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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Docket No. 15-ALJ-07-0369-CC

Appellate Case No. 2019-000074

South Carolina Coastal Conservation League Appellant,

v.

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

RECORD ON APPEAL

VOLUME VI OF IX

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1 THE COURT: Well, let's take a quick break. This
2 time it's going to probably be close to five
3 minutes.

4 (A break was taken from 5:44 p.m. until 5:51 p.m.)

5 COURT REPORTER: All rise.

6 MR. WALKER: Ready to go.

7 THE COURT: Okay, proceed. Are you ready?

8 MS. ARMSTRONG: Yeah, I think I'm ready.

9 MR. PANTLIK - CROSS-EXAMINATION BY MS. ARMSTRONG:

10 Q: Mr. Pantlik, Thomas and Hutton prepared some
11 plats showing 48 acres of high ground at one
12 point, didn't they? Do you remember that?

13 A: They prepared an exhibit I think you're
14 referring to, not a survey as such.

15 Q: Okay. But it showed 48 acres of high ground, do
16 you remember that?

17 A: I might need to see it just to make sure I'm not
18 confusing it with the any other things that
19 they've prepared.

20 (Petitioner's Exhibit Number 15 was introduced into
21 the record at this time.)

22 Q: I'll show you Exhibit Number 15, it's
23 Petitioner's Exhibit 15. Look at Petitioner's
24 Exhibit Number 15 on that tab. A copy of
25 Petitioner's Exhibit Number 15, you've seen this



1 map, right?

2 A: Yes, I have.

3 Q: And when Thomas and Hutton prepared this map for
4 you, didn't they? Isn't that Thomas and
5 Hutton's name on there?

6 A: Yes, it is.

7 Q: And you said that the number that they put on
8 here was not an accurate number, do you remember
9 telling me that in your deposition, about land
10 to be conveyed to keep that, those 40.9 acres is
11 not accurate?

12 A: Well, there are a number of things that I would
13 point out in the interest of the Court. This
14 was only an approximation to illustrate
15 generally the various conveyancing and
16 conservation easement commitments that are in
17 the Development Agreement. And if one were to
18 examine those sections in the Development
19 Agreement, there is separate discussion about a
20 conveyance to KICA, but all of the land, both
21 the KICA designated land and the other land, a
22 combination of both the light green and the
23 yellow, all get put under conservation easement.
24 So in that respect, it is inaccurate.

25 Q: And a lot of that -- a lot of that land is



1 actually seaward of the baseline, isn't it?

2 A: Yes, consistent with the Development Agreement,
3 it includes land that is above the mean high
4 water line, but it excludes land that is used
5 for other purposes such as residential lots and
6 road rights-of-way, consistent with the
7 Development Agreement.

8 Q: DHEC's requiring you to put 33 acres under
9 easement as part of a condition of the permit,
10 isn't that what you talked about with Mr.
11 Walker?

12 A: That is a condition, yes. Unimpacted upland I
13 think is the term in the condition which is --
14 would be similar to the 88 acres that's
15 generally represented here would be put under
16 the conservation easement.

17 Q: But you got some -- you had some concern about
18 putting -- the language requiring 33 acres be
19 put under easement, didn't you?

20 A: Well, it just depends on how one defines upland.

21 Q: Right, because the problem is if you define
22 uplands to mean developable land, land that's
23 above the baseline and the critical line, you
24 don't have 33 acres that you can put under
25 conservation easement, correct?



1 A: Correct.

2 Q: Because a lot of this land that's going to be
3 put under conservation easement is either below
4 the critical line or it's seaward of the setback
5 line and it's not developable land, right?

6 A: But it is land that we own and control above the
7 mean high water line.

8 Q: Sure. You own and control it, it's high ground,
9 but it's not developable high ground, right?

10 A: Not -- well, certainly not totally developable
11 as residential lots, which, of course, we're
12 restricted to only 20 acres out of this entire
13 peninsula to be lots.

14 Q: And so when you're looking at this map, all of
15 the white areas are the areas that are not going
16 to be put under easement or protected, right?

17 A: Based on the current delineations of baseline,
18 setback line, marsh side critical line, that
19 would be true.

20 Q: So there's some marsh that's going to be put
21 under easement, you've got these little green
22 marsh finger areas, and lands that are seaward
23 of the baseline, but above the mean high water
24 line, right?

25 A: Correct.



1 **THE COURT:** If the condition currently in the permit
2 was to remain in effect how much of the area in
3 white would have to be set forth in the
4 easement? There -- the lots of the property, do
5 you know? In other words, if you had to set 33
6 acres of highland aside, how would it affect
7 your ...

8 A: If the 33 acres is confined to land above the
9 baseline and the critical line, then there's not
10 enough acreage to execute the development in the
11 way that we had planned.

12 **THE COURT:** Well, how would it affect it is what I'm
13 asking.

14 A: Well, my understanding of the condition is that
15 these lands, contrary to the language in the
16 Development Agreement which allows for a date
17 yet unspecified, just before the expiration of
18 the agreement, we would have to place those
19 lands in conservation easement at the outset.

20 **THE COURT:** Proceed.

21 Q: But all of these areas in white are what is
22 incorporated in the area that is going to be
23 developed and would not be part of the easement
24 plan, correct?

25 A: Correct. I could see -- there's one isolated



1 hummock that could be included off of one of the
2 residential lots, but that's more or less
3 correct.

4 Q: Now, Mr. Pantlik, you've done some work with
5 Thomas and Hutton. You've worked closely with
6 them, haven't you?

7 A: Yes.

8 Q: And you work with Bill Fellers a good bit?

9 A: I do.

10 Q: And you've communicated with them pretty
11 regularly on various issues that have come up
12 over the course of working on this project,
13 haven't you?

14 A: Yeah, he's the project manager for the Kiawah
15 projects for Thomas and Hutton.

16 Q: Okay. And do you remember when Mr. Fellers
17 communicated with you expressing that though I
18 know you're a highly skilled agency manipulator
19 and see the path of a permit often before others
20 even open their eyes, in this case he's just not
21 with you. Do you remember that communication?

22 A: I don't.

23 Q: Do you remember having disagreements with Mr.
24 Fellers about how to handle the engineering
25 aspects of the project?



1 A: No, but please illuminate me.

2 Q: Well, when it comes to Mr. Fellers' comment
3 about the agency and how you work with the
4 agency, you've communicated directly with DHEC
5 management regarding this project, haven't you?

6 A: In some cases, yes.

7 Q: And you know who Mark Lutz is, don't you?

8 A: Yes.

9 Q: He's the chair of the DHEC Board?

10 A: I didn't think he was on the Board any more. I
11 don't know.

12 Q: At the time that you were communicating with
13 Mark Lutz -- do you remember communicating with
14 Mark Lutz?

15 A: Yes.

16 Q: Okay. And the time you communicated with him,
17 he was on the DHEC Board, correct?

18 A: Yes.

19 Q: And you also communicated with Katherine
20 Templeton, correct?

21 A: Yes.

22 Q: And you had Buddy Daugherty arrange for you all
23 to have a meeting with Mark Lutz and Katherine
24 Templeton, a Board member and the DHEC
25 Commissioner, while you had permit applications



1 pending seeking to get them to help provide some
2 assistance to you in getting the permits for
3 this project, didn't you?

4 A: Yes.

5 **MOTION TO ADMIT PETITIONER'S EXHIBIT NUMBER 15:**

6 **MS. ARMSTRONG:** Actually, Your Honor, Petitioner
7 would move Petitioner's Exhibit Number 15 into
8 evidence.

9 **MR. WALKER:** No objection.

10 **MR. CHURDAR:** No objection.

11 **RULING OF THE COURT:**

12 **THE COURT:** It's admitted.

13 **(Petitioner's Exhibit Number 15 was admitted into**
14 **evidence.)**

15 Q: Mr. Pantlik, you are aware that KDP represented
16 as it discussed relocating Beachwalker Park and
17 the associated facilities with Charleston Parks
18 and Recreation Commission, aren't you?

19 A: No.

20 Q: You don't know that those conversations have
21 occurred?

22 A: No.

23 Q: Do you know whether the park wants a permanent
24 facility that they own in fee simple?

25 A: I don't.



1 Q: So have you -- you're not familiar with Mark
2 Permar's drawings? If he had prepared drawings
3 depicting a possible new location, you haven't
4 seen those drawings?

5 A: I have seen drawings.

6 Q: So you're aware that he's prepared drawings
7 showing ---

8 A: Yes.

9 Q: --- potential different locations of the park?

10 A: Yes.

11 Q: And what's your understanding of why he prepared
12 those drawings?

13 A: To look at alternatives to where the park -- the
14 parking area could be located.

15 Q: So it would entail moving the actual parking
16 area to a different location, correct?

17 A: Yes.

18 Q: And that would be internal, it wouldn't be on
19 the Kiawah River, it would be some internal
20 piece of land, wouldn't it?

21 A: Right, but would still have beach access.

22 Q: Right, of course. And you were aware of some of
23 those problems with the critical area line that
24 we were talking about with Mr. Byrnes, aren't
25 you, and specifically that there was a little U-



1 shaped cut-in that you communicated with Jenn
2 Hayes about and some other staff members from
3 Mr. Byrnes' firm about a little U-shaped cut-in
4 area, do you remember that?

5 A: I -- I hadn't seen that in a couple of years, so
6 I'll take your word for it.

7 Q: Well, I don't want you to take my word for it.
8 Let me make sure that you're sure that you were
9 aware of those communications and concerns.
10 Might need to come back to that, Mr. Pantlik, I
11 can't put my fingers on the -- on the specific
12 e-mail. Let's see. There were communications
13 from around 2015 that you heard Mr. Byrnes talk
14 about earlier today and how there were two
15 different lines that were created. Do you
16 remember having some back and forth and some
17 problems with the 2015 line?

18 A: Well, from what I see here, we always want to
19 make sure that the critical lines that
20 ultimately are mapped and submitted to the
21 Department are accurate. So if I had a
22 question, it was just to make sure it was done
23 correctly.

24 Q: And there was some communication with Jenn Hayes
25 that you were copied on about a little washout



1 or low area and the escarpment where water
2 washes through and leaves marsh grass behind, do
3 you remember that?

4 A: As I read it, yes, I do.

5 Q: So you knew that there was a little low area or
6 a little washout that cut back in from the
7 escarpment that obviously presented some concern
8 that you were having conversations about amongst
9 the surveyor and the engineers at Thomas and
10 Hutton, correct?

11 A: Yes, I've walked the site many times and would
12 understand where this occurred.

13 Q: You do understand where it occurred?

14 A: Yes.

15 Q: Okay.

16 **MR. WALKER:** Your Honor, I don't have any objection,
17 I would just ask that Ms. Armstrong give us the
18 Bates numbers so that -- because we don't have
19 copies of these?

20 **MS. ARMSTRONG:** Sure, okay, and these e-mails are
21 from May 14th, 2015. It's -- they're
22 communications between Keith Campbell at ---

23 **THE COURT:** Well, he just asked for the Bates
24 numbers.

25 **MS. ARMSTRONG:** --- at Seamon Westside (sic). I'm



1 just making sure I'm going to get everything in
2 for the record, Your Honor. Keith Campbell at
3 Seamon Whiteside, the surveying company, they
4 include Ray Pantlik. They are Bates labeled KDP
5 II-RP 482 and so in those communications from
6 Jenn Hayes to Keith Campbell on which you and
7 Bill Fellers were copied. There's -- Jenn is
8 identifying that the critical line has a little
9 U-shape that they would need to -- she'll need
10 to work around in the wall design, correct?

11 A: It appears so.

12 Q: And then you were copied on an e-mail that's
13 Bates labeled KDP II-RP 4818. You were copied
14 on this e-mail from Keith Campbell to Jenn Hayes
15 indicating that there is a little washout in a
16 low area, that was the other document we had
17 talked about earlier. An e-mail from May 13,
18 2015. Do you remember -- you're aware of all of
19 this, correct?

20 A: Yes.

21 Q: And so there have been ongoing problems with the
22 amount of space between the setback line and the
23 critical line in -- because you are limited in
24 how much space you have to construct a road,
25 isn't that true?



1 A: It's been ongoing concern. Obviously, if you
2 reach a point where the road as designed can't
3 fit through a swath of property, it would likely
4 raise additional permit issues.

5 Q: It would raise additional permit issues because
6 it would cross critical area?

7 A: Yeah, either the setback line or the critical
8 line on the river side.

9 **(Joint Exhibit Number 3 was introduced into the record**
10 **at this time.)**

11 Q: And if you look at Joint Exhibit Number 3, I
12 think you have it up there, on the second page,
13 your application.

14 A: Exhibit 3?

15 Q: Joint Exhibit 3.

16 A: Yes.

17 Q: And on that second page ---

18 A: Yes.

19 Q: --- where it asks you what the impacts are to
20 wetlands, the very bottom on the left -- left-
21 hand corner. Do you see where it asks ---

22 A: Yes.

23 Q: --- about wetlands impacts?

24 A: Correct.

25 Q: And you indicate in that application that there



1 aren't going to be any wetland impacts
2 associated with this project, correct?

3 A: Correct.

4 Q: Okay. Let' stalk a little bit about the access
5 corridor and what all you need to fit in that
6 corridor. You've got water lines, right?

7 A: Yes.

8 Q: And sewer lines that need to go in there?

9 A: Sure.

10 Q: And you've got a road that needs to be 20 feet
11 wide, correct?

12 A: Without a variance from the Town Planning
13 Commission, although the Development Agreement
14 does speak to the ability to use a 16-foot wide
15 road.

16 Q: And you'd need to get a variance from the Town
17 in order to have a 16-foot wide road, wouldn't
18 you?

19 A: Only from the standpoint of the International
20 Fire Code. We need an allowance from the
21 building official.

22 Q: But you don't have that yet?

23 A: No.

24 Q: At one point you did actually apply for a
25 variance and then you withdrew it, is that



1 accurate?

2 A: Correct.

3 Q: And then you also need to have a guard rail?

4 A: Yeah.

5 Q: And that's because you don't have enough space
6 to have a shoulder that's wide enough to give
7 the kind of protection that somebody needs when
8 they're driving on a road, is that true?

9 A: Correct.

10 Q: And how wide would that guard rail need to be?

11 A: The guard rail?

12 Q: Yeah.

13 A: Foot and a half.

14 Q: Foot and a half. And then you've also got the
15 sheet pile wall that needs to fit in there
16 that's about almost two feet, isn't it?

17 A: Correct.

18 Q: Yeah. And then Ms. Hayes in her deposition
19 indicated that she would need five feet -- the
20 builders would need five feet from the
21 escarpment or the critical line back to build
22 the wall, correct?

23 A: Correct.

24 Q: I don't know that I agree with that particular
25 dimension. Certainly the conditions only speak



1 to not performing any of the development
2 activity in the critical area. It doesn't speak
3 to a five foot requirement the way you just
4 characterized it.

5 Q: Your engineers have indicated that they need
6 five feet back from the critical line or
7 escarpment to construct the steel sheet pile
8 wall, correct?

9 A: No. Well, certainly, if that's what Ms. Hayes
10 said in her deposition, but the five foot I
11 remember that more from the standpoint of it
12 being a goal that we started out having and
13 instructed them to come no closer than five
14 feet.

15 Q: Bates label KDP II-RP 4831 is an e-mail from you
16 to Jenn Hayes. Do you recall this e-mail
17 communication from May 15, 2015?

18 A: I don't remember it, but I don't doubt it's
19 authentic.

20 Q: And in this e-mail communication, it starts with
21 Ms. Hayes indicating that there is an issue with
22 using the toe of the escarpment as the critical
23 line because they aren't able to fit a two-lane
24 road in at least some area of that access
25 corridor, do you see that?



1 A: I do see it, but without seeing the plans that
2 she may have been referring to, I'm not sure
3 where that occurred.

4 Q: But you've been working a lot with Jenn Hayes
5 through this process, haven't you?

6 A: Yes, because she's the design engineer for the
7 location of the wall and the wall is the closest
8 thing that's in proximity to the critical line.

9 Q: Was there ever anybody else that was working on
10 the wall from Thomas and Hutton?

11 A: No.

12 Q: And do you -- is Jenn Hayes competent?

13 A: Yes.

14 Q: So you trust her judgment and her opinion?

15 A: Well, certainly in matters of structural
16 engineering.

17 Q: And you, in fact, in your response to her,
18 confirm that under the new critical line, there
19 would still be room for the wall to be five feet
20 behind that new critical line, didn't she?

21 A: I did make that statement.

22 Q: We talked about the permit conditions and one of
23 the conditions, condition number two, requires
24 that the wall be constructed in accordance with
25 the phasing detail in the construction drawings



1 dated April 10th, 2015, do you recall ---

2 A: Yes.

3 Q: --- talking about that? And do you remember
4 telling me at your deposition that KDP cannot
5 today construct the wall in accordance with that
6 certification requirement?

7 A: Yes, because it's really an inherent conflict
8 with the first condition because it requires an
9 update to the survey and most certainly an
10 updated survey is going to differ in an
11 erosional site from where the wall was designed
12 and located previously.

13 Q: No matter what, you're going to try and find a
14 way to put a road through that -- the neck of
15 the spit no matter what, aren't you?

16 A: I -- I can't say. There -- as an engineer, I
17 would look for creative ways to achieve our
18 development, certainly. So I don't know that I
19 can give a blanket answer to your question.

20 Q: As the critical line has grown closer and closer
21 to the setback line, it's caused more and more
22 difficulty with having enough space to get all
23 of the infrastructure that you need to do the
24 development, correct?

25 A: Well, there are some unanswered questions in



1 what you've posed today, particularly what
2 relief, if any, could be granted to the required
3 width and for what distance relief could be
4 granted. So I think there are a lot of
5 variables beyond the layout that was approved by
6 the Department.

7 Q: A lot of variables to try and figure out
8 whatever way you can to squeeze that road into
9 the narrow neck to access the development,
10 correct?

11 A: Yes.

12 Q: Is it more important to you to build this road
13 and build this project than to step away from
14 the development of a place that's so dynamic
15 that the buildable area changes with every
16 passing day?

17 A: Restate that question.

18 Q: Is it more important to you to just -- to build
19 this road, no matter what, rather than step away
20 from a project, a development project in a place
21 that's so dynamic that it's changing with every
22 passing day?

23 A: I really don't know how to respond to that other
24 than had we been able to stop the erosion when
25 we made our original application for the



1 revetment timber bulkhead, we wouldn't be having
2 these discussions about how tight the corridor
3 is. As I recall going back to 2008, there was
4 66 feet from the setback line to the critical
5 line at its closest point and with the ensuing
6 litigation, the permitting process for this
7 permit, you know, it's in the vicinity of about
8 30 feet. So we've -- you know, time -- time is
9 a problem that has affected and the unabated
10 erosion on the river side has certainly
11 constrained us.

12 Q: Let me ask it this way, at what point would you
13 walk away from the proposed project? How narrow
14 does it need to get?

15 A: I don't think -- well, as long as we have our
16 vested rights through both the Development
17 Agreement and by the Town approval or the -- of
18 a preliminary plat, I'm not an officer in the
19 company, but I can't imagine walking away from
20 the potential development.

21 Q: And as we were discussing earlier, you had been
22 involved in conversations and meetings with the
23 DHEC Board member -- the DHEC Commissioner, you
24 don't deny that KDP sought to influence the
25 decision making process at the highest levels,



1 do you?

2 A: I don't recall that being our intent at all. We
3 were frustrated with the multi-year review at
4 the agency. I may have said already what's
5 normally a three month process turned into a
6 three year plus process. And as the owners of
7 the property, we felt as if the review had gone
8 on extremely long.

9 Q: And after you had communications with -- and
10 meetings with the DHEC Board Chair and
11 Commissioner, you knew that the DHEC Board had
12 directed that staff not consider cumulative
13 impacts, didn't you?

14 A: I didn't know anything about what they were
15 advised to look at and certainly not the Shannon
16 Hicks' note that you presented earlier.

17 Q: Are you familiar with George Oertel and David
18 Basco?

19 A: Yes.

20 Q: That those were two professionals that you hired
21 to do work for you with respect to Captain Sam's
22 Spit, isn't that accurate?

23 A: Correct.

24 Q: Do you remember that they recall that they
25 prepared some various reports for you?



1 A: Yes.

2 Q: And do you recall that they identified concerns
3 that had been raised by the resource agencies
4 about adverse effects on piping plovers, you
5 were aware of that concern, weren't you?

6 A: Yes.

7 Q: And you were also aware, weren't you, that the
8 U.S. Fish and Wildlife Service expressed concern
9 that hard erosion control structures like walls
10 have proven to cause erosion in front of and
11 adjacent to the structure itself thereby
12 transferring perceived erosion control problem
13 instead of correcting it? I don't know if I
14 said that -- it's transferring a perceived
15 problem without -- instead of correcting it.

16 **MR. WALKER:** Your Honor, she is reading from a
17 document and we went into the rule last week
18 about part of a document and my recollection is
19 I'm required -- or I may be required at that
20 time to point out the other part that I would
21 like in fairness to submit that needs to be
22 submitted.

23 **THE COURT:** I'm familiar with that rule.

24 **MR. WALKER:** And I would like an opportunity to
25 review these things that are being thrown up in



1 order for me to submit to the Court that other
2 parts should be considered ---

3 **THE COURT:** You have a right.

4 **MR. WALKER:** --- in fairness.

5 **THE COURT:** Yes, you have a right to do that.

6 **MR. WALKER:** And I would ---

7 **THE COURT:** If you wish to exercise that right, you
8 can look at it right now.

9 **MR. WALKER:** All right. Thank you, Your Honor. Can
10 we have a copy of it?

11 **THE COURT:** I think under that rule you can offer it
12 contemporaneously.

13 **MS. ARMSTRONG:** Yeah, I mean, it's a document that we
14 got from ---

15 **MR. WALKER:** I'm not arguing about the source.

16 **MS. ARMSTRONG:** --- KDP.

17 **MR. WALKER:** I just would like to take a look at it
18 in fairness. There are two sentences that we
19 would like to publish from this in response to
20 the two that she read. One deals with ---

21 **THE COURT:** Well, are you through with your use of
22 this document?

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

24 **THE COURT:** Are you through with the use of this
25 document?



1 **MS. ARMSTRONG:** I wasn't entirely through with that.
2 I was going to finish off that one provision.

3 **THE COURT:** Well, then I'll allow her to finish and
4 then I'll allow you to respond.

5 **MS. ARMSTRONG:** Thanks.

6 **Q:** We were -- I was asking you whether you were
7 aware of these concerns that had been raised by
8 Fish and Wildlife Service that are reiterated in
9 Dr. Oertel and Basco's report and I think we
10 ended -- I ended with the first sentence, but
11 the next one indicates that the installation of
12 the project will likely accelerate erosion and
13 scouring on the back side of the island. The
14 proposed project could therefore denigrate
15 habitat downstream of the bulkhead. You were --
16 that was one of the things that they had alerted
17 you all to in looking at constructing a hard
18 erosion control structure on the river side of
19 the spit, correct?

20 **A:** I don't believe that -- certainly, those were
21 not the opinions of the consultants we
22 mentioned.

23 **MR. WALKER:** And, Your Honor, we have an objection to
24 this examination on this subject. Granted Ms.
25 Armstrong is saying you were aware in order to



1 try to avoid hearsay, but this is a different
2 structure, it's the bulkhead and revetment.
3 We're here on an in-ground sheet pile wall and
4 we've allowed some of this, but we object to the
5 continued questioning about the project that's
6 different from this. A structure that's
7 different from the one that would be implemented
8 were this permit approved.

9 **MS. ARMSTRONG:** Your Honor, I'm finished with the
10 document.

11 **THE COURT:** All right. Well, you didn't object
12 before -- I mean, at this point, you said any
13 further, right?

14 **MR. WALKER:** Right. I didn't want to get up and
15 object to her examination. May I see the
16 document?

17 **THE COURT:** So that I can be clear, I wasn't aware of
18 the -- this document doesn't apply to this?

19 **MR. WALKER:** This is a -- Your Honor, it is a 2000 --
20 August 2008 paper prepared by Oertel and Basco
21 concerning the bulkhead and revetment structure.
22 It has nothing to do with this application.

23 **THE COURT:** Okay.

24 **MR. WALKER:** The other four things that we would ask
25 be published are under plover and sensitive



1 habitat, the first sentence under the three
2 comments about habitat by the consultant is most
3 of Kiawah spit is densely vegetated with dune
4 grasses and/or dune shrubs and scrub trees.
5 Only the linear berm and overwashed spit end fit
6 the criteria for the potential critical habitat.
7 It was two sentences.

8 **THE COURT:** All right.

9 **MR. WALKER:** Then when in response to her publishing
10 the portion about hard erosion control
11 structures, we are going to publish the sentence
12 at the bottom of the second paragraph in
13 response. Since the revetment on the outer bank
14 does not alter the cross-sectional area, there
15 is no physical way the hardened shoreline can
16 cause erosion to the adjacent upstream natural
17 shoreline during flooding conditions.

18 **THE COURT:** All right. Continue.

19 **MS. ARMSTRONG:** Sure.

20 **Q:** Mr. Pantlik, the bulkhead and revetment permit
21 that Mr. Walker asked you about that you said is
22 in litigation, that's a hard erosion control
23 structure, isn't it?

24 **A:** Yes.

25 **Q:** And a steel sheet pile wall is also a hard



1 erosion control structure, isn't it?

2 A: Yes.

3 **MS. ARMSTRONG:** I don't have any other questions for
4 this witness.

5 **THE COURT:** Any re-direct?

6 **MR. PANTLIK - RE-DIRECT EXAMINATION BY MR. WALKER:**

7 Q: I'm going to try to keep these questions to
8 condition seven of the certification, the
9 consistency certification. That would be
10 Exhibit 6, Joint Exhibit 6.

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

13 A: Okay.

14 Q: If you'd turn to it, and before we get going,
15 let me ask you is there a difference between,
16 for purposes of stormwater, disturbed area and
17 area subject to development.

18 A: Yes, very much.

19 Q: Would you please explain to The Court the
20 difference?

21 A: Absolutely. The underlying intent of the whole
22 stormwater pollution prevention program is to
23 particularly control the sediments while
24 something is under construction, including the
25 roads and/or the houses. And so each one of



1 these NPDES applications have to stipulate the
2 amount of disturbed land. Now, land in land
3 development can be disturbed for a number of
4 reasons, but it's certainly not to indicate
5 necessarily that all of that land gets covered
6 with a house or a road or a driveway. It just
7 means that at some point in the execution of the
8 work, it is disturbed. So I can cite examples
9 of where the disturbance might be certainly, it
10 usually is, smaller than the total project area
11 because most of the time it's not necessary to
12 disturb the entirety of the site. There
13 certainly are sites, you know, elsewhere, but
14 certainly that wasn't what we thought necessary
15 to undertake this development.

16 Q: In this condition number seven, does there seem
17 to be a disconnect or a misunderstanding?

18 A: Well, there's -- again, I would call the Court's
19 attention to the footnoted letter that was in
20 response to certain questions that were posed
21 and they simply asked, you know, what was the
22 amount of disturbed land and that answer was
23 given in the context of not the entirety of the
24 overall 50 lot subdivision, but just in this
25 phase one application. So it under-represented



1 the amount of disturbed land that the entirety
2 of the development would necessitate. And, Your
3 Honor, if we had this letter, you could see that
4 they did a math calculation of what they viewed
5 as highland and subtracted the amount as
6 disturbed land and arrived at the 33.2 acres, I
7 think erroneously, certainly, when compared to
8 the intent of the Development Agreement.

9 Q: Would that -- if the intent was that the
10 unimpacted upland acres be developable land,
11 would that necessarily then have to include an
12 easement on the lots and the road?

13 A: It would.

14 Q: If unimpacted upland acres is considered to be
15 acreage that is not part of the development, but
16 upland in the sense that it is above the mean
17 high water line, could this condition be
18 complied with?

19 A: Absolutely.

20 Q: Have there been any discussions with the agency
21 about a resolution of this to come to a common
22 understanding?

23 A: We had a preliminary meeting to better inform
24 them as to our understanding of the, as they
25 call it, the planned unit development agreement



1 and in that meeting, they commented ---

2 **MS. ARMSTRONG:** Objection, Your Honor.

3 Q: I don't want you to go into the comment, just
4 was there a meeting.

5 A: There was a meeting and ---

6 Q: Are you encouraged that this can be resolved?

7 A: Yes.

8 **MR. WALKER:** That's all I have, Your Honor.

9 **MR. CHURDAR:** I don't have any follow-up, Your Honor.

10 **THE COURT:** I didn't think you would, but you may
11 step down.

12 **MR. PANTLIK:** Thank you.

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

14 **THE COURT:** We got through quicker than one hour and
15 I don't think I'm going to let y'all call
16 another witness this late.

17 **MS. ARMSTRONG:** Come on. Let's go.

18 **THE COURT:** Well ---

19 **MS. ARMSTRONG:** I was kidding.

20 **THE COURT:** Oh, okay. I would change and I was going
21 to take you up on it.

22 **MR. WALKER:** You've been on this side of the table to
23 know about what it feels like.

24 **THE COURT:** Yeah, that's true. When I was running
25 for my judgeship, the first time, I was in a



1 two-week murder trial up in York and the
2 Judicial Screening Committee wanted to interview
3 me and I said, well, I'm leaving at 5:00 in the
4 morning everyday and I'm getting back at about
5 10:00, so I can either interview you -- let
6 y'all interview me at 4:30 or at 10:30. They
7 decided not to interview me. So I've definitely
8 been on that side of the table. Well, tomorrow,
9 what time? 9:00?

10 **MS. ARMSTRONG:** That's fine with us. I do have
11 actually a -- one other matter that I wanted to
12 address now before it crops up. I don't -- I
13 think we're all aiming and would love to finish
14 up tomorrow, but I don't know if that will be
15 possible. If we do extend into Wednesday, I've
16 made longstanding plans for a meeting that
17 involve people traveling from out of town,
18 Greenville and Charleston area, on Wednesday.
19 It's a lunch meeting and if it so happens that
20 we aren't finished by then, I've asked opposing
21 counsel if they would agree to having a little
22 bit longer of a lunch if I need to if we are
23 carrying into Wednesday afternoon.

24 **THE COURT:** Okay.

25 **MS. ARMSTRONG:** I hope that we don't, but I just



1 wanted to bring it to the Court's attention.
2 When I planned it, I had the full expectation
3 that we would definitely be done by then, but
4 that's -- things don't always work out that way.

5 **MR. CHURDAR:** And, Your Honor, on that regard, as far
6 as the number of witnesses and where we are and
7 what we have left, I want to make sure that I
8 understand what and where we are because this
9 could impact -- this could impact whether I call
10 any more witnesses or not, but when both Mr.
11 Walker and I made the motion for non-suit, my
12 understanding -- and this is what I'm asking
13 just for correction, but my understanding is
14 that the Court accepted a proposed stipulation
15 from the League regarding the League stipulating
16 to the design sufficiency of the NPDES permit,
17 water supply construction permit, and wastewater
18 construction permit, as well as the sheet pile
19 wall.

20 **THE COURT:** That's correct.

21 **MR. CHURDAR:** Okay. All right, I just ---

22 **THE COURT:** I don't see any dispute, but that's how I
23 remember it.

24 **MR. CHURDAR:** Okay.

25 **THE COURT:** Okay.



1 MR. CHURDAR: All right. Thank you.

2 MR. WALKER: I was just going to ask if we could
3 start at 9:30 tomorrow rather than 9:00.

4 THE COURT: We can.

5 MR. WALKER: Thank you very much.

6 THE COURT: All right. This hearing's adjourned
7 until 9:30.

8 (DAY SIX of the hearing adjourned at 6:42 p.m.)

9 (DAY SEVEN - TUESDAY, AUGUST 29, 2017. The hearing
10 reconvened at 9:31 a.m.)

11 COURT REPORTER: All rise.

12 THE COURT: Y'all be seated. Thank you.

13 MR. WALKER: Good morning.

14 (Off the record discussion.)

15 THE COURT: Ready. Are y'all ready?

16 MR. GRESSETTE: Respondent KDP is ready, Your Honor.

17 THE COURT: Okay.

18 MR. WALKER: Respondent KDP II and KRA Development LP
19 calls Mark Permar.

20 COURT REPORTER: Mark Lamar, L-A-M-A-R?

21 MR. PERMAR: No, P-E-R-M-A-R.

22 COURT REPORTER: Oh, I'm sorry.

23 MR. PERMAR: That's okay.

24 COURT REPORTER: Spell it one more time.

25 MR. PERMAR: P-E-R-M-A-R.



1 **COURT REPORTER:** Thank you. Raise your right hand,
2 please.

3 **MR. PERMAR:** (Witness complies.)

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

8 **MR. PERMAR:** Yes, I do.

9 **COURT REPORTER:** Thank you.

10 **MR. PERMAR - DIRECT EXAMINATION BY MR. WALKER:**

11 Q: Mr. Permar, good morning.

12 **THE COURT:** Wait, wait. Wait one moment. All right.
13 Go ahead.

14 Q: Mr. Permar, where do you live?

15 A: Kiawah Island.

16 Q: How long have you lived on Kiawah Island?

17 A: Since 1979.

18 Q: Do you do any work that's associated with Kiawah
19 Island?

20 A: Yes, I do.

21 Q: What kind of work do you do?

22 A: Long range planning and concept design.

23 Q: And when did you first start working in long
24 range planning and concept design on Kiawah
25 Island?



1 A: I was hired in 1979 to -- by the then Kiawah
2 Island Company to head up planning and design.

3 Q: All right. And did you stay -- or have you
4 stayed continuously in that role since being
5 hired in 1979?

6 A: I was an employee of the company from 1979 'til
7 the summer of 1985. And then between 1985 and
8 1988 I did not work for the company. And then
9 beginning in 1988 I was a consultant to the
10 company.

11 Q: And have -- since 1985 have -- or when you
12 started back in 1988, since then, have you ever
13 been a direct employee of the company?

14 A: No.

15 Q: Have you been employed continuously as an
16 consultant by the company.

17 A: Yes.

18 Q: To give The Court an idea of what's gone on at
19 Kiawah Island during your tenure, either as a
20 direct employee or contract employee, around how
21 many units were there when you started in 1979?
22 Either lots or dwelling unit condos?

23 A: I don't know for certain but I -- I'm guess that
24 when I first started there had been maybe 800 to
25 1000 units sold at that time.



1 Q: How many are we talking about now?

2 A: Last time I checked it's a little over 4,400
3 pieces of property sold.

4 Q: Have various places on the island been developed
5 over your years?

6 A: Yes.

7 Q: What was the developed area when you first
8 started?

9 A: It was largely the west end of Kiawah. Kiawah
10 Island runs east-west and there's a section
11 between West Beach Village and the existing
12 utility track. And the majority of that had
13 been developed. And there had -- there were a
14 handful of ocean front lots further east.

15 Q: How about in comparison to today? How much of
16 the entirety of Kiawah Island has been developed
17 or in the planned development phase?

18 A: Well, I would suggest that it's probably the low
19 90 percent range.

20 Q: Over your years, what has been your specific
21 role with respect to different areas, different
22 communities that have been created over time
23 that you've just described?

24 A: The majority of my role as part of a team of
25 professionals in houses as well as outside is



1 largely focused on long range planning, concept
2 design, occasionally entitlement processes, the
3 very early stages of a project to determine it's
4 viability.

