



1 in Charleston and you see there's the deepest  
2 waters, the most inundation's going to be your  
3 smooth core grass, spartina alterniflora,  
4 that's your big nice bright colored grasses,  
5 and then up a little bit is going to be your  
6 juncus roemarianus, black needle rush, that's  
7 the darker patch, and then there's some other  
8 succession as you go up. But usually those  
9 two, they're only going to grow in frequently  
10 inundated tidal, you know, wetland areas and  
11 upland. Either upland and/or freshwater  
12 wetland vegetation, most of them do not do well  
13 being stressed by saltwater inundation. Now,  
14 the one -- really the one main exception is an  
15 eastern cedar. An eastern cedar tree can -- it  
16 can tolerate a -- I wouldn't be the person to  
17 tell you exactly how much salt inundation it  
18 can tolerate before it'll die, but you will  
19 find eastern cedars in uplands, freshlands --  
20 freshwater wetlands, and on the cusp of tidal  
21 wetlands, because it will -- like I say, it  
22 will tolerate to a degree some saltwater  
23 inundation.

24 Q: And setting aside the cedar, if freshwater  
25 vegetation gets stressed with saltwater



1 inundation, what happens to that freshwater  
2 vegetation?

3 A: So obviously there's going to be -- there'll be  
4 a frequency that it would have to get inundated  
5 and stressed, but with a semi-regular  
6 inundation, once tide is lapping into an area  
7 that has, in this case, wax myrtle, it's what  
8 you're gonna find all over the dunes and stuff,  
9 wax myrtle. Once tide is getting into an area  
10 of wax myrtle, probably -- I'd probably say  
11 twice a month, two to three times a month, if  
12 it starts getting in there, it's going to  
13 really stretch it to the point that it's going  
14 to die. If it gets in there, it could probably  
15 -- and, again, it's hard to judge for sure, but  
16 if it's dead, it's definitely getting in there  
17 multiple times a month, probably once a week,  
18 if not more. It's stressing it to the point of  
19 death it's going to take that. It probably  
20 wouldn't take more than once every three months  
21 -- once every three months in inundation of  
22 salt, high salt concentration water, would  
23 probably be what I would expect to be about the  
24 max it's going to take before it starts to show  
25 signs of dying.



1 Q: And was the -- what kind of vegetation did you  
2 see in that area that you just circled a few  
3 moments ago on Exhibit 1C?

4 **THE COURT:** Hold on one moment. Go ahead.

5 Q: In Exhibit 1C that's on the overhead, you were  
6 talking about what you saw in that area that  
7 you previously circled, maybe you could circle  
8 it again just so we can make sure we're all  
9 looking at the same thing. What did you --  
10 what kind of vegetation did you see there?

11 A: Mostly what I saw was wax myrtle.

12 Q: And what kind of condition was the wax myrtle  
13 in when you were there?

14 A: On the fringes, kind of like in this photo. I  
15 don't know when this photo was taken, but on  
16 the fringes you had some live stuff. But here,  
17 and where the dark stuff is, is definitely in  
18 the bowl. That area -- just to back up a  
19 second, that area was kind of depression, was  
20 a good depression, and on -- we'll call it --  
21 I refer to it as a bowl, on the edges, the  
22 higher edges of that bowl around were some in  
23 okay shape wax myrtle. Just on the inside of  
24 the edges were some dying wax myrtle and the  
25 rest of it in the bottom of the bowl, that



1 whole area that I've got kind of hatched here,  
2 dead. Very dead. Leaf off vegetation. Some  
3 are even black at that point.

4 Q: And do you have any opinion about why that  
5 vegetation died?

6 A: It's based -- looking at the site and based on  
7 the condition and everything that I saw there,  
8 it's got to be from the saltwater intrusion,  
9 saltwater intolerance of it. It's getting in  
10 there frequently enough that it's killed that  
11 stuff off.

12 **(Petitioner's Exhibit Number 37 was introduced into**  
13 **the record at this time.)**

14 Q: Mr. Wood, I'm going to put up on the screen  
15 what has been marked as Petitioner's Exhibit  
16 38. I looks like the judge is faster than I am  
17 on this. Thank you, Judge Anderson. It's  
18 marked as Petitioner's Exhibit Number 38. Are  
19 you able to -- or 37, I apologize. Are you  
20 able to identify this area?

21 A: Again, that's Captain Sam's Spit, looking --  
22 looks like it's looking generally south,  
23 southwest.

24 Q: Are you able to identify the area that we were  
25 just talking about? And from this image, it's



1 a little clearer I think if you're looking at  
2 it physically instead of on the screen, but  
3 have you seen a copy, have you seen this image  
4 before?

5 A: I saw a set of images -- no, I don't think I've  
6 seen this one, no. The set that I'm thinking  
7 of that I've seen had on the ground actual  
8 photos, so no, I don't think I've seen this  
9 one.

10 Q: Are you familiar -- you're able to identify the  
11 area that we were just speaking of, though?

12 A: Uh-huh.

13 Q: And I'm going to hand it to you because I think  
14 it might be a little bit easier for you to see  
15 what's going on. Can you describe what you see  
16 happening in that area?

17 A: Yeah, the colors looks a little bit better on  
18 the -- on this actual. But, again, it's more  
19 of the same thing. I see the -- we'll call it  
20 a horseshoe shaped area, u-shaped area, with --  
21 the resolution isn't great, but I see different  
22 colors in vegetation, especially you can tell  
23 the difference in the vegetation here because  
24 if you look at the other green spots, there's  
25 no gray dull areas as there are in this



1 horseshoe area we're talking about. The middle  
2 of it is just -- it's gray. Again, this isn't  
3 the best resolution photo by any means, but you  
4 can definitely tell that there's something  
5 different going on there.

6 Q: And what does the gray area indicate?

7 A: Dead. Dead vegetation.

8 Q: Okay. Now, on the day that you went out and  
9 placed those pink flags on the critical line,  
10 was there a surveyor there on that day?

11 A: There was.

12 Q: Who was that surveyor?

13 A: Barry Suggs and one of his guys with Crescent  
14 Moon Land Surveying. We use those guys, not  
15 exclusively by any means, but we work with them  
16 frequently. And I've worked with him a lot on  
17 critical area and freshwater wetland  
18 delineations on a regular basis.

19 Q: And what did -- what did the surveyor and his  
20 staff do while they were on the site?

21 A: They what we refer to as picked up my flags.  
22 So they placed their GPS survey positioning  
23 equipment on top of where each flag was,  
24 collected a point into a data collector and  
25 that's like I say we refer to that as picked up



1 the points.

2 Q: Okay. And did you observe Barry and his  
3 colleague locating your flags with their GPS  
4 unit?

5 A: I observed them in part of the area.  
6 Obviously, I didn't -- they weren't right  
7 behind us and we weren't holding their hands,  
8 but I saw them when they were starting and I  
9 didn't see them collect every single point, but  
10 I -- I would never sit there and watch them  
11 collect every single point. I mean, his job is  
12 to collect those points and certify accuracy  
13 that he has collected points where they are.  
14 You know, so he's putting his liability out  
15 there. So if he -- you know, we don't question  
16 them. It's standard practice. Either he or  
17 any other surveyor.

18 Q: And then what happened after you left the site?

19 A: We ate lunch. You talking about ---

20 Q: With this project ---

21 A: With the projects?

22 Q: --- the next steps that ---

23 A: So the next steps with the -- it wasn't but a  
24 day or two later Barry was back by our office.  
25 I think he gave -- gave me a file -- a text



1 file of the points in a thumb drive, which come  
2 off of his data collector. I put both points  
3 into AutoCAD so that they came in where they  
4 are. I'll say -- just probably say this phrase  
5 a couple of times, but where they are in the  
6 world, meaning they dropped in into AutoCAD in  
7 a geo-referenced position where they are, where  
8 they are picked up, they're coordinated. So he  
9 gave me those points, I ran a command that made  
10 a line that connected those points, they're  
11 numbered, and ran a command that connects dots  
12 from point one to -- I want to say it was  
13 around 200, give or take 20 points, so it  
14 connected the dots from one to 200. And that  
15 gave me a line.

16 Q: And do you routinely rely on surveyor's data,  
17 like Barry's point data, in creating maps and  
18 drawings for submission to regulatory agencies?

19 A: Yes.

20 Q: Is it typically reasonable in your field to  
21 rely on the survey data that you received in  
22 preparing maps and drawings?

23 A: It wouldn't just be reasonable, I mean, it's  
24 more or less expected. I don't know much of  
25 any other way you could do it to a degree of



1 accuracy. Now, I mention sometimes on an  
2 approximation we use our in-house GPS that  
3 isn't, you know, near this, the accuracy grade,  
4 but that's -- that's just to make maps for  
5 clients. It's generalized. For this and any  
6 other critical line or wetland delineation  
7 submission, we're going survey grade.

8 Q: And how does what you did with respect to this  
9 2,400 foot long critical area line delineation  
10 and the work that you've done related to this  
11 case compare with what you would do if you were  
12 preparing a critical area line to submit to  
13 OCRM for approval on some other project?

14 A: Every step -- I mean, like I said, I do every  
15 one just as if I were going to be submitting  
16 it. The only step that was omitted in this  
17 case was the actual having the surveyor prepare  
18 a formal plat, which he would sign and stamp  
19 with his surveyor's seal, and then that would  
20 get submitted to OCRM, who would then approve  
21 it. So we stopped just short of that step.

22 Q: And did you prepare some drawing -- we've  
23 discussed different things like maps and  
24 drawings that you've prepared ---

25 A: I did.



1 Q: --- did you do that in this case?

2 A: I did.

3 Q: I'm gonna ---

4 **MOTION TO ADMIT PETITIONER'S EXHIBIT NUMBER 37:**

5 **MS. ARMSTRONG:** Actually, petitioners move to admit  
6 Petitioner's Exhibit Number 37 into evidence.

7 **MR. GRESSETTE:** No objection.

8 **MR. CHURDAR:** None.

9 **RULING OF THE COURT:**

10 **THE COURT:** It's admitted.

11 **(Petitioner's Exhibit Number 37 was admitted into**  
12 **evidence.**

13 **(Petitioner's Exhibit Number 12 was introduced into**  
14 **the record at this time.)**

15 Q: In oversized drawings we can't quite -- I can't  
16 quite get the whole thing on the screen, but  
17 you see it's listed as Petitioner's Exhibit 12.  
18 There are some markings down there. I don't  
19 know, are you able to read those from where you  
20 sit? Are you able to identify this?

21 A: Me? Yes. I'm familiar with this.

22 Q: And is this something that you created?

23 A: This is.

24 Q: If you could just explain to The Court, walk  
25 The Court through how you created this.



1 A: So the blue line is the critical line that I  
2 walked and flagged and Barry and Crescent Moon  
3 Land Surveying picked up. The line -- the  
4 solid black line to the south and then the  
5 dashed black line -- the dashed black line to  
6 the south, those are OCRM's jurisdictional  
7 lines for the base line and the setback line.  
8 Those are -- those were gotten from -- we have  
9 on our server in-house the -- I think they call  
10 it the survey pack or something. Those lines  
11 are provided to the public by OCRM, so they're  
12 public knowledge, public access. That's where  
13 those lines come from. Then the red, green,  
14 and yellow lines here, those are all critical  
15 lines that were I guess certified by OCRM  
16 previously on this site. I was able to get  
17 those lines by taking some drawings, PDF file  
18 version drawings provided by Amy Armstrong and  
19 Jessie, they were provided to Earthworks and  
20 myself. I was able to take those into AutoCAD  
21 and georeference those. Again, kind of put  
22 those drawings into position in the real world  
23 where they are. And a combination of myself,  
24 I did some, and Grant Gibson working under me  
25 did some of the work, as well. We took and



1           painstakingly traced out the previous critical  
2           lines depicted on those figures that you  
3           provided to us. So that's where we got the May  
4           '16 line, May 2011 line, October 2008 line.