5 Q: During this time, have you become familiar with
6 Captain Sam's Spit?

7 A: Yes.

8 Q: When was the first time you walked on Captain
9 Sam's Spit?

10 A: 1979, when I first arrived.

11 Q: Have you observed it over the years on a --
12 basically a periodic basis?

13 A: Yes. Not a specific frequency, but I make a
14 point of observing areas of the island
15 throughout during a given year.

16 Q: Have you noticed any specific change with the
17 physical condition and topography of Captain
18 Sam's in the past 15 to 20 years?

19 A: The majority of observation is the accelerated
20 growth of the extension on the beach side and
21 the pattern of erosion and shoreline change on
22 the river side.

23 Q: I want to jump back a second to your role at
24 Kiawah. Have you served on any board that deals
25 with the nature of development at Kiawah?



1 A: The principle one is the Architectural Review
2 Board. I was chairman of it during my tenure as
3 an employee. And then have been appointed as a
4 company appointment as a representative on the
5 ARB since 1988.

6 Q: What does the ARB do?

7 A: The Architecture Review Board reviews plans for
8 new construction or renovation of all properties
9 on Kiawah. And it's largely involved in the
10 aesthetics of the proposed improvements.

11 Q: Now, have there been other sensitive -- or have
12 sensitive areas on Kiawah Island been developed
13 before?

14 A: I believe the entirety of Kiawah is sensitive.
15 So yes, other areas have been developed that
16 have unique sensitivity issues.

17 Q: What would be some good examples of that?

18 A: Well they would range from the preserve which is
19 in the northeastern section of Kiawah, which is
20 characterized by large impoundments that were
21 created prior to the Kuwaiti period, fresh water
22 wetlands, and then surrounding tidal marshes.
23 The Summer Islands which is a chain of hummocks
24 that were joined together that sort of float in
25 the marshland and creek area. Ocean Park at the



1 extreme eastern end. I mean, there are a whole
2 variety of communities that sort of have unique
3 natural conditions. Ocean Park is the most
4 recent one which is a dense maritime forest
5 that's surrounded by marshland and then bridges
6 between a location at the east end and where the
7 Ocean Course is, the dune fields of the Ocean
8 Course.

9 Q: Have you dealt with properties of narrow width
10 that are surrounded by critical area?

11 A: Yes.

12 Q: Were any of the examples that you just gave
13 properties like that?

14 A: Summer Islands would be an example, Terrapin
15 Island. They're surrounded by marshland areas.

16 Q: And we're very soon to be talking about Captain
17 Sam's Spit, but because you've been involved in
18 these areas, I'd like you to tell The Court what
19 approaches you use to -- if any, for the
20 particular topography of a given location.

21 A: Well the core process is a consistent process by
22 our team of evaluating the existing natural
23 conditions, which would include topographic
24 vegetation types, wetlands, critical areas, a
25 broad range of the natural features of land.



1 And the process we use is a consistent process
2 of identifying those, developing base
3 information that outlines existing conditions.
4 And to the extent that we can seek information
5 about prior conditions, we add that to the
6 archives. At the same time that that work is
7 being done, similar work is being done in market
8 research, financial analysis, assessment of the
9 entitlements of what you're allowed to do on the
10 property. There's a broad range of different
11 areas of focus. A series of Venn diagrams that
12 then you start to join together in terms of
13 concept development.

14 Q: Are any of these areas encumbered by specific
15 restricted covenants?

16 A: Of the ---

17 Q: Of these ---

18 A: --- prior development?

19 Q: Yeah.

20 A: Yes. Yes. I mean, it's a common pattern to
21 develop protective covenants of general and
22 specific to a particular area prior to the sale
23 of it to a third party.

24 Q: Now, in the beginning of development, was there
25 concern at all about the size of dwellings, as



1 far as whether they were ---

2 A: At -- on ---

3 Q: --- what was the ---

4 A: On Kiawah?

5 Q: --- yeah, Kiawah. Yes.

6 A: At the very earliest stages of size of homes on
7 a piece of property, if it's a fee simple home
8 site for example verses a built for sale, the
9 concern principally was that people would build
10 too small a structure. So ---

11 Q: Is that the concern today?

12 A: No. It's just the opposite. So the early
13 versions have minimum sizes that you could not
14 breach. But no, no caps on maximum sizes.
15 Beginning in -- beginning I think in the late
16 '80s, early '90s we started to establish maximum
17 squared footages in certain neighborhoods too.
18 And now that's common practice.

19 Q: Are those maximums embodied in the restricted
20 covenants for that neighborhood?

21 A: Yes.

22 Q: I now just want to ask you just a few things
23 about the development agreements. Are you
24 familiar with any of the three development
25 agreements that have been entered between Kiawah



1 Partners and the Town of Kiawah Island?

2 A: Yes.

3 Q: Were you involved in the process of negotiation
4 of those development agreements?

5 A: Yes.

6 Q: Were you involved specifically in the 2005 --
7 the negotiations for the 2005 development
8 agreement?

9 A: Yes.

10 Q: In those discussions, was there discussion about
11 the possible development of Captain Sam's?

12 A: Yes.

13 Q: And was there an understanding worked out with
14 the town about that?

15 A: As it relates to Captain Sam's?

16 Q: Yes.

17 A: Yes.

18 Q: And in return, did the developer make any
19 concession?

20 A: Yes.

21 Q: What was that?

22 A: The principle concession was to remove forever
23 the entitlement that allowed for hotel use on
24 one of the parcels at the west end.

25 Q: Just one moment. I'd like our -- can you call



1 that one up?

2 **MR. WALKER:** Tom, which Exhibit number is this?

3 **MR. TOM:** 43.

4 **MR. WALKER:** Exhibit 43.

5 **MR. TOM:** 45.

6 **MR. ROBERTS:** This is 44.

7 **(Respondent's Exhibit Number 44 was introduced into**
8 **the record at this time.)**

9 Q: All right. Here we go. Do you recognize this
10 photo?

11 A: Yes.

12 Q: Which is KDP 44. All right. What are we
13 looking at?

14 A: Well it's an aerial shot over the top of the
15 beach looking west with the bottom foreground,
16 the original inn, and as you proceed up to the
17 top of the page there's Beach Townhouses and
18 Duneside Villas.

19 Q: Would you -- you can touch the screen. It's a
20 very smart screen. Could touch the screen and
21 circle where the original inn that you just
22 referred to?

23 A: Right there.

24 Q: All right. Is that still there?

25 A: No.



1 Q: Is there anything in the works for that
2 property?

3 A: Yes.

4 Q: What is?

5 A: The property is owned by the Kiawah Island Golf
6 Resort and they're in the process of a multi-
7 year assessment of major improvements that would
8 include a new hotel, beachfront hotel, a new
9 golf clubhouse with the Cougar Point Gold Club
10 and a new meeting facility.

11 Q: All right. And what was there before? Was
12 there a hospitality facility there before?

13 A: The original inn was a 150 rooms.

14 Q: All right.

15 A: And then a restaurant sic retail center and so
16 on.

17 Q: I jump shifted on you. You were talking about
18 the right that was given up related to the
19 hotel. And where was the piece of parcel --
20 where was the parcel where that development
21 would have occurred? Can you show us that with
22 your finger?

23 A: That parcel is that parcel right there.

24 Q: And what is it ---

25 A: Overlap ---



1 Q: --- it's location to Beachwalker Park?

2 A: I'm sorry.

3 Q: Where is it in relation to Beachwalker Park?

4 A: It's between Beachwalker Park and Duneside
5 Villas and the ocean.

6 Q: Now, I want to talk specifically about what you
7 have done in your work for Captain Sam's, what
8 was your role or responsibility at Captain
9 Sam's? What were you to do?

10 A: Well once again, I was part of team but I sort
11 of take the lead in the early stages of an
12 assessment of a particular piece of property.
13 And Captain Sam's, the normal process that I use
14 was applied to Captain Sam's in that I built
15 upon a lot of filed work, being on the site
16 different times of the year, different times of
17 the day. Multi-year you start to build up a
18 sense of what the place is. You commission
19 topographic work conducted by others that then
20 develops a base, a base information for early
21 conceptual work. But you try really -- I don't
22 know if this will make sense but you try really
23 hard not to draw any sooner than necessary so
24 that you get a better sense of what -- what the
25 land is suggesting is appropriate and



1 inappropriate. There was a sound understand of
2 the limits of the critical areas and other
3 impacts that would limit or severely constrain
4 potential development in that particular area.
5 And then ---

6 Q: Do you ---

7 A: --- you draw from other analogs in other
8 locations. Not only on Kiawah in terms of
9 lessons learned or observations of what happens
10 in unique sensitive areas but other coastal
11 areas. Then that evolves into the beginnings of
12 a series of alternatives, conceptual
13 alternatives.

14 Q: I'd like to ask you just roughly, how much time
15 did you spend on the ground doing this fieldwork
16 and gathering information before you started to
17 put anything on paper about a conceptual plan?

18 A: I have no idea how much time. You know,
19 knowledge is built over many years. I have the
20 luxury of living the place that I work, so you
21 build upon going there -- like I -- my first
22 trip out there was 1979, so you build upon that
23 going forward. You know, one expression of that
24 is it's more typical in planning and design and
25 development that you spend the vast majority of



1 time in the studio doing work in the studio and
2 20 percent or so in the field. Well Captain
3 Sam's and other similar places you actually
4 invert that. You spend more time in the field
5 and less time in the studio. So -- but I don't
6 -- I don't know how many hours.

7 Q: All right. You mentioned an analog. Did you
8 come up with a framework, a conceptual framework
9 in terms of guiding principles so to speak that
10 you would apply here?

11 A: Yes, different categories of potential
12 improvements.

13 Q: All right. Would you go over some of the -- and
14 we'll get to the specifics in a minute, but some
15 of the areas that you would have considered in
16 coming up with that framework and what types of
17 things were you considering?

18 A: Well one -- again, in no particular order, once
19 you develop base information that allows you to
20 have a consistent understanding by all team
21 members. So these are the base pieces of
22 underlying information about the site. You
23 begin to layer that information with the impact
24 of limitations of entitlements. What -- what
25 limitation or standards are existing in terms of



1 the zoning setbacks that -- a variety of other
2 things. And then you have other categories that
3 deal with consideration of potential
4 architecture or in this circumstance, there was
5 a limitation to fee simple -- potential fee
6 simple developments as opposed to multifamily
7 and a variety of other choices. So you then
8 develop an inventory of alternatives that are
9 considered under that category of the role of
10 architecture in the build. And you also have a
11 category that deals with basic infrastructure,
12 roads, water, sewer, that sort of thing.

13 Q: You mentioned that there was a limitation about
14 the type. What -- if this development proceeds,
15 is there a particular category of housing that
16 this has to be in terms of zoning?

17 A: If resident -- it's limited to residential
18 development and associated amenities that are
19 permitted within residential areas. It's
20 limited to fee simple detached -- single family
21 detached.

22 Q: Is there a maximum number of units?

23 A: There's a cap of 50 residential units.

24 Q: Is there a cap on the amount of acreage that can
25 be conveyed with the lot?



1 A: There's a limit of no more than 20 acres can be
2 conveyed to other parties.

3 Q: And if we were looking at it on a per acre
4 basis, just considering the acreage that can be
5 conveyed to parties, what type of density would
6 that be?

7 A: It's the -- it would be considered low density
8 residential.

9 Q: All right. Now, let's talk about some of the
10 specific techniques that you're either now
11 implementing or intend to implement at Captain
12 Sam's. All right?

13 A: Of what I just went through?

14 Q: Yeah.

15 A: Yeah.

16 Q: Getting down ---

17 A: So ---

18 Q: So why don't you start and start enumerating the
19 different things you've done or intend to do.

20 A: Well, once again in particular order, if you had
21 a category of infrastructure there's a clear
22 attempt to minimize both length, exposure and
23 dimension of roads. So to the extent possible
24 we want to minimize impervious surfaces. That
25 leads to then a strategy of rather than to have



1 a broad array of individual driveways that
2 connect to the basic infrastructure, we try to
3 gather those into shared driveways. And to the
4 extent we're allowed to have pervious materials
5 in areas such as that, we want to optimize that.

6 Q: All right. And continue on, please.

7 A: All right. The other category of basic
8 infrastructure strategies that transition to
9 individual properties, it's not uncommon on
10 Kiawah to have individual boardwalks of all
11 oceanfront properties to the -- to the beach.
12 The lesson that we learned there is to the
13 extent that we can in a location like this,
14 rather than to have individual boardwalks to the
15 beach, have communal boardwalks that everyone
16 joins and have those separated -- rather than
17 have those separated by 75 or 100 feet, which is
18 typical on Kiawah, they're separated by 500 to
19 700 feet. So you minimize the number of
20 boardwalks and the exposure to the impact on
21 dunes. The reciprocal of that is on the river
22 side, rather than individual docks for those
23 handful of home sites that are along the Kiawah
24 River, rather than having individual docks
25 there, there are no individual docks and there



1 are either one or two communal docks that would
2 be integrated. Those would be examples on sort
3 of a general level.

4 Q: How about the land itself in terms of what would
5 be cleared and landscaping?

6 A: We -- again, to the extent possible, we try to
7 minimize removal of existing vegetation and
8 alteration of the existing topography.

9 Q: And we're -- we're looking at, because you can
10 see obviously an aerial of Captain Sam's, but
11 would you circle for The Court the area in which
12 the residential development would be on this
13 aerial please, Mark?

14 A: It would generally be in that area at ---

15 Q: Would any of the development ---

16 A: It needs to -- it needs to be offset.

17 Q: I understand. It looks the state of South
18 Carolina a little bit. But would any of the
19 development be on those dune ridges that we see
20 in this picture?

21 A: The ones that are exposed, it's behind those.
22 It's landward of those.

23 Q: Where is it in relation to the -- the canopy
24 behind those dunes?

25 A: It's -- the majority of it's embedded within it



1 but there are certain areas such as that area in
2 there that's a little bit more exposed. But
3 it's emerging vegetation in those areas.

4 Q: Does the ARB control landscaping or does it
5 require a landscaping plan?

6 A: Yes. We require not only a registered architect
7 but a -- excuse me, a licensed architect but a
8 licensed landscape architect.

9 Q: What do you envision with respect to any quote
10 landscaping or lawns on Captain Sam's?

11 A: Well, the strategy there again would be to work
12 within the more narrow range of indigenous
13 material to this area that unlike other parts of
14 Kiawah where people have more freedom to import
15 landscape material, the idea here would be if
16 you were to import material, it should be
17 consistent with the existing natural vegetation.
18 And not -- less decorative. So the -- so the
19 expression of the usually is no grass lawns that
20 are mowed, ornamental landscape material, that
21 sort of thing, that would not be in a location
22 like this.

23 Q: What generally is the setback from the ocean of
24 this development? What would it range from
25 approximately?



1 A: The natural setback?

2 Q: Yeah, the setback ---

3 A: Yeah.

4 Q: --- from the beach. That distance.

5 A: Well in -- in this location it's probably --
6 that's probably a minimum of four dunes. That's
7 probably 200 to 200 feet from the transition of
8 the wet beach.

9 Q: Right.

10 A: And out here it is probably greater than 1000
11 feet, 12- -- it varies considerably out there.

12 Q: Since we're dealing with a written record, when
13 you ay out here, which direction are you
14 pointing?

15 A: I'm sorry. As you move further -- as you move
16 further west the dimension increases. The
17 separation between the buildable area and
18 transition of the wet area to the dry part of
19 the beach.

20 Q: Yesterday we looked at a development table for
21 Captain Sam's as part of the development
22 agreement and showed that houses could be two
23 and half stories under that development
24 agreement. Do you anticipate that that will be
25 the case?



1 A: No, the -- we believe that the restriction
2 should be one and half story at most to maintain
3 a low profile in this location.

4 Q: And what do you envision in terms of the square
5 footage? Do you envision a square footage cap?

6 A: The idea is as it relates to the most recent
7 conceptual plan, is there are variable size home
8 sites and that there would be some conditions
9 where the maximum may be as little as 4,000
10 square feet or maybe even less as we learn more.
11 But probably no more than 5,000 square feet.

12 Q: All right. What would be the requirement with
13 respect to the driveways in terms of materials?

14 A: As mentioned earlier, our intent would be to
15 have pervious materials and there would be
16 shared driveways. And to the extent possible
17 for parking, that would attributed to a
18 residential home site. If we can gain those
19 together, cluster them with home sites as
20 opposed to individual, that would be better.

21 Q: What about the elevation of these houses, Mark?
22 If they're gonna be one and half stories ---

23 A: Well ---

24 Q: --- what do you foresee in terms of the
25 elevation and sort of the -- what could go on in



1 grade?

2 A: Well the intent would be to have the first
3 habitable floor not be much higher than the
4 minimum base flood elevation. That is, not
5 exceed -- which has happened in other locations
6 on Kiawah, where the separation between base
7 flood and where people place the first floor
8 might be as much as five feet differential. We
9 would try to minimize that, keep the profile,
10 again, of the home lower as opposed to higher.

11 Q: Would parking under these houses be allowed?

12 A: It may be allowed under certain conditions if
13 the topo permits parking to go under somewhat
14 naturally without major excavation and so forth.
15 But more likely it would be pulled away from the
16 home.

17 Q: Have you given thought to building materials for
18 this location?

19 A: The preference would be -- the early ---

20 Q: What would be the range?

21 A: The early indication would be natural materials.
22 So we would favor the use of wood over certainly
23 synthetic materials for most of the surfaces.
24 Again, our attempt would be to make it feel more
25 natural in it's set in and over time would



1 weather naturally with it's environment rather
2 than a material that is static and never changes
3 its characteristics. So, for example, roofing
4 materials, copper, wood shingle, that sort of
5 thing that ages with -- as it matures.

6 Q: As part of your inventory, how we say at Captain
7 Sam's during this design process, have you
8 considered wildlife?

9 A: Yes.

10 Q: Tell us about that.

11 **MS. WHITE:** Objection, Your Honor. I'm sure a
12 foundation has been laid for this witness to
13 testify about wildlife. Other than just ---

14 **THE COURT:** Well his question was, has he considered
15 it.

16 **MS. WHITE:** Right. And I don't ---

17 **THE COURT:** There has to be a foundation for whether
18 you consider it?

19 **MS. WHITE:** As land use planner, I'm not sure that
20 wildlife is a considera- ...

21 **THE COURT:** Well.

22 **MS. WHITE:** To my knowledge, I wouldn't expect a land
23 use planner to have any understanding of
24 wildlife. So if there is one, I do believe that
25 a foundation needs to be laid.



1 THE COURT: Mr. Walker?

2 MR. WALKER: I'm not asking the witness a
3 professional -- an expert opinion about
4 wildlife. And we can develop more of a
5 foundation that the practice on Kiawah Island is
6 to encourage habitat and to be wildlife
7 sensitive. And that's what I'm getting to.

8 THE COURT: Proceed.

9 MR. WALKER: All right.

10 Q: Mr. Permar, on Kiawah is there any -- in your
11 design practice that you've described and long
12 range planning, does wildlife habitat play any
13 role?

14 A: Yes.

15 MS. WHITE: Objection, Your Honor.

16 THE COURT: Overruled.

17 Q: How so ---

18 THE COURT: I've heard your argument.

19 MS. WHITE: Well, I was making an objection.

20 THE COURT: Okay.

21 MS. WHITE: He was leading the witness.

22 THE COURT: Oh. Rephrase the question.

23 Q: In your practice do you ever consider wildlife?

24 A: Yes.

25 Q: How so?



1 A: Well an example would be the preserve, which I
2 mentioned earlier one. Once we started to do an
3 evaluation assessment of the existing conditions
4 there, one of the things that I did that is not
5 uncommon is I do aerial photography from a
6 helicopter and see the same place in a different
7 way. And when I elevated over the preserve I
8 notices this interstate system of deer trails
9 that I didn't necessarily pick up on in terms of
10 it's complexity on grade. I mean, you see them
11 on grade but you don't see the breadth of them.
12 So that was an example of we altered the pattern
13 of home sites in a location like that to
14 maintain, to the extent possible, this
15 interstate system of patterns. In the ---

16 Q: Now let's go to Captain Sam's ---

17 A: In Captain Sam's ---

18 Q: --- and summarize how this ---

19 A: In Captain Sam's an example of that, during the
20 early stages of the conceptual work, the town of
21 Kiawah Island, under Jim Jordan, was conducting
22 the early -- the early efforts of monitoring
23 bobcat habitat and patterns and what role they
24 play in our life on Kiawah. So I reached out to
25 Jim and indicated to him we were doing early,



1 pre-planning work in this area, would he --
2 could he share some of those findings? And it
3 quickly showed particular dens in certain
4 locations that I had previously shown as home
5 sites. So we altered -- we altered the plan to
6 pull away from those locations at least as a
7 minimum on most of them, remove the home site
8 completely, much the buildable area. So that
9 would -- those are two example of observing and
10 playing off the expertise of others.

11 Q: Would you continue to receive that type of
12 information as you go forward ---

13 A: Yes.

14 Q: --- with the development? Do you know Travis
15 Folk?

16 A: Yes, sir.

17 Q: Is he in the courtroom here today?

18 A: Yes, sir.

19 Q: Have you had discussions with him?

20 A: Yes.

21 Q: And without going into who said what, what has
22 been the subject of those discussions?

23 A: As it relates to Captain Sam's?

24 Q: Yes, sir.

25 A: Well, most of them involved, again, an exchange



1 of thoughts, observations, and early findings
2 where I share with Travis the conceptual work
3 and the basis for that and our intent. And seek
4 his sort of reaction assessment, consideration,
5 thoughts. And then Travis shares examples,
6 particularly in other areas, of his role in
7 growing and understanding of a particular place.
8 And in particular, how it might apply or inform
9 the -- not only the development of a particular
10 area but its life cycle after.

11 Q: Are you, as a planner, receptive to that kind of
12 information?

13 A: Yes, sir.

14 Q: Do you envision that once you get down to
15 further planning here in the restrictive
16 covenants that they will embody some of that?

17 A: Yes.

18 Q: Are you acquainted with Beachwalker Park?

19 A: Yes.

20 Q: Is there anything unusual about Beachwalker Park
21 in the world of private communities?

22 A: Well Beachwalker Park is a -- is an agreement
23 between the master developer and I believe
24 Charleston County that then coordinates with
25 PRC, community acc- -- general community access



1 to the beach. This was -- this agreement was
2 commenced, I believe in 1975 during the original
3 entitlement process, the original Kiawah Beach
4 Company in Charleston County. And as far as I
5 know, it remains yet the only example of
6 integrating public access as a part of a master
7 planned community. I don't -- there may be some
8 others but I'm not aware of any others since
9 then, which is a little surprising from 1975
10 there's been no one else that has done that.
11 But I don't know of any.

12 Q: And what do you know about the use of
13 Beachwalker Park?

14 A: It's limited to a certain -- the agreement is
15 limited to a certain number of parking spaces on
16 land leased by the county in a very specific
17 location. There are modest facilities on the
18 property in terms of changing rooms, restrooms,
19 a little bit of sundry shop and some decking and
20 that sort of thing. And then there's a public
21 beach access area, you know, a boardwalk that
22 goes out to the beach. So it allows for -- I
23 think the agreement was for 150 spaces. There
24 are actually a few more on that. But the --
25 allows for the greater community to gain access



1 to the Kiawah Beach.

2 Q: Is it popular?

3 A: Very.

4 Q: In your master planning for Captain Sam's Spit,
5 have you provided for any amenities for the
6 community, the Kiawah community with respect to
7 Captain Sam's?

8 A: Yes.

9 Q: What is that?

10 A: Part of the agreement with the Town of Kiawah
11 Island in the 2005 and more recent development
12 agreement, there was a commitment by the company
13 to integrate I believe up to eight parking
14 spaces and boardwalk access to the beach for the
15 Kiawah -- members of the Kiawah Island Community
16 Association. That which is -- those are all the
17 property owners.

18 Q: Is there a beach access -- a vehicular parking
19 area where residents can go and park, and guests
20 of residents, west of Beachwalker Park ---

21 A: Yes.

22 Q: --- at this time? I mean, will there -- is
23 there now?

24 A: No. There is -- there is none now.

25 Q: Will there be?



1 A: The intent is to provide that in the first phase
2 of potential development at Captain Sam's.

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

5 Q: On the screen is sheet C.1.5 of Joint Exhibit 7.
6 With your finger, could you show us where that
7 would be located, this community beach beach
8 parking and beach access?

9 A: That's right here. And it -- it includes that
10 segment right there (indicating). In the
11 original development agreement, there was a
12 commitment that was not time sensitive to do
13 this at the most western part of Captain Sam's.
14 When we were involved in the process of the
15 earliest phases, such a preliminary plat like
16 this, that would have meant that the community
17 -- the Kiawah Island Community Association
18 members wouldn't have access for quite many
19 years and if it was at the extreme western end,
20 it would be a much longer walk to the beach as
21 evidenced by how the dunes have increased. So
22 there was a general agreement during this
23 plotting process to integrate it earlier in the
24 process and move it further to the east.

25 Q: While we have this up, does this particular plan



1 sheet show lots?

2 A: Yes, sir.

3 Q: And does it show markings inside lots?

4 A: It shows proposed buildable areas.

5 Q: Were you involved in that determination?

6 A: Yes.

7 Q: Could you show The Court an example of that?

8 A: Well this -- this area right here would be an
9 example of a hared driveway that would serve
10 that home site, that home site, that home site,
11 and that home site (indicating). And within
12 that -- or as you can tell, they're variable
13 home site sizes and configurations as well as
14 variable buildable areas.

15 Q: Is the darker -- what does the darker line
16 represent inside the light line?

17 A: That right there would be a buildable area.
18 Right there, right there and right there
19 (indicating).

20 Q: How is that buildable area determined?

21 A: By fieldwork.

22 Q: By who?

23 A: By early fieldwork by another fellow by the name
24 of Charlie Harrington who is an employee of the
25 company, a landscape architect and myself. And



1 it was based upon walking the land and looking
2 at vegetation, looking at topo and other
3 influences in terms of orientation. So these --
4 these were setup, for example, in this area this
5 home site right here, is offset such that its
6 view toward the ocean goes between that home
7 site and that home site. And in a similar
8 fashion, right there (indicating).

9 Q: Were these view corridors considered throughout
10 the placement of lots?

11 A: Yes.

12 Q: Mr. Permar, two weeks ago did you go out to
13 Captain Sam's with John Byrnes?

14 A: Yes.

15 Q: And what were you doing with John Byrnes?

16 A: There was a question about updating an
17 understanding of the impact of erosion along the
18 shoreline. And John and I were asked to go out
19 and look at some specific locations.

20 Q: Did you go look at them?

21 A: Yes.

22 Q: And what did you do on those locations?

23 A: I was the photographer.

24 **(Respondent's Exhibit Number 19 was introduced into**
25 **the record at this time.)**



1 Q: And I'm gonna -- so we don't have to go through
2 all the slides, I'm gonna hand you what's been
3 marked Exhibit 19, KDP 19 and ask you to look at
4 those photos.

5 A: Yes.

6 Q: Are those the photos you took?

7 A: Yes.

8 Q: Who prepared that exhibit with the adjoining map
9 on the left side?

10 A: I -- borrowed from an exhibit prepared by
11 someone else. And we used it as a basis
12 document, a specific location on the
13 photographic side with the indication as
14 represented on this graphic.

15 Q: Did you do that to the best of your ability?

16 A: I did. I added the numbers that highlighted a
17 specific location. The rest I had nothing to do
18 with.

19 Q: All right. Have you, over the years, taken --
20 created basically a photographic record of the
21 river shoreline and the river bend that is
22 subject to erosion?

23 A: I've taken a lot of images of Captain Sam's
24 shoreline.

25 Q: You should have, you do, a notebook right to



1 your left. If you would go to Respondent's
2 Exhibit 36.

3 **(Respondent's Exhibit Number 36 was introduced into**
4 **the record at this time.)**

5 A: Okay.

6 Q: Are you there?

7 A: I'm there.

8 Q: Now if you would thumb through these photographs
9 please. Who took these photographs?

10 A: I took these photographs.

11 Q: And when did you take the photographs?

12 A: As outlined in the date on the pages, September
13 16th, 2015.

14 Q: Have they been altered in any way?

15 A: No.

16 Q: Do they accurately reflect the conditions that
17 you observed on September 16th?

18 A: Yes.

19 Q: And is that first photograph looking towards
20 where?

21 A: It's from a point looking mostly north toward
22 the parking lot of PRC.

23 Q: Let's go to the next ---

24 A: And my ---

25 Q: --- next page.



1 A: My vehicle's on the right.

2 Q: And what does that ---

3 A: It's ---

4 Q: --- show?

5 A: It's a closer vantage point. I think I was up
6 on ladder looking closer to the parking lot and
7 the conditions between it and the shoreline.

8 Q: Now is there a sequence to these photographs in
9 terms of east to west the way they're arranged
10 for the most part?

11 A: The -- with the -- with the exception of the --
12 of the initial pages. Then beginning on page
13 four -- beginning on page six I walked from
14 north to south, southeast along the shoreline.
15 The pages prior to that varied in terms of
16 orientation.

17 Q: And did you go to what you under- -- what
18 location did you go to when you were walking
19 east?

20 A: I was walking to a point that was generally
21 representative of the terminus of a proposed
22 shoreline improvement.

23 Q: So if we could go to the last slide there.

24 A: Page 19?

25 Q: Yes, please. It would be KDP 20 at the top.



1 All right. Is that the -- on the screen is that
2 the last one?

3 A: It -- yes. My page 19 but on the top is 20.

4 Q: All right. Now I'd like you to tell The Court
5 about the condition of the shoreline moving west
6 after the termination of where the interior wall
7 would be. What is that shoreline like?

8 A: Beyond this image?

9 Q: Yeah.

10 A: It's generally much softer in profile and is
11 characterized by dune vegetation, eventually
12 feathering into marshland. And the emergence of
13 beaches, the sandy exposed shoreline and the
14 vegetation, low vegetation and eventually higher
15 vegetation. But it doesn't exhibit the modest
16 erosional characteristics on this image.

17 Q: Well as we were -- are we -- what direction are
18 we facing on the top?

19 A: We're facing southwest -- excuse me, west,
20 southwest ---

21 Q: All right.

22 A: --- probably, on these images.

23 Q: Do those images show the sandy shoreline
24 continuing beyond that?

25 **THE COURT:** What -- where I can understand. Are we



1 facing toward the end of the spit or toward
2 Kiawah Island?

3 **MR. PERMAR:** Toward -- toward the end of the spit.

4 **THE COURT:** Okay.

5 **MR. PERMAR:** Toward the west. It's more westerly.

6 **THE COURT:** I just wanted to make sure.

7 Q: Does that sandy shoreline continue towards the
8 inlet?

9 A: Yes.

10 Q: Is that also reflected in the ---

11 **THE COURT:** Can I ask?

12 **MR. WALKER:** Yes, sir.

13 **THE COURT:** Can you give me an estimate for how long?
14 What's the distance?

15 **MR. PERMAR:** Your Honor, from this -- from the bottom
16 image on this page to when it begins to wrap
17 around as you go west, it begins to wrap around
18 and head toward the ocean, that's probably well
19 over 1,000 feet.

20 **THE COURT:** Okay.

21 Q: Is the shoreline similar to what we're viewing
22 here for that thousand feet?

23 A: No, it is mentioned it becomes a much lower
24 profile, you don't see this more abrupt
25 transition from the sandy area to the vegetative



1 area. It's softer. There are other grasses
2 that are in that zone.

3 **MOTION TO ADMIT RESPONDENT'S EXHIBIT NUMBER 36:**

4 **MR. WALKER:** KDP moves in Respondent's Exhibit 36.

5 **THE COURT:** Any objection?

6 **MS. WHITE:** No objection.

7 **MR. CHURDAR:** No objections, Your Honor.

8 **RULING OF THE COURT:**

9 **THE COURT:** It's admitted.

10 **(Respondent's Exhibit Number 36 was admitted into**
11 **evidence.)**

12 **Q:** Now I'd like you to go to Respondent's 38,
13 please.

14 **(Respondent's Exhibit Number 38 was introduced into**
15 **the record at this time.)**

16 **Q:** Is Respondent's 38 another series of photographs
17 that you took of the shoreline?

18 **A:** Yes.

19 **Q:** And what is the date of those photographs?

20 **A:** October 6th, 2015.

21 **Q:** Had there been a natural event soon before you
22 took these photographs?

23 **A:** I don't remember what it was, but I remember a
24 rather significant storm had come through.

25 **Q:** Is this approximately the same location as your



1 -- your second photograph? Or does it -- let me
2 rephrase that. Does this show the fence that
3 was shown in the photographs a month earlier or
4 three weeks earlier?

5 A: Yes.

6 Q: And what's happened to the fence?

7 A: The fence has collapsed more.

8 Q: Is that fence part of a facility?

9 A: The fence on the right side is part of where
10 they -- where the PRC has placed a gate that
11 restricts access by others.

12 Q: Now I'm not going to walk you through these
13 photos, but do these fairly and accurately
14 represent the condition that you observed of the
15 river shoreline in the river bend in the area
16 where the wall would go on October 6th, 2015?

17 A: Yes.

18 **MOTION TO ADMIT RESPONDENT'S EXHIBIT NUMBER 38:**

19 **MR. WALKER:** Your Honor, Respondent moves this into
20 evidence.

21 **THE COURT:** 38? Respondent's 38?

22 **MR. WALKER:** Yes, sir.

23 **THE COURT:** Any objection?

24 **MS. WHITE:** No objection.

25 **MR. CHURDAR:** None.



1 RULING OF THE COURT:

2 **THE COURT:** It's admitted.

3 **(Respondent's Exhibit Number 38 was admitted into**
4 **evidence.)**

5 Q: Mark, I see where you have an earlier series of
6 photographs, two earlier series, and those are
7 -- let's start first with Respondent's Exhibit
8 41, if you could go to that.

9 **(Respondent's Exhibit Number 41 was introduced into**
10 **the record at this time.)**

11 A: Yes.

12 Q: Is Respondent's Exhibit 41 a series of
13 photographs of similar locations, including
14 Beachwalker Park that were taken on April 21,
15 2014?

16 A: Yes.

17 Q: Have any of those images been manipulated in any
18 way?

19 A: No.

20 Q: Do they fairly and accurately represent the
21 conditions depicted on April 21, 2014?

22 A: Yes.

23 **MOTION TO ADMIT RESPONDENT'S EXHIBIT NUMBER 41:**

24 **MR. WALKER:** Your Honor, KDP moves into evidence
25 Respondent's 41.



1 THE COURT: Any objection?

2 MS. WHITE: No objections, Your Honor.

3 MR. CHURDAR: None.

4 RULING OF THE COURT:

5 THE COURT: It's admitted.

6 (Respondent's Exhibit Number 41 was admitted into
7 evidence.)

8 Q: I'd ask you to turn to Exhibit 40 please.

9 (Respondent's Exhibit Number 40 was introduced into
10 the record at this time.)

11 Q: Who took those photographs?

12 A: I took these.

13 Q: When were they taken?

14 A: June 14th, 200- -- Excuse me, June 14th, 2014.

15 Q: Have they been altered in any way?

16 A: No.

17 Q: Do they fairly and accurately represent the
18 condition of the shoreline photographed ---

19 A: Yes.

20 Q: --- on that day?

21 A: Yes.

22 MOTION TO ADMIT RESPONDENT'S EXHIBIT NUMBER 40:

23 MR. WALKER: Your Honor, Respondent KDP moves into
24 evidence the photographs marked as Respondent's
25 Exhibit 40.



1 MS. WHITE: No objection.

2 MR. CHURDAR: None.

3 RULING OF THE COURT:

4 THE COURT: It's admitted.

5 (Respondent's Exhibit Number 40 was admitted into
6 evidence.)