5           Q: And were those lines certified by OCRM?

6           A: Yes, yeah, I think it -- I've seen the signed  
7           OCRM certified critical area plats for those.

8           Q: But you didn't submit the critical area line  
9           delineation that you conducted in March ---

10          A: No.

11          Q: --- of this year?

12          A: No, I wasn't asked to. I wouldn't have had a  
13          problem submitting it, but I wasn't asked to.  
14          I wasn't tasked to.

15          Q: Do you know whether you have to be the owner of  
16          the property or have permission or any kind of  
17          authority to submit a critical area line  
18          delineation on a property? Affidavit of  
19          ownership required?

20          A: On a critical line you don't -- now, the  
21          permit, critical area permitting, yes.

22          Q: Okay.

23          A: Just to submit a critical area delineation,  
24          there's no affidavit of ownership or anything  
25          that needs to go on. Now, the -- you have to



1 list obviously the current property owners'  
2 name, contact info, so that if there's --  
3 probably if there's any question from OCRM of  
4 who or why is this being asked to be certified,  
5 they can contact the property owner. But it's  
6 -- I'll just say kind of -- it's not uncommon,  
7 especially on smaller residential lots and  
8 such, it's not uncommon for someone looking to  
9 purchase property to request for a delineation  
10 on a piece of property they're potentially  
11 going to buy.

12 Q: And you also have a few measurements of some  
13 areas with the -- in the neck that have some  
14 numbers and some black lines and arrows and  
15 numbers. What do those -- how did you arrive  
16 at those?

17 A: Again, using the combination of AutoCAD and our  
18 GIS software, we just dropped those  
19 measurements in here and here (indicating).  
20 And I think during the deposition ---

21 Q: And you say here and here ---

22 A: Oh, I'm about to ---

23 Q: Okay.

24 A: I'm going to -- and I think during the  
25 deposition there was a little confusion of



1 where -- from what point to what point we were  
2 measuring and if you'll notice the arrows face  
3 inward, so with the tip of the arrow facing  
4 inward is where we're measuring to to the other  
5 tip of the arrow facing inward. And then the  
6 extension of the tail just gives the  
7 measurement. So we're measuring from my  
8 critical line, the blue 2017 March critical  
9 line, to both the setback line and the distance  
10 to the base line and setback line.

11 Q: And what are those distances between the 2017  
12 line and the setback line?

13 A: To the setback line, 26.3 and from the critical  
14 line, same spot on the critical line to the  
15 base line is 46.3.

16 **MOTION TO ADMIT PETITIONER'S EXHIBIT NUMBER 12:**

17 **MS. ARMSTRONG:** Your Honor, the petitioner moves  
18 Petitioner's Exhibit Number 12 into evidence.

19 **MR. GRESSETTE:** No objection, Your Honor.

20 **MR. CHURDAR:** No objection from the Department.

21 **RULING OF THE COURT:**

22 **THE COURT:** It's admitted.

23 **(Petitioner's Exhibit Number 12 was admitted into**  
24 **evidence).**

25 Q: Mr. Wood, we earlier were looking at some



1 different photographs that depicted an area  
2 where you had identified some dead and/or dying  
3 wax myrtles.

4 Q: Putting Petitioner's Exhibit 1C back up, on the  
5 map. Do you recall identifying that area on  
6 this map?

7 A: I do.

8 Q: And looking back now at Petitioner's Exhibit  
9 Number 12, are you able to identify that same  
10 area on this map?

11 A: I do. I'll circle it or I'll draw an arrow to  
12 that horseshoe-shaped area we were discussing.

13 Q: That's what I was going to ask you. Is that  
14 how you would describe it?

15 A: The horseshoe-shaped area or U-shaped, yes.

16 Q: U-shaped area, okay. Thank you.

17 **(Petitioner's Exhibit Number 13 was introduced into**  
18 **the record at this time.)**

19 Q: Now, Mr. Wood, I'm going to put on the screen  
20 what's been marked as Petitioner's Exhibit  
21 Number 13, it's right under the exhibit label,  
22 it says critical line 2011 development plan.

23 A: Uh-huh.

24 Q: Are you familiar with this ---

25 A: I am.



1 Q: --- drawing?

2 A: I am.

3 Q: Did you create this drawing?

4 A: I did.

5 Q: Can you tell us what information you used and  
6 -- or tell The Court what information you used  
7 and how you created this drawing?

8 A: So for the critical lines shown, depicted --  
9 can you slide it up just a bit, Amy? I want to  
10 see the legend. I can't remember ---

11 Q: Oh, sure, sorry.

12 A: Yeah, so we did -- yeah, that's right. The May  
13 '16 and then my 2017 critical lines depicted on  
14 here. They're laid over a -- what we refer to  
15 that you provided myself and Earthworks with,  
16 is the 2011 development plan. It just shows the  
17 2016, 2017 critical lines overlaying of the --  
18 the development plan from circa 2011.

19 Q: And do you know whether that development plan  
20 was amended over time?

21 A: I don't. I -- I think -- I say I don't for  
22 sure, but I have seen some newer versions, so  
23 I guess I would assume that it has been  
24 amended, but yeah. Does that answer the  
25 question?



1 Q: I think so.

2 A: I think the reason I hesitated is I don't know  
3 whether it's been like amended with some minor  
4 changes or if they kind of went back to the  
5 drawing board and kind of re-did a lot of it.  
6 I know that there's newer versions, but I don't  
7 know for sure whether it's an amended version  
8 of this one or, like I said, kind of a back to  
9 the drawing board type thing.

10 **(Joint Exhibit Number 7 was introduced into the**  
11 **record at this time.)**

12 Q: I hand you a copy of what's been admitted into  
13 evidence, my copy of it, of the Joint Exhibit  
14 Number 7 and hand you that exhibit. Did you  
15 see any of the drawings that are in  
16 Petitioner's (sic) Exhibit Number Seven?

17 A: I'm pretty sure I did. The only reason I'm a  
18 little hesitant to say just straight up yes,  
19 I've seen a lot of different -- a lot --  
20 several different versions of several  
21 different things, and I'm not completely sure  
22 what year dated or what revision around each  
23 thing was dated. I didn't -- you know, but  
24 I've seen -- I'm pretty sure I've seen this now  
25 that I'm looking at it. Pretty sure I've seen



1 this exact version.

2 Q: And can you look at what the date is on the  
3 front cover of those development plans?

4 A: It's received by OCRM stormwater on May 2015.

5 Q: And when they call -- somewhere on there it  
6 says the development plans and the year of the  
7 development ---

8 A: Oh, August 1st, 2011. So, I'm going to assume  
9 that -- yeah, I see a revision table with  
10 revisions dating back all the way up -- this  
11 round of revision, round of revision all the  
12 way up to 2015.

13 Q: Okay.

14 A: So that's why I guess it was, yeah, received in  
15 May. Looks like it's been revised since August  
16 1, gone through several steps. And, again, I  
17 was a little hesitant to say for sure because  
18 there's so many rounds of revisions, I don't  
19 know which -- you know, revision twelve or  
20 eighteen, I've seen.

21 Q: Okay. But it is your understanding it had been  
22 -- whether it had been revised ---

23 A: Uh-huh.

24 Q: --- or not since 2011?

25 A: Yes, yeah, it's definitely been revised.



1 Q: And the one that you, the drawing that you  
2 utilized, is that -- do you know whether that  
3 had been revised ---

4 A: I don't know. I've gone back and looked, and  
5 I don't know which revision round it was on at  
6 that point.

7 **THE COURT:** The system's gotta be rebooted.

8 **MS. ARMSTRONG:** Pardon me? What?

9 **THE COURT:** The system's having to be rebooted.

10 **MS. ARMSTRONG:** Oh.

11 **THE COURT:** So it's not working right now. I'm  
12 sorry. We can take a break if you want.

13 **MS. ARMSTRONG:** Yeah, why don't we just take a break  
14 because I've got -- I've got a couple of things  
15 ---

16 **THE COURT:** Let's take a five minute break.

17 **(A break was taken from 12:23 p.m. until 12:32 p.m.)**

18 **COURT REPORTER:** All rise.

19 **THE COURT:** Y'all be seated, y'all be seated. Thank  
20 you. All right.

21 **MS. ARMSTRONG:** Are we back on?

22 **THE COURT:** Yeah.

23 Q: I don't want to replot any ground, but just go  
24 back and make sure we're clear on exhibit --  
25 Petitioner's Exhibit Number 13, the black and



1 white drawing you utilized that -- describe  
2 that again one more time, where it came from.

3 A: Where it came -- it was provided by Amy and  
4 Jessie to Earthworks and myself and geo-  
5 referenced into AutoCAD and ArcGIS software, so  
6 essentially, we put it in to where it was in  
7 the world using several different points or  
8 property lines and the jurisdictional lines for  
9 the OCRM, the setback and the base line. Used  
10 all that information to get it, you know,  
11 scaled and rotated and put into the right  
12 place.

13 Q: And is there a methodology that you normally --  
14 you typically utilize to make sure that things  
15 are where they are in the world, as you  
16 described them, in the right location?

17 A: Yeah, that's -- it's pretty standard. A lot of  
18 times on a project if I've got access to any  
19 old wetland surveys or critical line surveys,  
20 anything like that, a lot of times, I'll bring  
21 that in, geo-reference it again using the kind  
22 of property line -- using several different  
23 points of interest that we can match between  
24 information that we know is in the right spot  
25 and then the information we brought in with



1 the -- via PDF because, again, we're not always  
2 -- don't always have access to the digital CAD  
3 files which would drop right in in the right  
4 place. So, you know, this is a pretty standard  
5 procedure. A lot of times if I have the  
6 information available, I'll do that and I'll  
7 use that kind of as a guideline to give me an  
8 idea of kind of where I should start looking  
9 for the wetland line to start.

10 **MOTION TO ADMIT PETITIONER'S EXHIBIT NUMBER 13:**

11 **MS. ARMSTRONG:** Your Honor, Petitioner moves Exhibit  
12 Number 13 into evidence.

13 **MR. GRESSETTE:** Objection, Your Honor.

14 **THE COURT:** All right.

15 **MR. GRESSETTE:** The witness has testified he does  
16 not know from whence the underlying roadway  
17 came from. Therefore, first of all, it's  
18 irrelevant; second of all, there's no  
19 foundation; and third, it doesn't -- it's not  
20 probative of anything.

21 **MS. ARMSTRONG:** Well ---

22 **THE COURT:** I'll go with that one first before I ask  
23 Mr. Churdar. Go ahead.

24 **MS. ARMSTRONG:** Go ahead. No, I'm sorry. I'm  
25 assuming ---



1 **MR. CHURDAR:** No, I don't have anything further to  
2 add to ---

3 **THE COURT:** Okay.

4 **MR. CHURDAR:** --- Mr. Gressette.