7 THE COURT: Is the condition of the area the same as
8 it was then as it is now?

9 A: No.

10 Q: Have you taken more recent pictures, in fact, a
11 couple weeks ago?

12 A: Yes.

13 Q: I would direct your attention to Respondent's
14 Exhibit 37.

15 (Respondent's Exhibit Number 37 was introduced into
16 the record at this time.)

17 Q: Is this the last series of photographs you took
18 aside from those that you took to document
19 locations with John Byrnes?

20 A: Yes.

21 Q: And what is the date of those photographs?

22 A: August 13th, 2017.

23 Q: Do they fairly and accurately depict the various
24 locations along the shoreline?

25 A: Yes.



1 Q: Have they been manipulated in any way?

2 A: No.

3 Q: I'd ask you to go to the second photograph.
4 What does that show?

5 A: It shows that -- I shot this from a position
6 looking north with the PRC parking lot on the
7 right, shoreline and the Kiawah River on the
8 left. And I tried to replicate the position of
9 earlier shots. But I couldn't quite do it
10 because the shoreline had erode.

11 Q: That's what I was gonna ask. The court asked if
12 it was -- the condition of the shoreline was the
13 same. Has the -- from your observations, Mr.
14 Permar, has this shoreline changed from those
15 first pictures we looked at that I think were
16 April 2014?

17 A: It has, it's changed substantially.

18 Q: How so?

19 A: Well if you -- if you target the separation
20 between the parking surface of the parking area
21 that is now fenced off, and the shoreline in
22 prior images, there was a snow fence along that
23 line. That's entirely collapsed and portions of
24 the asphalt have collapsed. On this side of it
25 close to the back, you see the back of the sign,



1 there's the back of a sign and then ---

2 Q: Yes.

3 A: --- middle right, the fence line that runs
4 perpendicular to the shoreline has more
5 substantially collapsed.

6 Q: If you go to the third photograph in this
7 exhibit, where is -- what is the advantage of
8 that? It's number -- number three by the way,
9 page three.

10 A: The image is taken on top of my vehicle looking
11 toward the ocean. So it's looking south. And
12 you see more evidence of more erosion along the
13 line -- the transition between the parking
14 surface that's off limits, and the shoreline and
15 the Kiawah River on the right.

16 Q: All right. Would you please go to page four.
17 That's two photographs. Could we hone in on the
18 top one first. All right. What does that
19 depict, Mark?

20 A: I'm standing on the lower level of the exposed
21 sandy shoreline. These were shot relatively
22 close to low tide. I'm photographing toward the
23 north. So the parking lot is above this image
24 on the right where that sign is. And what I'm
25 trying to do is show the conditions where the



1 parking area is fully exposed, and there's a
2 portion of the area between the parking lot in
3 the river where there are trees. And those are
4 at dead center on the image. And you'll see
5 evidence of the remnants of the fence line that
6 used to be there that's collapsed.

7 **MR. WALKER:** Could we go to the lower photograph.

8 Q: Is this another perspective of the same
9 location?

10 A: It's a similar orientation, but I'm -- I've
11 backed up closer to the ocean side, still the
12 same orientation toward the north. The parking
13 lot is above us on the right side, and it just
14 shows more of the condition between the upper
15 parking lot and the lower natural areas.

16 Q: And the -- are the next -- tell us about the
17 next few images, I'm not going to stop on all
18 the images because there are so many, but ---

19 A: The images on page five are again attempts to
20 show evidence ---

21 **THE COURT:** I'm going to tell you this doesn't --
22 taking longer on this doesn't bother me in the
23 least because I want to learn about the area.

24 Q: Okay. Very good. So would you walk us ---

25 **THE COURT:** That'd be -- I want to learn about it



1 from both -- I want to learn about it from both
2 sides.

3 Q: Could you walk us through these photos then,
4 Mark, if we go to five.

5 A: This image, again is an attempt to show the
6 conditions in a somewhat similar location as
7 prior images taken from this point of view.

8 Q: If you go to the lower photo?

9 A: I'm -- what I'm doing is marching toward the
10 ocean, shooting back toward the north to show
11 conditions of continuous erosion.

12 Q: Are you familiar with what's been described as
13 the Town of Kiawah Island Emergency Beach
14 Access?

15 A: Yes.

16 Q: Has the erosion had any effect on the location
17 of that beach access?

18 A: It has. The area in the upper right portion of
19 this image of that emergency vehicular access
20 was so close to the shoreline, I went to both
21 Kiawah Partners and the Town and suggested that
22 they modify the position of that emergency
23 access.

24 Q: Was that done?

25 A: Yes.



1 Q: Now let's go to seven. Now let's go to the
2 upper image on seven.

3 A: Similar to other images that I've taken of the
4 shoreline, I am now facing south toward the
5 ocean with the parking lot to the left, upper
6 left, and from this point on my series of images
7 are walking the shoreline on the sandy -- on the
8 low tide sandy area along that shoreline.
9 Toward the south initially and then around the
10 bend, to ---

11 Q: Mark, could you give us an approximate estimate
12 of the height of that escarpment that we're
13 looking at?

14 A: I think it probably varies from seven to over
15 ten feet, depending upon where these dune lines
16 meet the shoreline. What this is is exposed
17 dune lines that run parallel and then sweep up
18 toward the northwest. And as we -- as we walk
19 along the shoreline, you'll see evidence of
20 variable heights. And the -- as I said, in this
21 stretch they vary from seven to probably close
22 to ten feet.

23 Q: Could you go to eight, please? And what is
24 this, these photographs?

25 A: Again, just walking the shoreline. The left



1 portion of this, it's probably five ---

2 Q: You're referring to the top picture on eight?

3 A: Correct. The top picture on eight. On the left
4 side that's probably five or six feet exposure,
5 and then in the middle of the image just on this
6 side of that pine -- that lone pine tree, that's
7 probably the seven or eight feet or so. And it
8 varies considerably.

9 Q: All right. If we could go to the lower
10 photograph. Is that a head on of what we're
11 looking at?

12 A: That's correct.

13 Q: Let's go to nine. We're now showing the upper
14 image on nine. Tell us what that is.

15 A: It -- again, I'm repeating myself. I'm walking
16 the shoreline, shooting in similar locations.
17 If you were to review prior images, prior images
18 on other dates, the trees that are now in -- on
19 the sandy portion of the shoreline ---

20 Q: Could you circle with your finger what you're
21 talking about?

22 A: These right here used to be up there.

23 Q: So you've circled the trees on the bank, and
24 you've put an arrow where?

25 A: On top of the dune. They used to be on top of



1 the dune.

2 Q: And you've got an arrow to the right of the tree
3 that's shown in the image that's the upper image
4 on nine. Approximately how high is that
5 escarpment?

6 A: I'm guessing that's plus or minus eight feet.

7 Q: All right. Let's go to the lower image. Or
8 actually, here -- got it, thank you, Your Honor.
9 Is this just beyond those trees?

10 A: Yes.

11 Q: Which way are you going?

12 A: I'm still walking toward the beach and I'm
13 starting to go along the curve, so I'm going
14 from south to southeast as I would go around --
15 excuse me, southwest as we're going around the
16 bend. So for example, prior images showed that
17 tree up -- up further into the dunes. And now
18 it's stressed and probably ready to collapse.

19 Q: Your circle is on a tree on the right side of
20 the image?

21 A: Right, right center.

22 Q: Could you give us an approximation of the height
23 of the escarpment and it's on the left side at
24 it's highest point?

25 A: On the left side, this side, that's again, I'm



1 guessing that's probably eight to ten feet. And
2 then it feathers down the further to the right
3 you go to a much lower segment, probably less
4 than four feet.

5 Q: Maybe go to ten.

6 A: I'm now walking the shoreline, but I've turned
7 180 degrees, and I'm facing to the north.

8 Q: Is that the upper image in ten that we're
9 looking at?

10 A: That's correct. And the tree I've previously
11 referenced is this tree. And it shows the
12 exposure of the root system and the stress on
13 the tree with the dead -- the dead limbs and so
14 forth.

15 Q: Was it that way, to the best of your knowledge,
16 in 2014 when you took those images ---

17 A: I would have to refer to those images, but this
18 tree was likely up in the dunes less exposed to
19 the shoreline.

20 Q: Let's go to the lower image on ten. Does ---

21 A: Now I'm facing south, southwest again. I'm
22 going -- I'm proceeding down.

23 Q: Can you show us where the tree is in that image,
24 just ---

25 A: Right there (indicating).



1 Q: All right. Let's go to 11, please.

2 A: I'm walking southwest along the profile of the
3 bend. And this top image shows evidence of
4 again, a collapse in the vegetation as a result
5 of erosion. Dune heights in this area are much
6 shorter. They probably vary from three or four
7 feet to maybe six feet.

8 Q: Okay. And what would be the range of the
9 escarpment that we're looking at in the upper
10 picture on page 11?

11 A: Well that's what I was saying, in this area it's
12 probably three or four feet, this is probably at
13 most six feet.

14 Q: Would you circle the vegetation that you were
15 talking about that -- where was that previously?

16 A: Up here.

17 Q: All right. Does your arrow show the -- behind
18 the escarpment?

19 A: Yes.

20 Q: If you would please go to 12. Tell us about
21 this image.

22 A: Thi- -- continued walking the bend profile.
23 More evidence of variation in shoreline
24 exposure. This area there is probably five feet
25 maybe.



1 Q: We're looking at the upper image and you have
2 drawn a line on the left side?

3 A: Right. And this -- this profile is down to two
4 or -- two or more feet. More evidence of
5 collapse of the shoreline, exposed this tree to
6 the point that it's dead and will eventually
7 drop along the shoreline.

8 Q: How about the lower image on 12? Is that beyond
9 the tree?

10 A: That's beyond the tree. Walk- -- I'm starting
11 to walk more due west. This is the area that is
12 known as the neck, the tightest area, and you
13 can see a variable profile of dunes as they're
14 exposed going forward, to very low profile in
15 sections like this, and more abrupt profile in
16 areas like that.

17 Q: At those locations where you've drawn the abrupt
18 profile, which is the higher elevation of the
19 dunes, what would be the approximate height of
20 that escarpment from the toe?

21 A: That one is probably six plus feet. This area
22 in here is probably a foot or two at the most.

23 Q: Let's go to 13. Looking at the upper image on
24 13.

25 A: Right. I'm continuing on on my movement toward



1 the west, I'm starting to be more due west and
2 the continuation of similar patterns. That is
3 this profile (indicating).

4 Q: Okay. Can we go to the image at the bottom of
5 13?

6 A: I'm repeating myself by saying I'm walking to
7 the west, and there's more exposure without
8 evidence of vegetation collapse in these
9 locations, and evidence of the beginnings of
10 some collapse of vegetation -- more elevated
11 vegetation further to the west.

12 Q: Where you've shown the upper -- the higher
13 profiles, basically those little ridges, those
14 different areas including the one on the left.
15 What are the approximate elevations of those
16 escarpments from the base of the toe?

17 A: Exposure again is probably a plus or minus six
18 feet. The lower sections being three or so.

19 Q: Please go to 14. And tell us about the upper
20 image on 14.

21 A: Further to the west. The exposed shoreline dune
22 -- remnants of the dunes as they meet the
23 shoreline -- or as I represented there, this is
24 probably four feet. This is again about six
25 feet or so.



1 Q: And we've got a written record, so what are you
2 showing? The elevation of the profile of the --
3 -

4 A: The profile of the escarpment.

5 Q: All right.

6 A: All right. And then I circled another location
7 where there's a vegetation collapsing.

8 Q: And which side of the picture is that?

9 A: To the right, right center.

10 Q: And let's go to the lower picture on 14.

11 A: I'm simply moving further to the west. Closer
12 to the previously circled tree that's
13 collapsing.

14 Q: Let's go to 15. Upper image, please.

15 A: Walking further west. This is more due west
16 now. The shoreline exposure is still rather
17 abrupt. That is probably five to six feet, and
18 it's probably about four and then it goes down
19 to two or so.

20 Q: And those distances relate to what, those
21 elevations relate to what?

22 A: From the bottom of the -- the escarpment to the
23 upper cut before you transition to vegetation.

24 Q: Now let's go to the bottom image in 15.

25 A: Much further west, you can see the profile of



1 the dune escarpment is considerably lower.
2 Almost not evident. And more of the -- the dune
3 grasses and vegetation are exposed almost to the
4 same level. But with some examples of
5 vegetation to the east -- excuse me, to the
6 right of the center of the image of vegetation
7 that has died off and has collapsed along the
8 sandy shoreline.

9 Q: Thank you. 16, please.

10 A: Further to the west. You actually see the water
11 tower of Seabrook on the far right along the
12 horizon line.

13 Q: Could you circle that, so ---

14 A: There (indicating).

15 Q: All right.

16 A: And the shoreline has less evident (sic) of
17 these higher dunes meeting the edge. It's
18 mostly about, for example, in that location
19 right there behind the grasses there, there's
20 probably a little bit of a dune there that's
21 maybe a foot or foot and a half tall.

22 Q: And what is this thing we're looking at in the
23 foreground?

24 A: Remnants of the root system of a tree, I don't
25 know what kind of tree, but its -- its seen



1 better times.

2 Q: Has anything colonized it?

3 A: Yeah. There's some interesting growage on that.

4 Q: The bottom of 16, please.

5 A: Walking further west. Conditions similar. You
6 start to see evident of maybe a little bit more
7 exposure to higher dunes. To the right center
8 again, Seabrook water tower is to the extreme
9 right along the horizon line.

10 Q: Let's go to 17 on our walk quest. What does the
11 top image on 17 show?

12 A: Further west you see remnants of lower
13 vegetation like wax myrtles and other sort of
14 intermediate height vegetation that were in
15 portions of the previous dune areas that are now
16 eroded. Right to the left center ---

17 Q: Is there an escarpment ---

18 A: --- and similar examples to the right. And
19 there ---

20 Q: Is there an escarpment behind the ---

21 A: Right in that location (indicating), that is
22 probably -- there's a pretty pronounced
23 location, it's probably about six feet, but it's
24 very abrupt. It builds up and then it feathers
25 out quickly.



1 Q: Let's go to the bottom image on 17.

2 A: Further west again, in foreground left, the
3 evidence of indigenous vegetation and the dune
4 field being exposed, the root system, and then
5 it dies off and it's part of the collapse of the
6 shoreline. This area in here is an exposed dune
7 that's probably about four, five feet at most.
8 And then areas to the right center are more
9 evidence of vegetation dying off and finding its
10 way toward the sandy area, the shoreline.

11 Q: Now 18, the top image seems to be a repeat of
12 the one the bottom of 17, so let's go to the
13 bottom image on 18.

14 A: Yeah, sorry.

15 Q: And what is -- what are we looking at there?

16 A: There's a low profile dune to the left of the
17 image that has an exposure of about three or so
18 feet in terms of the escarpment. Then it
19 feathers down and then the areas in here are
20 vegetation that's partly -- was previously part
21 of the dune field. This image, if I remember
22 correctly, is closer to we're now looking into
23 areas that would be proposed home sites.

24 Q: All right. And let's go to the final series,
25 which is page 19, do the upper one first.



1 A: Further west.

2 Q: Yes.

3 A: The -- obviously the large area is part of that
4 dune vegetation that's exposed and died off.
5 Right center, similar example, similar
6 conditions as the dune profile is much lower --
7 lower in this area. The conditions are
8 different.

9 Q: And let's go to the last image on the bottom of
10 19.

11 A: Dead center is a pine tree that you can start to
12 see evidence of exposure of the root system
13 right here (indicating). So it's likely if this
14 pattern continues, it's likely that that tree
15 will eventually die off and collapse into the
16 sandy shoreline. Left center -- or left area is
17 one of the last exposures of escarpment along
18 the dunes, and that dimension is probably three
19 to four feet of exposure.

20 Q: Mark, could you show The Court where the wall,
21 the terminus of the wall is here? Or the
22 approximate location?

23 A: You know, I wish I could be entirely confident,
24 but it's somewhere in this image I believe. I
25 mostly refer to it as opposite where a creek



1 comes in across the Kiawah River, so I wish I
2 could be more definitive about that.

3 Q: Where did you stop your photographs that we've
4 seen in this montage?

5 A: Roughly in that position. Opposite the creek
6 that feeds back into -- toward Cassique to the
7 north.

8 Q: And which direction are we looking in the bottom
9 image?

10 A: We're looking -- we're looking west right now.

11 Q: Is that towards the -- where, the inlet?

12 A: Toward the inlet, right. What you see in the
13 immediate right horizon, on the bottom portion
14 of that, this is part of Captain Sam's Spit, but
15 there's remnant -- you can see in the very
16 distance there on the -- right there, there's a
17 tree line, that's Seabrook.

18 **MOTION TO ADMIT RESPONDENT'S EXHIBIT NUMBER 37:**

19 **MR. WALKER:** Your Honor, Respondent moves into
20 evidence Exhibit -- it's Exhibit 37, the
21 photographs dated August 13th, 2017 that we just
22 went over with Mr. Permar.

23 **THE COURT:** Any objection?

24 **MS. WHITE:** No objection.

25 **RULING OF THE COURT:**



1 THE COURT: They're admitted ---

2 MR. CHURDAR: No objections.

3 (Respondent's Exhibit Number 37 was admitted into
4 evidence.)

5 MR. WALKER: Okay.

6 MS. ARMSTRONG: Trenholm, are you maybe at a good
7 place we could take a break?

8 MR. WALKER: I was going to -- I was fixing to
9 finish.

10 MS. ARMSTRONG: Oh.

11 MR. WALKER: All right.

12 MS. ARMSTRONG: You are, okay.

13 MR. WALKER: That's all we have of Mr. Permar at this
14 time, Your Honor.

15 THE COURT: Mr. Churdar?

16 MR. CHURDAR: I don't have any questions for the
17 witness.

18 THE COURT: Do you want -- wish to take a break?

19 MS. ARMSTRONG: Yes, I do, Your Honor.

20 THE COURT: Okay. We'll take our traditional five
21 minute break.

22 (A break was taken from 10:53 a.m. until 11:02 a.m.)

23 COURT REPORTER: All rise.

24 THE COURT: Thank y'all. Be seated. All right. You
25 ready?



1 **MR. PERMAR - CROSS-EXAMINATION BY MS. WHITE:**

2 Q: Good morning, Mr. Permar.

3 A: Good morning.

4 Q: I believe we've met before. Maybe it's just me.

5 A: We have.

6 Q: You said you live on Kiawah?

7 A: Yes.

8 Q: What part -- what part of the island do you live
9 on?

10 A: 81 Dungannon Hall.

11 Q: What part of the island is that on?

12 A: It's on the northern marsh side about mid
13 island.

14 Q: Mid island. And you don't have a background in
15 biology do you?

16 A: No.

17 **(Respondent's Exhibit Number 37 was introduced into**
18 **the record at this time.)**

19 Q: And Mr. Walker was having you walk through these
20 photographs in KDP Exhibit Number 7 from just
21 recently in August 2017 that you had taken? So
22 KDP Exhibit 37. And you were looking at what's
23 marked as page 18, at the bottom image I
24 believe.

25 **MS. WHITE:** Harvin, could you turn on the Elmo,



1 please?

2 Q: I believe you were looking at this image of --
3 this is page 18, when you indicated that this
4 was kind of near the end of your walk that day
5 beginning at Beachwalker Park and making your
6 way around the neck towards the inlet, is that
7 correct?

8 A: Yes. I believe the next page was the -- were
9 the last series, so this was toward the end of
10 my walk.

11 Q: Okay. And do you see in this picture those kind
12 of -- those white marks right -- right there?

13 A: That's correct.

14 Q: Do you remember seeing those on that day?

15 A: Yes.

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

18 Q: I'm gonna put up what was marked last week as
19 Petitioner's Exhibit 3H. Do you recog- -- are
20 you able to identify where this picture is?

21 A: Well what I'm guessing is the creek in the
22 foreground ---

23 Q: Which creek is that?

24 A: Can I mark?

25 Q: Is -- sure.



1 A: This area here is the creek that feeds out from
2 Cassique (indicating).

3 Q: Okay. And do you recognize what's in the
4 background in this image?

5 A: This is Captain Sam's behind. That's correct.

6 Q: Okay. And do you see what we were just looking
7 at as those white stakes in the ground in this
8 image?

9 A: I believe they're there.

10 Q: Okay. And what else do you see right around in
11 that area where those stakes were on the ground
12 in the sandy beach?

13 A: The people on the sandy portion.

14 Q: And, Mr. Permar, you indicated that you spend a
15 good bit of time going and walking around on
16 Captain Sam's?

17 A: That's correct.

18 Q: So you've seen people using the sandy banks on
19 the back end of Captain Sam's Spit before,
20 haven't you?

21 A: Yes.

22 Q: There's usually a good number of people out
23 there when you go out there, isn't there?

24 A: I've seen it with no people and I've seen it
25 with more people.



1 Q: And when you took the images in KDP Exhibit 37,
2 the beach looked pretty extensive. Were those
3 taken at low tide?

4 A: They were close to low tide, I can't remember
5 the exact timing.

6 Q: And you indicated in the -- in the last
7 photograph on page 19 that that was
8 approximately in the area where the wall would
9 terminate on the western end?

10 A: I believe so. But I indicated that I wasn't
11 certain. I always use the mouth of the creek as
12 sort of the terminus point.

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

15 Q: So looking at KDP's Exhibit 35, are you able to
16 identify that mouth of the creek that you were
17 just referencing.

18 A: Yes. Would you like me to mark it?

19 Q: Sure.

20 A: So that right there I usually use that zone,
21 somewhere along there, as representative of the
22 terminus (indicating).

23 Q: And is it your -- it's your understand that
24 there is sandy banks across from where that
25 creek comes out?



1 A: That's correct.

2 Q: And it's a sandy bank all along that back end
3 where the wall would be located?

4 A: From ---

5 Q: From Beachwalker Park.

6 A: --- this point to this point?

7 Q: Correct.

8 A: At low tide there's exposed sand there, that's
9 correct.

10 **THE COURT:** How about at high tide?

11 **MR. PERMAR:** At high tide it usually is gone in terms
12 of the sandy profile, the lower sandy profile.

13 Q: And you've seen people recreating along the
14 sandy bank as you've indicated from Beachwalker
15 Park to the -- from across the creek on the back
16 end of Captain Sam's Spit?

17 A: I've seen people on the shoreline, that's
18 correct.

19 Q: And you described the change going -- moving --
20 continuing west towards the inlet and the end of
21 Captain Sam's Spit is less of sandy beach and I
22 believe you called it softer.

23 A: From -- if I -- my described? From this --
24 roughly this point on, this shoreline right
25 there is much lower profile topo and as



1 evidenced on this aerial photo there are grasses
2 in between the ---

3 Q: Sorry.

4 A: --- there are grasses ---

5 Q: I was trying to zoom in to ---

6 A: Oh that's -- that's okay.

7 Q: --- see if you could see any better.

8 A: So along this area between that line and that
9 line, the term I use is it's a softer profile
10 (indicating). It's very low profile and the
11 transition between the water, whatever might be
12 exposed at low tide in the grasses it's a very
13 low profile ---

14 Q: Okay.

15 A: --- through there.

16 Q: And so that low profile it's marsh, right?

17 A: Various grasses, that's correct.

18 Q: All right.

19 A: Right.

20 Q: And, Mr. Permar, regardless of the erosion that
21 you've observed over the years, you've still
22 seen people using the sandy banks along the back
23 end of Captain Sam's Spit, haven't you?

24 A: Yes.

25 **MS. WHITE:** One second, Your Honor.



1 Q: And, Mr. Permar, you don't see people using the
2 marshy areas beyond where you indicated the wall
3 would end, do you?

4 A: No.

5 MS. WHITE: No further questions.

6 THE COURT: Re-direct?

7 MR. WALKER: No re-direct.

8 THE COURT: You may step down, Mr. Permar.

9 (The witness was excused.)

10 MR. WALKER: Respondent KDP II and KRA Development,
11 LP call Townsend Clarkson.

12 COURT REPORTER: Mr. Clarke, do you have an E on the
13 end of you ---

14 MR. CLARKSON: I'm sorry?

15 COURT REPORTER: Townsend Clarke?

16 MR. CLARKSON: Clarkson.

17 COURT REPORTER: Clarkson. Thank you. Raise your
18 right hand, please.

19 MR. CLARKSON: (Witness complies.)

20 COURT REPORTER: Do you solemnly swear the testimony
21 you're about to give in this matter is the
22 truth, the whole truth and nothing but the
23 truth, so help you God?

24 MR. CLARKSON: I do.

25 COURT REPORTER: Thank you.



MR. CLARKSON - DIRECT EXAMINATION BY MR. WALKER:

Q: Mr. Clarkson, where are you currently employed?

A: The Kiawah Partners on Kiawah Island.

Q: How long have you been with Kiawah Partners?

A: 29 years.

Q: What's your current position at Kiawah Partners?

A: I am the chief operating officer.

Q: And have you held other positions over the years?

A: When I came originally in 2008 I was -- excuse me -- in 1988 I was the chief financial officer. And for awhile I was the chief financial officer and the chief operating officer. And now I'm the chief operating officer.

Q: Where did you work before you came to work for Kiawah Partners?

A: I was the senior VP of finance for Amelia Island Plantation.

Q: I'm gonna jump back a little bit. Where did you go to college?

A: University of South Carolina.

Q: Okay. And what was your degree in?

A: A B.S. in accounting.

Q: Did you later obtain a certification with respect to accounting?



1 A: Yes. I was a CPA.

2 Q: Are you currently a licensed CPA, is your
3 certificate valid?

4 A: I'm inactive.

5 Q: When did you go inactive?

6 A: Last year.

7 Q: In your position with Kiawah Partners, do you
8 deal with the finances of the business?

9 A: Yes. I deal with budgets, review of monthly
10 financial statements, review of daily
11 operational statements. Yes, sir.

12 Q: Over your 29 years, how many of those years have
13 you been dealing with the finances of the
14 organization?

15 A: Only 29 years.

16 Q: All right. Are you -- do you keep track of the
17 financial matters of the organization?

18 A: Yes, I do. And my staff.

19 Q: Do you deal with looking at the revenues?

20 A: Yes.

21 Q: What else do you look at?

22 A: You look at revenues and expenses, accruals,
23 everything associated with financial
24 projections, financial models, financial
25 statements.



1 Q: And you mentioned budgeting, what do you do in
2 that regard?

3 A: Budgeting in mostly final review before they go
4 to the ownership of the partners for their final
5 review.

6 Q: Is there any practice with respect to looking at
7 an estimate of fees and -- excuse me, revenues
8 and expenses if the company is to develop a
9 particular area?

10 A: Yes, we would -- it would typical that at that
11 point in time we would have a more definitive
12 development plan for that parcel. And we would
13 look at current pricing as far as revenues go to
14 determine sales prices based on the items that
15 determine what a price of a piece of property
16 would be, location, new easements being probably
17 the two most critical ones for it. We'd look at
18 comparable prices in the market, determining
19 brokerage properties and the company's own
20 property to get a range of prices for the
21 revenues.

22 Q: Now we talked about the considerations for
23 revenues, how about expenses? What do you do to
24 try to track those or put a budget on those?

25 A: Unless there are specific challenges for the



1 piece or parcel that we're looking, we would
2 look at the cost that we had been incurring at
3 that time for projects that are underway. We
4 are -- there is always a development project
5 typically under construction, so we would have
6 new bids and we would look at the costs that
7 were associated typically on a per linear foot
8 basis of the prior projects to determine, by our
9 best estimate, what would be the cost that we
10 anticipate on the coming project.

11 Q: I left out an essential element of this and that
12 is when Kiawah Partners develops a piece of
13 property, what specific things do they do to
14 that property?

15 A: Our -- typically we develop lots, would be the
16 major development that we do. And in that we
17 would install the road, the water and the sewer
18 and the road landscaping, or the entrance
19 landscaping depending on the type of
20 neighborhood that we were building at that time.

21 Q: Do you have a -- how would you describe the base
22 of information that you have on cost in -- on
23 the island?

24 A: We probably do the major vertical -- excuse me,
25 horizontal development on the island. So we



1 would have a really good history and information
2 on that cost. And we sell about 85 percent of
3 the property on the island, whether brokerage or
4 ours. And we would have the information on
5 sales prices based on property type.

6 Q: Have you prepared an estimate of revenues and
7 expenses associated with Captain Sam's Spit?

8 A: Yes, I have.

9 Q: Before I get to that, one more question. In
10 your various financial capacities, do you deal
11 with real estate taxes?

12 A: Yes, I do. I am responsible for real estate,
13 real estate taxes and tax appeals during my
14 tenure here. I -- now somebody else does do
15 that.

16 Q: In your budgeting, do you budget for taxes?

17 A: Yes, sir.

18 Q: Now back to your estimate of revenues and
19 expenses. In calculating revenues, what did you
20 use as the principle determinant?

21 A: Well the first thing I did was look at the
22 preliminary plat or the parcel and determine the
23 location or type of lot that was being developed
24 there. Our -- typically our most expensive or
25 our most valuable lots on the island are



1 oceanfront. And as you back up from oceanfront
2 lots toward the interior of the island, the
3 values of those lots, sales prices typically
4 reduce until you get on the river side of
5 Kiawah, which would be what I call the northern
6 side of Kiawah. And as you get on the river the
7 prices will go back up, but not up to the level
8 that the oceanfront lots were. So I -- I looked
9 at our listing sheets that we have of both
10 company property and brokerage property and got
11 an average sales price or listing sheets price
12 for oceanfront property of which in Captain
13 Sam's there's -- in phase one there's 14 for,
14 you know, I think it was homes. Yeah, 14 -- 13,
15 excuse me, oceanfront lots and 13 near ocean
16 lots. Phase two there's ten oceanfront lots and
17 14, 15 of the -- 14 near ocean lots. So I
18 looked for sales in -- or listings in those
19 categories of properties.

20 Q: Did you use the same procedures that you would
21 use in doing a pro forma for any other
22 subdivision?

23 A: Yes, we would. That's the exact same procedure.

24 Q: Well what was your estimate of the approximate
25 gross revenues ---



1 A: The average prices ---

2 Q: --- of the lots?

3 A: Per lot?

4 Q: I mean for the lots, gross for the sale of the
5 ---

6 A: For the lots. The average price if you take the
7 -- the average price for oceanfront lots were
8 around 5.4 million dollars. And the average
9 price for a near ocean lot was three million
10 dollars. So that came out to be about a 4.2
11 million dollar average for those lots. Because
12 -- that's in phase one. So that generated about
13 109 million dollars worth of total revenue.
14 Phase ---

15 Q: How about for phase two?

16 A: For phase two there were only 10 ocean front
17 lots and 14 near ocean lots. So the average
18 value there was four million dollars. And
19 combined, if you take those two we earned -- the
20 total value there was about 210 million dollars.

21 Q: Let's go to the expense side. Did you consider
22 the cost to the wall?

23 A: Yes, we did.

24 Q: And what did you use -- what figure did you use
25 for the cost of the wall?



1 A: We used -- we had a contract -- because that' a
2 unique development criteria for that
3 neighborhood, we had a -- an existing contract
4 for 950 linear feet of sheet pile wall from Cape
5 Romain. I used the linear foot cost for that
6 sheet pile wall, plus the estimated cost for the
7 tie backs. And then added into the construction
8 road, which was about 900,000. And other costs
9 that we had already incurred or anticipated
10 incurring relating to survey, engineers and
11 consultant and multiplied that times the linear
12 footage on the -- for the wall and came up with
13 about 8.2 million dollars to put in the sheet
14 pile wall.

15 Q: Is that all inclusive?

16 A: That's all inclusive, yes.

17 Q: Can we talk about now the -- are there other
18 expenses that you've not considered?

19 A: There's normal road and sewer and water
20 development costs and I looked at our most
21 recent development projects in our Cassique
22 neighborhood and also in our Ocean Park
23 neighborhood that were ongoing. Got an average
24 for anywhere -- or got costs anywhere from
25 around 650 a linear foot to 950 a linear foot.



1 And so just used an average of 825 linear foot
2 for the 6,000 linear feet of infrastructure
3 development there, which was a total of about
4 almost five million dollars.

5 Q: Did you also do a calculation of property taxes
6 that would payable to Charleston County on ad
7 valorem basis based on those lots values ---

8 A: Yes.

9 Q: --- for the lots alone?

10 A: Well, I did it ---

11 Q: Using current millages?

12 A: Yes. I did it based on the lot values plus an
13 improved facility or home resident on that lot.
14 And assumed a 5,000 square foot home at an
15 average price of about 600 dollars a square
16 foot. So if you looked at 50 homes, that
17 totaled about 150 million dollars for that. So
18 the total value, including the land at 110 --
19 210 million, was about 360 million dollars. And
20 based on last year's millage rate, that would
21 generate close to five million dollars a year in
22 property taxes to Charleston County.

23 Q: Would there be any employment associated with
24 the development of Captain Sam's?

25 A: Well, yeah. I mean, there would be employment



1 associated with the development of the sheet
2 pile wall. There would be employment with the
3 construction of the infrastructure. There would
4 be over a longer period probably 10 years to
5 develop -- to build out the 50 homes. And over
6 that period of time there would be employment
7 associated with the construction of those homes.
8 Then after they're constructed there would be
9 the services that those property owners would
10 require for maintaining the property of their
11 homes or for services within their homes. So
12 yes, there would be.

13 Q: Was Kiawah Partners recently contacted by
14 Charleston County?

15 A: I think it was 2016.

16 Q: What was the subject of that communication?

17 A: The subject was erosion of the parking lot at
18 the Beachwalker County Park.

19 Q: What -- what was the form of the communication?

20 A: It was in the form of a letter to our company
21 that came in expressing concerns about the
22 safety situations around the eroding and washout
23 on a portion of their parking lot.

24 **MS. WHITE:** Objection, Your Honor. Move to strike.

25 The witness was just testifying to hearsay about



1 the contents of the letter.

2 **MR. WALKER:** Well we -- we will go directly to the
3 letter.

4 **THE COURT:** All right.

5 **(Respondent's Exhibit Number 13 was introduced into**
6 **the record at this time.)**

7 Q: It -- would you turn to KDP Respondent's 13?

8 A: I'm not sure I'm familiar with this. I see a
9 13. Yes, I have it.

10 Q: Is that the letter you were referring to?

11 A: Excuse me, one second. Yes, it is.

12 Q: Did that letter make it's way to you?

13 A: It did. It went directly from Ms. Cardenas who
14 works for us in our accounting area to me.

15 Q: And what was included with the letter? Were
16 there enclosures?

17 A: Yes, there was. There was a copy of our lease
18 that we have -- with the county for the county
19 park and also copies of pictures to illustrate
20 the erosion along the side of the county park.