5 **MS. ARMSTRONG:** Well, first on the probative value,  
6 I think that -- I'm looking at it and seeing  
7 that there are critical lines overlaid over  
8 drawings that were produced by KDP in discovery  
9 prepared by their witnesses that depict the  
10 location of the proposed project, the  
11 structures that are authorized by the permits  
12 that are issued, that's certainly probative.  
13 When it comes to the -- I don't remember what  
14 his other objections were, relevance, the  
15 probative value ---

16 **THE COURT:** Do you want to ---

17 **MR. GRESSETTE:** Your Honor, in fact, these are not  
18 the drawings that are permitted. The witness  
19 has testified that he based this on some  
20 version, he does not know which, it has been  
21 modified many times. He said he didn't know  
22 which of the 2011 preliminary plat. That is a  
23 document that is submitted to the city. It has  
24 nothing to do with the permits; it's not part  
25 of the permits. These drawings are not the



1 construction roadway that was permitted. It's  
2 not relevant.

3 **MS. ARMSTRONG:** Well, what I'd say to that in  
4 response is that what's going to come out in  
5 evidence is there -- there's a set of approved  
6 drawings, permitted approved drawings that the  
7 agency authorized. Since that time, we've  
8 learned through discovery that the drawings  
9 have been changed a number of times and it's  
10 not even possible -- KDP's never really  
11 produced us a copy set and said, you know, this  
12 is it, these are the final drawings. They  
13 changed, as Mr. Wood indicated, multiple times  
14 or multiple iterations, it's ---

15 **RULING OF THE COURT:**

16 **THE COURT:** Well, I'll state at this point, from  
17 what I understand is being told to me that the  
18 drawings are pertinent as far as that which  
19 they show about the critical line, but not in  
20 reference to the roadway because there was --  
21 there's a reference to the roadway. He can't  
22 attest for where the roadway is and this is not  
23 apparently the document, the permitted roadway  
24 is in the file of OCRM, so I'll allow it to  
25 stand for that which I just said, but nothing



1 further. Is that all right?

2 **MR. GRESSETTE:** That's fine, Your Honor.

3 **(Petitioner's Exhibit Number 13 was admitted into**  
4 **evidence).**

5 Q: Mr. Wood, do you remember if there was some  
6 initial, initially some -- maybe some concerns  
7 raised about the original drawing that you had  
8 prepared with the plat?

9 A: Yeah.

10 Q: With respect to this drawing, do you remember  
11 any -- what were those concerns?

12 A: Yeah, I know what you're talking about. So  
13 originally, this particular drawing, I didn't  
14 have enough point -- POI, the point of  
15 interest, on the -- on this particular sheet  
16 that I could accurately match up with known  
17 point of interests, say like intersections of  
18 roads that exist or property corners, that type  
19 thing that are there for sure. I didn't have  
20 enough points of interest that I could geo-  
21 reference this to the point to where I was  
22 comfortable producing a final product. Now,  
23 after I voiced that interest, or that concern,  
24 I believe you guys sent me a much more detailed  
25 drawing of the same road layout and some of the



1 same development, had a lot more line work on  
2 it and I -- using that line work, I was able to  
3 geo-reference that PDF into position that I  
4 felt comfortable enough to use. Then I was  
5 able to take that one, where it was comfortable  
6 where I wanted -- where I was happy with where  
7 it was geo-referenced into, and in the interest  
8 of simplifying and not showing too much line  
9 work that it was busy, I dropped this drawing  
10 back over the detailed drawing and then, so to  
11 speak, turned the detailed one off, leaving  
12 this one in a -- back into a position where I  
13 was comfortable. I felt like it was in the  
14 right place.

15 **THE COURT:** I don't even know if I followed all  
16 that, but.

17 **MS. ARMSTRONG:** Well, I think the way Your Honor  
18 seemed to be where you were headed with your  
19 ruling is it was going to be admitted to show  
20 where the line was, but maybe that The Court  
21 would take that piece of evidence with the  
22 understanding that this may not be ---

23 **THE COURT:** Where the roadway is.

24 **MS. ARMSTRONG:** Right.

25 **THE COURT:** Yeah, I admitted it already.



1 MS. ARMSTRONG: Okay.

2 THE COURT: I don't know what all that just meant,  
3 but.

4 Q: Mr. Wood, in front of you there's a big black  
5 notebook and at the very front of it there, you  
6 will see a tab number seven, that's the Joint  
7 Exhibits ---

8 A: Okay.

9 Q: --- that have been admitted in this case.

10 A: Okay.

11 Q: And that Exhibit Number 7 is the one we were  
12 looking at just a few minutes ago and if you  
13 look at the very last page -- second to last  
14 page ---

15 A: Number 7?

16 Q: --- of Exhibit Number 7 ---

17 A: Second to last leaflet or second to last  
18 back/front page because they're back and front?

19 Q: Yeah, so the second to last page with the front  
20 of the second to last page.

21 A: Front of second to last leaf.

22 Q: Well, this is what I'm ---

23 A: I see where you're going. I got it. S1-0 --  
24 or it's one ---

25 Q: S1.0?



1 A: Yes.

2 Q: Yes. This drawing right here. Have you seen  
3 this drawing before?

4 A: I have before. This is what I think we  
5 referred to as the sheet pile drawing.

6 **(Petitioner's Exhibit Number 14 was introduced into**  
7 **the record at this time.)**

8 Q: And I'm going to put Petitioner's Exhibit  
9 Number 14 on the overhead. It's got the legend  
10 down there at the bottom, is this a drawing  
11 that you created?

12 A: It is.

13 Q: And what is this a drawing of?

14 A: That -- this page of evidence from tab seven,  
15 the sheet pile drawing, with the 2016 and 2017  
16 critical line overlaying of the sheet pile  
17 drawing and there is a roadway out there, as  
18 well.

19 Q: So you used the approved sheet pile wall layout  
20 from Exhibit Number 7 in creating this drawing,  
21 Petitioners Exhibit Number 14?

22 A: Yes. And I'll add that this one, I was able to  
23 geo-reference in in a position without much --  
24 without much struggle.

25 Q: So are you confident to a reasonable degree of



1 scientific certainty the accuracy in location  
2 of the layout of the sheet pile wall?

3 A: To a reasonable degree of scientific survey,  
4 absolutely.

5 Q: And with respect to the critical lines, the  
6 2016 line and the 2017 line, that are shown?

7 A: Yes.

8 Q: To a reasonable degree of scientific certainty,  
9 these are located where they are in the world,  
10 to use your term?

11 A: As I say, like to say, yes, correct.

12 Q: Now, can you describe where the road is in  
13 relationship to the 2017 critical line that you  
14 delineated? And you can use the image, but  
15 also if you could describe it in words.

16 A: Well, with this road layout, it looks like  
17 there are several instances -- with respect to  
18 the 2016 or 2017 line did you ask?

19 Q: The 20 -- well, we can -- let's talk about the  
20 2016 line first and then we can talk about the  
21 2017 line.

22 A: So right here I notice an impingement on a  
23 critical line from the roadway, so it would be  
24 a crossing that would -- I would assume have to  
25 be permitted for some fill there and I think --



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**MR. GRESSETTE:** Objection, Your Honor. He's not an expert on permitting.

**MS. ARMSTRONG:** He already has testified that as part of his wetland science degree or certification and really what this Court qualified him in is being familiar with the regulatory programs having to apply for permits for applicants that seek permits to impact critical area wetlands, dock permits, which are critical area permits, Corps of Engineers permits. He's got to have a working familiarity of those regulations that apply.

**THE COURT:** He testified that he assumed would have to be filled. Took it one step further. That's the only thing I understood him to do is that one narrow comment.

**Q:** Mr. Wood, can you -- are you -- is your -- did Earthworks submit permit applications for filling in wetlands and critical areas associated with the roads, construction of a road?

**A:** I've never done one with -- concerning construction of a road. Most of the time, if not exclusively, but definitely most of the



1 time when I'm filling critical line -- critical  
2 area wetland, which is I guess I might add to  
3 my understanding is pretty highly regulated.  
4 You don't get -- I advise my clients all the  
5 time, you don't get to fill a lot of critical  
6 -- critical area. But the -- generally, what  
7 I do is any time that there's going to be a  
8 little bit of fill, it's a bulkhead, it's  
9 straightened out a line where you've got a  
10 critical line a lot of times on a piece of  
11 property, it zigs and zags. You're going to  
12 get a little bit of fill here and there to more  
13 or less straighten out a run of a bulkhead.  
14 But I've never -- I've never done one that was  
15 going to involve permit for a road.

16 Q: If you've got -- if you've delineated critical  
17 area wetlands for a client and they want to  
18 construct something where those critical area  
19 wetlands are located, will you seek a permit  
20 for approval of those impacts?

21 A: Unless you want to go risk going to jail, yes.  
22 You would have to -- you'd have to apply for a  
23 permit.

24 Q: So you were testifying about the areas where  
25 the critical line -- the 2016 critical area



1 line intersects with the location of the road.

2 A: Yeah, so I'm not, you know, my knowledge of  
3 what permits were issued and not issued, I  
4 don't really know with the case. My deal was  
5 mainly looking at critical lines, so that's why  
6 I said I would assume that this would have been  
7 permitted for that road to be able to cross  
8 there. Does that clarify it? There's another  
9 little spot right here where it's very, very  
10 close to the shoulder of the road. I know it,  
11 you know, would probably have to be some kind  
12 of stabilization structure there for it to be  
13 that close to the road.

14 Q: I'm sorry, I'm messing up your lines just a  
15 little bit. Can you tell ---

16 A: Yeah, I got you.

17 Q: --- now that we're a little bit closer ---

18 A: Yeah.

19 Q: --- where that 2016 line is in relation to the  
20 road?

21 A: Yeah, the road goes right up to the shoulder  
22 and then, you know, there would have to be some  
23 sort of seawall or something at least right  
24 there on the edge though. Yeah, that one's  
25 mine and the other one I think is a little bit



1 more discreet.

2 Q: Yeah, we're talking about the blue, the 2017  
3 line.

4 A: Oh, I was talking about just the red 2016 line.

5 Q: Okay.

6 A: But the 2017 line there's a bunch of spots that  
7 it would have to have a permit to cross.

8 Q: Let's just zoom back out and talk a little bit  
9 more about the areas. If you could just  
10 identify the areas, almost drawing it and  
11 verbally ---

12 A: In -- in respect to the 2016 or 2017?

13 Q: 2017.

14 A: 2017, oh. You know, if we were -- if someone  
15 were attempting to put a road in with this  
16 alignment, you know, this would be an impact;  
17 this would majorly impact; have an impact here,  
18 here, here, here (indicating).

19 Q: So approximately six areas where the critical  
20 line is located in the path of the proposed  
21 road?

22 A: Of this road alignment, yes.

23 Q: And is there an area where the critical line  
24 touches the setback line?

25 A: Yes, right there (indicating).



1 Q: And if -- to be able to construct a road in  
2 that area, would it be possible to construct a  
3 road that did not cross through the critical  
4 area?

5 A: It would not be possible to my knowledge to be  
6 able to construct one without a permit that did  
7 not touch critical area wetlands.

8 **MOTION TO ADMIT PETITIONER'S EXHIBIT NUMBER 14:**

9 **MS. ARMSTRONG:** Your Honor, the petitioner moves  
10 Exhibit 14 into evidence.

11 **MR. GRESSETTE:** No objection, Your Honor.

12 **MR. CHURDAR:** None from the Department.

13 **RULING OF THE COURT:**

14 **THE COURT:** It's admitted.

15 **(Petitioner's Exhibit Number 14 was admitted into**  
16 **evidence).**

17 **MS. ARMSTRONG:** Give me just a moment, Your Honor.  
18 I don't have any other questions for this  
19 witness.

20 Q: Please answer any that counsel for KDP or DHEC  
21 has.

22 **THE COURT:** Mr. Gressette?

23 **MR. GRESSETTE:** Thank you, Your Honor.

24 **MR. WOOD - CROSS-EXAMINATION BY MR. GRESSETTE:**

25 Q: Good morning, Mr. Wood.



1 A: Good morning.

2 Q: How you doing?

3 A: I'm all right.

4 Q: It's a little more comfortable in here to talk  
5 than when we last talked.

6 A: I don't know.

7 Q: I guess there are a few people watching. You  
8 testified a few moments ago about the 2011  
9 preliminary plat, do you recall that?

10 A: Preliminary plan, preliminary development plan,  
11 yeah.

12 Q: Okay. And when you testified about that, I  
13 seem to recall you told us that you used a PDF  
14 of that document to create some other piece?

15 A: That's correct.

16 Q: Okay. And so we're going to put up a copy of  
17 Petitioner's -- I'm sorry, Respondent's Number  
18 1 and this is the preliminary subdivision plat.

19 **(Respondent's Exhibit Number 1 was introduced into**  
20 **the record at this time.)**

21 Q: Bears Bates number KDP 1123. And then we're  
22 going to look at page number ---

23 **MS. ARMSTRONG:** Tom, I'm really sorry to interrupt.  
24 I just had a water spill situation ---

25 **MR. GRESSETTE:** Oh, sure.



1 **MS. ARMSTRONG:** --- and I just -- can we just have  
2 like literally a minute. I think Merrill went  
3 to go grab some ...

4 **MR. CHURDAR:** I've got some over here if you need --  
5 -

6 **MS. ARMSTRONG:** Oh, thank you.

7 **MR. CHURDAR:** Yeah.

8 (Off the Record)

9 Q: Is this the preliminary plat that you used?

10 A: No, I don't -- I have never seen this.

11 Q: Okay. And if we turn to page two. Oh, sorry,  
12 page two of the PDF, so back a couple of pages.  
13 I'll show it to you. So we'll go to the next  
14 page and then the next page.

15 **MR. ROBERTS:** I'm sorry, next page?

16 **MR. GRESSETTE:** Yes, sir, please. Sorry. And one  
17 more. I think it might be missing one.

18 Q: Here, I'll just show it to you. I'm going to  
19 walk over, assuming that's all right, and show  
20 you this page. Does that look like the  
21 preliminary plat that you used?

22 A: This looks like maybe one page of the  
23 preliminary plan. Again, I've been scolded by  
24 surveyors referring to things at plats.

25 Q: Right.



1 A: I don't know if you're doing it on purpose or  
2 just generally calling it a plat, but this  
3 would just be a plan.

4 Q: Okay.

5 A: A plat would be like a boundary survey, so I  
6 apologize if ---

7 Q: Okay. Is that the document you used to lift  
8 the roadway?

9 A: This looks like part of it. There's another  
10 piece that I don't see that goes this way.  
11 That -- yeah, I believe that would be -- this  
12 looks like it.

13 Q: Okay.

14 **MS. ARMSTRONG:** And what exhibit number is that,  
15 Tom?

16 **MR. GRESSETTE:** 1. KDP 1.

17 **MS. ARMSTRONG:** Oh, KDP 1.

18 A: Can I look at the sheet that I produced and  
19 this at the same time?

20 Q: Sure.

21 **MR. GRESSETTE:** Is it still in there?

22 **MS. ARMSTRONG:** They're all over by the ---

23 A: Yeah, I don't think I ever had my hands on  
24 them. The maps that I produced.

25 Q: Oh, over there.



1 MR. GRESSETTE: Sorry, Your Honor.

2 A: I just want to look because, again, so many  
3 different versions and revisions and just kind  
4 of want to see what I produced and make sure.

5 Q: I don't blame you. You want to be accurate.

6 A: Yeah, I would attest that these are one in the  
7 same.

8 Q: Okay.

9 A: What I used.

10 Q: Why don't I take that so it doesn't get smushed  
11 up in your ... Then I can take those back,  
12 too.

13 A: Okay.

14 Q: Well, actually, there's a last page on there  
15 that has a bunch of numbers.

16 A: Yeah.

17 Q: Can you take a look at those and then we'll pop  
18 them up on the screen?

19 A: Okay. Yeah.

20 Q: Oh, okay. Why don't we use the Elmo. Can I  
21 borrow them?

22 A: Uh-huh.

23 Q: All right. So you took a minute to look at  
24 that page.

25 A: Uh-huh.



1 Q: I'm going to put this up on the Elmo, if that's  
2 okay. That's a whole lot of numbers.

3 A: It is.

4 Q: What are those numbers?

5 A: That's a line table.

6 Q: And what's a line table?

7 A: That coordinates with -- or it matches all the  
8 other sheets of the plan you showed me, line --  
9 each line has a number and would -- because all  
10 the short little lines can't have these numbers  
11 assigned to it shown on here, you just label  
12 it with a L line number and then it references  
13 on the last sheet.

14 Q: So those are numbers that reflect all the  
15 points shown in the drawings that you use?

16 A: That's correct.

17 Q: And aren't those points the most accurate  
18 information about the location of those lines  
19 for the preliminary plat?

20 A: They are.

21 Q: And did you use them?

22 A: I did not.

23 Q: Why not?

24 A: If I'm not mistaken, I never got the line  
25 table. I had ---



1 Q: Did you ask for it?

2 A: I did not.

3 Q: Wouldn't you have liked to have had the most  
4 precise information about what you were dealing  
5 with?

6 A: It would have been nice, but, you know, doing  
7 it the way we did it, we do very -- you know,  
8 all the time and it would have been ---

9 **THE COURT:** Wait a second.

10 (Off the record discussion.)

11 **THE COURT:** Go ahead.

12 Q: So would using that data made your work more  
13 reliable?

14 A: Potentially.

15 Q: And wouldn't you want your work to be the most  
16 reliable possible?

17 A: Yeah, I mean, I felt good about what I  
18 produced.

19 Q: And why did you feel good about it?

20 A: Again, it's not anything that I've never done  
21 before. It's pretty common for what I do.

22 Q: So it might be common, but it's not the best  
23 practice you could have used?

24 A: The best practice would have been if you guys  
25 would have given us the digital CAD files.



1 Q: I didn't give you anything.

2 A: Oh, yeah. Well, if I would have been able to  
3 get ahold of the digital CAD files, yeah.

4 Q: Did you ask anybody for the digital CAD files,  
5 because I remember in your deposition you said  
6 you didn't?

7 A: I did not.

8 Q: Okay. So in other words, applying your normal  
9 and usual techniques, you didn't need the CAD  
10 files, you didn't need mind using the less  
11 reliable information, is that correct?

12 A: I wouldn't call it less reliable.

13 Q: Well, if the other is more reliable, this is  
14 less reliable, correct?

15 A: I think you're splitting hairs there, but ...

16 Q: Which one is the most precise data?

17 A: The exact data from which this information was  
18 produced, the digital CAD files.

19 Q: Okay. And did you use a digital CAD file?

20 A: I did not.

21 Q: So you did not use the most reliable  
22 information available?

23 A: If you want to word it that way, then I guess  
24 I'd have to agree.

25 Q: Now, why don't I collect back up that page.



1 And I want to be sure that we're clear for  
2 purposes of the record, when we talk about a  
3 2011 set of plans or plat, whichever one you  
4 want to use, that form the basis of your  
5 drawings in this case, you don't know whether  
6 those were final, they were revised later or am  
7 I understanding correctly, that you know that  
8 they were revised and you don't know where your  
9 drawings fall in the revision history?

10 A: I wouldn't know where the drawings fall in the  
11 revision history, but I think it was maybe  
12 alluded to that the road alignment's the thing  
13 that potentially could have been revised, the  
14 critical line, off of those drawings. You're  
15 not going to revise the critical line. The  
16 critical line was where it was; it was  
17 certified. So, for the intents and purposes of  
18 generating the critical line off of those, you  
19 know, the revision history is kind of  
20 irrelevant.

21 Q: Okay. So for your work in this case in  
22 creating the exhibits that you created, you  
23 were careful to use the precise information  
24 that was most reliable for the critical lines,  
25 yet something less reliable for how you were



1 attempting to depict the roadway in relation to  
2 it, isn't that correct?

3 A: The roadway in relation to the critical line on  
4 the drawings that I depicted, depending on  
5 origin history, I mean, the relationship of  
6 where that critical line is and the roadway is  
7 on that specific drawing, they are the same.  
8 Now, in another set of drawings, the critical  
9 line would not have changed; the road could  
10 possibly have changed, but the critical line's  
11 always going to be where it was.

12 Q: In other words, for purposes of our work here  
13 today, the three exhibits that you just  
14 identified, if I understand you correctly, you  
15 believe you used the most reliable and constant  
16 information to depict the previously certified  
17 critical lines, but you did not use the most  
18 reliable information to depict the roadway, is  
19 that correct?

20 A: The roadway depicted on these sheets -- on the  
21 drawings that I provided, it was in the spot  
22 where it was in relation to the critical line  
23 on both sets -- on both sets of the sheet pile  
24 in the development plan drawing.

25 Q: And those drawings were PDFs?



1 A: They were.

2 Q: They were not the exact coordinates that we  
3 looked at earlier?

4 A: They were not CAD files.

5 Q: And the CAD files, again, you testified were  
6 the most reliable information?

7 A: They would have been the most reliable  
8 information if they were available.

9 Q: We had a little bit of confusion earlier when  
10 we were going back and forth about all that  
11 technical expert stuff, so I just want to be  
12 sure that I'm clear. You have never handled a  
13 Coastal Zone Consistency Certification permit,  
14 have you?

15 A: Not an explicit -- exclusively CZC permit, no.  
16 There's a lady at our office that handles most  
17 of just CZC stormwater permit.

18 Q: And so you've never handled a Coastal Zone  
19 Consistency Certification in relationship to an  
20 NPDES permit?

21 A: That would be correct.

22 Q: And you've never handled one in conjunction  
23 with a wastewater construction permit?

24 A: That would be correct.

25 Q: And of your work, how much of it is in Horry



1 County versus other counties?

2 A: The majority would be in Horry and Georgetown  
3 County.

4 Q: And do you delineate critical lines in other  
5 counties?

6 A: I do.

7 Q: And do you delineate critical lines in  
8 Charleston?

9 A: I have.

10 Q: When was that?

11 A: It was one that was not certified, but I did --  
12 I've done a couple of versions of critical line  
13 delineations as the mitigation bank that I  
14 mentioned earlier.

15 Q: And have you ever delineated any critical lines  
16 in Charleston County and had them certified?

17 A: Oh, yeah, not long ago, probably within the  
18 last year, Church Creek Landing ---

19 Q: Okay.

20 A: --- in Charleston County.

21 Q: All right. And ---

22 A: Certified.

23 Q: --- tell me about how much area did that  
24 involve?

25 A: Off the top of my head, 30 acres, give or take.



1 Q: And how long did you work on that project?  
2 Sounds like a big one.

3 A: Oh, no, I wouldn't say it's a big one. It's --  
4 that one was really more of a recertification  
5 of a critical line. It had been done  
6 previously.