21 Q: You mentioned that you were provided pictures.
22 Is there an enclosure at the back of the letter
23 that included those ---

24 A: Yes, there ---

25 Q: --- that you're looking at now?



1 A: Yes. They're called term erosion updates.

2 **MOTION TO ADMIT RESPONDENT'S EXHIBIT NUMBER 13:**

3 **MR. WALKER:** Your Honor, we would offer Respondent's
4 Exhibit 13 into evidence for the notice that we
5 have, not for the truth of the matter asserted
6 but the notice of the concerns about erosion and
7 -- first the notice of the erosion problem from
8 the county on behalf of PRC and the concern for
9 safety of human and vehicles that is expressed
10 in the letter as a result of the erosion.

11 **THE COURT:** Any objection?

12 **MS. WHITE:** I think so. We don't -- I think we can
13 agree to allow it in for notice that the ---

14 **THE COURT:** Did you hear what he just said?

15 **MS. WHITE:** Right.

16 **THE COURT:** Okay.

17 **MS. WHITE:** And I think they can agree to allow it in
18 for -- for notice that the park had concerns but
19 I feel like if we allow it in and qualify what
20 those concerns were, we're kind of getting
21 hearsay in through the -- this limited admission
22 of the document. And so I -- I think we can
23 agree that it can come in as to notice that the
24 park had concerns, but if we qualify what those
25 concerns were then we're allowing the contents



1 of the documents to be -- we're allowing in the
2 hearsay. That would be concern that we would
3 have for these documents.

4 **THE COURT:** Any response?

5 **MS. WHITE:** And it's -- sorry. The other thing, I
6 just note that Mr. Clarkson wasn't -- there's
7 several people that were cc'd and Mr. Clarkson
8 wasn't listed as one of them and so we just --
9 we're not sure exactly who the notice is to
10 since this witness isn't the recipient of the
11 letter.

12 **THE COURT:** I thought I saw at the top of the letter
13 who it was to, who it originally was.

14 **MR. WALKER:** And Mr. Clarkson testified it went
15 immediately form Debbie Cardenas to him, that
16 she routed it immediately to him and that he
17 received it. We are, as The Court has said and
18 I have offered, offering it for notice. And I'm
19 not offering it for the truth.

20 **THE COURT:** I recognize that. Mister ---

21 **MR. CHURDAR:** The department has no objection.

22 **RULING OF THE COURT:**

23 **THE COURT:** It's admitted for notice and not for the
24 truth for the matter asserted.

25 **(Respondent's Exhibit Number 13 was admitted into**



1 **evidence.)**

2 Q: And, Mr. Clarkson, if you would go down to the
3 second paragraph, would you please publish for
4 us what KDP, Kiawah Partners was put on notice
5 of?

6 A: The main concern is the -- is the erosion has
7 set in motion ---

8 **MS. WHITE:** Objection, Your Honor. This is the
9 concern that I just expressed about the contents
10 of the letter being hearsay.

11 **THE COURT:** Well it's been offered -- your concern
12 was Hearsay. It's not offered for the truth of
13 a matter asserted and that is component of the
14 definition of hearsay.

15 **MS. WHITE:** Right. But he's publishing ---

16 **THE COURT:** So that ---

17 **MS. WHITE:** --- it by putting it in ---

18 **THE COURT:** Well, wait a second, let me finish. Your
19 concern is hearsay, not for the truth of the
20 matter asserted, so you didn't have a problem
21 with that. You removed the hearsay objection by
22 your own statement. The document has been
23 admitted into evidence so he can publish the
24 document that is not offered for the truth of
25 the matter asserted.



1 **MS. WHITE:** Well I would just, again, assert that we
2 object on grounds of hearsay at this point as to
3 the contents.

4 **THE COURT:** Well, I'm not gonna repeat the definition
5 of hearsay again, I'll just overrule you're
6 objection.

7 **Q:** Would you please publish the second paragraph as
8 to what Kiawah Partners was put on notice of as
9 far as contentions?

10 **A:** The main concern is the erosion has set in
11 motion actions that have caused concern for
12 safety of humans and vehicles. It negatively
13 affects the way CCPRC operates and how they
14 serve the guest who use this facility. The
15 river was accessible and was a unique benefit to
16 the guests and the facility.

17 **Q:** If you would continue on the third paragraph,
18 please.

19 **A:** According to Mr. Macchia, they had to close off
20 a section of the parking lot because they don't
21 know how extensive the erosion is under the
22 asphalt. A larger concern to them is how stable
23 the base under this asphalt is and, as you walk
24 closer to the edge, how fractured the non-
25 supportive the base is. Supposedly a permit was



1 obtained by Kiawah Development to construct a
2 bulkhead in that area near the riverbank that
3 has never been done.

4 Q: Thank you, Mr. Clarkson. Please answer any
5 questions that Mr. Churdar or Ms. Armstrong may
6 have.

7 **MR. CHURDAR:** I have no questions.

8 **MR. CLARKSON - CROSS-EXAMINATION BY MS. WHITE:**

9 Q: Hi, Mr. Clarkson.

10 A: Good morning.

11 Q: So you indicated that each of the lots in phase
12 one would be approximate -- would have a value
13 of approximately 4.2 million dollars?

14 A: The average, yes.

15 Q: It could be more?

16 A: It could be more. I mean, they will be. The
17 oceanfront lots would be more than the ocean
18 view lots.

19 Q: So then that value that you, the developers,
20 stand to make from the development of Captain
21 Sam's Spit is a little under 200 million
22 dollars?

23 A: That is correct.

24 Q: And Kiawah Partners owns the Kiawah Club, is
25 that correct?



1 A: It owns the Kiawah Island Club.

2 Q: The Kiawah Island Club. And part of that club
3 is the River Course Golf Club?

4 A: Yes.

5 Q: And Cassique?

6 A: And Cassique, yes.

7 Q: And Kiawah Partners also owns Kiawah Island Real
8 Estate?

9 A: Yes.

10 Q: And Kiawah Partners also owns the Kiawah Island
11 Utility company?

12 A: No, that has been sold.

13 Q: Sold to a third party?

14 A: Sold to a third party.

15 Q: And when was that?

16 A: About a year ago.

17 Q: How much was the Kiawah Island Utility Company
18 sold for?

19 A: A rough estimate I believe was around 36
20 million.

21 Q: And Kiawah Partners also owns Kiawah Publishing
22 Company?

23 A: Kiawah Publishing, yes.

24 Q: And do they also own Fresh Fields Village
25 Commercial Center?



1 A: Fresh Fields Village is -- the improved part of
2 Fresh Fields Village has been sold.

3 Q: How much was that sold for?

4 A: Around 68.

5 Q: So what is the total value of all these holdings
6 that Kiawah Partners has?

7 A: I do not know off the top of my head?

8 Q: Are you able to give an estimate? You deal with
9 these numbers all the time, right?

10 A: But I don't look at the estimated value on the
11 balance sheets like that, no.

12 Q: And Kiawah Partners was actually bought by a
13 company, Coral Canary Land?

14 A: Yes, it was in May of 2013.

15 Q: And Coral Canary Land is managed by South Street
16 Partners?

17 A: Yes, it is.

18 Q: And also backed by Coral Canary Holdings?

19 A: Coral Canary Holdings, yes.

20 Q: And that's a hedge fund out of New York?

21 A: That's a fund out of New York, yes.

22 Q: And when Coral Canary bought Kiawah Partners,
23 they assumed a mortgage that was upwards of 80
24 or 90 million dollars, is that right?

25 A: They assumed -- yes. Several mortgages.



1 Q: And they also put in additional cash when they
2 purchased Kiawah partners, right?

3 A: Yes.

4 Q: And that was ---

5 **MR. WALKER:** Objection, Your Honor. And we have
6 allowed this because I thought it was gonna end,
7 but all of this has nothing to do with this
8 project or the financial benefit from this
9 project. She seems to be trying the fact that
10 they've -- I don't know what the relevance is
11 quite frankly.

12 **THE COURT:** Well, I'll ask her. I was actually
13 questioning that myself, so.

14 **MS. WHITE:** I was just trying -- I was trying to
15 understand the status of who exactly owns the
16 land that's being developed.

17 **MR. WALKER:** Well those are not questions going to
18 the status. I mean, he can tell you who owns
19 the land.

20 **MS. WHITE:** There's a lot of holdings ---

21 **THE COURT:** If you could ask him more directly, I --
22 that'd get us to the -- I don't really need to
23 know all about Kiawah, the island of Kiawah to
24 decide this case, do I?

25 **MS. WHITE:** I think it's all related to the Kiawah



1 Island. That's Kiawah Island Partners what they
2 own and what they've sold and who just recently
3 purchased them. And ---

4 **THE COURT:** You want to respond to that?

5 **MR. WALKER:** Well I don't see any relevance to that.
6 I don't see what it has to do with the CZMP
7 certification or the consideration of the
8 policies in the CZMP, none of that. I just
9 don't see it. The ownership has no bearing on
10 the issues before This Court.

11 **THE COURT:** What does the ownership prove one way or
12 the other?

13 **MS. WHITE:** Well it would prove ---

14 **THE COURT:** Who owns it.

15 **MS. WHITE:** Yeah. I think I was ---

16 **THE COURT:** You know, but that's not an issue though,
17 is it?

18 **MS. WHITE:** Well I was just trying to ask the witness
19 to explain the background of who owns it and who
20 was listed on the ---

21 **THE COURT:** Well, one more time though. What does
22 the fact of who owns it have anything to do with
23 my decision in this case?

24 **MS. WHITE:** I think it's relevant to know who owns
25 the property that's at issue.



1 **THE COURT:** Why?

2 **MS. WHITE:** It's -- they're the ones applying for the
3 permits and receiving the permits and performing
4 the work and hiring others to do the work.

5 **THE COURT:** Well I know who's doing that. It's --
6 now I don't know if I can say their names.

7 **MS. WHITE:** If I could maybe just ask one ---

8 **THE COURT:** Okay. Go ahead.

9 **MS. WHITE:** --- further question.

10 Q: Mr. Clarkson, Kiawah Partners wasn't the
11 applicant on these permit applications, was it?

12 A: No, it was not.

13 Q: And that's because Kiawah Partners is part of a
14 company that has several subsidiaries and other
15 holdings?

16 A: It -- when the permits were applied for Kiawah
17 Partner's structure had both holding companies
18 and development companies.

19 Q: And one of those holding companies is a company
20 called KDP II?

21 A: It's actually spelled out. Kiawah Development
22 Partners II, Inc. was the holder of those at
23 that time of the application. And the
24 development company was the one that made
25 application for the -- for the permits.



1 Q: And Kiawah Partners owns Kiawah Development
2 Company, is that correct?

3 A: Kiawah, at the time of purchase in 2013, the
4 land was transferred. The seller retained the
5 company that owned the property at that time.
6 And so the land was purchased through a company,
7 at that point in time KDP II, LLC. And that is
8 the entity in which the property now is owned,
9 or through which it is owned.

10 MS. WHITE: No more questions.

11 THE COURT: Any re-direct on those questions?

12 MR. CLARKSON - RE-DIRECT EXAMINATION BY MR. WALKER:

13 Q: Does Kiawah Partners refer to a specific entity
14 or is it basically just an operating name?

15 A: It's our operating name for our various
16 entities, all of our entities.

17 Q: Thank you.

18 THE COURT: You may step down.

19 MR. CLARKSON: Thank you, sir.

20 (The witness was excused.)

21 MR. WALKER: KDP calls Rick Karkowski.

22 COURT REPORTER: Spell your last name for me, please.

23 MR. KARKOWSKI: K-A-R-K-O-W-S-K-I.

24 COURT REPORTER: Raise your right hand, please.

25 MR. KARKOWSKI: (Witness complies.)



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

5 **MR. KARKOWSKI:** I do.

6 **COURT REPORTER:** Thank you.

7 **MR. KARKOWSKI - DIRECT EXAMINATION BY MR. WALKER:**

8 Q: Mr. Karkowski, what is your profession?

9 A: I'm a professional engineer.

10 Q: Where do you work?

11 A: I work for Thomas and Hutton Engineering
12 Company.

13 Q: Are you licensed in the state of South Carolina?

14 A: Yes, I am.

15 Q: Has your practice as an engineer tended to
16 concentrate in a particular area?

17 A: It has. I concentrate in the area of water
18 resources management.

19 Q: And in the course of that do you ever get
20 involved in doing stormwater plans?

21 A: I do.

22 Q: With respect to the plans that we've looked at
23 in this case that are -- let me back up. What
24 was your role with regard to Captain Sam's Spit?
25 What did you do from an engineering standpoint?



1 A: I oversaw much of the design of the stormwater
2 management system and the integration of that
3 system and the overall design.

4 Q: Now rather than get into the specifics such as
5 the calculations, I want to ask you about
6 particular methods that were used. Were the
7 methods that were used here typical for a
8 residential subdivision?

9 A: Generally not. They're a lot more specific to
10 the location.

11 Q: And would you describe them as more or less
12 environmentally sensitive than typically used?

13 A: That's right.

14 Q: Which way?

15 A: A lot more environmentally sensitive than a
16 typical neighborhood development stormwater
17 management would be.

18 Q: And what I'd like you to do now is to tell The
19 Court about some of the things and the methods
20 that were used in this stormwater plan that are
21 on the environmentally sensitive side.

22 A: So some of the things that we incorporated in
23 the design and overall stormwater management is
24 we use best management practices, stormwater
25 best management practices to limit or eliminate



1 the amount of runoff that goes to the adjacent
2 rivers or ocean. We have a swale system on the
3 roads. There's no curb and gutter. There's no
4 inlets that capture that water and concentrate
5 it in any way. The water is -- in those swales
6 are directed to shallow bioretention areas that
7 ---

8 Q: And by shallow, about how deep are these
9 bioretention areas?

10 A: I believe they're in the neighborhood of three
11 feet.

12 Q: All right.

13 A: They -- and they're designed to capture large
14 amounts of runoff and infiltrate into the ground
15 rather than letting them release over land into
16 the adjacent water body.

17 Q: You mentioned the work infiltrate, what are you
18 talking about infiltrate?

19 A: Infiltrate is the phenomenon where stormwater or
20 other waters go into the ground rather than
21 running off on the surface like stormwater
22 runoff.

23 Q: And what -- were the soils that you were working
24 with conducive to infiltration?

25 A: They were.



1 Q: Why?

2 A: Very much so. We had some tests run by a
3 geotechnical subconsultant that demonstrated
4 that the -- the soils had very, very large
5 capacity to infiltrate runoff. You know, on the
6 order of magnitude I believe in the, you know 10
7 to 20 inches per hour range.

8 Q: Now, in what -- or let me ask you this. How --
9 what was the capacity of these bioretention
10 areas in relation to the standards that you were
11 required to meet?

12 A: We designed them to meet the -- what would be
13 called the shellfish standard. When you're
14 designing a facility adjacent to a shellfish
15 waters, which all these waters are classified as
16 shellfish, you would design that for an inch and
17 a half -- I believe an inch and a half of runoff
18 over the impervious area. So it's a depth times
19 an area to give you a volume.

20 Q: All right. At this time I'd like to review with
21 you some excerpts from something called the
22 Coastal Zone Management Program document. And
23 if you would pull out page 72 -- 372.

24 **MR. WALKER:** Now, Dave, if you could feature D near
25 the top of the piece.



1 Q: Have you reviewed that?

2 A: Yes, I have.

3 Q: Would you go over this particular standard with
4 us and let us know how your design comports or
5 does not comport with this standard?

6 A: So the item D pertains to, you know, where
7 adjacent critical area drainage plans and
8 construction measures shall be designated to
9 control erosion and sedimentation. So we have
10 a very advanced stormwater pollution prevention
11 plan as part of the construction of this site.
12 And there's a lot of controls like silt fences,
13 double row silt fences, doing special measures
14 where we get -- where we get close to buffers.
15 We have a lot of constructions buffers. And
16 then where we can't maintain a certain amount of
17 buffering we have additional measures in a plan
18 that's called a buffers management plan that has
19 addition soil and erosion control measures to
20 help protect the adjacent waters so that that
21 control erosion and sedimentation is addressed
22 by a stormwater pollution prevention plan that's
23 part of our construction plans.

24 Q: Well let me ask you specifically, does the plan
25 that's been provided for Captain Sam's control



1 erosion and sedimentation and avoid water
2 quality degradation and other negative impacts
3 on adjacent water and wetlands?

4 **MS. ARMSTRONG:** Objection, Your Honor. He's leading
5 the witness.

6 Q: All right. Would you tell us whether or not
7 your standard ---

8 **THE COURT:** You can rephrase it. I ---

9 Q: Does your standard comply with the last half of
10 this sentence?

11 A: Yes. We have various stormwater, post-
12 construction stormwater BMPs that would be a
13 permanent fixture of the site that addresses
14 water quality degradation. And you know, again
15 like we said, it totally retains that water
16 quality volume and doesn't allow it to flow into
17 the adjacent waters or wetlands, thus not having
18 a negative impact on those waters.

19 Q: Let's move to the next sentence starting with
20 example techniques.

21 A: So the sentence reads, example techniques
22 includes buffering and filtering runoff water.
23 We have significant amounts of buffers
24 incorporated into the overall design. Like we
25 were highlighting -- I think one of the other



1 people that were up here were highlighting how
2 the cleared area is very minimal and then the
3 area around it is to remain relatively native
4 vegetation so that would promote filtering of
5 runoff. We call that disconnected impervious
6 area. So impervious areas are disconnect form
7 each and allows to flow onto impervious areas to
8 promote filtering of runoff.

9 Q: Would you -- you just said it allows runoff into
10 impervious, did you mean pervious?

11 A: Pervious, you are correct. And then going on
12 here, use of permeable surface materials for
13 roads, parking and other paved areas. The road
14 itself is an asphalt surface because there's
15 other concerns that we have to deal with, mainly
16 county standards require us to have more a
17 permanent road. But where we could we
18 incorporated, for particularly the parking in
19 the driveway areas, we have an impervious --
20 pervious area to promote infiltration and
21 reduced runoff.

22 Q: Continue on with the sentence please.

23 A: And grass ditching, which we have. We're more
24 of swale. Ditch is really not -- we -- shallow
25 swale to promote again, not to move the water



1 but to promote infiltration as it runs off the
2 road. Surface drainage contours and catchment
3 ponds that direct stormwater discharge. We
4 don't have ponds. We have more of what we've
5 designed as bioretention areas.

6 Q: Now let's go to the next excerpt which is from
7 the CZMP at page 322 on roads and
8 transportation. All right. That's the cover
9 page on 21 if you go there. Not all these are
10 applicable but could you highlight the first
11 portion of this please? The top, or just -- all
12 right. Now, let's go to 1A.

13 A: Right. Roads and highway routes shall be
14 aligned to avoid saltwater brackish and
15 freshwater wetlands where feasible, where they
16 can not be avoided bridging the wetlands. So,
17 you know, we have designed this site, you know,
18 with all the jurisdictional and regulated
19 saltwater and freshwater wetlands identified on
20 the site. And all our facilities have been
21 designed to avoid those areas.

22 Q: All right. Let's go -- is there any other part
23 of A that you see that would be pertinent, Mr.
24 Karkowski?

25 A: I mean, we don't have any filling, you know, of



1 wetlands. You know, we don't have any bridging
2 where it's not necessary. We use minimal
3 contouring to not have excessive embankments to
4 affect anywhere.

5 Q: All right. Let's go to B.

6 A: Road structures through saltwater, salt,
7 brackish, and freshwater wetlands must be
8 designed so as not to cause substantial change
9 in natural water flows and circulation.

10 Q: Is that app- -- even applicable?

11 A: No. We don't have any roads through these
12 areas.

13 Q: Let's go down to D. It may take a second for us
14 to get D up. There we go.

15 A: D reads, impart care should be taken to design
16 roads to minimize direct drainage of roadway
17 runoff in adjacent water bodies, which as I have
18 talked about further, we have the swale system
19 and the bioretention areas to infiltrate runoff
20 rather than allow stormwater to drain directly
21 to the river or the ocean. Inclusion, and here
22 again, I'm reading inclusion of techniques for
23 filtering runoff water such as grass ditching or
24 vegetative buffers must be considered. And we
25 did consider them, we did include both of those



1 in our -- in our stormwater management design.
2 During construction and later maintenance,
3 roadway embankments should be stabilized to
4 minimize or to minimize erosion and water
5 quality degradation to sedimentation problems.
6 We do have a landscape plan and a restoration
7 plan as part of our stormwater management.

8 Q: Would that meet the standard?

9 A: I believe so.

10 Q: Let's see the other subsections. I don't know
11 off the top of my head whether they apply but
12 let's look at E.

13 A: E has to do with roads, highways and bridges in
14 wetlands.

15 Q: Why don't we go to F then.

16 A: Construction of private roads for private access
17 shall be aligned to avoid salt, brackish, and
18 freshwater wetlands where feasible and where
19 applicable and must provide bridges, culverts or
20 other means to maintain circulation of water
21 flow. Where practicable, permeable surface such
22 as gravel or shell should be used rather
23 pavement. And, you know, for our private
24 driveway access we have included a pervious,
25 permeable surface that meets this requirement.



1 Q: I think that's it on this particular one. Thank
2 you. Mr. Karkowski, were you asked to
3 essentially determine whether you could do a
4 design layout of the road and infrastructure in
5 the most narrow part of the spit based on the
6 latest delineation of the critical line in June
7 of 2016?

8 A: Yes.

9 Q: Did you undertake to prepare or to do that?

10 A: I did.

11 Q: Did you prepare a rendering?

12 A: I did.

13 Q: Did you consult with others in doing that
14 rendering?

15 A: My -- the staff at Thomas and Hutton, I brought
16 them in to do the work that was necessary to
17 produce that rendering.

18 Q: I'd ask you to go to Exhibit 19. That's the
19 wrong one, 18.

20 **MR. WALKER:** Your Honor, I never -- I never tendered
21 him as an expert in road design and stormwater
22 as an engineer. I don't think he's getting into
23 any opinions, but now we're looking at a design,
24 so at this time, we would offer Mr. Karkowski as
25 an engineer.



1 Q: And do you do road design?

2 A: I do.

3 Q: Do you do the engineering associated with that?

4 A: I do.

5 Q: And you've also mentioned stormwater, right?

6 A: Yes, sir.

7 **MOTION TO OFFER AS EXPERT:**

8 **MR. WALKER:** Your Honor, at this time we would offer
9 him as expert to render opinion in road design
10 and stormwater.

11 **MS. ARMSTRONG:** No objection.

12 **MR. CHURDAR:** None.

13 **RULING OF THE COURT:**

14 **THE COURT:** Well that is one of the most easy
15 development and qualifications I've ever seen.

16 **MS. ARMSTRONG:** Well when you know it's coming, it's
17 a little easier, Your Honor.

18 **THE COURT:** Yeah. All right.

19 Q: Okay. So were you able to determine whether the
20 road and associated infrastructure and
21 stormwater system would fit? And I'm including
22 in that the steel sheet pile wall in the limited
23 area between the critical line of June 2016 and
24 the OCRM setback line.

25 A: Yes. Yes, we were able to determine that given



1 some adjustments to the design as permitted we
2 could make the project still work as intended.

3 **(Respondent's Exhibit Number 18 was introduced into**
4 **the record at this time.)**

5 Q: And what is 18? What is Exhibit 18? Is that --
6 -

7 A: 18 is the -- 18 is the exhibit we produced to
8 demonstrate that we could still make the project
9 function as intended.

10 Q: Was this meant to be a construction drawing?

11 A: No. This is a -- an exhibit drawing and there
12 would still be an amount of engineering that
13 would have to go into the final engineering of
14 this plan.

15 Q: All right. Now, I'm gonna ask you to look at a
16 document that's been entered into evidence as --
17 it's actually, I think, Petitioner's Number 12
18 but it's the end of KDP Exhibit 19.

19 **MR. WALKER:** So, Mr. Roberts, if you could go to
20 Exhibit 19, to the last page, please.

21 **(Respondent's Exhibit Number 19 was introduced into**
22 **the record at this time.)**

23 **MR. WALKER:** And there is some -- there's a little
24 ink marking on the river. If you would blow up
25 the area, Mr. Roberts, and -- there you go.



1 Q: Mr. Karkowski, do you see that?

2 A: I do.

3 Q: You were not here for the testimony but there's
4 been testimony about that little triangle, not
5 the big one but do you see the triangle on the
6 left? The little triangle way on the left?

7 A: Yes. And I believe you're talking this area
8 here.

9 Q: Yes, exactly.

10 **THE COURT:** Well leave it to an engineer to be able
11 to go into it and pick the things -- the tools
12 to use.

13 Q: Now I'm going to ask you a bit of a hypothetical
14 -- well, have you correlated that location with
15 the -- with your schematic road layout that's
16 Exhibit 18?

17 A: I have.

18 Q: Okay. Now, I'd like you to jump back to ---

19 **MR. WALKER:** If we could go and show Exhibit 18. We
20 have to -- all right. Now if we could down to
21 this section right here in the lower left
22 corner. All right.

23 Q: Could you show us where that -- and you can look
24 at the last -- are you looking at ---

25 A: Yeah. The triangle is something like that



1 (indicating).

2 Q: Right. Assuming, hypothetical question,
3 assuming that the small area that is shown on
4 Petitioner's 12, that little V we were looking
5 at, turns out to be critical area, even though
6 not designated as such in June 2016 critical
7 line, certified critical line, would the road
8 and improvements in stormwater still be feasible
9 at this location?

10 A: Yes, it would.

11 Q: All right. And is -- where ---

12 **MR. WALKER:** If we could zoom back from this now.

13 Q: Where is this location in relation to the
14 portion of the neck where the distance between
15 the critical line and the setback line is the
16 narrowest?

17 A: It is the -- we were talking at this location
18 and the narrowest point is this location,
19 roughly, which is ---

20 Q: If you go back to that location where that
21 little indentation is we were just talking
22 about, can you show us where the setback line
23 would be?

24 A: The setback line is right there (indicating), so
25 ---



1 Q: And your little pen went into something that's
2 grey. What is that little grey area?

3 A: That is our proposed bioretention area.

4 Q: Okay. The last few questions I'm gonna ask you
5 are about elevation. When you are designing a
6 stormwater system or a road system do you
7 consider elevation?

8 A: Yes.

9 Q: Why?

10 A: Elevations in two parts. In -- you know, they
11 have to do with the direction of runoff of the
12 stormwater is one of my main concerns. But also
13 it has the relativeness to the tides that may
14 affect that road.

15 Q: Now I'm gonna talk about elevation of tides.
16 Are you familiar with the elevations that are
17 used for tides?

18 A: I am.

19 Q: Is there a difference between the standard
20 that's used or the datum that's used to -- for
21 the elevation of tides and that you use in your
22 engineering?

23 A: There is.

24 Q: Would you explain that to The Court?

25 A: So there's -- engineering drawings are prepared



1 on datums that have been established throughout
2 the country.

3 Q: When we say a datum, is that like a baseline
4 basically, or?

5 A: Yeah. That's a elevation or a vertical ---

6 Q: Okay.

7 A: --- baseline, not a horizontal baseline.

8 Q: All right, cool.

9 A: And it's essentially in a very simple term it's
10 a constant distance from the center of the earth
11 essentially, but. So in this case, the Kiawah
12 project has been developed on the -- what's
13 called the NGVD 29 Datum. And that's an
14 engineering datum that references some standard
15 that was set back in 1929.

16 Q: Is that basically used across the profession as
17 a datum?

18 A: It has been. It's been phased out to a newer
19 datum but it has been. In the past it's been
20 widely used.

21 Q: Is it still in use for your designs on Kiawah
22 and for Captain Sam's in particular.

23 A: Yes, it is.

24 Q: All right. Now let's talk about a tide. We've
25 heard -- you were not here last week but we



1 heard about seven foot tide, seven foot four
2 tide. Is that measured off the same datum?

3 A: It is not measured off the same datum.

4 Q: What is that measured off?

5 A: Depending the source of the information it's
6 generally referred to a gauge datum or a mean
7 lower, low water elevation on that gauge datum.
8 So I've seen it reported two different ways.

9 Q: So if we heard that there was going to be a
10 seven foot tide, does that mean that the water
11 would be seven feet above the datum that you're
12 using?

13 A: No, it would not be. It would -- it's -- there
14 a conversion from the mean lower, low water
15 datums that are customarily reported in tide
16 data.

17 Q: So let's say seven foot tide in a tide datum,
18 using that conversion, what would that elevation
19 convert to in the datum that you used to
20 engineer these roads?

21 A: It's like 2.3 feet negative.

22 Q: So do the math for me. What would that ---

23 A: Seven ---

24 Q: --- positive elevation be?

25 A: 4.- -- 4.7.



1 Q: In relation to your datum?

2 A: In relation to my datum.

3 Q: What is the, to best to your knowledge, the
4 lowest elevation of the road surface at Captain
5 Sam's?

6 A: I believe it's elevation seven.

7 Q: So if there were a seven foot tide, or even a
8 7.4 foot tide, would that top your road at seven
9 feet on your datum?

10 A: No, it would not.

11 Q: How much below it would it be?

12 A: It would be the, roughly that 2.7 I think we
13 talked about. We might have ---

14 Q: Would it be more that two feet below?

15 A: Yes.

16 **MR. WALKER:** Your Honor, that's all I have?

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

18 **MR. CHURDAR:** I don't have any questions.

19 **THE COURT:** Ms. White?

20 **MS. ARMSTRONG:** Yes, I do.

21 **MR. KARKOWSKI - CROSS-EXAMINATION BY MS. ARMSTRONG:**

22 Q: Mr. Karkowski, I'm Amy Armstrong. We met a
23 while ago, do you remember when we met?

24 A: Yes.

25 Q: When was that?



1 A: It was a long time ago.

2 Q: But it was in connection with the Angel Oak
3 case, wasn't it?

4 A: It was.

5 Q: And you actually have done the stormwater design
6 for that project haven't you?

7 A: I did.

8 Q: Is that?

9 A: I did, yes.

10 Q: Do remember ---

11 A: No, wait a minute. I did not do the stormwater
12 design of that one.

13 Q: What did you -- what was your -- the part of
14 your work on that one?

15 A: I was brought in to explain that design and the
16 function of it to The Court I believe.

17 Q: So you were a witness in that case?

18 A: I was.

19 Q: Do you know what the ultimate outcome was of
20 that development project surrounding the Angel
21 Oak?

22 A: I believe the developer sold the land to a trust
23 in the end.

24 Q: So is it your understanding that that land
25 surrounding -- the 42 acres surrounding the



1 Angel Oak is now permanently protected?

2 A: To the best of my knowledge, yes.

3 Q: And in your -- your personal -- personally,
4 would you consider that a good thing, to have
5 permanent protection of the lands around the
6 Angel Oak?

7 A: Yes.

8 Q: Now, you work with a number of different
9 engineers in your office, in developing -- in
10 creating designs for development projects, don't
11 you?

12 A: Yes.

13 Q: And Jenn Hayes is one of those people, isn't
14 she?

15 A: Yes.

16 Q: Did she -- she did -- had input on this
17 particular project, didn't she?

18 A: Yes.

19 Q: She's a structural engineer, is that right?

20 A: Yes.

21 Q: So she would have been the one who actually
22 designed the sheet, steel sheet pile wall,
23 correct?

24 A: That's correct.

25 Q: And she indicated to you that she would need



1 five feet between the critical line and the wall
2 to allow for construction of that wall, didn't
3 she?

4 A: What was the dimension again?

5 Q: Five feet.

6 A: From?

7 Q: From the critical line.

8 A: To?

9 Q: To the location of where the wall would be
10 constructed in order to allow for construction.

11 A: That was a, you know, like a -- a standard that
12 we thought was appropriate for that design, and
13 which we have incorporated into this current
14 design.

15 Q: Okay. So you incorporated her five foot
16 distance into your design?

17 A: That's correct.

18 Q: And you're required under state law to utilize
19 best management practices when you're doing
20 stormwater designs, aren't you?

21 A: Yes.

22 Q: Okay. You wouldn't give -- would get an NPDES
23 permit or a stormwater permit if you didn't
24 utilize the BMPs or best management practices,
25 would you?



1 A: Correct.

2 Q: Right. So you actually use BMPs in every
3 project for which you do a stormwater design,
4 don't you?

5 A: To a certain level, yes.

6 Q: To a certain level. And you use buffers and you
7 use silt fences, you use those kind of things
8 when you're designing stormwater projects of any
9 kind, don't you?

10 A: Correct.

11 Q: Now you knew that Ray Pantlik was lobbying the
12 DHEC Board for some involvement in how OCRM
13 would process the KDP's permit, didn't you?

14 A: I don't know what you mean lobby.

15 Q: Seeking assistance from the DHEC Board to
16 influence the agency's decision. Are you
17 familiar with that?

18 A: I am not.

19 **MR. WALKER:** Objection, I don't think that's what Mr.
20 Pantlik said, he said it was a time issue.

21 **THE COURT:** Well number one, it doesn't matter what
22 he said because she asked him a question and he
23 said he's not familiar with it, so.

24 **MR. WALKER:** All right. Thank you, Your Honor.

25 **MS. ARMSTRONG:** Harvin, wold you mind turning on the



1 Elmo, please? Thank you.

2 Q: Mr. Karkowski, I'm going to put on the screen
3 what's Bates labeled as KDPII-RP1439. It's an
4 email communication between you. It appears to
5 be an email communication between you and Ray
6 Pantlik from -- on November 7th, 2011. I'll ask
7 you if you've seen this communication.

8 A: In 2011.

9 Q: Do you recall that communication?

10 A: I do not, but ...

11 Q: You don't recall it, but does that appear to be
12 a communication, a correspondence between you
13 and Mr. Pantlik?

14 A: Yes.

15 Q: And he was indicating to you that the staff was
16 going to receive new policy direction from the
17 DHEC Board with respect to the project that
18 we're at -- discussing today, correct?

19 A: That's what it says, yes.

20 Q: Mr. Karkowski, you recognize that the shoreline
21 along -- actually, let me back up. We were
22 talking about Jenn Hayes and I wanted to just
23 ask you a question about some communication with
24 Jenn Hayes. I'm going to show you what's Bates
25 labeled as KDP II-RP4888. And it's a



1 communication from May 20th, 2015 between you
2 and -- you and Jenn Hayes and Ray Pantlik. I
3 want you to just look it over and tell me if you
4 recognize this communication.

5 A: I mean again it is my, you know, my email
6 account on there.

7 Q: And Ray is asking about whether they are to
8 pursue -- Or Jenn -- Jenn's asking Ray whether
9 she should assume that the total of the
10 escarpment, dated May 20th, 2015 is the critical
11 line for the revised drawing. And your response
12 is that you would tell Jenn the plan. What was
13 the plan that you were going to tell Jenn about?

14 A: I do not recall.

15 Q: Do you remember problems with the 2015 critical
16 area line?

17 A: No, I do not.

18 Q: All right. You do recognize that the shoreline
19 around the bank of the Kiawah is eroding, don't
20 you?

21 A: It is.

22 Q: Have you ever been involved with a project where
23 the critical line has changed as frequently and
24 as often as it has in this -- with this project?

25 A: No.



1 Q: The conditions on the ground are changing in
2 this project than -- more than they have been in
3 any other project you've dealt with, aren't
4 they?

5 A: To the best of my knowledge, yes.

6 Q: So from an engineering perspective, this project
7 is a little unique as far as what's on the
8 ground, isn't it?

9 A: To the -- to the effect that there's an eroding,
10 you know, critical area, yes.

11 Q: And that's caused you to have to shift the road
12 multiple times to keep up with a changing
13 critical line, right?

14 A: That's correct.

15 **(Petitioner's Exhibit Number 14 was introduced into**
16 **the record at this time.)**

17 Q: All right. I'm going to -- I'm going to
18 Petition- -- what's been admitted as
19 Petitioner's Number 14. Mr. Walker was asking
20 you about this. I presume that means that
21 you've seen this drawing before?

22 A: I have.

23 Q: Okay. Now I want you to assume with me, Mr.
24 Karkowski, that the blue line shown on this
25 drawing is where the critical area line is now.



1 How would you design the road to avoid the
2 critical area?

3 A: Well, obviously you can't.

4 Q: And so when you were talking about the coastal
5 management policy regarding roads on -- in
6 Chapter 322 that roads shall be designed to
7 avoid salt, freshwater, and brackish wetlands,
8 you wouldn't be able to do that if this was the
9 critical line, correct?

10 A: If that was the critical line.

11 Q: I'm going to mark that, please.

12 (Petitioner's Exhibit Number 47 was marked for
13 identification purposes.)

14 MOTION TO ADMIT PETITIONER'S EXHIBIT NUMBER 47:

15 MS. ARMSTRONG: The court reporter has just marked
16 Petitioner's Exhibit Number 47, the email dated
17 November 7th, 2011 between Mr. Karkowski and Mr.
18 Pantlik that he recognized as an email
19 communication that he had had with Mr. Pantlik.
20 And the petitioner moves Exhibit 47 into
21 evidence.

22 MR. WALKER: Your Honor, we object on the basis of
23 relevance, since this witness said he didn't
24 remember it. So it came in. He said it was
25 from his email address, but he didn't remember



1 the substance of it or the context.

2 **THE COURT:** Any response?

3 **MS. ARMSTRONG:** He said -- he said yeah, it appeared
4 to be an email communication that he had with
5 Mr. -- Mr. Pantlik.

6 **RULING OF THE COURT:**

7 **THE COURT:** I overrule your objection.

8 **MS. ARMSTRONG:** I don't have any other questions,
9 Your Honor.

10 **MR. KARKOWSKI - RE-DIRECT EXAMINATION BY MR. WALKER:**

11 Q: Mr. Karkowski, before you completed your
12 rendering, your drawing that's KDP 18, did you
13 consult with Ms. Hayes?

14 A: We did, yes.

15 Q: Did you move the wall in the rendering without
16 consulting with her?

17 A: No.

18 Q: Did she approve it?

19 A: She designed the modification.

20 **MOTION TO ADMIT RESPONDENT'S EXHIBIT NUMBER 18:**

21 **MR. WALKER:** Your Honor, we forgot admit 18, but we'd
22 offer into evidence at this time, got through it
23 in our direct, but we'd offer Exhibit 18 into
24 evidence, the rendering that was referred to in
25 detail.



1 **MS. ARMSTRONG:** Objection, Your Honor. The grounds
2 for the objection is this is one of the
3 documents that we received on the eve of trial.
4 This Petitioner has spent a lot of time going
5 through multiple iterations of documents showing
6 the changing location of the road. It took quite
7 a bit of coordination and we worked with counsel
8 for KDP to identify which was the most recent
9 road design drawing. We utilized that one, we
10 gave it to our expert, our expert created
11 different maps and drawings that have already
12 been admitted into evidence based on what we --
13 what we were presented and what was represented
14 to us as the most recent drawing. And now we're
15 -- and then we created maps, we've provided
16 those maps to KDP so that they could cross-
17 examine our expert witness on it. By the time
18 we got these drawings, it was too late for us to
19 be able to do a single thing with this with our
20 expert. And so this is definitely an ambush to
21 get a brand new drawing after multiple
22 iterations, we finally were able to lock down on
23 what the most recent one is and then have this
24 come in without any ability to address it in any
25 meaningful fashion whatsoever.



1 **MR. WALKER:** Mr. Wood's deposition was not taken
2 until August 3rd. Mr. Wood is the man who
3 produced those renderings that we looked at. He
4 was examined by Mr. Gressette. It was after
5 that deposition that we asked Mr. Karkowski to
6 do this rendering. The record would show, we're
7 not offering it as an actual construction
8 drawing, we're offering it to show feasibility,
9 it would have to be refined to be a construction
10 drawing. Ms. Armstrong has had the approved
11 construction drawings the whole time. We are
12 not suddenly changing the construction drawings,
13 we're merely offering it as an illustration of
14 the feasibility and where it would be located,
15 these improvements. The witness has testified
16 to it, she could have provided the expert if the
17 expert said it's -- it doesn't work here or
18 something like that. There's no reason why it
19 couldn't have been provided to the expert. If
20 he wanted to comment on it, he was free to
21 comment on it.

22 **THE COURT:** Well he's testified to it already,
23 correct?

24 **MR. WALKER:** Correct.

25 **RULING OF THE COURT:**



1 THE COURT: Without objection. I admit the document.
2 (Respondent's Exhibit Number 18 was admitted into
3 evidence.)

4 MR. WALKER: Thank you, Your Honor.

5 THE COURT: I overrule your objection.

6 MR. WALKER: We have no further questions on re-
7 direct.

8 THE COURT: You may step down.

9 A: Thank you.

10 (The witness was excused.)

11 MR. WALKER: Our next witness is going to take a
12 while, and ---

13 THE COURT: Can we break for lunch?

14 MR. CHURDAR: --- I think -- I don't want to make
15 false prophecies, but I think we're -- very good
16 chance we're gonna finish this afternoon.

17 THE COURT: All right. And then we'll get to DHEC?

18 MR. CHURDAR: Your Honor, I won't be calling
19 witnesses regarding this permit.

20 THE COURT: Oh, okay.

21 MR. CHURDAR: So.

22 MS. ARMSTRONG: Petitioner anticipates rebuttal.

23 THE COURT: Okay. Well with that said, we'll --
24 12:23, does 1:30, or do you want longer?

25 MS. ARMSTRONG: Can we do like 1:45?



1 THE COURT: Okay.

2 MR. CHURDAR: Thank you, Your Honor.

3 THE COURT: 1:45 it is. Sold.

4 (A break was taken from 12:26 p.m. until 1:45 p.m.)

5 COURT REPORTER: All rise.

6 THE COURT: Y'all can be seated. Thank you. All
7 right. Mr. Walker?

8 MR. WALKER: Thank you. Mr. Gressette is going to
9 take it from here, Your Honor.

10 THE COURT: Mr. Gressette?

11 MR. GRESSETTE: Good afternoon, Your Honor. KDP II,
12 LLC and KRA Development, LLP would call Dr.
13 Travis Folk.

14 COURT REPORTER: Raise your right hand please.

15 DR. FOLK: (Witness complies.)

16 COURT REPORTER: 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 DR. FOLK: I do.

21 COURT REPORTER: Thank you, sir.

22 DR. FOLK - DIRECT EXAMINATION BY MR. GRESSETTE:

23 Q: Good afternoon, Dr. Folk.

24 A: Good afternoon.

25 Q: How are you, sir?



1 A: I'm well. And you?

2 Q: Good. You got settled up there?

3 A: Yep.

4 Q: All right. Can you state your name for the
5 record, please?

6 A: My name is Travis Hayes Folk.

7 Q: And where do you live, Dr. Folk?

8 A: I live in Mount Pleasant, South Carolina.

9 Q: And who lives in Mount Pleasant, South Carolina
10 with you?

11 A: My beautiful bride and my little girl.

12 Q: All right. Tell the Court about your education,
13 if you would.

14 A: I received a bachelor's in forest resources from
15 the University of Georgia in 1998. I then
16 received a master's degree from Auburn
17 University in wildlife science in 2001. And
18 then my doctorate in wildlife science from
19 Auburn University in 2006.

20 Q: And what is wildlife science?

21 A: Wildlife science is a discipline that approaches
22 the natural world to understand the composition
23 and juxtaposition of habitats, how those
24 habitats influence wildlife populations, both
25 vertebrates and bugs and all of the flora and



1 fauna. So it's an attempt to understand the
2 natural world, the processes that go on in those
3 habitats and how we can manage those habitats to
4 enhance them.

5 Q: And did you have any particular focus of your
6 studies when obtaining your master's of science
7 in wildlife sciences?

8 A: I did. For my master's degree I worked on wood
9 ducks, and most specifically I worked on the
10 relationship of habitat use to incubation
11 behavior of female wood ducks, asking the
12 question that if an individual female,
13 incubating female, uses some high quality
14 habitats, that might lead to some higher
15 reproductive success. For my doctoral work it
16 was a broader discussion -- investigation to
17 understand how northern bobwhites, or what we
18 typically call quail, are influenced by patterns
19 and prescribed firing. These birds utilize what
20 we call early successional habitats dominated by
21 grasses and shrubs. And naturally that habitat
22 composition is maintained by fire. Historically
23 it was lightning ignited fire, potentially fires
24 made by Native Americans. More recently, in the
25 20th and 21st century, we use prescribed fire to



1 maintain those habitats. The common theme
2 between both of those studies was the under --
3 was the investigation of how changes in the
4 natural world, habitats in and of themselves and
5 changes in those habitats, influence the
6 demography of a wildlife species ---

7 Q: What is ---

8 A: --- it influenced the population.

9 Q: What is demography of a wildlife species?

10 A: Demography is understanding the parameters that
11 influence overall population size. So if you
12 think of a certain number of individuals in a
13 particular area, the change in that population
14 size is -- changes in only four ways. There's
15 a survival rate, individuals must survive until
16 the next time step. There's also reproductive
17 output by females. And then there's also
18 immigration with an I into the population or
19 emigration with an E of the population. Those
20 are the four quantitative parameters that
21 influence whether a population size goes up or
22 down over time.

23 Q: And is quantitative analysis something that is
24 important to the modern study of wildlife
25 sciences?



1 A: It is. It -- for the last probably 20 years of
2 so, we've been able to, as a wildlife community,
3 wildlife science community, been able to better
4 understand, both investigate and estimate
5 demographic parameters of wildlife species.
6 Simple things like the development of radio
7 technology, able to put small radios on things
8 the size of bats or butterflies. That gives us
9 information about how those individuals survive,
10 as well as where they move across the landscape.
11 Do they leave a particular area because of some
12 factor.

13 Q: And in obtaining your master's and Ph.D. in
14 wildlife sciences at Auburn, did you receive any
15 training that was geared toward demography
16 analysis?

17 A: I did. By -- I was in school for 12 years and
18 by -- at that point you by and large take the
19 vast majority of all the wildlife science
20 courses. And so during my Ph.D. I focused
21 especially on statistical and mathematical
22 description of populations. So linear matrix
23 algebra, calculus I, II, and III. A whole
24 variety of quantitative courses that teach me
25 quantitative methods to then estimate certain



1 parameters for wildlife species.

2 Q: And are those quantitative methods that you just
3 described employed by other professionals in the
4 wildlife sciences area?

5 A: Yes, sir.

6 Q: Okay. I'd like to hand you a copy of Exhibit
7 Number 23. It's Respondent's Exhibit Number 23.

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

10 Q: If you would take a moment and take a look at
11 that. Do you recognize that document?

12 A: I do. I produced this.

13 Q: And what is that?

14 A: This is a summary of my professional and
15 educational experience.

16 Q: Is it a copy of your CV?

17 A: It is, yeah. My CV.

18 Q: Okay. And does the information on that CV
19 appear to be a true and accurate representation
20 of your professional qualifications and
21 experience?

22 A: Yes, it does.

23 Q: Okay. Will you tell The Court a little bit
24 about what you do in your current employment
25 role?



1 A: Certainly. I am employed and also part owner in
2 a company called Folk Land Management based out
3 of Green Pond, South Carolina. That has been --
4 my father established it in '84, '85. And we
5 work with private land owners to meet ecological
6 goals ranging from, some cases, backyard
7 habitats all the way to plantations that are
8 multiple thousands of acres.

9 Q: All right. You just used the words ecological
10 goals. Can you take a moment and explain what
11 you mean by ecology or ecological goals?

12 A: Sure. I'll give you an example. In one that's
13 common amongst many of our larger land owners,
14 and that is the -- the establishment and
15 management of longleaf pine forests. Longleaf
16 pine was the predominant forest type that
17 covered the southeast coastal plain and it's
18 incredibly biodiverse. But it doesn't develop
19 by accident. And so we develop management plans
20 for both the planting and establishment of
21 longleaf pine, the management of not only those
22 pine tree, but also the competing vegetation as
23 time goes forward. We do that for -- that
24 habitat is valuable for a variety of species.
25 Not only northern bobwhites, quail, but also



1 red-cockaded woodpeckers, a whole variety of
2 song birds.

3 Q: In your work at Folk Land Management, do you
4 engage in projects that require you to identify
5 plant species?

6 A: Yes. That is one of the most basic critical
7 aspects of what I do. If their goal is to
8 manage wildlife populations, then we need to
9 understand what are those habitats, what -- not
10 only what are the individual species but the
11 composition collectively of those species and
12 how that might be changing through time. So
13 that through different enhancement techniques we
14 can conserve that habitat value of, for example,
15 longleaf pine.

16 Q: And have you ever taught college level courses
17 of any kind?

18 A: Yes. I taught an introductory biology course
19 for one of the branch campuses of the University
20 of South Carolina.

21 Q: And for how many semesters did you teach that
22 course?

23 A: I think it was four or five years so it was
24 probably six or eight semesters.

25 Q: Okay. And are you a member of any professional



1 organizations?

2 A: I am. I am a member of the Wildlife Society,
3 which is the professional organization of
4 wildlife biologists. I'm also a member of the
5 American Ornithologist Union which is --
6 publishes the premier Ornithological Journal and
7 well as the Ecological Society, and several
8 other smaller organizations.

9 Q: And what is the Premier Ornithological Journal
10 you just mentioned?

11 A: It is the journal called AUK.

12 Q: Can you spell that?

13 A: A-U-K.

14 Q: And is that a peer-reviewed journal?

15 A: It is.

16 Q: And have you published work in AUK?

17 A: I have.

18 Q: All right. Can you tell The Court a little bit
19 about that article?

20 A: Sure. That article, to give you the name, was
21 the Effects of habitat use and movement patterns
22 on incubation behavior of female Wood Ducks (*Aix*
23 *sponsa*), the scientific name, in Southeast
24 Alabama. And that was to relate how incubating
25 females, incubating female wood ducks, how



1 different types of habitats that they used
2 influenced the incubation behavior.
3 Evolutionarily it's most advantageous for a
4 female to incubate a nest as short a period of
5 time as possible. So she wants to stay on that
6 nest for as long a period of time as possible.
7 If she's using high quality habitats that meet
8 her energetic requirement, daily energetic
9 requirements, she can get back to that nest and
10 maintain that temperature of the eggs.

11 Q: And have you published an article in the Journal
12 of Wildlife Management?

13 A: I have.

14 Q: Is that a peer-reviewed journal?

15 A: Yes.

16 Q: And can you tell The Court a little bit about
17 that article?

18 A: That was the Estimates of survival from radio-
19 telemetry: a response to Guthery and Lusk.
20 There was a previous article dealing with
21 northern bobwhites that dealt with the use of
22 ratios of juveniles to adults to establish
23 survival rates. There were a group of us, I
24 think seven or eight colleagues, that didn't
25 think that that quantitative approach to



1 describe the population was appropriate. And so
2 that was a response to their methodology. And
3 have you also published in a peer-reviewed
4 journal focused on population ecology?

5 A: I have. I was a journal called Population
6 Ecology and that was the Temporal and
7 latitudinal variation in northern bobwhite
8 population dynamics. And that was really an
9 interesting study. I became the recipient of
10 two data sets as a graduate student. One from
11 Wisconsin and one from Alabama, demographic data
12 from populations back in the '30s and '40s of
13 Bobwhites. And the data had been collected in
14 some cases for over 15 years and put in a box
15 and sealed up and nobody analyzed it. So we --
16 it was an interesting comparative analysis
17 between the northern latitude -- northern
18 latitudinal population verses the southern. We
19 built population models to understand how those
20 populations might have changed over that time
21 period and then made some comparisons.

22 Q: I want to be sure that I understand what you
23 did. You had -- can you explain the sets of
24 data that you had and again what you did with
25 it?



1 A: Certainly. There were two data sets that I
2 became the recipient of that were collected in
3 the '30s, '40s that dealt with demographic -- it
4 was demographic data of northern bobwhites. One
5 population was in Alabama. One population was
6 in Wisconsin. The methodology was identical and
7 sufficient that it allowed us to estimate
8 demographic rates to the point that we could
9 then build a population model. Once we built a
10 population model for both populations, we could
11 then ask questions about variation between
12 northern latitudes and southern latitudes.

13 Q: And when you use the term wildlife management,
14 does that mean the same thing as conservation?
15 Or are those terms different?

16 A: They're by and large the same. Both relate to
17 interacting with the natural world. And in
18 wildlife science you enhance habitats and in
19 conservation work you enhance habitats.

20 **MOTION TO OFFER AS EXPERT:**

21 **MR. GRESSETTE:** At this time we would move that Dr.
22 Travis Folk be admitted as an expert in wildlife
23 sciences, including wildlife management and
24 wildlife conservation ecology and the
25 relationship between species and habitats.



1 **THE COURT:** That's a lot.

2 **MS. ARMSTRONG:** Could you read those over one more
3 time?

4 **MR. GRESSETTE:** Sure. Wildlife sciences, including
5 wildlife management and wildlife conservation,
6 ecology and the relationship between species and
7 habitats.

8 **THE COURT:** Is the ecology one wildlife ecology? Are
9 you just doing ecology ---

10 **MR. GRESSETTE:** Just ecology, Your Honor.

11 **THE COURT:** Wildlife management ...

12 **MS. ARMSTRONG:** The witness said that wildlife
13 management and conservation are the same thing
14 but you want him qualified in both? I mean, I'm
15 just trying to make sure I understand. I'm
16 getting -- I'd like to voir dire and I'd I
17 certainly -- absolutely object to the ecology
18 because I don't -- I haven't heard anything at
19 all about ecology. And I want to voir dire
20 because you've got some really, really broad
21 categories that seem to encompass the whole ---

22 **THE COURT:** I agree.

23 **MS. ARMSTRONG:** --- natural world as it stands.

24 **THE COURT:** Go ahead.

25 **MS. ARMSTRONG:** Okay.



1 THE COURT: Ecology is pretty broad.

2 MR. GRESSETTE: It is, Your Honor. And, you know,
3 these are my terms. I think wildlife sciences
4 including wildlife management and then the
5 relationship between species and habitats will
6 be sufficient if that helps any.

7 MS. ARMSTRONG: Again, I'm not -- I can't -- I've got
8 voir dire on that.

9 MR. GRESSETTE: Okay.

10 THE COURT: Go ahead.

11 DR. FOLK - VOIR DIRE EXAMINATION BY MS. ARMSTRONG:

12 Q: Okay, Mr. Folk, you agree that all of your
13 research relates to game species, correct?

14 A: No.

15 Q: What -- I've looked at your website and I saw --
16 I think I may have seen one published article
17 that related to egrets and the was published in
18 the Wilson Bulletin. That's the only one that
19 I identified of all your publications that were
20 not ---

21 A: Yeah.

22 Q: --- related to game species, is that right?

23 A: The -- yes. The motivation of that study is
24 there was a -- the concern that cattle egrets
25 were predating an endangered lizard in Saint



1 Croix. And so individuals were collected at the
2 site and -- cattle egrets ---

3 Q: So you've done one research article that is
4 related to non-game species and that's related
5 to egrets, which is a bird, right?

6 A: Yes.

7 Q: Okay. And your work generally focuses on game
8 species, doesn't it?

9 A: No.

10 Q: Your -- you're doing -- you do forestry work,
11 right?

12 A: I do.

13 Q: And you manage forestry, a lot of that you said
14 is for longleaf pine, for bobwhite quail, and
15 other species that use it?

16 A: Other species to include flatwood salamander, to
17 include red-cockaded woodpeckers, to included
18 spotted turtles. The habitat is used by a
19 variety of organisms.

20 Q: Okay.

21 A: Some of which are game species.

22 Q: So you've got some really broad categories that
23 you've been talking about with Mr. Gressette.
24 What species of wildlife, aside from bobwhite
25 quail and ducks, do you believe you have



1 expertise in and are able to provide opinions
2 on?

3 A: Wildlife in low country habitats.

4 Q: No, tell -- I want to know specifically what
5 wildlife species you're gonna be -- you believe
6 yo have opinions on because I want to understand
7 what the basis is for your opinions on specific
8 species that you may be testifying about today.

9 A: I'd be happy to go through that. I mean it's --
10 we have clients up and down the coast and we
11 meet a variety of objectives. How do you want
12 me to answer that?

13 Q: Well you can start by telling -- start with the
14 species that you're gonna talk -- intend to talk
15 about today.

16 A: Okay. Yeah.

17 Q: That you believe that you have expertise on.

18 A: I have expertise to -- to review the literature
19 on the population dynamics of diamondback
20 terrapins and what we know and what we don't
21 know. And how potential habitats may or may not
22 influence the population, those populations.

23 Q: Okay. What other species?

24 A: I also reviewed the literature of bottlenose
25 dolphins and how flexibility in foraging



1 behavior might influence the population
2 dynamics.

3 Q: I'm asking you just species. You don't have to
4 tell me what you did.

5 A: Okay.

6 Q: Just tell me the species. We're gonna get into
7 a lot of detail about the species ---

8 A: Sure.

9 Q: --- in just a minute, so hold your ---

10 **MR. GRESSETTE:** Your Honor, if I may, if he needs to
11 explain an answer, he's certainly able to do
12 that.

13 **THE COURT:** I think he got the -- she was kind of
14 doing a speaking objection so I'll -- go ahead.
15 Proceed.

16 **MS. ARMSTRONG:** I just wanna -- I just wanna know a -
17 --

18 **THE COURT:** I get -- I get what you're doing.

19 **MS. ARMSTRONG:** --- list of the species. Yeah.

20 **THE COURT:** Sure.

21 Q: Diamond back terrapins, dolphins.

22 A: Yeah. We also reviewed a potential habitat for
23 piping plover, loggerhead sea turtles.

24 Q: Which sea turtles?

25 A: Loggerheads.



1 Q: Okay. Anything else?

2 A: Our -- I guess I'm not understanding the scope
3 of my question. I can also address everything
4 that we manage across our clients. I guess I'm
5 not understanding the scope of my ---

6 Q: Okay. We can keep it specific to what we're
7 talking about here today.

8 A: Okay.

9 Q: What you intend to testify and your expertise.
10 And I'm asking -- the question really is what
11 species do you believe you are qualified to give
12 expert opinions about in this case.

13 A: Uh-huh.

14 Q: Did you understand that question?

15 A: Yes, I did.

16 Q: Okay. And do you have anything else to add?
17 You said diamondback terrapins, dolphins, piping
18 plovers and sea turtles.

19 A: Yeah. We also reviewed the potential for other
20 threatened and endangered species to be within
21 the footprint of Phase 1 of Captain Sam's.

22 Q: And what other species did you identify?

23 A: None. There were endangered species that were
24 within the county but suitable habitats aren't
25 there.



1 Q: I want to go through these one by one. And
2 first, have you ever testified as an expert
3 witness before?

4 A: No.

5 Q: So you've never provided expert opinions on
6 diamondback terrapins, dolphins, piping plovers,
7 or sea turtles have you?

8 A: No.

9 Q: And if you could just walk -- I want to take
10 them one at a time, with respect to diamondback
11 terrapins, what's the foundation, or your basis,
12 the basis for your ability to provide opinions
13 on that species, on diamondback terrapins?

14 A: The basis is my ability to both read and
15 understand the peer-reviewed literature and what
16 is understood about the demographic rates of a
17 particular species and how that might be -- vary
18 across habitats or be impacted by a certain --
19 things in the natural world.

20 Q: So what's the methodology that you use in making
21 any -- forming an opinion on diamondback
22 terrapins? You read -- you read the
23 literature.

24 A: Yes.

25 Q: What's the methodology you use?



1 **MS. ARMSTRONG:** Your Honor, does the methodology go
2 to qualifications or does it go to weight? I
3 would think the weight.

4 **THE COURT:** Well, she's on voir dire. I'm gonna
5 allow her to pursue it.

6 **Q:** What methodology have you employed in forming
7 opinions on diamondback terrapins?

8 **A:** I've reviewed the peer-reviewed literature and
9 analyzed it for the demographic rates that have
10 been reported. And understanding of different
11 processes that might occur within those
12 populations.

13 **Q:** Based on literature review?

14 **A:** Yeah.

15 **Q:** You haven't published anything related to
16 diamondback terrapins have you?

17 **A:** No.

18 **Q:** You haven't collected any data yourself related
19 to diamondback terrapins?

20 **A:** Huh-uh.

21 **Q:** You haven't done any research on diamondback
22 terrapins?

23 **A:** (Shakes head.)

24 **Q:** You haven't looked at where they nest, have you?
25 You yourself? Conducted research about where



1 they nest?

2 A: Not research but certainly investigated.

3 **COURT REPORTER:** I just want to remind you that my
4 job is to produce a verbatim record, so when you
5 say huh-uh ---

6 **DR. FOLK:** Oh.

7 **COURT REPORTER:** --- or you shake your head -- I just
8 want you to give a verbal response for me ---

9 **MR. FOLK:** Okay.

10 **MR. COURT REPORTER:** Okay?

11 **DR. FOLK:** Sure.

12 **COURT REPORTER:** Thanks.

13 Q: So your -- your understanding comes just from
14 the literature, is that correct?

15 A: Yes, literature and interacting with other
16 biologists over the years.

17 Q: You haven't made any study yourself of the
18 nesting behaviors of diamondback terrapins, have
19 you?

20 A: No, I don't make studies of a lot a species that
21 I -- that I manage.

22 Q: And you don't -- your opinions that you have on
23 diamondback terrapins are not published
24 anywhere, even informally, are they?

25 A: No.



1 Q: In fact, any opinions you have about diamondback
2 terrapins haven't been even mentioned outside of
3 this case, have they? Outside of the
4 development on Captain Sam's Spit, have they?

5 A: Huh-uh.

6 Q: So the first time you ever formulated any
7 opinions that you might have diamondback
8 terrapins are with respect to the case that
9 we're about here today, right?

10 A: Other than, you know, in my education becoming
11 aware and understanding the suite of wildlife
12 species that are in the southeast and the
13 coastal plain.

14 Q: But you have never formed opinions about
15 diamondback terrapins' ability to nest or their
16 habitat requirements independently, outside of
17 this case, correct?

18 A: No.

19 Q: Let's talk about little bit now about dolphins.
20 What's the methodology that you used to form any
21 opinions that you may have bottlenose dolphins?

22 A: Was to review the literature and evaluate the --
23 any of the proposed actions, if there's any
24 evidence in the literature that it might
25 influence populations.



1 Q: That what might influence populations?

2 A: Some of the actions talked about in this case.

3 Q: What are those actions?

4 A: The permits involved, the sheet pile wall.

5 Q: And you haven't published any -- you haven't
6 written any articles or published anything in a
7 peer-review journal related to bottlenose
8 dolphins have you?

9 A: No.

10 Q: You haven't published anything informally
11 related to bottlenose dolphins, have you?

12 A: No.

13 Q: And you've never been asked to give opinions
14 about bottlenose dolphins outside of this case,
15 have you?

16 A: No.

17 Q: So I assume that also means you haven't
18 collected any data related to bottlenose
19 dolphins?

20 A: No.

21 Q: With respect -- with respect to loggerhead sea
22 turtles, what's the methodology that you used --
23 -

24 A: The same as in the previous two.

25 Q: Reading the literature and reviewing it and



1 gaining an understanding what the literature ---

2 A: And training and interaction with colleagues
3 over the years.

4 Q: What training do you have specifically with
5 respect to loggerhead sea turtles?

6 A: Well, there are multiple courses we take in the
7 -- during our undergraduate and graduate work,
8 some of which cover the life history of turtles
9 and birds and whole suites of species.

10 Q: And just specific to loggerhead sea turtles,
11 have you done any work or done any research or
12 written any papers with respect to ---

13 A: No.

14 Q: --- logger head sea turtles?

15 A: (Shakes head.)

16 Q: Have you given opinions about loggerhead sea
17 turtles in the past?

18 A: No.

19 Q: And with respect to piping plovers, have you
20 ever conducted any research with respect to
21 piping plovers?

22 A: No.

23 Q: Is that basis of your -- the methodology you
24 used to form any opinions about piping plovers,
25 is that also derived from a review of the



1 literature?

2 A: That and being an avid birder. So understanding
3 where those organisms occur.

4 Q: And you prepared a letter that you provided back
5 in 2008 with connection -- in connection to the
6 bulkhead revetment ---

7 A: Uh-huh.

8 Q: --- that related to piping plovers, didn't you?

9 A: I believe that I did, yeah.

10 Q: So the information that you've utilized, if I
11 understand it correctly, is you look at peer --
12 at literature -- peer-reviewed literature?

13 A: Uh-huh.

14 Q: Is that accurate?

15 A: (Nods head.)

16 Q: On these different species and you make an
17 assessment and then you are able -- you believe
18 you are able to provide opinion related to those
19 species. Is that ---

20 A: Uh-huh.

21 Q: --- an accurate recitation of ---

22 **THE COURT:** Speak up.

23 A: Yes, sir. Yeah. Yes, sir. That's the
24 methodology that we use for the whole suite of
25 wildlife species that we manage in the low



1 country.

2 Q: Okay. So if you read literature about black
3 bears related to their population, you believe
4 you would be able to also give opinions about
5 black bears?

6 A: About the population dynamics of black bears,
7 yeah.

8 Q: The population dynamics?

9 A: Certainly.

10 Q: Okay. And as gorillas in Africa, you read
11 literature about gorillas in Africa, you'd also
12 be able to give opinions about them and their
13 population dynamics?

14 A: Population dynamics are governed by four
15 factors, survival, reproduction, and movement
16 into and out of the population. And there is
17 accepted methodology for both quantifying and
18 describing those population phenomena. And
19 that's what I was trained in.

20 Q: And I understand your qualification of
21 population dynamics. But what I -- we're
22 talking about here today, and I think you
23 understand this, is what the impacts of the
24 proposed development project are going to have
25 on a variety of species that you've listed.



1 We're in agreement on that aren't we?

2 A: Yes, ma'am.

3 Q: Okay. So would you be able to take literature
4 and formulate opinions about how a certain
5 project is gonna affect a gorilla based on
6 reviewing the literature and understanding what
7 the project is?

8 A: It -- certainly it would depend on my ability to
9 understand the scope of the project.

10 Q: Okay. But if you understood the scope of the
11 project and you reviewed literature about
12 gorillas, you could give opinions on the impacts
13 to gorillas of a project in your -- in your
14 view?

15 A: On the population dynamics, yes.

16 **MS. ARMSTRONG:** Your Honor, I -- we object to this
17 witness providing opinions related to
18 diamondback terrapins, dolphins, piping plovers,
19 sea turtles on the basis that this witness has
20 said he's never even formulated any opinions
21 ever on these species outside of this particular
22 case. He's got -- he's done no research. His
23 only methodology is that he reviews literature.
24 And that's a very low standard, if somebody --
25 all they have to is go out -- they have a Ph.D.



1 and they go out, they can review literature and
2 then all of a sudden opine on what the impacts
3 of a project are on a species, that's getting
4 way beyond how expert witness -- rising to the
5 level of expertise that a witness has to bring
6 to the table to be able to shed light on -- on
7 an issue before The Court. The court could
8 certainly review and read the literature also.
9 Now that's -- that's not ---

10 **THE COURT:** But I don't have expert -- I mean, a
11 court would not have expertise in evaluating
12 population dynamics because I used to take
13 quantitative statistics for easy As in college,
14 but I -- at least I took two courses for that,
15 but that doesn't make me qualified to do a
16 quantitative analysis of population dynamics for
17 animals. So would -- would he not bring
18 expertise in that area?

19 **MS. ARMSTRONG:** On -- he's said that he is intending
20 to give opinions about the impacts of a project.
21 This is not a population dynamics question.
22 This is what kind of impacts this project is
23 gonna have on a number of different wildlife
24 species. And he hasn't -- he hasn't given The
25 Court -- certainly hasn't given the petitioners



1 any confidence level. I don't believe he's
2 given The Court enough to indicate how he can
3 form reliable opinions on specific species of
4 which he has no knowledge, has not done any
5 research, hasn't looked at -- all he's doing is
6 reading articles about and then he's gonna give
7 The Court opinions on things which he's got no
8 experience in.

9 **THE COURT:** Okay. Any response?

10 **MR. GRESSETTE:** Thank you, Your Honor. The witness
11 testified he has knowledge of these species. He
12 testified he has done research on these species
13 contrary to what you just heard. To follow
14 petitioner's argument would be to say that no
15 one can testify about the impact of a sheet pile
16 wall unless they have previously opined in
17 multiple scenarios and situations about the
18 impact of a sheet pile wall.

19 **THE COURT:** All right. Everyone's gotta be an expert
20 the first time. So I recognize that. But let's
21 stay on the issues of population dynamics and
22 why he can testify in regard to that.

23 **MR. GRESSETTE:** I believe that the record and his
24 testimony demonstrates that he has studied and
25 done significant work in the relationship



1 between species and their habitats, which is
2 population dynamics, the relationship between
3 the two. He's outlined for you the four
4 scientific factors. I also believe that The
5 Court will be more than confident after he
6 testifies when he points out the fact that there
7 is no peer-reviewed literature to support the
8 testimony that has been presented thus far in
9 the case. In fact, what has been presented is
10 the opinion of people who've had their hands on
11 terrapins a lot and they want you to believe
12 them.

13 **RULING OF THE COURT ON MOTION TO OFFER AS EXPERT:**

14 **THE COURT:** I'm not going there in making my
15 decision. I find that he's qualified -- I
16 haven't heard from your Mr. Churdar, do you wish
17 to weigh in?

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

19 **THE COURT:** I find that he's qualified as an expert
20 in wildlife science habitats, wildlife
21 management, and population dynamics, recognizing
22 that he has explained to us that there -- that
23 he has been specifically trained in quantitative
24 analysis of populations. And that quantitative
25 analysis is -- experience he has in that



1 methodology is what he brings to the table. So
2 that is the qualifications I narrowed it down
3 to.

4 **MR. GRESSETTE:** Thank you.

5 **DR. FOLK - CONTINUED DIRECT EXAMINATION BY MR.**
6 **GRESSETTE:**

7 Q: Dr. Folk, have you spent time on Captain Sam's
8 Spit?

9 A: I have.

10 Q: Tell me what you've done on Captain Sam's Spit.

11 A: My experience at Captain Sam's started in --
12 about 10 or 11 years ago when I was approached
13 to do a native plant installation project. So
14 that involved visiting the site, documenting
15 what plant species were there, and then
16 developing a planting plan to understand how
17 those different plants might vary were they
18 planted in different micro-habitats.

19 Q: And did there come a time more recently that you
20 spent additional time out at Captain Sam's?

21 A: Yes, starting in late 2016 I visited the site,
22 have visited the site multiple times.

23 Q: And have you reviewed any documents related to
24 the permits on the project, as it's often
25 described, that has been the discussion of this



1 case?

2 A: I have. I've seen the permits and other
3 associated paperwork.

4 Q: Okay.

5 **MS. ARMSTRONG:** Your Honor, you did note my objection
6 to the qualifications? Is that ---

7 **THE COURT:** Yeah.

8 **MS. ARMSTRONG:** Okay. I just wanted to make sure.

9 **THE COURT:** We're on the record. I'll listened to
10 them too.