7 Q: How much time did you spend out there?

8 A: Not long.

9 Q: Okay. So it is usual and customary in your  
10 business to visit a site property for say four  
11 hours and certify the critical line?

12 A: Depending on size and one of that size, yeah.

13 Q: Okay. And how much knowledge did you possess  
14 the day you went to Kiawah about the history of  
15 the erosion processes at Kiawah?

16 A: Specifically, the erosion process specifically  
17 at Kiawah, I'd say none.

18 Q: Did you endeavor to learn anything about that?

19 A: No.

20 Q: Is that type of information not important to  
21 determining where a critical line may or may  
22 not be on a present day?

23 A: I'll say familiar with erosional processes in  
24 general on a spit or any type of geography of  
25 this similar, now, not specifically limited to



1 Kiawah Island or Captain Sam's Spit, you know,  
2 no, I wouldn't have done that for probably any.  
3 But the erosional processes in Horry County,  
4 Georgetown County, Charleston County, are all  
5 going to be mostly the same.

6 Q: Okay. So there would have been no benefit to  
7 your having been involved at work out at the  
8 spit for say the last four or five years?

9 A: Oh, no.

10 Q: No, there would have been no benefit to that  
11 knowledge?

12 A: Well, not for the task I was -- not for the  
13 service I was tasked for, to go out delineate  
14 a line where it is today. Yeah, knowing where  
15 the old line was, new lines, old lines, no. I  
16 was just tasked to find where it was today or  
17 that day.

18 Q: Okay. And earlier you testified about an  
19 Exhibit 1C, I think it's the Petitioner's 1C.  
20 I think it's right here. I'll put it on the  
21 board if I can or it may still be over here.

22 **(Petitioner's Exhibit Number 1C was introduced into**  
23 **the record at this time.)**

24 Q: This is a photograph that you testified about  
25 earlier, do you remember that?



1 A: I do.

2 Q: Okay. And did you take this photograph?

3 A: No.

4 Q: Do you know when it was taken?

5 A: I don't.

6 Q: Do you know from what angle it was taken?

7 A: Only because I've been out there and, you know,  
8 mapped it, I would -- I'd say that it was taken  
9 from the beach -- from the beach side, the  
10 ocean side, looking back to the marsh side,  
11 which would make that looking due west,  
12 southwest.

13 Q: I probably didn't ask the question very well.  
14 The perspective seems a little skewed to me and  
15 I'm wondering how high the photographer was.

16 A: Oh.

17 Q: Do you know?

18 A: No, I don't know.

19 Q: Okay. Did anybody tell you anything about that  
20 picture?

21 A: No, I hadn't seen that until today.

22 Q: Okay. And am I correct that it is your  
23 testimony that that is an accurate depiction of  
24 what you saw the day you went to Kiawah in that  
25 area?



1 A: Define accurate. It looks a lot like what I  
2 saw, but is that -- could I say that that was  
3 taken the day I was out there, probably not.  
4 You know, I don't think so, but it looks like  
5 what I saw. How accurate, you could split  
6 hairs, but it looks similar to what I saw.

7 Q: Well ---

8 **THE COURT:** Well, I'd like to understand why  
9 accurate splits hairs.

10 A: Well ---

11 **THE COURT:** I just don't understand that.

12 A: And I might be over-thinking this and I  
13 apologize if I am. But I try -- you know, I  
14 don't necessarily want to get pigeon-holed into  
15 anything, but ---

16 **THE COURT:** Well, I hope all of your testimony's  
17 accurate.

18 A: Oh, yeah, no, for sure.

19 **THE COURT:** Okay.

20 A: Just I guess what I'm saying is accuracy is  
21 splitting hairs is, you know, okay, is this one  
22 bush, is it not dead in this picture, but was  
23 it dead when I went out there, to that degree  
24 of accuracy, you know. Does that make sense?  
25 You know, I can't say that there was eleven



1 bushes dead here and twelve when I went there.

2 Q: Okay. So ---

3 A: It accurately depicts a dead, a dead clump of  
4 vegetation in the center of the bowl  
5 depression, with a little bit of live  
6 vegetation around the rim, which is consistent  
7 with what I saw out there. Does that answer  
8 it?

9 Q: Does that picture form the basis of any of your  
10 opinions?

11 A: No, again, I had never seen it until today.

12 Q: Did you rely on that photograph for any of your  
13 opinions?

14 A: No.

15 Q: And am I correct that you just testified that  
16 you cannot confirm whether it is an accurate  
17 depiction of what you saw the day you visited  
18 Kiawah?

19 A: It looks like -- it looks similar to what I  
20 saw, but I can't say it is exactly what I saw  
21 that day.

22 Q: Now, talk to me, if you would, about how much  
23 inundation it takes to classify a particular  
24 area as a saltwater wetlands, is that right?

25 A: I would say on the order -- so a tide would be



1 inundating an area, I would say on the order of  
2 once to twice a week would probably be the  
3 frequency that it would take for signs of a  
4 critical area wetland to present themselves,  
5 being dead vegetation, dead upland or  
6 freshwater vegetation, or rack lines. Water  
7 staining of ground or, you know, existing  
8 vegetation and stuff around there. You can get  
9 water stain. So it would take probably once or  
10 twice a week frequency for it to start  
11 exhibiting the things that I would look for to  
12 determine whether it's a critical line --  
13 critical area or not.

14 Q: Hypothetically, you visited an area on a king  
15 tide and had a few inches of water, would you  
16 believe it scientifically reasonable as a  
17 wetland scientist to, based on that sole visit,  
18 determine that that area was critical area?

19 A: My opinion would be that it is not, and that's  
20 based on living in a tidal flooded area,  
21 Murrells Inlet. Am I frequently, you know, in  
22 the marsh walk and on a king tide, you're  
23 getting that super high tide. You're getting  
24 tidal water up in peoples' yards that are, you  
25 know, upland yards, but, you know, those king



1 tides occur once, twice a year sometimes, so it  
2 is my opinion that just because a king tide  
3 touches a spot does not classify that as a  
4 critical area wetland.

5 Q: That's all I got. Thank you, sir. You've been  
6 very patient.

7 **THE COURT:** Mr. Churdar?

8 **MR. WOOD - CROSS-EXAMINATION BY MR. CHURDAR:**

9 Q: Good afternoon, Mr. Wood.

10 A: Good afternoon.

11 Q: I just want to ask you a couple of questions.  
12 Are you familiar with the statute that  
13 addresses the authority of the Department to  
14 certify critical area delineations?

15 A: I probably couldn't recite it back to you, but  
16 I am familiar with it, yes.

17 Q: Okay. Okay. And is it your understanding that  
18 the Department is the only agency that has the  
19 authority to certify critical area  
20 delineations?

21 A: Critical area, yeah.

22 Q: Okay. And the critical area delineation is  
23 valid for what period of time?

24 A: Five years.

25 Q: Okay. And the start date of the critical area



1 delineation is made with the stamp and date  
2 that is affixed to the survey, correct?

3 A: The start date of the valid period?

4 Q: Correct.

5 A: Yeah.

6 Q: Okay. And, in fact, are you familiar with the  
7 statutorily required statement at the bottom of  
8 a critical area delineation that says the  
9 following: The area shown on this plat is a  
10 representation of Department permit authority  
11 on the subject property. Critical areas by  
12 their nature are dynamic and subject to change  
13 over time. By delineating the permitting  
14 authority of the Department, the Department in  
15 no way waives its right to assert permit  
16 jurisdiction at any time in any critical area  
17 on the subject property whether shown hereon or  
18 not. Are you familiar with that statement that  
19 goes on each ---

20 A: Uh-huh.

21 Q: --- critical area delineation?

22 A: Yeah, a lot of times I see it not necessarily  
23 written on the survey, but I'll stamp and sign  
24 under statement read. I'm familiar with it.

25 Q: And the reason for that and the reason for the



1 five year limitation is because this is a  
2 dynamic area, correct?

3 A: Yeah, I would say probably all wetlands are,  
4 are dynamic in nature.

5 Q: Okay.

6 A: Freshwater and tidal.

7 Q: And are you familiar with the special condition  
8 on the Coastal Zone Consistency Certification  
9 issued as part of this cluster of permits, are  
10 you familiar with the special condition that  
11 requires an updated critical area line for  
12 review and approval 30 days prior to the  
13 initiation of construction?

14 A: I'm familiar in the aspect that I've seen that  
15 on other permits. Again, I think I mentioned  
16 earlier, I haven't seen any of the permits for  
17 this particular project, so I have seen that on  
18 other projects.

19 Q: Okay. And the reason for that is because of --  
20 again because ---

21 A: The dynamic nature.

22 Q: --- of the dynamic nature of the critical area?  
23 Thank you very much. That's all my questions.

24 **MS. ARMSTRONG:** I just have four on new material.

25 **THE COURT:** Go ahead.



1 MR. WOOD - RE-DIRECT EXAMINATION BY MS. ARMSTRONG:

2 Q: Mr. Wood, do you routinely utilize PDF  
3 documents to create drawings like the ones you  
4 did in Petitioner's Exhibit 12, 13, and 14?

5 A: I do. Again, any time that I have old  
6 information available to me, I make highest and  
7 best use of anything that's given to me, so,  
8 yes.

9 Q: And with respect to the numbers that Mr.  
10 Gressette was asking you about in that Exhibit  
11 1, do you actually -- do you need the numbers  
12 in order to create the maps that you've  
13 created?

14 A: The maps that I've created, no. Now, I would  
15 not try to use the lines that I did to create  
16 construction drawings. I would not do that  
17 unless I had some numbers or probably wouldn't  
18 do it unless I had CAD, but for mapping, I  
19 would not necessarily need those, no.

20 Q: And do you need the numbers or a CAD file in  
21 order to prepare drawings in a manner that  
22 represents -- that's accurate with a  
23 reasonable degree of scientific certainty?

24 A: No.

25 **MS. ARMSTRONG:** I don't have any other questions.



1     **THE COURT:** Re-cross from you?

2     **MR. GRESSETTE:** No, we're done.

3     **THE COURT:** Okay. You may step down.

4     A: Thank you.

5     **(The witness was excused.)**

6     **THE COURT:** I think it's time to break for lunch.

7     **MS. ARMSTRONG:** Yeah.

8     **THE COURT:** And what time do we need to come back?  
9             2:30?

10    **MR. CHURDAR:** That's fine with me.

11    **MR. GRESSETTE:** Fine, Your Honor.

12    **THE COURT:** All right. Thank y'all.

13    **MR. CHURDAR:** Thank you.

14    **MR. GRESSETTE:** Yes, sir.

15    **(A lunch break was taken from 1:21 p.m. until 2:29**  
16    **p.m.)**

17    **THE COURT:** Next witness.

18    **MS. ARMSTRONG:** Yes, the petitioners call Sidi  
19             Limehouse to the witness stand.

20    **THE COURT:** Well, Mr. Limehouse, could you just step  
21             out of the courtroom just for a second?

22    **MR. LIMEHOUSE:** Yes, sir.

23    **THE COURT:** I hate to make you ---

24    **MR. LIMEHOUSE:** I can leave.