11 **MS. ARMSTRONG:** Tom, do you mind just -- could you
12 just -- I feel like I'm leaning way ... Thank
13 you.

14 Q: Have you reviewed the NPDES permit issued in
15 this case?

16 A: Yes, I have.

17 Q: Have you reviewed the water supply construction
18 permit issued in this case?

19 A: Yes, I have.

20 Q: Have you reviewed the waste water construction
21 permit at issue in this case?

22 A: Yes, I have.

23 Q: Have you also reviewed the Coastal Zone
24 Consistency Certification at issue in this case?

25 A: Yes, I have.



1 Q: And is that first time you reviewed a Coastal
2 Zone Consistency determination?

3 A: No, it is not.

4 Q: When else have you reviewed Coastal Zone
5 Consistency determination?

6 A: A significant portion of my job at Folk Land
7 Management is designing and developing wetland
8 permits for the enhancement of most typically
9 historic rice fields so that we can ---

10 **THE COURT:** Historic what?

11 A: Rice fields along the coast of South Carolina.
12 As a part of that I develop those permits. I
13 submit them to both Corp of Engineers for
14 federal permits and whether OCRM or Bureau of
15 Water depending on the location for state
16 certification. As a process of their review,
17 that is covered in my permits.

18 Q: And when preparing the information to submit to
19 those agencies, do you have occasion to analyze
20 whether your work will have an impact on species
21 that may be listed as threatened or endangered?

22 A: I do. And it primarily happens in two ways.
23 One is what threatened or endangered species
24 will be benefitted by the wetlands work. The
25 other is most -- more commonly is were there to



1 be a bald eagle nest located within proximity of
2 that wetland, there are some temporal
3 restrictions on their ability to do rice field
4 work. More specifically we don't do that work
5 during their breeding season, late -- starting
6 in fall going into winter. That equipment might
7 influence their incubation behavior and their
8 rearing of chicks in the nest. So those
9 particular areas we know to avoid during our --
10 during our wetland enhancement work.

11 Q: So when you're analyzing this wetlands
12 enhancement work, do you have to form opinions
13 about the activity of a variety of animals in
14 that habitat ---

15 **MS. ARMSTRONG:** Objection, Your Honor.

16 Q: --- and ---

17 **THE COURT:** Whoa.

18 **MS. ARMSTRONG:** Sorry. He's -- I mean, he's leading
19 the witness.

20 **THE COURT:** Well he hasn't finished the question yet.

21 **MS. ARMSTRONG:** Well I was trying to avoid him giving
22 the witness the answer that he wants him to
23 agree with before he gets there.

24 **MR. GRESSETTE:** I'll rephrase the question.

25 **THE COURT:** Peremptory leading.



1 **MR. GRESSETTE:** Peremptory half-way objections.

2 **THE COURT:** That's an interesting one.

3 Q: Do you consider species in conducting this work
4 with wetland permits?

5 A: We do. A feature of every permit that we submit
6 is not only the design and methodology for how
7 that wetland enhancement work will be done, but
8 also a habitat management plan. So in the case
9 of title rice fields, that involves describing
10 how we will manage that rice field in
11 relationship to different tide cycles and then
12 how that will develop and enhance habitat for
13 not only water fowl but for black-necked stilts,
14 for white pelicans, for roseate spoonbills, a
15 whole suite of water bird species.

16 Q: Have you had occasion to review particular
17 application, permit application activities for
18 their impact upon species?

19 A: Could you clarify?

20 Q: Sure. That was a pretty poorly asked question.
21 Have you had occasion in preparing permit
22 applications to consider the impact of the
23 requested activity that is subject to the permit
24 and whether it will have an impact on particular
25 species?



1 A: Yes. Most certainly.

2 Q: All right. How do you go about doing that?

3 A: With the case -- because we're speaking about
4 permits, that denotes a wetland. Along the
5 coast the most important factor for
6 understanding how we manage and conserve
7 wetlands is the salinity of the water. Will it
8 be -- will we utilize tidal water that has some
9 salt content, which lead to a certain set of
10 plant community, widgeon grass, other types of
11 species. Or in the case -- other cases where we
12 might manage wetlands as strictly fresh water
13 wetlands, which will lead to a completely
14 different plant community, both herbaceous and
15 forested. I have one project right now where I
16 -- where I submitted the permit, received it to
17 re-impound a wetland, which is a 135 acre
18 cypress forest that is being impacted by salt
19 water coming in. And so we made the decision
20 that we wanted to retain that cypress tree
21 community because of its importance to things
22 like prothonotary warblers, other species. So
23 yes.

24 Q: What species, other than the warblers, were
25 considered in the project you just spoke?



1 A: Well, of course water fowl. The types of
2 activities that we do are not done commonly. It
3 typically requires a landowner with both the
4 passion and resources to manage these habitats.
5 Habitat management is not necessarily a cheap
6 endeavor. So certainly water fowl is involved,
7 wading birds. Some of the work that we're --
8 have been doing on one plantation in Georgetown
9 is we found black rails which are a species of
10 concern. And so ensuring that we continue to
11 manage that habitat to ensure the black rail
12 habitat persists.

13 Q: What is a black rail?

14 A: Black rail is one of the most talked about,
15 rarely seen bird species. It's a secretive
16 marsh bird. And it inhabits tidal marshes along
17 the South Carolina Coast. And it's quite small.
18 I've actually seen one on this individual
19 property so it was a special event.

20 Q: What other animal species have you considered in
21 conjunction with an application for permitted
22 activity?

23 A: Probably in more brackish environments. One of
24 the benefits of having the historical legacy of
25 rice culture is these are managed tidal



1 wetlands. And in particular context, we are
2 able to manage those wetlands so that we can
3 enhance a variety of fish species. Menhaden,
4 mummichogs, other feeder species, as well as
5 things like flounder and sea trout and spottail
6 bass. And so we manage that water based off of
7 different tide cycles to enhance the aquatic
8 habitat for those aquatic wildlife species.
9 That also, I should mention, is not just
10 managing for recreational fishing, although
11 flounder, and crabs, and shrimp are. A large
12 component of that is creating that small -- the
13 foraging fish species that are important for
14 wading birds, so egrets, great blue herons,
15 other species like that.

16 Q: Dr. Folk, this is a photograph. Do you
17 recognize the photograph up on the screen, what
18 that is a photograph of?

19 A: I do.

20 Q: And what is that?

21 A: That is the -- the lower western, southern
22 portion of Kiawah Island.

23 Q: And is this where you went to do your field work
24 in this case?

25 A: It is. I would typically park at Beachwalker



1 Park right here, and then traverse the site in
2 a variety of areas.

3 Q: Okay. And do you understand that there is to be
4 a in-ground steel sheet pile wall constructed
5 pursuant to the permits at issue in this case?

6 A: I do.

7 Q: And do you understand where that structure is to
8 go?

9 A: I do.

10 Q: Can you indicate that on the drawing?

11 A: Certainly. It's to extend from this portion of
12 Beachwalker Park all the way around to a point
13 just across the river, just south of this creek
14 that goes up towards Cassique.

15 Q: And have you walked that area specifically for
16 your work in this case?

17 A: I have.

18 Q: Once? More than once?

19 A: Multiple times. Probably four, five, six times.

20 Q: And we heard some testimony earlier about
21 distances and composition of the area where
22 you've marked the pink and then beyond that.
23 Can you describe those areas to The Court based
24 on your personal observations?

25 A: Certainly. The -- the pink line that I have on



1 the map represents the foot print of what I
2 understand to be the sheet pile wall which is
3 2300 and I believe 48 feet long. And then, I
4 can just clear that. And then another section
5 starting here continuing to a point about here
6 is 1700 feet of predominantly sandy beach. And
7 then that transitions into more of a pluff mud
8 spartina situation.

9 Q: Okay. And how do you know that that's 1700
10 feet?

11 A: I use a software called Geographical Information
12 Systems, it's a type of software. The software
13 name is ArcMap. I use it daily to measure
14 linear footage, acreage, a variety of spatial
15 measurements for my management work.

16 Q: Okay. And do other scientists engage in --
17 engaged in similar management work use that
18 program?

19 A: Yes. It is for describing things spatially,
20 both within the wildlife research world, as well
21 as the wildlife conservation and practice of
22 that. That's the standard software for spatial
23 measurements.

24 Q: When you were on Captain Sam's Spit for your
25 work in this case, what did you observe with



1 regard to -- what did you observe?

2 A: I observed several things. Initially my work
3 back in 2006 and notes I had prepared for that
4 planting project compared to more recent visits
5 is the development of that plant community has
6 advanced. It's gone through ecological
7 succession. Ecological succession is a
8 predictable plant pattern over time. So for --
9 think of an old field. If you stopped disking
10 it, dog fennel, other grassy species invade and
11 then wax myrtle and pines and eventually some
12 type of hardwood forest. That's the first thing
13 that I noticed in late 2016 as compared to some
14 of my earlier visits in 2006 is the advanced
15 shrubby and tree community as compared to a more
16 herbaceous shrubby community earlier.

17 Q: And as you visited Captain Sam's, did you
18 conduct a -- an evaluation of the habitat for
19 your work in the case?

20 A: I did, in two ways. One, obviously, is to
21 understand the individual plant species that are
22 there. But also to understand the composition
23 and juxtaposition of those plants. So there are
24 certainly species like wax myrtle out there and
25 sweet grass. And to understand that it's not a



1 monotony of one species but rather an
2 interspersed of some areas that are forested
3 with pine and live oaks and other areas wax
4 myrtles, occasionally Yaupon, which is another
5 holly type shrub species. Then down to
6 herbaceous species. Then certainly open patches
7 of bare sand. And all of those were not
8 separated but rather intermixed in certain
9 areas.

10 Q: And as you evaluated the habitat you've just
11 described and identified plants, did you also
12 consider animal species that might be present on
13 the spit?

14 A: I did.

15 Q: All right. And generally, how did you perform
16 that consideration during your site visits?

17 A: The question was posed, or related to threatened
18 and endangered species, might they be there
19 within the footprint of Phase 1 and would they
20 be impacted by the proposed work?

21 Q: Okay. And stepping back one moment to the
22 vegetation that you were discussing at Captain
23 Sam's, did you see anything in addition to what
24 you have described that caused you any concern?

25 A: I did. Most recently, just two weeks ago, I



1 observed probably six or seven patches of a
2 species called phragmites, phragmites australis,
3 which is what we call an invasive exotic plant
4 species. And it's one that actually I'm about
5 to deal with through herbicide next month on
6 another property because it's -- it's an
7 incredibly aggressive species and will
8 extricate, will remove, the local vegetation --
9 local, native vegetation such that it is a
10 monotony of that invasive plant species.

11 Q: And if left unattended does that plant species
12 interfere with the ---

13 MS. ARMSTRONG: Object. Objection, Your Honor. I'm
14 sorry. He's getting ready to lead the witness
15 again and I'm trying to prevent him from giving
16 the witness the answer before he does so by way
17 of his question.

18 MR. GRESSETTE: I'll be glad to rephrase ---

19 THE COURT: You have a remarkable ability to --
20 insight to anticipate what he's gonna ask better
21 than I do.

22 MS. ARMSTRONG: Well, I've at through multiple of
23 these questions. And I've let it get far and
24 then I object.

25 THE COURT: Okay.



1 **MS. ARMSTRONG:** Then at that point the witness has
2 already heard the answer so when the question is
3 rephrased, the witness knows where to go with
4 it, so.

5 **THE COURT:** What was it -- what were you about to ask
6 him? You were four words into it. But go --
7 please ask a question that is not leading.

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

9 **THE COURT:** That's all I can do at this point. I
10 can't make a ruling on it.

11 Q: What impacts, if any, does phragmites have on a
12 habitat?

13 A: It's first effect is to, because it has such an
14 aggressive growth form, is to out compete the
15 existing native vegetation. And so that --
16 those native plant species that are important
17 are eliminated. That then, in turn, eliminates
18 the habitat that wildlife species might have
19 utilized that area for.

20 **THE COURT:** Now what species does it eliminate? It
21 doesn't eliminate trees, does it?

22 A: No, sir. This is a grass species.

23 **THE COURT:** Okay.

24 A: And it typically occurs in areas with abundant
25 sunlight.



1 **THE COURT:** Okay.

2 A: As a good example, it will in wetlands, will
3 eliminate virtually all of the aquatic
4 herbaceous plant species such that there isn't
5 open water habitat for -- for foraging, for
6 water fowl, and water birds. There's not nest
7 -- suitable nesting habitat for other species.
8 So, no, sir. It doesn't affect forested systems
9 but more open upland and some -- sometimes
10 wetland situations.

11 Q: What species' nesting sites could be affected on
12 Captain Sam's, if any, by this plant?

13 A: If phragmites is allowed to persist on this area
14 then it could negatively impact terrapin nesting
15 sites.

16 **MS. ARMSTRONG:** Objection, Your Honor. And I'm gonna
17 move to strike. And the basis of that objection
18 is that this court determined that the issue of
19 whether Wildlife and Fisheries Management
20 policies apply, an issue which was raised by
21 DHEC, forced us to proffer any -- all of the
22 evidence regarding diamondback terrapins was all
23 made proffer because the Department raised the
24 issue of whether the wildlife and management --
25 Wildlife and Fisheries Management policies



1 apply. They took issue with whether this court
2 has jurisdiction to make those determinations.
3 And in that regard, all of Dr. Folk's testimony
4 with respect to diamondback terrapins should not
5 be admitted for the same reasons The Court
6 didn't allow admission of Dr. Gibbon's
7 testimony.

8 **THE COURT:** Well, I was gonna wait until the end of
9 this case to address that issue. I can go ahead
10 and allow that to be a proffer or -- I will
11 state through my research on that that the
12 Department's objections, I've looked at
13 Respondent KDPs prehearing statement. And in
14 that prehearing statement, you set forth that
15 the overall issue for determination is whether
16 the proposed project is consistent with the
17 CZMP. And then you went on to ... So even
18 though that's not the Department setting forth,
19 but I can't -- hadn't read their's yet because
20 I haven't got my hand on it yet. I mean, I was
21 gonna allow us to argue about that, so I can
22 take two, two tracks. I can start down this
23 path and hear argument on the implications of
24 your prehearing statement and whether that opens
25 the door to Mr. Gibbons. Or I can -- we can



1 proffer it under the same theory that I've done
2 Mr. Gibbons' proffer and we can decide it later.
3 So ...

4 **MS. ARMSTRONG:** Sure. I mean, if you -- either both
5 come in or not both come in.

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

7 **MS. ARMSTRONG:** Yeah.

8 **MR. GRESSETTE:** I'm happy to proffer it, Your Honor,
9 since ---

10 **THE COURT:** Okay.

11 **MR. GRESSETTE:** --- that's the way we did the other
12 testimony.

13 **THE COURT:** Okay.

14 **MR. GRESSETTE:** And then how and whenever you want us
15 to sort it out, we're happy to do that.

16 **THE COURT:** Okay. Well, you'll now hear one of my
17 concerns about your side of the argument on
18 that, so if you'll be able to explain that.

19 **MS. ARMSTRONG:** I do have -- this is gonna be an --
20 this will be a little bit awkward because it's
21 gonna be a proffer recognizing that there's the
22 possibility that it could come into evidence and
23 I'm -- there's a likelihood that I might have
24 objections if this testimony comes in.

25 **THE COURT:** We just treat it as a proffer in which



1 the -- your make your objections ---

2 **MS. ARMSTRONG:** Okay.

3 **THE COURT:** --- within the umbrella of the proffer.

4 **MS. ARMSTRONG:** Okay.

5 **THE COURT:** I think we did that with Gibbons. They
6 objected.

7 **MS. ARMSTRONG:** Okay. I just wanted to make sure.
8 It feels a little awkward because ---

9 **THE COURT:** It's awkward because most of the time you
10 do a proffer it's just a -- this is what the
11 testimony would be but under the circumstances
12 of this case, I took -- I don't think I've ever
13 done it where I've done a Q and A of the
14 witness. But I just thought was the procedure
15 -- proper procedure in this case. Tell me when
16 your proffer ends.

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

18 **MR. CHURDAR:** Your Honor, can I get some
19 clarification? You were saying that your
20 concern was KDP's prehearing statement made
21 mention to section VII on Wildlife and Fisheries
22 Management in the C ---

23 **THE COURT:** No, KDP's prehearing statement took the
24 approach that the overall issue is whether the
25 proposed project is consisted with the CZMP,



1 which is a more umbrella approach, which could
2 include the regulation that she was concerned
3 about. Therefore, if that -- if the umbrella
4 approach is taken, then it will include, she
5 being, so the record will be clear, because I
6 was pointing to Ms. Armstrong, it would include
7 her contention concerning, and I don't remember
8 the provision number, do you?

9 **MR. CHURDAR:** It was the Wildlife ---

10 **THE COURT:** Seven something.

11 **MR. CHURDAR:** Yes, sir. The Wildlife and Fisheries
12 Management policy.

13 **MR. WALKER:** The fisheries management policy.

14 **THE COURT:** But that doesn't -- I still haven't --
15 because I've got plenty of work to do when I'm
16 not in this courtroom. I'm the chief judge of
17 my court. So when I -- when I leave here, you
18 know, I tell people sometimes being chief judge
19 is like being a fire hydrant at a dog
20 convention, you know. The bottom line is, I've
21 got plenty to do. So I haven't researched your
22 issue about that it's not even an issue at all.
23 I've just been addressing or just considering
24 the generalities of it. So I think y'all can
25 see that my legal analysis is starting down the



1 path but has not concluded. So, all right.

2 **MR. CHURDAR:** Thank you.

3 **MR. GRESSETTE:** Thank you, Your Honor, and so what
4 I'll do is ---

5 **THE COURT:** You hereby proffer -- you're proffering
6 the testimony and you're gonna tell me when the
7 proffer ends.

8 **MR. GRESSETTE:** Yes, sir. So I'm going to move into
9 testimony about the diamondback terrapin?

10 **THE COURT:** Yes.

11 **MR. GRESSETTE:** Do my best to put bookends on it,
12 we'll note it for the record when we finish that
13 questioning. Okay. Is it the same objection to
14 the dolphin testimonies?

15 **MS. ARMSTRONG:** Yes.

16 **MR. GRESSETTE:** Okay. All right.

17 **THE COURT:** We'll take that path with both of those.

18 **MR. GRESSETTE:** Yes, Your Honor.

19 **PROFFERED TESTIMONY:**

20 **Q:** Have you any opinion, Dr. Folk, on the impact of
21 this plant you've just described, if left
22 unattended upon potential nesting sites for any
23 animal species that nest on Captain Sam's?

24 **A:** Yes. If indeed phragmites is able to persist
25 throughout the site it will impact available



1 nesting sites for both terrapins and a whole
2 range of wildlife species that utilize those
3 habitats.

4 Q: Have you had the opportunity to explore the
5 relationship, if any, between the project and
6 diamondback terrapins beyond that opinion?

7 A: Yes, I have.

8 Q: What have you done?

9 A: To understand the impact of this area on
10 terrapins, it's first important to understand
11 why this area is important in the annual life
12 history of this organism. And reproductively
13 active females utilize this area to nest. So
14 the question is, will the -- what is proposed
15 within the permit, specifically the sheet pile
16 wall, will that influence the reproductive
17 capability of adult female terrapins.

18 Q: And how did you go about considering the
19 question of whether the sheet pile wall will
20 influence the reproductive capability of the
21 diamondback terrapins?

22 A: Well most obviously if that -- through that area
23 that I marked -- I'll mark one more time. If
24 the vertical limits in the literature and
25 multiple areas and if the vertical height it



1 greater than six or eight inches then terrapins
2 are unable to scale that vertical escarpment to
3 then reach their nesting sites.

4 **MR. ARMSTRONG:** Objection, Your Honor. I'm gonna
5 move to strike because this witness has just
6 testified -- he's gotten in hearsay evidence.
7 He hasn't testified that with respect to
8 diamondback terrapins this is the kind of
9 information that would be of the type that we
10 would rely on in forming opinions. And in fact,
11 he's already said he's never formed opinions
12 about diamondback terrapins before this case.
13 So I move to strike that answer.

14 **THE COURT:** Mr. Gressette?

15 **MR. GRESSETTE:** I'm happy to lay a foundation
16 differently. Maybe that will take care of it.

17 **THE COURT:** I'll strike the answer and allow you to
18 proceed.

19 **Q:** Dr. Folk, when you began your work for Captain
20 Sam's with regard to consideration of the
21 impact, if any, of the sheet pile wall upon
22 diamondback terrapins, did you initiate a course
23 of action that is recognized by wildlife
24 scientists to examine such questions?

25 **A:** Yes.



1 Q: What did you initiate?

2 A: There were two things in particular. One is the
3 accessibility of the site by those
4 reproductively active female terrapins. The
5 other is, there is an analysis type that's used
6 throughout the wildlife management and
7 conservation literature called patch occupancy.
8 And what that does is it addresses -- it
9 evaluates a variety of landscape level features
10 and asks the question, is a species likely to
11 occur in this spot or patch given these
12 landscape features? So you would go out to a
13 variety of different areas and land- -- and of
14 varying landscape features and both observe is
15 that organism there and then document the
16 covariates, the landscape features to ask, is it
17 there? So that ultimately gives you the
18 management and conservation tools to say these
19 are the landscape level features that make it
20 likely to either find or not find an organism
21 within a specific site.

22 Q: Okay. Let's begin with the question of
23 accessibility. How do wildlife scientists
24 investigate a question of accessibility for a
25 species to a potential nesting area?



1 A: With terrapins, because of -- impacting
2 reproductively active females has a significant
3 negative impact on the population. And
4 strategies to enhance the survival rate of
5 females is to develop vertical profiles that
6 terrapins can not cross. And so there are cases
7 in New Jersey and Jekyll Island and Chesapeake
8 Bay where, in built environments, they want to
9 make sure that terrapins do not reach roadways
10 and they aren't killed by motorists. So that we
11 know that terrapins can not cross vertical
12 obstruction that are six or eight inches high.
13 And that technique is used to prevent them from
14 reaching roadways.

15 **MR. ARMSTRONG:** Objection, Your Honor. I'm going to
16 move to strike again. He -- he's given a little
17 bit longer of an explanation but ultimately has
18 done the same thing. He is giving -- it's
19 hearsay, it's not -- he hasn't ever formed
20 opinions on diamondback terrapins ever before
21 this case. And he's trying -- what he's done is
22 read articles and now he's reciting back what
23 he's read in articles to The Court. And having
24 The Court -- asking The Court to have them come
25 in as evidence, even though those aren't the



1 kinds of things he relies on in forming opinions
2 on diamondback terrapins because as we
3 established early on, he's never formed opinions
4 on diamondback terrapins before right here.

5 **THE COURT:** Interesting. He can -- he can give his
6 opinion, he can value, he can publish, but he
7 can't publish that which he's -- I tell you
8 what, I'm gonna allow you to respond. I think
9 I've got my conclusion but go ahead.

10 **MR. GRESSETTE:** Well, the next question, Your Honor,
11 was directed -- or going to be directed at what
12 wildlife scientists do. I can ask in reverse.

13 **THE COURT:** Well, I think that's an interesting
14 objection but -- because it's relating a
15 component of that which he used but he's using
16 that component to explain his reasoning. And --
17 so it's not offered for the truth of the matter
18 asserted, I don't think. I tell you what.
19 Yeah, because if it's offered, the truth of the
20 matter asserted, I don't believe it comes in.
21 If it's offered to explain his reasoning, it
22 would come in. Since I'm not clear and I don't
23 want to waste our time on one habit, I'm gonna
24 strike his testimony. If I have to hear
25 something very similar that's okay, but rephrase



1 the question.

2 **MR. GRESSETTE:** Sure. Thank you, Your Honor.

3 Q: Were you presented with a question in your work
4 on this case of ---

5 **THE COURT:** Well I'll tell you what, I can -- well,
6 no. Go ahead ask, go ahead.

7 Q: --- of whether -- let me say that again. Were
8 you asked in this case to analyze whether a
9 vertical structure would impact nesting of
10 terrapins?

11 A: Yes.

12 Q: Describe for me the structure that you
13 considered.

14 A: The construction -- the structure that I
15 considered was the proposed vertical sheet pile
16 wall to continue through that area that I have
17 designated as pink.

18 Q: And to begin your analysis of that question, did
19 you utilize a technique that is utilized by
20 wildlife scientists when facing similar
21 questions?

22 A: Yes. And that ---

23 Q: What was that technique?

24 A: That -- the first was to visit the site and to
25 see where that would be, that sheet pile wall



1 would be established. The first observation is
2 that area is not accessible by terrapins right
3 now anyway. The escarpment that exists
4 throughout there is in most cases three feet
5 plus and towards the end maybe a foot or so.
6 And those are vertical escarpments that a
7 terrapin can't go over.

8 Q: Well before we go to the terrapins, can we look
9 together at a few photographs that were
10 introduced into evidence today? They are part
11 of KDP's Exhibit Number 37.

12 **(Respondent's Exhibit Number 37 was introduced into**
13 **the record at this time.)**

14 Q: And we will start on number 12 at the bottom.
15 And you can turn and look if you'd like to
16 number 37. And then we're gonna begin with the
17 picture at the bottom of page 12.

18 **MR. ARMSTRONG:** Which exhibit is this?

19 **THE COURT:** Number 37.

20 **MR. GRESSETTE:** 37.

21 Q: Do you recognize that photograph that is at the
22 bottom of page 12 of Exhibit 37?

23 A: I do.

24 Q: And what is depicted in that photograph?

25 A: To the best of my knowledge that is a portion of



1 the escarpment where the proposed sheet -- sheet
2 pile wall will go.

3 Q: And have you been to the location depicted in
4 that photograph?

5 A: I have.

6 Q: And can you indicate for The Court your
7 observation of the height of the escarpment
8 there?

9 A: Yeah. These photos are dated August 13th and I
10 was actually at the site just after that, maybe
11 four or five days after that. And I walked the
12 entire length and that appears to be likely
13 three, four, five feet. Some portions further
14 down behind that dead plant material is probably
15 six feet.

16 Q: Okay. And if you would take a look at the next
17 page, page 13, the photograph at the bottom.
18 What do you understand to be depicted in that
19 photograph?

20 A: This is, to the best of my knowledge, another
21 portion of this vertical escarpment along the
22 Kiawah River on the back of Captain Sam's where
23 the sheet pile wall will go.

24 Q: Have you been to that location personally?

25 A: I have.



1 Q: And can you identify for The Court the height of
2 that area over to the left?

3 A: This area right here, based off of having been
4 there and the surrounding vegetation, that's
5 likely at least four feet, four or five feet.

6 Q: Okay. Can you take a look at 14, top
7 photograph? Do you recognize that photograph?

8 A: I do.

9 Q: And what do you recognize is depicted in that
10 photograph?

11 A: This represents a portion of the area where the
12 sheet pile wall is proposed to go at Captain
13 Sam's.

14 Q: And we keep using those words, but for purposes
15 of the record, what is an escarpment?

16 A: I use the word escarpment to describe this
17 vertical zone that occurs throughout the edge of
18 where the sheet pile wall would go.

19 Q: And by vertical, for purposes of the record,
20 describe it for me.

21 A: Vertical in relationship to horizontal is
22 straight up.

23 Q: Okay. And the portion that you've marked on
24 this exhibit as a straight up vertical or
25 escarpment, can you explain to The Court about



1 how high that area is?

2 A: Yeah. This area, both based off of having been
3 there just a couple weeks ago and the
4 surrounding vegetation, this is likely, again,
5 three to four feet. Probably six feet in some
6 other areas.

7 Q: Okay. And let's take a look at number 16, at
8 the top. Do you recognize that photograph?

9 A: I do.

10 Q: And what do you understand that photograph to
11 depict?

12 A: I -- the same area that we've seen in the last
13 three photos. The area along the edge of
14 Captain Sam's, along the Kiawah River.

15 Q: And for purposes of bearing, do you see any
16 landmarks in that picture that are manmade
17 landmarks?

18 A: I can see development right here, which I
19 believe are house built along the, I guess,
20 northeast corner of Seabrook Island.

21 Q: Okay. And what direction is the photographer
22 looking when taking this image?

23 A: The photographer is looking in the direction of,
24 I guess it would be southwest towards the inlet
25 of Captain Sam's with Beachwalker Park behind.



1 Q: And is it your understanding that -- can you
2 indicate on the photograph whether and what
3 structures you understand may be built there as
4 part of the project?

5 A: This is the lower end of the proposed sheet pile
6 wall where it will -- proposed to be built.

7 Q: And what do you mean lower end?

8 A: Neat the portion -- the length -- the extent of
9 the 2,348 feet.

10 Q: Closer to the 1,700 feet of ---

11 A: Yes, that ---

12 Q: Okay. And can we take a look at photograph 19?
13 At the bottom. Okay. And does photograph
14 number 19 at the bottom include an escarpment?

15 A: It does.

16 Q: And have you been to the location pictured in
17 this photograph?

18 A: I have.

19 Q: And did you make any observation while at that
20 location about the height of the escarpment
21 there?

22 A: I did. Consistent with the rest of the
23 footprint, it was in excess of two or three feet
24 in vertical height. In some cases this, to the
25 far left of this photograph, is likely closer to



1 five or six feet.

2 Q: Okay. And the visit to the spit that we've just
3 talked about in conjunction with these areas
4 that you've identified in the photograph, did
5 you make that visit as part of your work for
6 this case?

7 A: I did.

8 Q: Did the observations form any part of the
9 methodology of your work in this case?

10 A: They certainly did.

11 Q: Okay. Did you do anything else in addition to
12 visiting the site and observing the escarpment
13 as you applied the techniques used by wildlife
14 scientists to analyze a question like that that
15 was proposed to you?

16 A: I did -- we used an analysis technique called
17 patch occupancy, which asks the question for a
18 particular place in the landscape. What are the
19 landscape features or habitat features
20 surrounding that point that make it likely or
21 less likely that an individual species will be
22 present.

23 Q: And when a wildlife scientist utilizes the patch
24 occupancy technique, what does he or she do?

25 A: It's the -- that analysis provides quantitative



1 benchmarks to understand land -- the threshold
2 for landscape features of when or -- when a
3 population will be in that area or not. In
4 particular, there was a recent study, 2015.

5 Q: Just tell me who the study was by.

6 A: Isdell, et al., 2015.

7 Q: Okay. Did the Isdell article you just discussed
8 identify a patch work occupancy methodology?

9 A: They did. In the lower Chesapeake Bay, they
10 asked the question ---

11 **THE COURT:** Well this is where we were a while ago.
12 He can give the opinion, and then if -- and Ms.
13 Armstrong can ask him on cross about the hearsay
14 aspects of which he relied upon. But right now,
15 he -- he's open game to give his opinion.

16 **MR. GRESSETTE:** Okay.

17 **THE COURT:** So.

18 Q: Okay. Did you undertake to apply patch
19 occupancy analysis to the area surrounding the
20 proposed sheet pile wall location?

21 A: I did.

22 Q: And did you do that in terms of diamondback
23 terrapins?

24 A: Yes.

25 Q: What did you conclude?



1 A: What I concluded is there are benchmarks for
2 landscape features in the peer-reviewed
3 literature that suggest whether terrapins will
4 exist or not. And one of the most important
5 covariates or factors in recent research is the
6 percent of hard armoring, or bulkheading
7 throughout a landscape, and whether that would
8 influence whether it's likely or unlikely that
9 terrapin would be there. And in particular,
10 this study found that for a particular landscape
11 area, 17 percent of the interface between
12 wetland and upland, if 17 ---

13 **MS. ARMSTRONG:** Objection, Your Honor. He's getting
14 ready to again give testimony for the truth of
15 the matter, and it's not his own opinion, it's
16 research. He can explain -- if he's got to form
17 some opinion ---

18 **THE COURT:** I'll sustain that.

19 Q: Applying patchwork analysis, do you have an
20 opinion to a reasonable degree of wildlife
21 science certainty as to whether or not the
22 proposed sheet pile wall will impact the
23 population of diamondback terrapins in the
24 Kiawah River and surrounding area?

25 A: Yes. It will not impact diamondback terrapin



1 population.

2 Q: Is one of -- is it your opinion to a reasonable
3 degree of wildlife science certainty that the
4 proposed sheet pile wall will not create a
5 barrier to terrapins attempting to access the
6 spit any greater than that which exists
7 naturally?

8 **MS. ARMSTRONG:** Objection, Your Honor, the question
9 is -- not only is it leading, he's also not laid
10 a foundation for how this witness would have any
11 knowledge or ability to form an opinion on how
12 -- how this wall is going to affect the
13 terrapins.

14 **THE COURT:** You've kind of got a catch 22, you don't
15 want him to go into the hearsay, but then you
16 don't -- well you're objection to him offering
17 the opinion.

18 **MS. ARMSTRONG:** Right, but he doesn't have a basis
19 for the opinion. I mean he has to explain --
20 he's got to have some ---

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

22 **MS. ARMSTRONG:** Let -- we can -- I want to back up
23 just a little bit to look at the Rule and the
24 basis of opinion testimony by experts. Now if
25 it's of a type of a reasonable -- okay, well



1 back up. The facts or data upon which an expert
2 bases an opinion may be those perceived by or
3 made known to the expert at or before the
4 hearing. If of a type reasonably relied upon by
5 experts in the particular field in forming
6 opinions or inferences upon the subject. And
7 that -- the biggest problem here is with the
8 subject, is diamondback terrapin, and this
9 expert's never formed opinions on diamondback
10 terrapins before. So we're at -- we are at a
11 little bit of a catch 22 because ---

12 **THE COURT:** Well he may never formed them before, but
13 he's formed them now. If he's -- at least if he
14 asks him about them ---

15 **MS. ARMSTRONG:** So that's -- we believe it's outside
16 the area of his expertise, that he's ---

17 **THE COURT:** Okay.

18 **MS. ARMSTRONG:** --- testified he's got expertise in
19 population dynamics. And now, all of the
20 sudden, he's being brought in to give opinions
21 on how armoring is going to affect the terrapin.
22 Now that's going outside of the survival -- the
23 four different areas that this witness has
24 described as covering population dynamics and
25 giving opinions about impacts of structures on



1 -- on a species to which he's got no --
2 admittedly no experience or expertise.

3 **THE COURT:** All right. That objection's kind of
4 moved a little bit, but ---

5 **MS. ARMSTRONG:** I've got multiple objections to this
6 witness' testimony. Obviously him -- I think
7 I've said them all.

8 **THE COURT:** Okay.

9 **MR. GRESSETTE:** Your Honor, this objection that as a
10 wildlife scientist with information and training
11 in population dynamics and he's qualified by The
12 Court to present opinions on wildlife
13 management, to repeatedly say that he's never
14 studied the diamondback terrapin so he can't
15 have an opinion, is rehashing that ruling.
16 Additionally, the petitioner can't have it both
17 ways. Either we follow the Rule and I elicit
18 the opinion prior to his articulating upon what
19 he relies, which is allowed by the Rules of
20 Evidence, and she can cross him on it, or I lay
21 a foundation, he provides the hearsay, and then
22 he states the opinion. But I think they have to
23 pick one or the other. And I'm happy to just
24 have him articulate his opinions and she can
25 cross examine him all day long. And if she



1 doesn't want the hearsay in, it doesn't have to
2 come in.