25    **DISCLOSURE BY THE COURT:**



1     **THE COURT:**   Okay.  Let me pull this up.  Under the  
2                    disqualification rules, it says a judge shall  
3                    disqualify himself in a proceeding in which his  
4                    impartiality might be reasonably questioned,  
5                    including, but not limited to, and it gives a  
6                    bunch of instances.  None of which apply to  
7                    what I'm about to tell you.  But one of them  
8                    says personal bias or prejudice concerning  
9                    parties, lawyer, or party or party's lawyer.  
10                  But when I ran for one of the -- I think I ran  
11                  for chief judge, I don't know when, someone  
12                  named Limehouse, don't know who, because I just  
13                  don't remember, gave a letter to some members  
14                  of the General Assembly saying that I shouldn't  
15                  be elected to that position.  The reason I say  
16                  that is, it says a judge should disclose on the  
17                  record information the judge believes the  
18                  parties or their lawyers might consider  
19                  relevant to the question of disqualification  
20                  even if the judge believes there is no real  
21                  basis for disqualification.  I'm telling y'all  
22                  that to tell you, I don't know who the person  
23                  was.  If there is any possibility that that is  
24                  the person, I don't want to know about it,  
25                  number one.  So I'd prefer to make sure it



1 doesn't -- it doesn't get disclosed.

2 **MS. ARMSTRONG:** He sent a letter to the legislature  
3 and what the con- -- what was ---

4 **THE COURT:** I never read it.

5 **MS. ARMSTRONG:** You haven't read it, okay.

6 **THE COURT:** So ---

7 **MS. ARMSTRONG:** So we don't know, okay.

8 **THE COURT:** I was told he was complaining about me,  
9 but I didn't know what.

10 **MS. ARMSTRONG:** Okay. I didn't know if it was in  
11 support of or opposition.

12 **THE COURT:** No, it was opposition.

13 **MS. ARMSTRONG:** Okay.

14 **THE COURT:** But I don't remember who it -- I mean,  
15 they told me it was a unique individual and  
16 that's -- I didn't go from there. So I'm  
17 saying this mainly because even if it was --  
18 even if it was him, I wouldn't disqualify  
19 myself because I don't -- my wife complains  
20 about me. So, you know, hey, one of my biggest  
21 critics is myself, so that wouldn't phase me  
22 one way or the other whether to believe the man  
23 or not. So -- but I just, out of an abundance  
24 of caution, I'm disclosing that on the record.  
25 And I'm making the request that in questioning



1 that individual, if he is the individual,  
2 please don't bring out ---

3 **MS. ARMSTRONG:** I mean ---

4 **THE COURT:** Okay

5 **MS. ARMSTRONG:** Harvin caught me off guard a little  
6 bit, just a few minutes ago.

7 **THE COURT:** Well, that caught me off guard.

8 **MS. ARMSTRONG:** I mean, I've talked about his  
9 testimony with him and that's never been  
10 something that's raised, discussed ---

11 **THE COURT:** Well, that's all the best.

12 **MS. ARMSTRONG:** --- or ---

13 **THE COURT:** It sounds like he's not the person.

14 **MS. ARMSTRONG:** I mean, I can't guarantee that that  
15 isn't going to come out. That's definitely not  
16 anything that ---

17 **THE COURT:** Well, sounds to me like he's not the  
18 person, so I would like to leave it at that.  
19 We're all -- we're all good to go if we stay  
20 there, so. I'm good to go even if it's not,  
21 like I said. So I just wanted to put that on  
22 the record and I wanted to do it without him in  
23 the courtroom because if ---

24 **MS. ARMSTRONG:** Absolutely.

25 **THE COURT:** --- if there's any chance that he is the



1 one, I didn't want him to stand up and say  
2 yeah. Okay. All right. So with that said, do  
3 you need to speak to him before or is ---

4 **MS. ARMSTRONG:** I'm fine, judge.

5 **THE COURT:** All right. Well, let's just proceed  
6 then. I'm ready. And sorry to make him hobble  
7 outside.

8 **MS. ARMSTRONG:** Sure, no, that's okay.

9 (Off the Record discussion)

10 **MS. ARMSTRONG:** Sidi, we just had a preliminary  
11 matter to take care of. We're ready to call  
12 you up to the stand. Okay?

13 **MR. LIMEHOUSE:** That's fine.

14 **MS. ARMSTRONG:** Right over -- follow Jessie.

15 **COURT REPORTER:** I understand you spell your name S-  
16 I-D-I?

17 **MR. LIMEHOUSE:** Yes, ma'am.

18 **COURT REPORTER:** And it's Limehouse, L-I-M-E-H-O-U-  
19 S-E?

20 **MR. LIMEHOUSE:** Yes, ma'am.

21 **COURT REPORTER:** Raise your right hand for me,  
22 please, sir.

23 **MR. LIMEHOUSE:** (Witness complies.)

24 **COURT REPORTER:** Do you solemnly swear the testimony  
25 you're about to give in this matter is the



1 truth, the whole truth, and nothing but the  
2 truth, so help you God?

3 **MR. LIMEHOUSE:** Yes, ma'am.

4 **COURT REPORTER:** Thank you.

5 **MR. LIMEHOUSE - DIRECT EXAMINATION BY MS. ARMSTRONG:**

6 Q: Good afternoon, Sidi, how are you?

7 A: How you doing, Amy?

8 Q: Good. Where are you from?

9 A: John's Island.

10 Q: Thanks for making the trip to be here with us  
11 this afternoon. Where did you grow up?

12 A: Mostly John's Island, yeah.

13 Q: So are you ---

14 A: Mullet Hall Plantation, so I'm right on the  
15 Kiawah River. Right across from Kiawah.

16 Q: That's what I was going to ask, where that's  
17 located. Is that where you were born?

18 A: Yes.

19 Q: And you still live there?

20 A: I was born in a hospital, you know how that is.  
21 Baker Hospital, but.

22 Q: And where did you grow up?

23 A: John's Island.

24 Q: And what do you do for a living, Sidi?

25 A: Farm.



1 Q: And how long have you been a farmer?

2 A: I'm 78 and three-quarters and I've been farming  
3 most of that time. Yeah, I was in -- went to  
4 Clemson and was in the Army, you know, but most  
5 of the time I've been farming.

6 Q: And what position were you holding when you  
7 were in the Army?

8 A: I was a major. I got out as a major. You  
9 know, second lieutenant, first lieutenant,  
10 captain, major.

11 Q: And were there any other things that you did  
12 aside from farming that occupied your time?

13 A: Hunting and fishing. We didn't have golf back  
14 then. Everybody does -- everybody's looking  
15 for a tee time, I don't have to worry about  
16 that, you know.

17 Q: Have you played any other roles? You served in  
18 the Army for a little while, is there any other  
19 service that you provided, public service?

20 A: I was in the legislature for a short period,  
21 yes.

22 Q: When was that?

23 A: The '70s.

24 Q: When you say the legislature, the House of  
25 Representatives?



1 A: House of Representatives, yes.

2 Q: And you mentioned right on the other side of  
3 the Kiawah River, could you explain where  
4 John's Island is located in relationship to the  
5 Kiawah River and really specific to Captain  
6 Sam's Spit?

7 A: Okay. John's Island kind of is the biggest  
8 island outside of Long Island on the East Coast  
9 and it's south of Charleston. And it's  
10 separated from Kiawah Island by the Kiawah  
11 River, which runs parallel to the ocean and  
12 separates Kiawah, which is probably two or  
13 three miles wide and John's Island which is 20  
14 miles wide.

15 Q: And have you been to Kiawah Island?

16 A: I've been there. It's kind of like Yogi Bear,  
17 I don't go there any more, it's too crowded,  
18 you know. Nobody goes there any more, it's too  
19 crowded. It's just eat up with yankees, but  
20 that's all right. No, I started going there as  
21 a child. You know, I went there very often as  
22 a teenager. It was -- it was -- you can  
23 imagine a young wild guy with a 20-gauge gun,  
24 it was paradise, it was.

25 Q: Why was it paradise?



1 A: Game, fish, nobody there. You know, just ...

2 Q: And how about let's -- if we can get a little  
3 bit more detail about what it looked like and  
4 what it was like on Captain Sam's Spit. Do you  
5 know where Captain Sam's Spit is located?

6 A: Oh, yes, sure.

7 Q: Are you able to identify it on that map behind  
8 you, which is an oversized representation of  
9 Petitioner's Exhibit 1A?

10 **(Petitioner's Exhibit Number 1A was introduced into**  
11 **the record at this time.)**

12 A: It's right behind Cape Charles. Actually, this  
13 -- Captain Sam's Spit is found between Kiawah  
14 and Seabrook and, I mean, Kiawah River comes  
15 between Captain Sam's Spit and Seabrook Island.  
16 And it's on the tip of Kiawah -- southern --  
17 let's say the -- I always said the southern tip  
18 of Kiawah, which, you know, it's kind of the  
19 western tip of Kiawah, but it's the southern  
20 most western tip of Kiawah.

21 Q: And what about Captain Sam's Spit, did you ever  
22 go there when you were a child?

23 A: Oh, yeah, my -- my father had like a brother  
24 and four or five sisters and they were all from  
25 Summerville and they would come down and we



1 would go to what we called the back beach,  
2 okay. Just take row boats and row from the  
3 plantation. It was about probably two miles,  
4 maybe even not that far, but two miles at the  
5 most, to this area right in here we call the  
6 back beach. And you could -- it's just beach  
7 sand just like the front beach. And you could  
8 walk across to get in the waves or you could  
9 stay on this side and -- there was a lot of  
10 little kids and it was a safe place because  
11 there was no oyster shells, you know, that was  
12 one of the major things as a kid in the  
13 saltwater creek is stepping on an oyster and  
14 cutting their feet, but there was none of that.  
15 And I remember specifically, and you know when  
16 you're young like that, it looked like there  
17 was a sand dune there 40 foot tall, but it  
18 probably wasn't quite that tall. But I do  
19 remember right in the bend there ---

20 **THE COURT:** Hold on one moment.

21 A: --- the side of a ship ---

22 **THE COURT:** Hold on. Hold on.

23 A: --- the side of a old boat, a ship, about  
24 halfway up, which we could get under and get  
25 out of the sun. It was probably only about



1 maybe eight foot wide, but it was probably  
2 twelve or fourteen feet stuck out of the, you  
3 know -- and I often wondered how ---

4 Q: Stuck out of the what?

5 A: --- how that thing got there?

6 Q: Stuck out of the ---

7 A: Sand dune.

8 Q: Sand dune. And about where was that ship?

9 A: It was right in that -- right in that curve,  
10 that's where we used to go.

11 Q: The curve where Captain Sam's connects to  
12 Kiawah?

13 A: In that narrow part. Yeah, the narrow part.  
14 And there was -- and there was -- I remember  
15 specifically there were a lot of swallows in  
16 the bank, bank swallows, you know. Of course,  
17 it's all -- it's changed. The thing changes  
18 all the time and now that whole sand dune is  
19 gone and there are no more bank swallows.

20 Q: What kind of activity, what kind of things  
21 would you do at the spit? You talked about you  
22 going out there with your gun. Did you -- what  
23 kind of things did you do?

24 A: Well, at first, you know, it was like this is  
25 our playground. You have to understand.



1 Mullet Hall was good, but this was no adults,  
2 no -- you know, none of that. We didn't have  
3 to put up with anybody -- put up with mothers  
4 telling us what to do. We took our lunch and  
5 we went hunting later on. But at first, you  
6 know, we went there and we went crabbing and  
7 then as I grew up, we started -- got me a  
8 little 20-gauge Ithaca shotgun for Christmas,  
9 a box of shells. I was on a roll, you know.  
10 So we would go -- we would go to the spit  
11 mainly because one person with a shotgun could  
12 cut that off and the other two or three or  
13 other one whoever was with you could walk  
14 around that thing and then just come back  
15 through the shrubs and stuff and make a little  
16 noise and the deer would get up and then he'd  
17 run down and we call that lunchbox because it  
18 was -- when you wanted to go kill a deer you  
19 could guarantee, you know, you could guarantee  
20 it, so.

21 Q: And how would you get down to the spit?

22 A: We rowed in old bateaus, you know, which --  
23 after a while, you get pretty good at it. You  
24 go pretty fast. And then later on, we had a  
25 eight and a half horsepower Martin which



1 sometimes ran and sometimes didn't.

2 Q: What -- you mentioned a few types of wildlife,  
3 I think you said swallows and deer, are there  
4 any other -- what other wildlife have you  
5 observed over time at the spit?

6 A: Well, one -- you know, this is my main concern  
7 with the spit. The spit up to the high  
8 tideland is public property. It's a public  
9 beach ---

10 **MR. WALKER:** Objection, Your Honor.

11 A: It has been a public beach.

12 **MR. WALKER:** Objection. It's unresponsive to the  
13 question. She asked what kind of wildlife have  
14 you seen and Mr. Limehouse went on to talking  
15 about his main objection with the spit rather  
16 than the wildlife.

17 **THE COURT:** Well ---

18 A: He's right.

19 **THE COURT:** I can -- good point. I mean, I can  
20 sustain the objection. I imagine we're going  
21 to get there anyway, but I imagine Mr.  
22 Limehouse is just going ahead and taking us  
23 down the path we're going to go.

24 A: No, no, I ---

25 **MR. WALKER:** I -- I -- You're right. I'm not going



1 to get in the way of this. So I withdraw my  
2 objection.

3 **THE COURT:** Okay.

4 A: Thank you, sir. And I shouldn't have diverged,  
5 but let's finish that. You know, because that  
6 is public property because I used to go there.  
7 My family used to go there. That was our place  
8 to go to the beach and we called it the back  
9 beach.

10 **COURT REPORTER:** I'm sorry; the what beach?

11 A: The back beach, B-A-C-K.

12 **COURT REPORTER:** Thank you.

13 A: As opposed to the front beach. The other thing  
14 is you asked me about was wildlife. Well,  
15 there's all sorts of wildlife there. But the  
16 other concern I have is the terrapins. The  
17 terrapins have declined so much in the Kiawah  
18 River basin that if somebody asked me to go  
19 find one tomorrow, I couldn't -- I'd have to  
20 tell them I couldn't guarantee that we would  
21 find one where there used to be just thousands  
22 of them. And right in that corner of that  
23 spit, there was a nesting spot and terrapins  
24 are colony nesters. In other words, if a  
25 terrapin lays ---



1 **MR. WALKER:** Objection. He's not a biologist.

2 **THE COURT:** I understand where you're going.

3 **MR. WALKER:** I think he can testify ---

4 **MS. ARMSTRONG:** Yes, I understand.

5 **MR. WALKER:** --- to his observations.

6 Q: So ---

7 A: Well, I'm not -- what is ---

8 Q: Giving opinions about what terrapins do and  
9 their behavior ---

10 A: No, this is not opinion. I know.

11 Q: Okay. So let's talk about what -- we'll talk  
12 about like what you've observed, what you've  
13 seen.

14 A: Okay, yeah.

15 Q: Okay.

16 A: I mean, I know what I know and I -- if I don't  
17 know it, I don't know. We say that on John's  
18 Island. That's an old John's Island saying.  
19 If you know, you know; if you don't know, you  
20 just don't know.

21 Q: That's true.

22 A: A lot of times I just don't know.

23 Q: Well, let's back up because I think you and I  
24 had talked about this earlier. Are you aware  
25 of any projects on Kiawah Island related to



1 terrapins?

2 A: Yeah. I don't know, this could have been 20  
3 years ago. There was -- I was messing around  
4 the river and I saw these people and I said, I  
5 wonder what they were doing. And they were from  
6 the University of Georgia and they were  
7 studying the terrapins. And I got interested  
8 in what they were doing and helped them for  
9 three or four years. We would seine the little  
10 creeks just like we used to sene when I was  
11 young for fish and terrapins, seine the little  
12 creek and catch them and, you know, scientists  
13 measure them and do whatever, weigh them,  
14 whatever.

15 Q: So did you -- you assisted in ---

16 A: Yes.

17 Q: --- with the research project in catching  
18 terrapins?

19 A: Yeah.

20 Q: Okay. And so were you involved with counting  
21 and the numbers of how many terrapins are in  
22 the river, were you involved in that process?

23 A: Yeah, I mean, you know, we really didn't find  
24 very many, I mean. We would go out one day and  
25 maybe find ten or twelve, you know. I mean, up



1 in the creeks, you know, because that's where  
2 the terrapins generally live is in the smaller  
3 creeks. But getting back to the -- you know,  
4 with -- and I have no knowledge of where  
5 terrapins nested on Kiawah, but terrapins are  
6 colonial nesters. In other words, if mother  
7 lays eggs and the babies leave, they're going  
8 to come back to the same spot, just like the  
9 ocean turtles come back to the same beach.  
10 These guys come back to the same exact little  
11 spot like. And it's probably about as big as  
12 this courtroom, you know. And one of those was  
13 in that bend in the spit because one year when  
14 I was there, there was a graduate student from  
15 the University of Georgia and it was either 183  
16 or 186 nests, I don't exactly remember, that he  
17 counted in that -- in that little area.

18 **MR. WALKER:** Objection. It's hearsay. He's ---

19 **THE COURT:** I understand.

20 **MS. ARMSTRONG:** Yeah, I understand.

21 **THE COURT:** I'll strike that. Let's just keep on.

22 Q: Are you personally aware that terrapins nest in  
23 the -- along the neck of the spit?

24 A: No, no.

25 Q: You haven't observed any nests ---



1 A: No.

2 Q: --- on your own?

3 A: No.

4 Q: Did you observe researchers from Georgia,  
5 University of Georgia conducting or looking for  
6 nests along the neck of the spit?

7 A: Yes.

8 Q: And so what we were -- I originally asked you  
9 about what kind of wildlife did you see and you  
10 mentioned the terrapins. Is there other  
11 wildlife that you've observed when you go out  
12 to the spit?

13 A: Well, of course, they're all the -- most on the  
14 ocean side there are all the shore birds, but  
15 on the inside, there are all the egrets,  
16 porpoises. I've seen minks there. I've seen  
17 all sorts of animals, you know, just ---

18 **THE COURT:** You've seen minks?

19 A: Everything, you know. Yeah.

20 **THE COURT:** Did he say minks?

21 A: Minks, yeah.

22 **THE COURT:** Okay.

23 A: Minks. Minks, we have a lot of minks in the  
24 saltwater in Charleston County. Nobody --  
25 nobody really knows a lot about them because



1 they're mostly nocturnal and, you know, they  
2 just don't -- they're like wildcats, they don't  
3 know they're there, but they're there.

4 Q: So you mentioned that you called it the back  
5 beach, why do you call it, refer to it as the  
6 back beach?

7 A: Because that was where we went. That was the  
8 beach we went to and to differentiate between  
9 the back beach and the front beach, which was  
10 right across, you know, and walked across. And  
11 back then it was wider. I remember it being a  
12 good bit wider, but we would walk across and  
13 we'd be in the ocean. Well, it was all beach.  
14 I mean, the whole thing is beach sand. It was  
15 no -- there's nothing there like soil, you  
16 know.

17 Q: That's what I was wondering what the soil in  
18 the ground is like when you called it a beach.  
19 I think that ---

20 A: Well, if you -- this is -- that's not exactly  
21 clear as it should be, but if you look at it,  
22 see the white sand right along in down here  
23 (indicating) ---

24 Q: Uh-huh.

25 A: --- well, there's white sand, the whole thing



1 is white sand.

2 **(Petitioner's Exhibit Number 3A was introduced into**  
3 **the record at this time.)**

4 Q: I'm putting Petitioner's Exhibit 3A on the  
5 screen. Do you see that, Sidi?

6 A: Yeah.

7 Q: Is that what you're referring to? Is that what  
8 you're referring to?

9 A: Yeah, it's -- it's certainly different now  
10 because it's different every year, you know,  
11 every -- certainly, every five, ten years it's  
12 a vast difference.

13 **(Petitioner's Exhibit Number 3B was introduced into**  
14 **the record at this time.)**

15 Q: Is that another -- is that what -- is that the  
16 beach that you're referring to, the back beach?

17 A: Yeah, this kind of right -- right -- anywhere  
18 on this side of those (indicating) ...

19 Q: Okay. That's -- you're right now looking at  
20 Petitioner's Exhibit 3B. And Sidi, I'm not  
21 sure how many of us were around in 1949, but  
22 you certainly were around in 1949. Do you  
23 remember going out to the spit around that  
24 time when you were about ten years old and what  
25 it looked like?



1 A: Yeah, it was just -- it didn't -- you know,  
2 parts of it you could recognize, but right --  
3 right here there was the sheered wall, I mean,  
4 it was -- like I said, it was a big sand dune  
5 in this bend. Somebody like took a knife and  
6 cut it in half. Then there was an old boat  
7 sticking out of it. The old boat was there for  
8 four or five years and then it finally -- it  
9 wasn't a boat, it was the side of a ship,  
10 finally fell in, an old wooden ship.

11 **COURT REPORTER:** It finally fell, what? I'm sorry,  
12 I didn't hear you.

13 A: Fell in. Fell -- just fell down. Got eroded  
14 away, however you wanna say it. Disappeared.

15 Q: When you say it was sheered off, can you point  
16 to the oversized Exhibit 1A that's behind you  
17 and are you able to identify approximately  
18 where that occurred?

19 **(Petitioner's Exhibit Number 1A was introduced into**  
20 **the record at this time.)**

21 A: Yeah, right here. It's right down this narrow  
22 part. Right there in the narrow part, that's  
23 where it was (indicating).

24 Q: So you actually observed a time when that neck  
25 was not -- Captain Sam's Spit wasn't connected



1 to Kiawah Island?

2 A: Oh, no, no, no, no, it was connected there. It  
3 was connected then. I don't ever recall, you  
4 know, when you, when you're young like that, I  
5 cannot say specifically that I went over there  
6 and this was an island. I know that they say  
7 that happened, but I never ---

8 Q: You don't remember it?

9 A: If I observed it, I didn't remember it, yeah.

10 Q: My memory from ten years old isn't all that  
11 great either.

12 A: Yeah.

13 Q: Do you still go to the spit now, Sidi?

14 A: No. Well, I go -- I go -- I take people down  
15 there, you know, just to show it to them  
16 because they want to -- you know, they just  
17 want to see what's -- what it looks like and I  
18 take them to -- I generally have an excursion  
19 there once a year where I take people down and  
20 invite them to donate some money to you, that  
21 sort of thing. But otherwise, recreation,  
22 that's over for me.

23 Q: What motivates you to take people out to  
24 Captain Sam's Spit? What do you do when you're  
25 out there?



1 A: I just say that this, this is what we're  
2 talking about and I tell them, I say, frankly,  
3 I'm not against the houses, okay. I'm not  
4 against the mcmansions. I think they're  
5 foolish, I think it's unwise, but I said what  
6 I'm definitely against and fighting is the way  
7 they want to get there.