3 **MS. ARMSTRONG:** What I heard about the patch work was
4 that that was how they determine what kind of
5 habitat they like, it does not allow him to form
6 opinions about whether a structure is going to
7 affect terrapin ---

8 **THE COURT:** Well that's a subject of cross ---

9 **MS. ARMSTRONG:** --- that's a different ---

10 **THE COURT:** --- cross-examination. I overrule the
11 objection, I'll allow you to ask the opinion.

12 **MR. GRESSETTE:** I don't even remember ---

13 **THE COURT:** Because we -- we've gotta go -- I mean --
14 I get your point.

15 **MR. GRESSETTE:** Thank you, Judge.

16 **Q:** Do you have an opinion to a reasonable degree of
17 wildlife science certainty as to whether or not
18 the sheet pile wall proposed by this project
19 will create a greater barrier to terrapins
20 attempting to access Captain Sam's Spit than
21 currently exists due to the current escarpment?

22 **A:** Yes. It's my belief that effectively the
23 situation is the same. There is significant
24 vertical face now of sand, and ultimately sheet
25 pile wall, to not allow reproductively active



1 females to access nesting sites.

2 Q: And in your analysis of population dynamics of
3 a species, in this instance diamondback
4 terrapins in the Kiawah River area, why would
5 access to the spit by gravid females be
6 important?

7 A: It's important because it is potentially -- well
8 terrapins -- some terrapins do nest there, the
9 extent to which is unknown. When you consider
10 reproduction in a population, it has to be
11 documented to contribute to overall population
12 growth rate. So just because an organism lays
13 eggs does not automatically equate to
14 contribution to the next cohort of individuals.
15 It also -- you need to understand the extent and
16 location of reproduction, whether those nests
17 are successful, and how that compares to nesting
18 sites for the rest of the population. And
19 that's not known in this area.

20 Q: And you reviewed the deposition that Dr. Whit
21 Gibbons provided in this case?

22 A: I have.

23 Q: And after reviewing that deposition, are you
24 still of the same opinion as to whether or not
25 there is any evidence in this case about exactly



1 where diamondback terrapins currently nest, if
2 at all, on Captain Sam's Spit?

3 A: I have reviewed that portion of his deposition,
4 and there's no compelling evidence that places
5 the overall importance of this site for
6 reproductive -- reproductive activities in the
7 population.

8 Q: All right. And do you hold that opinion to a
9 reasonable degree of wildlife certainty?

10 A: I do.

11 Q: I'm sorry. Do you hold that opinion to a
12 reasonable degree of wildlife science certainty?

13 A: I do.

14 **MR. GRESSETTE:** Okay, Your Honor. I think that
15 concludes my direct on terrapins.

16 **THE COURT:** All right. Well you want -- I think we
17 also said that dolphins were in this area. Are
18 you going to go to the dolphins next?

19 **MR. GRESSETTE:** Sure. Yes, Your Honor.

20 **THE COURT:** Well then we're gonna stay within the
21 proffer I assume? Ms. Armstrong?

22 **MS. ARMSTRONG:** Yes, Your Honor.

23 **THE COURT:** All right. I don't want to get you out
24 of order. If you want to just move in and out
25 we'll do that.



1 **MR. GRESSETTE:** That's okay, Your Honor.

2 **THE COURT:** Okay.

3 Q: Dr. Folk, did you do any work in this case
4 regarding questions about the population of
5 bottlenose dolphins that lives in and around the
6 Kiawah River?

7 A: I did.

8 Q: Did you make a determination as to whether or
9 not bottlenose dolphins are classified as a
10 threatened or endangered species by any
11 governmental agency?

12 A: I did, and they are not.

13 Q: Did you consider the question of whether the
14 project at issue in this case will have an
15 impact on the bottlenose dolphins that live in
16 and around the Kiawah River?

17 **MS. ARMSTRONG:** Objection, Your Honor. Hee hasn't
18 laid a foundation for the basis of the opinion.

19 **THE COURT:** Lay a foundation, if you can.

20 Q: Did you undertake any actions upon which you
21 based a determination regarding whether or not
22 the project at issue in this case will impact
23 the bottlenose dolphins living in and around the
24 Kiawah River?

25 A: I did. I considered the demographic rates that



1 might be impacted by the placement of that sheet
2 pile wall.

3 Q: And how did you undertake that consideration?

4 A: The premise was given that were the sheet pile
5 wall placed there and that beach eroded, that a
6 foraging site would be eliminated from use by
7 dolphins. And so the question that I asked is
8 how does the elimination of a single foraging
9 site influence the fitness and survival of
10 females. It can either influence the overall
11 survival rate, or it can influence female's
12 reproductive rate. I should also qualify right
13 here, I refer to females throughout because in
14 wildlife population modeling, that's actually
15 all we model. The presumption is that the male
16 -- sufficient males are present in the
17 population to provide the reproductive services
18 to females. So that's why I continually refer
19 to modeling females and the concern of female
20 survival or female reproduction.

21 Q: In considering the question of a potential
22 impact on bottlenose dolphins, did you undertake
23 any activities that a wildlife scientist usually
24 undertakes to answer such questions?

25 A: Certainly. And it's important to understand how



1 certain behaviors might influence a demographic
2 rate. And in this case, there are -- there is
3 no literature that addresses the removal of a
4 single foraging site for an individual dolphin.
5 There also is literature that shows that these
6 dolphins in this area are semi-migratory. So
7 some individuals will actually leave the area,
8 migrate further south to Georgia or northern
9 Florida. There's also telemetry work that shows
10 that the majority of dolphins in what is called
11 the Charleston Stock area are not faithful to
12 one site. That they utilize multiple creeks and
13 rivers for foraging. In addition, a dolphin
14 does not employ a single foraging strategy, they
15 are highly novel, adept creatures that foraging
16 in a variety of different ways.

17 Q: And did you obtain the information that you just
18 described about dolphin behaviors from a
19 literature review of the kind wildlife
20 scientists undertake to analyze such questions?

21 A: Yes. Wildlife science is constantly evolving
22 and utilizing the literature, as well as their
23 training and experience to understand new
24 insights into the science of wildlife
25 populations, so it's a -- I have a copy of a



1 journal in my satchel right now that I read.
2 Now, it's just a part of being a professional
3 wildlife biologist. So that is a normal
4 strategy, to review new research to understand
5 how conservation actions can occur.

6 Q: Did you identify any peer-reviewed research that
7 concludes removal of a single foraging site will
8 negatively impact a dolphin population?

9 A: No.

10 Q: Is it your opinion to a reasonable degree of
11 wildlife science certainty that if dolphins
12 strand feed at the area where the sheet pile
13 wall is located, and if it removes that foraging
14 area, that it will not have a negative impact on
15 the populations of dolphins living in and around
16 Captain Sam's Spit?

17 A: No. I don't believe that it will. In addition,
18 there's similar adjacent habitat that's 1,700
19 feet through here, which is also available for
20 foraging.

21 Q: Based upon your expertise in wildlife science,
22 wildlife management, population dynamics, is
23 there any evidence to support a conclusion that
24 the project will negatively impact bottlenose
25 dolphins living in and around the Kiawah River?



1 A: No.

2 Q: Do you hold that opinion to a reasonable degree
3 of scientific certainty?

4 A: Yes.

5 Q: So that we're clear for the record before we
6 move on, based upon your expertise in wildlife
7 science, wildlife management, and population
8 dynamics, is there any evidence to support a
9 conclusion that the project will negatively
10 impact diamondback terrapins living in and
11 around the Kiawah River?

12 A: No, with the exception that understanding the
13 potential breeding habitat on the -- on the
14 spit, which is not known.

15 Q: And do you hold that opinion to a reasonable
16 degree of scientific certainty?

17 A: Yes.

18 **THE COURT:** That concludes your proffer?

19 **MR. GRESSETTE:** Of those two species, yes, Your
20 Honor.

21 **THE COURT:** Okay.

22 **PROFFERED TESTIMONY CONCLUDED.**

23 Q: Are you okay over there?

24 A: Yeah, I'm good.

25 Q: All right. For your work at Captain Sam's Spit,



1 did you undertake any analysis regarding
2 critical habitat for endangered or threatened
3 species as identified by state or federal
4 agencies?

5 A: I did.

6 Q: When you did that, did you employ the
7 methodology used by wildlife scientists
8 routinely, when faced with such a question?

9 A: Yes.

10 Q: And so for purposes of the record, what was the
11 question you considered?

12 A: The question I considered were -- was for the
13 footprint of the Phase 1 of Captain Sam's or
14 Cape Charles Project, would those activities
15 impact the critical habitat of threatened or
16 endangered species as recognized at a federal
17 and state level.

18 Q: And applying, as you testified, the methodology
19 employed by law by scientists, to answer such a
20 question, what did you do?

21 A: I did two things. One obviously is to
22 understand the nature of the habitat and the
23 plant species present and the composition of
24 those -- the juxtaposition of those different
25 microsites and plant species. Second is to



1 understand the recognized threatened or
2 endangered species in the area. Typically those
3 data sets are maintained at a county level, both
4 at the federal for -- with the Fish and Wildlife
5 Service and the state level through DNR. And so
6 you review those lists and understanding the
7 life history requirements, it's quite easy to go
8 through and understand that certain plant
9 species or threatened plant species, threatened
10 or endangered plant species, or threatened or
11 endangered animal species would not be there.

12 Q: And so that I'm correct for the record, did you
13 undertake that analysis?

14 A: I did.

15 Q: And physically, what did you do?

16 A: Went to the databa- -- well, other than visiting
17 the site and documenting what was there, both
18 suite of the plant species and the density and
19 juxtaposition to each other. Also to obtain
20 those lists, those current lists of threatened
21 or endangered species through the Fish and
22 Wildlife Service website and DNR's website.

23 Q: And after you reviewed the Fish and Wildlife
24 website and the DNR website, did you determine
25 any habitats were present on Captain Sam's Spit



1 in the project footprint?

2 A: I did, and there were no species that were on
3 those lists that depend on the footprint of the
4 proposed project as their critical habitat.

5 Q: Is it your opinion to a reasonable degree of
6 wildlife science certainty that no threatened or
7 endangered species habitat is located in the
8 project footprint?

9 A: It is, I don't -- it is -- that critical habitat
10 is not present within the footprint.

11 Q: Is it also your opinion to a reasonable degree
12 of wildlife certainty that the project will not
13 negatively impact the habitat of any threatened
14 or endangered species?

15 A: No. The project will not impact the critical
16 habitat of threatened or endangered species.

17 Q: And do you hold that opinion to a reasonable
18 degree of wildlife science certainty?

19 A: I do.

20 Q: And based upon your expertise in wildlife
21 science, wildlife management, and population
22 dynamics, and your work undertaken in this case,
23 is there any evidence to support a conclusion
24 that the project will negatively impact any
25 threatened or endangered species?



1 A: No, I do not believe it will impact any
2 threatened or endangered species.

3 **MR. GRESSETTE:** I'm going back to terrapins, within
4 the proffer.

5 **THE COURT:** Okay.

6 **PROFFERED TESTIMONY:**

7 Q: In forming your opinions about the relationship
8 of the project and the diamondback terrapins
9 that live in and around the Kiawah River, did
10 you consider locations on Captain Sam's Spit
11 that the terrapins might use to access the spit
12 if the sheet pile wall is constructed?

13 A: I did.

14 Q: And can you mark on the map that is on the
15 screen there those locations for The Court?

16 A: Certainly. Where -- beyond this point,
17 essentially just south of the creek that goes to
18 Cassique extending in a west and then southerly
19 direction, these areas are suitable terrain for
20 terrapins to access for nesting.

21 Q: And why are those areas suitable for terrapins
22 to access the spit?

23 A: There's lack of vertical relief.

24 **THE COURT:** In other words, there's not an
25 escarpment?



1 A: No, sir.

2 **THE COURT:** All right.

3 A: No, it comes up -- the beach comes up and then
4 goes straight to marsh, whereas the other area
5 where the wall will go is a beach and then comes
6 up to a vertical escarpment and then turns
7 horizontal.

8 **THE COURT:** All right.

9 Q: For purposes of the record, since this
10 photograph won't be here, can you describe the
11 area that you have identified as accessible by
12 diamondback terrapins?

13 A: Certainly. I have identified the area that is
14 approximately just south of what I'll call the
15 Cassique Creek on the other side of the Kiawah
16 River. From that point extending in a westerly
17 and southerly direction towards the inlet, the
18 Captain Sam's inlet. Effectively beyond the end
19 of the proposed sheet pile wall.

20 Q: And so that I understand your response to The
21 Court, that area is accessible in your opinion
22 as a wildlife scientist to a reasonable degree
23 of scientific certainty because there is no
24 vertical escarpment there greater than a certain
25 height?



1 A: That and there is suitable nesting habitat in
2 some areas of Captain Sam's that would motivate
3 a reproductively active family to enter the
4 area.

5 Q: Oh, in comparison to the distance of the sheet
6 pile wall that you testified earlier, would this
7 site that is available for terrapin access after
8 construction of the wall be -- can you quantify
9 it in terms of the wall or some other manner?

10 A: Well, metric that I've measured this area is
11 1,700 feet.

12 Q: Yes, sir.

13 A: And then if we know that this is 2,300 feet,
14 then the majority and -- there it is. There is
15 a significant area, at least in the 1,700 feet,
16 and then -- because I haven't measured it
17 further around the inlet, you would assume that
18 this measurement right here appears to be
19 similar to this measurement here, so.

20 Q: So in your estimation, the site available for
21 terrapins to access Captain Sam's Spit after
22 construction of the sheet pile wall is equal to
23 a distance greater than that which is being
24 allegedly removed by the sheet pile wall?

25 A: Yes.



1 Q: After construction of the sheet pile wall, which
2 you've testified, won't impact terrapin access
3 to the spit because they can't cross the current
4 escarpment. There will still be greater than
5 1,700 feet of accessible terrain?

6 A: Yes. There is as much or more available
7 distance for them to access as compared to the
8 footprint of the 2,348 foot sheet pile wall.

9 Q: Have the methods that form the basis of your
10 opinions today been utilized by other wildlife
11 scientists to conduct similar analysis?

12 A: Yes. Wildlife science is an evolving scientific
13 discipline. What we're trained in provides us
14 the foundation, both to begin to understand
15 certain ecological processes and wildlife
16 populations, but it also, at Ph.D. level,
17 provides us with the tools to stay current with
18 the research to understand what are the new
19 insights into how we should manage wildlife
20 populations. And that's something I'm engaged
21 in virtually every day and every week, most
22 importantly so that I can inform myself to
23 better enable my -- meet the objectives of my
24 land owners, which is ecological enhancement of
25 habitats for wildlife populations.



1 Q: And during that work period that you identified
2 earlier when we were talking about when you
3 began your professional work, have wildlife
4 scientists consistently applied that method to
5 the type of evidence involved in this case?

6 A: Yes. Ones that want to stay current and abreast
7 of the literature, and the current state of
8 science in their discipline.

9 Q: And do those techniques function as quality
10 control procedures to enhance reliability of
11 opinions formed based on those techniques?

12 A: I would say so.

13 Q: And are the techniques that you've utilized
14 consistent with the method of recognized
15 scientific law and procedure in the fields of
16 wildlife management, wildlife science, and
17 population dynamics?

18 A: Yes.

19 **MR. GRESSETTE:** That's all I have, Your Honor, thank
20 you.

21 **PROFFERED TESTIMONY CONCLUDED.**

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

23 **MR. CHURDAR:** I don't have any questions, Your Honor.

24 **MS. ARMSTRONG:** I definitely have quite a few
25 questions, Your Honor. I'm gonna need to take



1 a restroom break before I can start.

2 **THE COURT:** I figured that's what you were about to
3 say. I was looking to you to hear -- hear your
4 response. Okay. Let's take a five or ten --
5 well five minute break.

6 **MS. ARMSTRONG:** I'll try and make it back that
7 quickly. Your Honor knows I have to go all the
8 way downstairs to use the bathroom ---

9 **THE COURT:** Okay. Well then I'll recognize that.

10 (A break was taken from 3:40 p.m. until 3:56 p.m.)

11 **COURT REPORTER:** All rise.

12 **THE COURT:** Y'all be seated. Thanks.

13 **MS. ARMSTRONG:** Thank you, Your Honor. I have one
14 quick clarification I wanted to make with
15 counsel. I wasn't sure whether we had
16 Petitioner's Exhibits 18 and 19 introduced into
17 evidence, and I checked with the court reporter,
18 and she said that we had although I was a little
19 unclear in my notes about whether they were
20 admitted for notice of inquiry or for the truth
21 of the matter.

22 **MR. WALKER:** They were both admitted.

23 **MR. GRESSETTE:** With limitations.

24 **MS. ARMSTRONG:** They were both admitted fully?

25 **MR. GRESSETTE:** But limited. Petitioner's 18 and 19.



1 MR. WALKER: Oh, Petitioner's 18 and 19 or KDP's 18
2 and 19?

3 MS. ARMSTRONG: Our, Petitioner's.

4 MR. WALKER: Yeah, they were admitted for purposes of
5 notice to the agency. Notice and inquiry was --
6 -

7 THE COURT: Yeah.

8 MR. WALKER: --- the condition they were -- the DNR
9 and Fish and Wildlife letters.

10 MS. ARMSTRONG: Okay. That was like how I recalled
11 it, but if the court reporter had something
12 different and I wanted to -- if she's right on
13 -- I'd like her to be right, but if y'all had
14 something different in the record, something
15 different, then I'd ---

16 THE COURT: Well I will tell you that as I remember
17 it, it was under the caveat that Mr. Walker just
18 said.

19 MR. WALKER: And we'd noted it is limited.

20 COURT REPORTER: I'm sorry, I must have been looking
21 at the Respondent's list when I told you,
22 because it says 18, 19 is A, which means
23 admitted and limited. I'm so sorry, I must have
24 been looking at looking at Respondent's ---

25 MS. ARMSTRONG: No, it's okay. I just want to make



1 sure that I don't overlook something.

2 **DR. FOLK - CROSS-EXAMINATION BY MS. ARMSTRONG:**

3 Q: Dr. Folk, I would -- before we get started, I
4 just want to make sure that we are on the same
5 page because I understand you haven't been an
6 expert before in court, and for the way this is
7 gonna work, I want it to work real smoothly with
8 us, but I'm going to ask you a question and I
9 want you to listen to it carefully ---

10 A: Uh-huh.

11 Q: --- and answer the question that I ask you. Are
12 we on the same page with that?

13 A: Certainly, yes, ma'am.

14 Q: Great. Now when did -- when did the attorneys
15 for KDP first contact you about testifying,
16 providing opinions in this case?

17 A: It was sometime in the latter portion of 2016,
18 but I'm not positive of the day.

19 Q: And when did they give you all of the -- read
20 the literature that they had regarding
21 diamondback terrapins?

22 A: It was over a series of months, I don't -- I
23 couldn't ---

24 Q: Starting?

25 A: Starting certainly when they -- when they



1 approached me, and for some handful of months.
2 But I don't know specifically the time period.

3 Q: So this starting sometime from November of 2016
4 up until now, they've provided you a series of
5 articles related to the diamondback terrapins,
6 is that accurate?

7 **THE COURT:** Objection?

8 **MR. GRESSETTE:** Objection, Your Honor. You've ruled
9 on the alleged prejudice that the petitioner is,
10 I think, trying to lay a foundation for.
11 Allegedly how long we've been sending articles
12 and how long we knew that the witness was going
13 to testify, et cetera. I don't think it's
14 relevant to anything we're determining.

15 **MS. ARMSTRONG:** It's certainly relevant. I mean he's
16 talked about literature, diamondback terrapin's
17 literature that he's read and reviewed, and I'm
18 asking him when he got it and where he got it
19 from. He's testified he got it from his lawyers
20 since November of 2016 ---

21 **MR. GRESSETTE:** The only liter- ---

22 **THE COURT:** Whoa, whoa.

23 **MR. GRESSETTE:** He can tell her exactly where he got
24 all his literature, that's fine.

25 **THE COURT:** Okay.



1 A: I received some literature from them, but I
2 would say that the vast majority of the
3 literature that I've relied on is what I've find
4 through a standard review of the academic peer-
5 reviewed literature, so.

6 Q: And have you been doing work continuously for
7 KDP since November of 2016?

8 A: No. With different periods of frequency, but
9 no, not continuously.

10 Q: And how much have you billed them so far for
11 your services?

12 A: I don't know.

13 Q: Give me an estimate.

14 A: To be honest, I don't actually know because I
15 don't handle the billing in our company.

16 Q: What's your billing rate?

17 A: My billing rate is \$125 an hour.

18 Q: And about how many hours do you think that
19 you've spent working for KDP?

20 A: To be honest, I -- I don't know because it would
21 be opportunistic. I would discover an article
22 and spend an hour or two reviewing it and -- but
23 I honestly could not say.

24 Q: Do you have any idea how much time you've spent
25 in the last two weeks working on this?



1 A: Because I'm not -- I'm skilled at -- at
2 answering questions in the legal environment, I
3 spent some to understand how this environment
4 works.

5 Q: Roughly how much time?

6 A: I would probably spend three -- two, three, four
7 hours a day maybe. I did that on vacation
8 several weeks ago when I completely unplugged,
9 so there have been some periods of time where I
10 haven't done anything.

11 Q: You don't keep track of your time?

12 A: I do, but I do not keep up with -- I have an
13 assistant that handles my paycheck and deposit
14 and I just don't -- I don't pay attention to
15 that. I know ---

16 Q: You keep track of time, you don't submit it to
17 anyone?

18 A: No, I do. I submit it to my assistant and --
19 but at a broad overview I don't, as a routine,
20 go back and review how much time over multiple
21 months I've spent on a project.

22 Q: You received -- the checks do come from KDP that
23 are made to Folk Land Management, though, don't
24 they?

25 A: They are.



1 Q: Okay. And who deposits those?

2 A: My assistant.

3 Q: And you don't see those at all?

4 A: No, I don't actually.

5 Q: You don't look over the record of ---

6 A: I have an assistant that I trust explicitly and
7 she has handled my business financial affairs
8 suitably.

9 Q: You don't track income or expenses going out of
10 your account?

11 A: At a broad quarterly level we do over multiple
12 projects, but I -- many of my relationships with
13 my clients are long-term. We've had some
14 clients we've worked for for 30 years, and so I
15 don't have very discreet start/stop projects.
16 Those projects will cost this amount of money or
17 this project will cost that. Management is an
18 ongoing effort, so there are times when I'm more
19 involved and then times when I'm less involved
20 with management and conservation work. I have
21 a very distinct luxury of working for clients
22 that don't require me to say exactly how much is
23 this going to cost and I'm not going to pay a
24 penny more, so.

25 Q: And some of those clients have the luxury of



1 paying you whatever it is that you're billing
2 them or KDP, right?

3 A: Certainly.

4 Q: Certainly. Would you -- if you had to give a
5 best guess, would it be over 5,000?

6 A: Likely, but I'm not certain because I have not
7 looked at that.

8 Q: Have you heard of the term biostitute before?

9 A: (Shakes head.)

10 Q: You've never heard of that term ever?

11 A: I believe I have, but I would ask for you to
12 define it for me.

13 Q: You have heard of it, you just don't know what
14 it means?

15 A: I believe I know what it means, but I ---

16 Q: Okay. What do you think it means?

17 A: I believe it means somebody that's willing to
18 selectively and opportunistically look at
19 science on a topic and come up with this -- the
20 answer that is perfect for the client.

21 Q: Okay.

22 A: And so I think it gets to an ethical question.

23 Q: We do have the same understanding, then, Dr.
24 Folk, that's good to know. I want to ask you --
25 there was thesis that was prepared by a guy



1 named Timothy Zimmerman. It's been marked as
2 Petitioner's Exhibit Number Eight. It was
3 something that your -- that the attorneys gave
4 to you. Do you remember receiving that?

5 A: I do.

6 Q: And you don't disagree that it's the only
7 research that's been done on diamondback
8 terrapin nesting at Captain Sam's Spit, do you?

9 A: I do not disagree that it is the only research
10 on Captain Sam's ---

11 Q: And it's ---

12 A: --- for nesting females.

13 Q: And you don't disagree that it's the only
14 published peer-reviewed article related to
15 diamondback terrapin nesting on Captain Sam's
16 Spit, do you?

17 A: No.

18 Q: Okay. Now ---

19 **MS. ARMSTRONG:** Harvin, could you turn the projector
20 on, please?

21 Q: So you had an opportunity to review Zimmerman's
22 thesis, haven't you?

23 A: Yes.

24 **MR. GRESSETTE:** Your Honor, the witness hasn't
25 testified he relied on this article. I mean



1 it's ...

2 **THE COURT:** She's got wide latitude on cross-
3 examination.

4 **MR. GRESSETTE:** You're right. That's fine.

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

7 Q: All right. And, Dr. Folk, do you recognize this
8 diagram from the Zimmerman thesis?

9 A: I ---

10 Q: The cover of the Zimmerman thesis?

11 A: I do.

12 Q: You do remember seeing that?

13 A: Uh-huh.

14 Q: And that's where Mr. Zimmerman identified the
15 area where he identified the majority of
16 diamondback sea turtle nesting on Kiawah -- on
17 Captain Sam's Spit, isn't it?

18 A: I would identify that as areas where he found
19 sufficient number of diamondback terrapin nests
20 to answer his hypothesis in his thesis.

21 Q: Okay. He was asking where the majority of
22 diamondback terrapins nest, what the best
23 habitat was for nesting?

24 A: No, that was not my impression from that thesis.

25 Q: It's not?



1 A: No.

2 Q: Okay. What was your impression?

3 A: My impression is he was trying to answer an
4 evolutionary question, which was optimal egg
5 size theory. In general, both reptiles and
6 birds that lay eggs have an evolutionary
7 dilemma, do you lay fewer, more well-provisioned
8 eggs, such that those hatchlings might have a
9 greater survival rate, or do you lay fewer less-
10 provisioned eggs with the thought that a greater
11 number of offspring would survive and contribute
12 to the next generation. He had data sets that
13 he had taken from the literature from I believe
14 New Jersey and Florida and wanted to ask how
15 optimal egg size theory might vary across the
16 latitudes along the East Coast.

17 Q: And as part of that, he had to identify where
18 diamondback terrapins were nesting and where it
19 was a good habitat for them to nest, isn't that
20 true?

21 A: I think to do that would mean that he would have
22 considered the whole -- the whole breadth of the
23 area. And my -- to answer those sorts of
24 questions, you need sufficient sample sizes and
25 he found sufficient sample sizes to answer that



1 evolutionary question in those areas.

2 Q: In those areas on Captain Sam's Spit?

3 A: Yeah.

4 Q: Okay. You were talking about -- do you know
5 what kind of habitat diamondback terrapins like
6 to lay their eggs in?

7 A: Uh-huh.

8 Q: And where do ---

9 **MR. WALKER:** You have to answer verbally.

10 A: Yes, yes, I do.

11 Q: How did you -- where did you come by that
12 knowledge, by reading it in literature?

13 A: That and my training, as well. When we go
14 through school, we're trained in the habitat
15 requirements of a variety of organisms.

16 Q: They like to nest in sandy habitat with low
17 shrubby vegetation, right?

18 A: Sandy habitats are the variable to lay that
19 nest, as well as above areas that might be
20 frequently inundated with water.

21 Q: Okay. And you testified earlier that they would
22 have difficulty nesting along the banks in the
23 areas that were identified by Mr. Zimmerman as
24 nesting areas for diamondback terrapins because
25 of the escarpment, is that what you said?



1 **MR. GRESSETTE:** Objection, Your Honor. The witness
2 on direct never referred to the area defined by
3 Zimmerman.

4 **THE COURT:** Well, I'll sustain that.

5 **Q:** Okay. The area that you just looked at that's
6 defined by Zimmerman, you looked at the images
7 on direct examination and there are -- there's
8 an escarpment in front of those areas, wouldn't
9 you agree?

10 **A:** I believe so. Without having matched
11 Zimmerman's darker areas that he denoted with --
12 with an aerial photo, I couldn't say
13 specifically where those are. It's sufficient,
14 I mean, they are on Captain Sam's, but exactly
15 their location, I -- from a simple ink drawing,
16 I can't tell exactly where.

17 **Q:** Okay. So you're not able to say whether any of
18 that area identified on this drawing, and it
19 looks like it's taken from some sort of a plat
20 or survey, it's not hand -- the actual layout of
21 the landscape isn't hand drawn, is it?

22 **A:** Not hand drawn, it was perhaps done through
23 AutoCAD or some sort of computer, but it's
24 simple -- a simple black background with white
25 lines shown.



1 Q: Are you able to tell if any of that area that's
2 identified in this -- by Zimmerman as the
3 nesting area, is any of that along -- is it
4 along the banks of the Kiawah River?

5 A: Well, certainly, those polygons about that white
6 portion that says Kiawah River.

7 Q: And I want to look at the larger of the polygons
8 right here (indicating).

9 A: Uh-huh.

10 Q: Are you able -- do you know whether there is an
11 escarpment in front of that area on the Kiawah
12 River in that location?

13 A: This was -- since it was done in '92, I imagine
14 in the early '90s, and I'm not sure what things
15 looked like in that area back in the early '90s,
16 so I don't -- I'm not sure the landscape that he
17 was looking at.

18 Q: I'm asking in today's time. I know you didn't
19 go out there in 1992 ---

20 A: Uh-huh.

21 Q: --- I'm asking like right now today, you
22 testified that you went out to the site and you
23 observed it, right?

24 A: Uh-huh.

25 Q: Okay. So to the best of your ability to think



1 about what you saw when you were on site and
2 relate it to this area on the Kiawah River in
3 this drawing, do you have -- are you able to say
4 what the landscape looks like along that area?

5 A: Yes, you know, I assume that this is the creek
6 that we've been referring to and so that it
7 would continue back at some distance.
8 Beachwalker Park isn't mentioned here, so.

9 Q: And that's all right now is escarpment, the
10 vertical escarpment that you were talking about?

11 A: Yes.

12 Q: And you testified in your opinion you didn't
13 think the turtles would be able to get up a
14 vertical escarpment, is that what you testified?

15 A: Not when it's in excess of two to three -- up to
16 six or eight feet, no.

17 Q: And you formed that opinion how?

18 A: There were a variety of ways, but most
19 importantly, that some of the strategies to keep
20 terrapins off of roads, adult -- reproductively
21 active adult females, are simple barriers of six
22 inches and so if they can't cross six inches to
23 get into a roadway, then a measurement -- a
24 vertical measurement greater than six inches
25 would be inaccessible, as well.



1 Q: And those vertical barriers are manmade barriers
2 in those articles that you're talking about,
3 aren't they?

4 A: Oh, they were, yeah.

5 Q: Yes, they weren't natural sand, which is a lot
6 different than a hard structure, you would agree
7 with that, wouldn't you?

8 A: They're different materials, but it is a
9 vertical -- vertical face.

10 Q: I think my question was there's a difference
11 between a hard structure, whether it's steel,
12 whether it's wood, whether it's rock vertical
13 structure versus a sandy vertical structure.
14 That's a very different habitat, isn't it?

15 A: Certainly, it's a different material.

16 Q: I want to talk a little bit about what the area
17 that we've been talking about and that I'll
18 represent has been identified also. I want you
19 to work on this assumption with me because it
20 was testified to earlier in this case, you were
21 sequestered during his testimony, but Dr.
22 Gibbons testified, I'll represent, that
23 diamondback terrapins nest all along this area
24 of Captain Sam's Spit. So let's go ahead and
25 operate under that assumption, okay.



1 **MR. GRESSETTE:** Objection, Your Honor, I don't think
2 that's what he testified to. If she wants to
3 present it as a hypothetical, that's one thing.
4 If she wants to present it as Dr. Gibbons'
5 testimony, she's going to have to do better than
6 that because I don't think that's what he
7 testified to.

8 **MS. WHITE:** Okay. I'll present it as a
9 hypothetical.

10 **THE COURT:** Okay.

11 **Q:** Actually, let's back up. You were talking about
12 the area where the steel sheet pile wall is, can
13 you show me -- draw where that is on this
14 drawing which is Respondent's Exhibit Number 29?

15 **(Respondent's Exhibit Number 29 was introduced into**
16 **the record at this time.)**

17 **A:** Certainly. I'll attempt to select a color
18 that's not already used. And I'll step just
19 inland just so it's clear of those other lines.
20 I might have gone just a little bit too far
21 there, but that will work. (Witness does as
22 requested.)

23 **Q:** And was your testimony that that whole area is
24 currently inaccessible to diamondback terrapins
25 because of the escarpment?



1 A: The escarpment and those sandy areas are
2 currently flooded and so nests, those nests
3 cannot sustain periodic flooding from the tide
4 if you're talking about at the toe of the
5 escarpment.

6 Q: Now, I want to look at the dates on these lines.
7 Do you see that legend down there. Are you able
8 to read it or do you need to blow it up for you
9 a little bit?

10 A: No, I can see it.

11 Q: Okay. Let's see, it looks like the black line
12 was in 1979, and the orange or red line in '84,
13 the green line in '92, a pinkish line in '99, a
14 blue line in '08, and a yellow line in 2014.
15 Are you able to tell looking at that chart and
16 the lines on Petitioner's -- Respondent's
17 Exhibit Number 21 (sic) what's happening to the
18 bank of the Kiawah River over time?

19 A: The bank is moving from top to bottom.

20 Q: Is it -- does that indicate that it's eroding,
21 it's been eroding consistently from 1979 to
22 2014?

23 A: I would assume, but I've not been out there over
24 that time period, so.

25 Q: Does it look like that's what this map



1 represents to you that it's eroding along the
2 Kiawah River?

3 A: I would presume that.

4 Q: And when an area like the Kiawah River's
5 eroding, you're going to a scarp line, aren't
6 you?

7 A: Uh-huh.

8 Q: So basically there's been a scarp line there
9 since -- at least since 1979 along the Kiawah
10 River, hasn't there been?

11 A: I don't know whether it was a vertical
12 escarpment or -- I don't know what that -- that
13 margin line represented by black, red, green,
14 pink, what that looked like back in 1979 going
15 forward until recently.

16 Q: But if it's eroding, there's going to be some
17 escarpment of varying heights?

18 A: Sure, it's possible, yeah.

19 Q: Just like there are varying heights of the
20 escarpment right now, aren't there?

21 A: Sure.

22 Q: Sometimes, some places the escarpment's very,
23 very low and some places it's high?

24 A: In only minut areas is it low. The vast
25 majority of it is two foot or greater.



1 Q: You talked a little bit about -- well, actually,
2 let me ask you a few more questions about
3 diamondback terrapin. You haven't actually ever
4 observed them on Captain Sam's Spit, have you?

5 A: No, I've not intentionally gone out during
6 periods when I would expect to find them.

7 Q: And you haven't observed whether they were --
8 physically whether they're able to nest on
9 Captain Sam's Spit or not, have you?

10 A: No, other than the comparison of the present
11 habitat to commonly defined habitat
12 requirements.

13 Q: And is that -- you're talking about the patch
14 occupancy, is that the tool that you utilized?

15 A: No. The patch occupancy analysis related to a
16 different type of question rather than nesting
17 habitat.

18 Q: That related more to just whether the species
19 would exist there at all, right?

20 A: Exactly.

21 Q: Okay. And it's true that the detection under
22 the patch -- the patch work in that -- patch --
23 work patch over ---

24 A: Patch occupancy modeling.

25 Q: Patch occupancy modeling. It's true that



1 detection isn't perfect with that system, is it?