8 Q: And what are the concerns? What's your  
9 understanding of how they want to get there?

10 A: They want to build a road on that -- on that --  
11 on that narrow spit which is maybe not public  
12 property today, but tomorrow it will be public  
13 property. And then they want to put -- they  
14 want to put a wall. They want to put up a  
15 steel, steel pilings in the ground for I don't  
16 know how far along there to keep the river from  
17 moving toward the ocean, which will deny the  
18 people access to the back beach because the  
19 back beach won't be there any more, it will be  
20 a steel wall. And I can understand them  
21 wanting to do that, and I'm not against them,  
22 but I'm against them putting that wall there  
23 because I know that's going to take away the --  
24 destroy the back beach. It won't be there any  
25 more.



1 Q: And do people -- do members of the public go  
2 out with you? Do they want to go out to the  
3 spit with you?

4 A: Yeah, yeah, I take them. And sometimes they  
5 get out, you know. We used to -- back then, in  
6 those days, we were all from the south and we  
7 liked to eat crabs and we'd all have chicken  
8 necks and strings and we'd -- nets and big  
9 things, and we'd carry a big pot and eat crabs  
10 right there on the beach, you know. I don't  
11 think they do that any more, those yankees just  
12 -- they like to look at stuff. That's all they  
13 want to do. And then build on it and then make  
14 sure they got their tee time.

15 Q: And why is it a concern to you if there will be  
16 no back beach?

17 A: Well, it's -- it's nature and it's -- the whole  
18 thing is dynamic and if there's no back beach,  
19 you're denying the public the part of the beach  
20 that is there, you know, anything above the  
21 high tide line is -- belongs to KRA or KDP or  
22 whatever they call themselves now. But  
23 anything on the downside of the high tide line  
24 is public beach.

25 Q: And when you go out to the Captain Sam's Spit



1 by way of Kiawah River, do you see people using  
2 the Kiawah River or the banks of the Kiawah  
3 River?

4 A: Oh, yeah, there's always somebody there. I  
5 mean, in this picture here there's some  
6 kayakers. There's all kind of people that got  
7 kayak rental companies and all that stuff. I  
8 think even see some -- but that's used a lot.  
9 I mean, it's used -- it's not too far from  
10 Beachwalker Park and I see people down there  
11 when I go down there. Now, I went down there  
12 -- a lot of people see this as foolish, but I  
13 went down there the middle of Matthew. And I  
14 drove down there and well, the county park was  
15 closed, so I had a guy with me, I said let's go  
16 lift up the gate and he lifted up the gate and  
17 we drove down there. I just wanted to see what  
18 Matthew was doing to the spit. And it was  
19 beating it up, I can tell you that.

20 Q: What did you see? What did you observe?

21 A: Well, I was -- it was -- wind was coming from  
22 one way and the waves were breaking over the  
23 front, and then it turned around and then, you  
24 know, it started -- it really was eroding it  
25 when all that water went out because, you know,



1 there's several islands there. I think they  
2 got -- we used to call one Saw Pit because back  
3 in the 1700s they dug a big hole and they put  
4 -- that's where they had the saw mill down in  
5 the hole. We call that the Saw Pit. And the  
6 other one they called Snake Island. Well,  
7 those islands back in 18 -- I think it was 83,  
8 they were all connected to Seabrook, but when  
9 the storm -- I forget which one it is, there's  
10 so many of them, came in, destroyed the beach  
11 at Edisto, what was it? You know, what's that  
12 beach down there?

13 **UNKNOWN MALE:** Beddingfield?

14 A: No.

15 **MR. WALKER:** Botany?

16 A: Before Botany.

17 **UNKNOWN FEMALE:** Eddington?

18 A: The beach ---

19 Q: Well ---

20 A: No, it was a village. It was a village there.

21 **UNKNOWN FEMALE:** Edingsville.

22 **UNKNOWN FEMALE:** Eddington.

23 A: Edingsville.

24 **MR. WALKER:** Edingsville.

25 **THE COURT:** This is the first ---



1 A: Edingsville.

2 **THE COURT:** --- I've ever had audience participation  
3 in testimony.

4 A: Edingsville.

5 **THE COURT:** I just note that for the record.

6 **MR. WALKER:** He's going to end up asking me more  
7 questions than I ask him.

8 A: Edings -- Edingsville Beach was a big beach.  
9 And that hurricane just destroyed it. And when  
10 it flooded -- when it went back out, of course,  
11 it took the spit out. It took the end of that  
12 island off, and that's why the bridge to no  
13 where, we used to call it the bridge to no  
14 where, was once solid land in there. And when  
15 that tide went out, you know, probably 20 foot  
16 of tide, it went out, that was it.

17 Q: And do you know what category storm Matthew was  
18 when it hit Captain Sam's Spit?

19 A: It wasn't a very strong storm. I think it was  
20 a one. And it was low tide and was only eight  
21 feet surge, so the water was two feet above  
22 regular high tide and had it hit at high tide,  
23 it would have really done some damage, but.

24 Q: And you mentioned the wall and it impacting the  
25 public's ability to use it, do you know where



1 that wall, steel sheet pile wall, is located?

2 A: Yeah.

3 Q: Where is it proposed to be located?

4 A: It kind of goes -- I think it was -- I don't  
5 know, but maybe -- it doesn't really matter,  
6 could have been 1500 feet, could have been 2500  
7 feet. But it runs along right where the main  
8 part of it's right where the spit is the  
9 narrowest, which makes sense.

10 Q: And if the wall is constructed in that  
11 location, will it affect your use and enjoyment  
12 of that area in any way?

13 A: It won't -- it won't -- for four years, two  
14 years, ten years, I don't know, but it's going  
15 -- the river is going that way and when it gets  
16 to the wall, you know, it's just going to be a  
17 wall two feet, ten feet of water, who knows.  
18 But there will be no beach there, it's gone.

19 Q: And how will that affect you personally?

20 A: At 68 and three-quarters, I don't think it's  
21 going to affect me personally very much. But,  
22 you know, it's -- it affects me personally in  
23 the fact that I don't like to see the public  
24 denied what's their's, you know. It's property  
25 rights. And everybody has property rights.



1 And the private people have their's and the  
2 public has their's. And what this wall would  
3 do is eliminate the public's property.

4 Q: Sidi, are you a member of the Coastal  
5 Conservation League?

6 A: Yes.

7 Q: Why are you a member? Is there anything that  
8 motivates you to be a member?

9 A: Well, if you -- if you live in Charleston and  
10 you see the number of people that have moved  
11 here who have no idea, no concern about the way  
12 it used to be and the way it should be, you  
13 have to join in some way. Because I mean,  
14 everybody complains about the traffic, but  
15 there's a lot more to complain about than the  
16 traffic. The traffic is you see and feel it  
17 everyday. But the environmental, the number --  
18 just the sheer number of people is destroying  
19 what I remember as the lowcountry life.

20 Q: Does the League in challenging these permits,  
21 does that represent -- do you believe that's  
22 representing your interests?

23 A: Sure.

24 Q: Are there any other organizations or groups  
25 that you're a member of?



1 A: I have one called the Friends of the Kiawah  
2 River, which I'm president of. And we're in  
3 this fight too. In other words, all -- there  
4 was a bunch of people on Kiawah and we got  
5 together and then I was unfortunately elected  
6 president, you know. Treasurer, I would have  
7 gladly had, but we didn't have any money so it  
8 didn't make any difference. But anyway, they  
9 just look at the -- you know, the Kiawah River  
10 is the most pristine river on the east coast.  
11 It has the best water quality of any river on  
12 the entire east coast from Key West to Maine.  
13 And I can say that because I read it somewhere.  
14 Anyway, the reason that is is we don't have any  
15 freshwater running into the Kiawah River. It  
16 comes in from both ends of the island and goes  
17 back up to the ocean, so it's pretty clean.

18 Q: So why did you -- what was the purpose of  
19 Friends of Kiawah River forming? What's the --  
20 -

21 A: We wanted -- we wanted to keep that basically.

22 Q: You wanted to keep what?

23 A: We wanted to keep the Kiawah River the purest  
24 river on the east coast, that is one, protect  
25 it, and any animals and beaches, just anything



1 environmental that affected the Kiawah River,  
2 that's what it was.

3 Q: As a farmer, Sidi, do you know anything about  
4 soils?

5 A: I know a good bit. I know a good bit.

6 Q: What do you know about the soils on Captain  
7 Sam's Spit? What type of soil, can you  
8 identify it?

9 A: In layman's terms, it's just beach sand. It's  
10 white beach sand. That's all it is. Has very  
11 little nutrient value. High salt content.  
12 That's it. Doesn't hold water, you know, has  
13 nothing in it to hold water.

14 Q: And what's your observation of the soils on the  
15 rest of Kiawah Island?

16 A: The rest of -- Kiawah -- Kiawah Island at one  
17 time was too big plantations and the soil there  
18 -- there's actually no better soil in the south  
19 than is on Kiawah and Seabrook Island. I know,  
20 I've farmed between them. My farm right behind  
21 the fresh fields there, is no better soil in  
22 the world than on those two islands.

23 Q: And so is it sandy soil on the rest of Kiawah?

24 A: The sand -- it's a sandy lawn, which means it  
25 holds water and drains well. High nutrient



1 content, you know.

2 Q: Based on your observations is it the same kind  
3 of soil as you would find on Captain Sam's?

4 A: Captain Sam's -- the land, the soil on Kiawah  
5 came from thousands, thousands of years  
6 process. It was once beach sand like Captain  
7 Sam's Spit, but the spit has probably been  
8 there, only been there 15,000 years or less,  
9 for 2,000 years, for 100 years, who knows. But  
10 it's just blows around, gets beat up by the --  
11 you know, when you see a sand dune, and there  
12 are sand dunes there, how do they get there?  
13 They get blown there by the wind and the waves.  
14 What's on there, beach sand, you know. Same  
15 kind they pump out the ocean to pump on Folly  
16 Beach, which makes the spit grow. When they  
17 pump it on Folly Beach, the sand moves south  
18 and makes the spit grow out towards the ocean.  
19 But it's just not doing it fast enough.

20 Q: What's the vegetation like on Captain Sam's  
21 Spit, that you observed?

22 A: Well, there's -- I know some people try and say  
23 well, it's a maritime forest, but it's  
24 certainly not that. There's some -- there are  
25 some pine trees there. There's some cedar



1 trees, but everything on that -- on that spit  
2 is stunted -- its growth is stunted because  
3 lack of nutrients and at certain times of year,  
4 lack of water because the sand has no water  
5 holding capacity and there are no real  
6 nutrients in the soil, so it's kind of -- they  
7 struggle. They're there, but they struggle.

8 Q: Give me just a minute. I don't have any more  
9 questions. If you would just answer any  
10 questions that Mr. Walker has.

11 **MR. WALKER:** No questions.

12 **MR. CHURDAR:** None from the Department.

13 **THE COURT:** You may step down.

14 A: What a disappointment.

15 **MS. ARMSTRONG:** That's not the way most people feel  
16 when they're sitting up there.

17 A: Yeah. Am I through, Judge?

18 **THE COURT:** Yes, sir.

19 A: Thank you, sir.

20 **THE COURT:** Thank you.

21 **(The witness was excused.)**

22 **MS. WHITE:** Petitioners would next call Celie Dailey  
23 to the witness stand.

24 **COURT REPORTER:** Spell your name, please.

25 **MS. DAILEY:** My name is Cecelia Dailey, C-E-C-E-L-I-