2 A: It isn't, but the statistical technique allows
3 for non-detection probabilities.

4 Q: Okay. One of the problems is that there is a
5 bias by false absences. In other words, when
6 you're not there -- when you're there and you
7 don't see them, then you've got false bias,
8 correct?

9 A: Potentially, although the statistical technique
10 and the lack of observability of an individual
11 of a wildlife -- of a species has been something
12 that's been confronted by wildlife researchers
13 for some time and there are some quite powerful
14 statistical tools to accept that, so we are not
15 observing all of the organisms there.
16 Therefore, let me estimate that probability of
17 detection so that that can then help lessen any
18 bias in the ultimate probabilities that come out
19 of the patch occupancy model.

20 Q: And the basis is even more pronounced when
21 you've got a species that's elusive and rare,
22 isn't that true?

23 A: It depends on the methodology that the
24 investigator employs. You could go out very
25 casually to observe terrapins and certainly not



1 observe them or some understanding of their
2 biology and when they're likely to be observed,
3 you can incorporate that into the methodology,
4 so it's difficult to say in a broad scale
5 because this is a sometimes secretive organism
6 that you can't estimate those probabilities at
7 all.

8 Q: But it makes it more challenging when you've got
9 an elusive animal that you're not able to
10 observe, that bias is more pronounced in the
11 literature, isn't that what it indicates?

12 A: All of wildlife research is difficult. There
13 isn't anything that's easy about it. Dealing
14 with species and -- so I wouldn't -- sure, it's
15 difficult as is all of wildlife science when
16 you're trying to deal with documenting where
17 species -- where individuals of a species
18 utilize certain habitats.

19 Q: And it's even more difficult when you don't
20 actually study a species year in and year out to
21 be able to get good numbers on them, true?

22 A: I'm not ---

23 Q: Do you want me to rephrase my question?

24 A: Sure, yeah.

25 Q: Okay. So if you were out there collecting data



1 on diamondback terrapins year in, year out for
2 30 years, you would probably have a better
3 understanding of the existence of that
4 population than would somebody that's utilizing
5 a method that's not -- a lot of statistics
6 involved in it, but not actually observational
7 data?

8 A: I -- I wouldn't say that. The collection of
9 data and observation is one component of
10 scientific inference. You need to analyze that
11 as data based upon a certain hypothesis and so
12 observation and data collection is just the
13 first couple of steps of the scientific method,
14 so.

15 Q: And gives you true numbers of actually what's
16 there, for example, how many terrapins have been
17 caught, how many have been banded, how many
18 nests have been observed at a particular site,
19 to get that kind of hard numbers from doing that
20 kind of work, right?

21 A: Certainly. Those are simple statistics that
22 just describe what had been done, but don't
23 describe a process in general.

24 Q: Right. And we're talking about population, the
25 number that ---



1 A: Yes.

2 Q: --- could exist in an area?

3 A: Yes.

4 Q: Right. So if you're actually out there
5 collecting data about what -- how many exist,
6 how many terrapins exist, how many dolphins
7 exist, how many nests exists, how many nests
8 have been created, you have actual real numbers
9 instead of statistical model numbers, correct?

10 A: You do, but the accepted estimation of an
11 abundance measurement, whether that abundance
12 measurement is number of individuals or number
13 of nests, what is accepted in the peer-reviewed
14 literature is those data on the observations of
15 that occurrence and then the analysis of that.
16 So just to say I've collected this data,
17 therefore, this is the number is not appropriate
18 in modern conservation and population analysis,
19 so.

20 Q: You've never observed these things occurring;
21 you haven't observed a diamondback terrapin
22 nesting or seen diamondback terrapin tracks
23 going into a nest area, have you?

24 A: No, there ---

25 Q: Okay, no. And so you don't know -- you don't



1 know from an observational standpoint whether a
2 diamondback terrapin would actually be able to
3 scale a sandy bank or not, do you? You're
4 making a prediction.

5 A: I am making the prediction that based off of
6 other population protection measures that
7 utilize six foot vertical obstruction, that
8 measurements greater than that would also be
9 inaccessible.

10 Q: I think you -- we may have touched on this a
11 little bit early on, but do you know what the
12 reproductive numbers are of diamondback
13 terrapins?

14 A: The reproductive numbers for terrapins?

15 Q: Yeah. Well, for example, how -- how many eggs
16 do they lay in a normal nest?

17 A: I think it'll vary, but it might be twelve to
18 fourteen, maybe greater, maybe less.

19 Q: Do you know when they're sexually mature, at
20 what age?

21 A: Yes. In most estimates are anywhere from three,
22 four, five years old.

23 Q: And what are the -- do you know what the
24 relative egg and hatchling sizes are?

25 A: Because it varies -- excuse me. Because it



1 varies, it can be, you know, several centimeters
2 to maybe slightly larger.

3 Q: And you talked about females being the primary
4 species that you looked at or that you look at
5 as a wildlife scientist, but you would agree
6 with me that males could have a substantial
7 effect on population dynamics, especially when
8 there are human influences that result in biased
9 sex ratios, wouldn't you?

10 A: I would -- that question is -- there are a lot
11 of factors that go into determining whether --
12 the importance of males in population dynamics.

13 Q: I think that you testified and maybe you can --
14 I may not have gotten it all down, but it
15 sounded like you were unsure about the extent of
16 the impact on diamondback terrapins as a result
17 of this project, is that -- tell me -- if you've
18 got confidence level about the extent of the
19 impact, please tell me.

20 A: I think that I would make two statements about
21 my expectation there. One is that where the
22 proposed sheet pile wall is going is
23 inaccessible currently and would be with --
24 potentially would be with the wall. The other
25 is nobody's directly addressed the magnitude of



1 reproduction at Captain Sam's. And, in fact,
2 that's been proposed -- if that road goes
3 through there, through the center of Phase 1,
4 then that could represent a threat to
5 reproductively active females as -- to deal
6 with that, we've developed the methodology for
7 a couple of years to monitor access of nesting
8 terrapins onto Captain Sam's to inform whether
9 the design of that road needs to have some
10 barrier to prevent terrapins from reaching it.

11 Q: So it's difficult for you to really form a full
12 opinion because you don't know how much the
13 structure or the road's going to affect
14 terrapins because you don't have enough
15 information to do that.

16 A: I think I know the first question to address
17 that, which we have is what are the number of
18 terrapins that come to Captain Sam's.

19 Q: As far as the bottlenose dolphins, let's work on
20 the assumption that the area where the proposed
21 rebutment's going to be constructed and
22 eventually exposed in the critical area, if that
23 is a site that's heavily utilized by bottlenose
24 dolphins on a daily basis, your opinion is that
25 that would not have any harmful effect on them



1 at all to lose a heavily used on a daily basis
2 foraging site?

3 A: There's been no literature to evaluate if one
4 foraging site is removed from the range of
5 foraging sites that an individual utilizes how
6 that influences female fitness or overall
7 population dynamics.

8 Q: So there's no literature on it at all, right?

9 A: There's no literature other than they use a
10 variety of foraging techniques and so ...

11 Q: So the basis of your opinion isn't on any
12 literature that says that removal won't harm
13 them, you're just -- you don't have any basis
14 for that opinion?

15 A: For that specific question, yes.

16 Q: Okay. Do you know what wildlife scientists have
17 studied and published literature on bottlenose
18 dolphins in South Carolina?

19 A: Uh-huh.

20 Q: Who are those people?

21 A: Dr. Young is one. I think Sibler might have
22 been another one. I can't recall all the
23 specific names.

24 Q: You're talking about Dr. Young at Coastal
25 Carolina ---



1 A: Uh-huh.

2 Q: --- University? Okay. And is he somebody that
3 you know to be conducting research and be very
4 knowledgeable about bottlenose dolphins?

5 A: He certainly has studied bottlenose dolphins.
6 I haven't necessarily seen population level
7 analyses in his work.

8 Q: You talked about your work, a big part of the
9 goal is to enhance habitat, is that what you
10 testified to earlier?

11 A: Uh-huh.

12 **THE COURT:** Say yes or ---

13 A: I'm sorry, I apologize. Yes, that is -- yes.

14 Q: Do you understand the scope of the permits and
15 authorizations that you're here advocating for
16 today?

17 A: Yes.

18 Q: So it's a road, it's a wall, and it's the
19 development of 26 houses, right?

20 A: Yes.

21 Q: Okay. And now even if the nesting -- even if
22 the diamondback terrapins could get into the
23 area that we were talking about where you
24 thought that they could go to nest, I know this
25 isn't a full picture, but if you could kind of



1 show us generally where you were talking about
2 that you felt that they would still be able to
3 go and nest?

4 A: I have -- I've not made a statement of where
5 they would specifically -- where they would go
6 nest, but rather the access to Captain Sam's in
7 general. Nobody has evaluated the overall
8 reproductive effort that occurs on Captain
9 Sam's, so.

10 Q: And where would they go? Where could they go --
11 -

12 A: They ---

13 Q: --- in your opinion?

14 A: They could go through a variety of areas,
15 especially areas with open sand. You can see
16 some of these denoted in white, so any area
17 that's got a microsite condition where they're
18 able to bury their eggs above high water, then
19 they would be able to nest.

20 Q: And do you know what's going to be in those
21 areas that -- where your little blue lines are
22 headed towards? Do you know what's going to be
23 located there?

24 A: I do. I know that some of the infrastructure --
25 well, the infrastructure for the proposed Phase



1 development.

2 Q: Houses are going to be there, right?

3 A: It will be in certain areas, yes.

4 Q: Now, this construction of the wall that's going
5 to be exposed in the critical area, a road,
6 water lines, sewer lines, and houses, those
7 aren't going to enhance the habitat of Captain
8 Sam's Spit, are they?

9 A: No, in those specific sites, not, but it
10 represents the opportunity to enhance the rest
11 of the area.

12 Q: All of the areas that are going to be impacted
13 by this project, which I'm going to represent to
14 you is about, I think, 12.8 acres of land
15 disturbance, that's going to convert completely
16 untouched, good quality habitat in -- and it's
17 going to take those valuable aspects of that
18 habitat away, right?

19 A: For those specific acres, yes.

20 Q: Okay. And do you remember preparing a letter
21 that you gave to Kiawah Development Partners in
22 2008?

23 A: You mentioned it earlier and other than I likely
24 wrote it, I don't remember the specifics
25 contained within it.



1 Q: Do you want to look at that? Because I'd like
2 to ask you some questions about exactly what you
3 meant in this letter and I can ---

4 A: Sure.

5 Q: --- show it to you.

6 A: Sure.

7 Q: Okay.

8 **MS. ARMSTRONG:** If you can go ahead and put it up.

9 Q: This is the front of the letter. It's marked
10 received by DHEC in September -- on September
11 2nd of 2008, and it's a letter dated June 23rd,
12 2008. It's addressed to Mr. Ray Pantlik at
13 Kiawah Development Partners, and it's got your
14 name on it. Does this look like the letter that
15 you wrote, Dr. Folk?

16 A: It does. It has my signature on it.

17 Q: Okay. And you see that first full paragraph?
18 This letter was in reference to a rebutment
19 bulkhead structure along the Kiawah Riverbend,
20 wasn't it?

21 A: I think it was a different permit.

22 Q: And it was about -- the structure was about
23 2,700 linear feet, do you remember that?

24 A: I saw it in the first page of the letter, but
25 that's -- yeah, that's my only recollection.



1 Q: Okay. So it's in generally the same area as the
2 structure that we're talking about today except
3 it's longer and it's actually going to be built
4 on the critical area. But aside from that, you
5 would agree with me it's still along the same
6 banks of the Kiawah River, correct?

7 A: Certainly.

8 Q: Okay. And you had -- they requested you provide
9 them your opinion about impacts on piping
10 plovers within this letter?

11 A: Uh-huh.

12 Q: Do you remember that? But you actually had an
13 additional concern that was unsolicited, didn't
14 you?

15 A: I'm assuming -- can I read that second
16 paragraph?

17 Q: Yeah, please read it out loud to us, this is
18 something that you wrote. Go ahead.

19 A: Sure. One additional comment concerns post
20 construction conditions immediately behind the
21 proposed bulkhead. The natural condition for
22 this area consists of relatively low plant
23 density and the majority of the area in open
24 sand. This vegetative architecture is critical
25 to many species that exist in the area of



1 proposed activities. I recommend that post
2 construction activities should restore as much
3 area as possible to preconstruction conditions.

4 Q: And at the time you wrote this letter, there
5 wasn't going to be anything at all constructive
6 behind the revetment/bulkhead, correct?

7 A: I don't remember. It was ---

8 Q: Right now, in that habitat that you were
9 referring to as the vegetative architecture
10 that's critical to a number of species, in that
11 area there's going to be a road, right?

12 A: Uh-huh.

13 Q: And talking also about the quality of the
14 habitat, in your letter you -- actually, are you
15 familiar -- you know Dana Beach?

16 A: I do.

17 Q: Are you familiar with his book, *Deveaux*?

18 A: I know it exists; I haven't purchased a copy of
19 it. Actually, I haven't looked at it. I've
20 heard good things about it.

21 Q: Okay. Dr. Folk, have you had an opportunity to
22 review any of the letters that were submitted by
23 the Department of Natural Resources or the Fish
24 and Wildlife Service with respect to this
25 project?



1 A: I believe so. I believe that was a portion of
2 what I reviewed.

3 **MS. ARMSTRONG:** Give me just a moment, Your Honor.
4 Sorry. Your Honor, if I may just take less than
5 a five minute break, we have issued a subpoena
6 and I see that counsel's here related to the
7 subpoena and are trying to coordinate with the
8 witness I mentioned earlier that we would have
9 as a rebuttal witness, and I want to -- feel
10 like I need to tend to that. If we can just
11 take a quick break.

12 **MR. WALKER:** Oh, that's fine. Are you at liberty to
13 disclose who the witness is?

14 **MS. ARMSTRONG:** Susan Davis.

15 **MR. WALKER:** Okay.

16 **(A break was taken from 4:39 p.m. until 4:44 p.m.)**

17 **MS. ARMSTRONG:** Sorry about that, Your Honor, I
18 apologize.

19 Q: I think where we left off was talking about
20 those letters. Are you aware of what the
21 opinions are of the Fish and Wildlife Service
22 regarding the project and its impacts on
23 endangered species?

24 A: Not specifically. I remember looking at the
25 letters, but I don't recall specifically what



1 was written in those letters.

2 Q: Do you know what a take is, Dr. Folk?

3 A: I do under the Endangered Species Act ---

4 Q: Okay.

5 A: --- that context.

6 Q: And what is a take under the Endangered Species
7 Act?

8 A: It's where certain activity will take an
9 individual of an endangered species or prevent
10 them from doing certain life cycle activities.

11 Q: I've handed the witness Petitioner's Exhibit
12 Number 19.

13 **(Petitioner's Exhibit Number 19 was introduced into**
14 **the record at this time.)**

15 Q: Do you see the letter dated January 11, 2012?

16 A: From the Fish and Wildlife Service?

17 Q: Yes.

18 A: Yes.

19 Q: And if the Fish and Wildlife Service in this
20 letter's indicating that the project may lead to
21 a take as defined by the Endangered Species Act,
22 would you disagree with that?

23 **MR. GRESSETTE:** Objection, Your Honor. The document
24 has come in only for notice to the parties
25 involved and so by having the witness publish



1 it, he's publishing the hearsay and I believe
2 the petitioner's asserting it for the truth of
3 the matter.

4 **THE COURT:** It comes in in its entirety then. I
5 mean, she can open -- I think you asked for the
6 limitation, didn't you?

7 **MR. GRESSETTE:** No, Your Honor, this is Petitioner's
8 Exhibit. It was limited at our request.

9 **THE COURT:** Oh, oh, okay.

10 **MR. GRESSETTE:** And so now I think she's attempting
11 to have him read it into the record and to use
12 it for the truth of the matter asserted with
13 this witness when she wasn't allowed to with the
14 corporate witnesses.

15 **MS. ARMSTRONG:** I'm just asking whether he would
16 agree or disagree with it being a take.

17 **THE COURT:** I don't -- I don't think I have a problem
18 with that.

19 **MR. GRESSETTE:** Okay, Your Honor.

20 **THE COURT:** Overruled.

21 A: Can you direct me to exactly what you would like
22 for me to look at? I'm looking through this,
23 but I'm ---

24 Q: Sure, sure. It's the last sentence of the first
25 paragraph and I'm wanting to know in this letter



1 there's concern about the piping plover. Is
2 that what -- they're talking about the piping
3 plover in this letter, is that ---

4 A: Piping plover, yeah. It's one of the species
5 mentioned in this letter.

6 Q: And I'm wondering, their conclusion in the last
7 sentence of the first paragraph where they -- do
8 you agree with their conclusion that the -- or
9 their belief that the project may lead to a take
10 as defined by the Endangered Species Act?

11 A: I -- at least what I can see here, they haven't
12 defined how that take would occur, so I'm -- I'm
13 not certain as to ...

14 Q: Do you disagree -- would you disagree with their
15 determination?

16 A: That the critical habitat for plovers is not
17 within the footprint?

18 Q: No, about the project may lead to a take?

19 A: Don't think I could form an opinion right now
20 because I'm not sure the mechanism for that
21 take, what is the activity or the action that
22 is going to lead to that take?

23 Q: Do you see the top of this letter where it
24 indicates that it's in reference to Cape Charles
25 Development Phase 1, Kiawah Island, Charleston



1 County?

2 A: I do.

3 Q: Do you understand that that's the same project
4 that we're talking about here today in Court?

5 A: I do.

6 Q: So this letter -- you understand this letter is
7 referring to this particular project?

8 A: It is, yes.

9 Q: And would you believe that the Fish and Wildlife
10 Service is authoritative when it comes to
11 Endangered Species Act determinations?

12 A: They certainly have expertise, yeah.

13 Q: You had some concern about the analysis, I think
14 is what you were saying, how they determined a
15 take. If you would look at the second letter
16 dated October 4th, 2011 ---

17 A: Uh-huh.

18 Q: --- in Petitioner's Exhibit 19 and if you'd look
19 at the middle paragraph that talks about -- that
20 starts off the piping plover winter and
21 migration habitat.

22 A: Oh, on the second page, yeah.

23 Q: And read that ---

24 A: I was on the first page. Would you like for me
25 to read that aloud or just read that right now?



1 Q: I want you to read it -- you can read it to
2 yourself, because my question is -- well, you
3 indicated that you weren't sure what they were
4 talking about and I want you to know what they
5 are talking about when they give your opinion
6 and then you can tell me whether you disagree
7 with it ---

8 A: Sure.

9 Q: --- or agree with it and why.

10 A: Okay. The only thing I see is the last sentence
11 that says the services map ---

12 **THE COURT:** Yeah, go ahead.

13 A: Okay. The Service is concerned that the
14 proposed project development may result in
15 impacts of sea turtle nesting habitat and piping
16 plover migration and winter habitat through
17 future beach and inlet stabilization efforts
18 aimed at migrating excess erosion or sea level
19 rise impacts.

20 Q: Do you think that Captain Sam's Spit is an
21 appropriate place for a residential development?

22 A: I don't think I have the training to know where
23 to do that.

24 Q: I want you to look now at Exhibit Number 18,
25 please.



1 (Petitioner's Exhibit Number 18 was introduced into
2 the record at this time.)

3 Q: Do you see the letter from Department of Natural
4 Resources to Tara Maddock dated October 27,
5 2011?

6 A: I do.

7 Q: Do you see -- do you agree with the DNR's
8 statement in the very first sentence of the
9 bottom paragraph that indicates that surveys of
10 migrant shore birds in the last three decades
11 indicates that most shore birds are in serious
12 decline?

13 A: Certainly, yeah, a number of shore bird species
14 are in decline.

15 Q: Okay. And red knots have experienced about 50
16 percent decline, haven't they?

17 A: They have.

18 Q: And this serious decline is a result of habitat
19 loss, isn't it?

20 A: I -- I would expect, but I'm not positive of
21 that.

22 Q: If DNR believed that the habitat loss was what
23 was causing this serious decline, would you have
24 any reason to disagree?

25 A: Not based off -- I don't dispute their statement



1 there.

2 Q: Okay. And would you dispute their statement
3 that the habit loss and degradation comes from
4 coastal development?

5 A: I guess I'm not -- that connection I'm not --
6 you know, the footprint of the development is
7 not critical habitat for these species, so I'm
8 not sure of the mechanism that you're talking
9 about.

10 Q: Okay. Well, I'm just wanting to know because it
11 was a letter that the Department was on notice
12 and inquiry of and I'm trying to understand how
13 you would -- what the basis would be for forming
14 an opinion, your basis would be, and I'm looking
15 at the second page and the first full paragraph
16 of a letter that we were looking at.

17 A: Are you -- you're talking about this paragraph
18 that says threats to protected species? Is that
19 what you're looking at?

20 Q: Yes. And they continue to list a number of
21 different threats, but do you have a reason to
22 disagree that coastal development can result in
23 habitat loss that impacts shore birds?

24 A: I think to make a broad scale statement that all
25 coastal development is negative is not



1 appropriate to the level of question that needs
2 to be asked. And the footprint of that
3 development, where the proposed road and other
4 sorts of things will go, it's not critical
5 habitat.

6 Q: And critical habitat for piping plovers is the
7 sandy shoreline areas, isn't it?

8 A: Uh-huh.

9 Q: Okay. So that would be lands that's not -- that
10 are not developable, a house wouldn't go there
11 anyway, would it?

12 A: No.

13 Q: Okay. So really, the notion that you would have
14 development in critical area for piping plover
15 is not very realistic because we wouldn't see --
16 -

17 A: Huh-uh.

18 Q: --- houses on the beach, right?

19 A: Huh-uh.

20 Q: Thank you. Now, Dr. Folk, are you aware of the
21 controversial nature of this project?

22 A: I am.

23 Q: And you're currently the vice chair of the Board
24 of The Nature Conservancy?

25 A: I am, although my appearance here has nothing --



1 is not representing any TNC policies or board
2 positions, so.

3 Q: And the executive director -- who's the
4 executive director of Nature Conservancy?

5 A: Mark Robertson.

6 Q: Okay. And Terry Richardson, he serves on the
7 Board with you, doesn't he?

8 A: Yes.

9 Q: Do you know that Terry Richardson was on --
10 served on the Blue Ribbon Committee for
11 Shoreline Change?

12 A: Uh-huh.

13 Q: Did you know that?

14 A: Yeah.

15 Q: And did you also know that the Blue Ribbon
16 Committee recommended a permitted adoption of a
17 baseline for the coast of South Carolina?

18 A: I remember generally that was one of the
19 suggestions that came out of the Blue Ribbon
20 Panel Committee.

21 Q: And were you aware that KDP lobbied for the
22 baseline to be extended for another period so
23 that they could get the baseline redrawn
24 presumably more favorably to the development on
25 Captain Sam's Spit?



1 A: No, I was not familiar with that.

2 Q: You weren't familiar with that. Were you
3 familiar that Nature Conservancy was lobbying
4 very hard to have the baseline permanently set?

5 A: No. At that level, the Board typically does not
6 get into the daily workings of the TNC staff.

7 Q: But you know April Donnelly, she's the lobbyist
8 ---

9 A: I do, yeah.

10 Q: --- for the Nature Conservancy, right?

11 A: Uh-huh.

12 Q: But you just weren't aware that she was spending
13 a significant amount of time lobbying ---

14 A: No.

15 Q: --- to have the baseline set with respect to the
16 Captain Sam's Spit ---

17 A: No.

18 Q: --- later -- sooner than they wanted to have it
19 done?

20 A: Yeah.

21 Q: Were you aware that Mark Robertson and Terry
22 Richardson were invited guests to speak at a
23 course in coastal environmental law for the
24 University of South Carolina on Captain Sam's
25 Spit?



1 **MR. GRESSETTE:** Objection, Your Honor, relevance.

2 **THE COURT:** I don't get that.

3 **MS. ARMSTRONG:** Well, I'm getting there.

4 **THE COURT:** Well, you're going to have to tell me
5 how you're getting there because I don't ---

6 **MS. ARMSTRONG:** I'm getting there because the whole -
7 - I was there at this meeting that I'm getting
8 ready to talk to him about, this class, and
9 where the whole impetus was on identif- --
10 brainstorming ways to try and identify
11 opportunities for permanent protection of
12 Captain Sam's Spit and that the Board on which
13 he serves, members of that Board, were active
14 participants in that and I'm ---

15 **THE COURT:** But what relevance does it have for the
16 position of the Board that he serves on?

17 **MS. ARMSTRONG:** I think the ability of this witness
18 to provide reliable testimony. I mean, I'm
19 definitely going to reliability and bias of this
20 witness.

21 **MR. GRESSETTE:** If anything, Your Honor, it goes to
22 the opposite.

23 **THE COURT:** Yeah.

24 **MR. GRESSETTE:** But it's not relevant.

25 **THE COURT:** I sustain the objection.



1 **MR. GRESSETTE:** Thank you, Your Honor.

2 **MS. ARMSTRONG:** If I could have just a moment, Your
3 Honor. Okay. Your Honor, I don't understand
4 your ruling. I think it's important for our
5 case to make the proffer to show the conflict of
6 interest, so I'd like to proceed with this
7 witness and make a proffer.

8 **THE COURT:** Well, I think -- just tell me what your
9 proffer is on this one so we can just move
10 along.

11 **PROFFER BY MS. ARMSTRONG:**

12 **MS. ARMSTRONG:** Okay. Well, the proffer is that the
13 Nature Conservancy has been working on
14 identifying ways for permanent protection for
15 Captain Sam's Spit. That this witness is --
16 serves in a fiduciary role with that
17 organization and is taking now a position --
18 he's being paid to give testimony that's
19 contrary to the work of the organization on
20 which he serves and has a fiduciary duty.

21 **THE COURT:** Okay. Having heard that proffer, do you
22 amend your objection in any way?

23 **MR. GRESSETTE:** In addition to being irrelevant, I
24 think the witness testified that he wasn't here
25 on behalf of the organization upon which he sits



1 on the Board and so that the record's clear,
2 he's not being paid to give testimony. He was
3 paid to conduct analysis and to testify based on
4 the same.

5 **THE COURT:** All right. Anything else?

6 **MS. ARMSTRONG:** I don't have anything else for this
7 witness.

8 **THE COURT:** Any re-direct?

9 **MR. GRESSETTE:** No, Your Honor. Thank you.

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

11 **MR. FOLK:** Thank you, sir.

12 **REQUEST TO TAKE JUDICIAL NOTICE OF RESPONDENT'S**
13 **EXHIBIT 21:**

14 **MR. WALKER:** Your Honor, the last thing we have is to
15 have the Court take judicial notice of the
16 ordinances that we talked about with Mr. Pantlik
17 ---

18 **THE COURT:** Yeah.

19 **MR. WALKER:** --- and we'd move for the Court to take
20 judicial notice of Exhibit 21, which are the
21 ordinances of the Town of Kiawah Island
22 governing beaches. It also addressed the
23 protection of critical habitats and the
24 disturbance of critical habitats and wild
25 animals and all of that stuff.



1 **THE COURT:** Well, you, as an attorney, do you certify
2 or whatever to the Court, that those are ---

3 **MR. WALKER:** It's a true and accurate copy of the
4 current, to the best of my knowledge, I would be
5 happy to double-check that to make sure that it
6 is. I understand that it is. I looked at it.
7 It was I believe the latest update, but I'd be
8 happy to get the -- to make sure.

9 **THE COURT:** Well, I'll take judicial notice of it
10 subject to you checking again to make sure it is
11 indeed accurate.

12 **MR. WALKER:** I will confirm that to The Court, Your
13 Honor.

14 **THE COURT:** All right. Any problem ---

15 **MS. ARMSTRONG:** We'd just object because we don't
16 think it needs to come in and be part of the
17 record. In the anticipation of an appeal, that
18 seems like unnecessary information to have in a
19 record on appeal. I'm not -- we're not
20 disputing that those are rules that may have
21 been applied and certainly not by DHEC in this
22 case.

23 **THE COURT:** All right. Any response to that?

24 **MR. WALKER:** Oh, I do think they need to be -- I do
25 think that they need to be a part of the record.



1 I don't think that The Court -- The Court or any
2 court on appeal is going to take -- just say
3 that's automatically something we -- well, you
4 can just put them in.

5 **THE COURT:** Well, I don't know if I have the -- with
6 him taking judicial -- or having The Court take
7 judicial notice of it, I'm not sure if I, in my
8 Westlaw contract, that I have access to it, so
9 ---

10 **MR. WALKER:** You would not.

11 **THE COURT:** So I think -- I think it is proper.

12 **MS. ARMSTRONG:** It's publicly available, Your Honor.

13 **THE COURT:** But, I mean, I've got -- it's not for The
14 Court to go out and ---

15 **MS. ARMSTRONG:** Sure, and it's not -- it's not a law
16 that -- they could cite to it in their briefing,
17 but also it's not a law -- it's not anything
18 that DHEC had to apply. DHEC doesn't have to
19 apply the ordinance -- any ordinances in making
20 its decision at all. That's not -- really,
21 it's not relevant either. I mean, I understand
22 that Mr. Walker's argument is that ---

23 **RULING OF THE COURT:**

24 **THE COURT:** I made a comment like that to Mr.
25 Gressette earlier -- well, maybe it was to you,



1 I said -- I think you were arguing something and
2 I said well, it's not prejudicial then. So I'll
3 use that same response with you, if indeed it is
4 irrelevant, it won't be very prejudicial for me
5 to take judicial notice of the law.

6 **MR. WALKER:** Your Honor, that concludes the
7 respondent KDP's case.

8 **THE COURT:** All right.

9 **MS. ARMSTRONG:** Not DHEC?

10 **MR. CHURDAR:** Yeah, same.

11 **THE COURT:** Okay.

12 **ISSUE OF REBUTTAL WITNESS:**

13 **MS. ARMSTRONG:** Your Honor, I guess this brings up --
14 because we do have a rebuttal witness. As I
15 mentioned earlier, we have issued a subpoena.
16 Van White, who's counsel for DNR, is in the
17 courtroom today. That witness would be here and
18 testifying tomorrow, her name is Susan Davis.
19 She authored the two letters which are in
20 evidence only for notice and inquiry. I know
21 we'd all like to depart today if it was possible
22 and I would -- I mean, I would offer that Ms.
23 Davis is going to testify to what's in these
24 letters and authenticate them and her opinions
25 are going to be what are contained in these



1 letters. And, in lieu of her testimony, I would
2 suggest that we could introduce these for the
3 truth of the matter in lieu of having us all
4 stay another day, but that's a decision that's
5 gonna come -- I'm going to leave up to KDP and
6 DHEC.

7 **MR. WALKER:** Your Honor, we object to Ms. Davis being
8 a rebuttal witness. First, it's not in response
9 to anything that was put up in KDP's case.
10 These letters were put in in the petitioner's
11 case. The petitioner called Curtis Joyner of
12 DHEC OCRM and inquired of the witness about
13 those letters. We didn't get into the letters
14 at all. She may have crossed on the letters,
15 but I didn't bring it up in direct. Mr.
16 Gressette didn't bring it up in direct. We
17 didn't even talk about the letters. So we don't
18 think that it's properly rebuttal. Number two,
19 Ms. Davis was not listed as a witness on Answers
20 to Interrogatories anywhere. So she was not
21 listed as a witness. The third thing is that
22 under the Rule in the Administrative Law Court,
23 whether there is to be any rebuttal or
24 surrebuttal is in the discretion of The Court.
25 And here we think it's not proper under Rule 29



1 of the Administrative Law Court, it'd be
2 29(A)(3) for rebuttal. This is just buttressing
3 the case that they made and trying -- they could
4 have called this witness in their case and had
5 her identify the exhibit if they wanted to.
6 We'd object to it. We would cross then. Now,
7 they're just trying to expand the proof of their
8 case in chief. And for that reason, Your Honor,
9 their failure to disclose, it's not truly
10 rebuttal, and we'd request The Court exercise
11 its discretion under the Rule. It's not
12 mandatory. We'd ask that the testimony not be
13 allowed. We don't think it's proper.

14 **THE COURT:** Ms. Armstrong?

15 **MS. ARMSTRONG:** Your Honor, in response, Mr. Folk was
16 just disclosed on Friday before trial that he
17 was going to be testifying on a bunch of new
18 matters that he just testified about today. So
19 in that regard, I mean, Ms. Davis has been --
20 her name's in the documents. They've known that
21 she exists. We didn't know what he was going to
22 testify on except for threatened and endangered
23 species, so we have the same -- we were in the
24 same position with having a surprise -- you
25 know, feeling caught off guard by a notice ---



1 THE COURT: I see this ---

2 MS. ARMSTRONG: --- or by a witness. So I ---

3 THE COURT: --- quite different in that, number one,
4 Mr. Folk was identified. Number two, his
5 testimony was set forth -- or what he would
6 testify to was set forth. You disagree as to
7 the implications of whether -- or the ambiguity
8 of that statement. And three, you chose not to
9 depose him. In this instance, this individual
10 was never listed as a witness and -- but even
11 more so, Mr. Folk's testimony fits within the
12 parameters of that which we're here today to
13 decide, whereas this doesn't fit within the
14 parameters of rebuttal testimony.

15 MS. ARMSTRONG: It's directly rebuttal to Dr. Folk's
16 testimony. We didn't put up any evidence at all
17 in our case in chief about impacts to threatened
18 and endangered species. The petitioner did not
19 put up that evidence. That evidence was put up
20 by KDP and Ms. Davis would be directly
21 responsive rebuttal testimony to what Dr. Folk
22 just testified today about, sea turtles and
23 piping plover, which are endangered species,
24 which are the content of Ms. Davis' testimony.

25 MR. WALKER: I would disagree vigorously with that.



1 They went over with Curtis Joyner everything
2 that was in that letter. They asked him all
3 about it. So they brought that out in their
4 case through that letter. Weren't you on notice
5 of this, weren't you on notice of that, what
6 about the loggerhead turtles, what about the
7 piping plovers, didn't you consider this map.
8 And she put this big ole map from DNR up there
9 and said did you get into that; isn't that the
10 map of the critical habitat, when, in fact, the
11 map's wrong and the federal regulations says
12 it's not the habitat. So they got into it and
13 they got into it big time. She just wants to
14 come back and backfill what she didn't do in her
15 case in chief.

16 **MS. ARMSTRONG:** When we admitted those -- when we
17 offered Exhibits 18 and 19, we specific- -- we
18 were very clear that we were offering them for
19 notice and inquiry, not for the truth of the
20 matter. I don't -- I don't believe there was
21 any contest over the admission of those two --
22 those two exhibits. And I just -- I just
23 disagree with Mr. Walker's characterization.

24 **MR. WALKER:** They offered them outright and we
25 objected and then they said we'll offer them for



1 notice and inquiry. They didn't just say we
2 want to put them in. That was the way they were
3 going to get them in because they couldn't get
4 them in otherwise.

5 **RULING OF THE COURT:**

6 **THE COURT:** Well, I sustain the objection.

7 **MR. WALKER:** Thank you, Your Honor.

8 **ADMISSION OF PROFFERED TESTIMONY:**

9 **THE COURT:** As far as the testimony of Mr. Gibson
10 (sic) and the proffered testimony today, I just
11 want to run this by y'all because it just seems
12 like it's something that I can resolve.
13 Regarding both the issue concerning the pre-
14 hearing statements and even -- and the issue of
15 whether this is a legal jurisdictional issue for
16 me to consider, both of those issues are
17 jurisdictional arguments. It appears to me that
18 I could let all of this proffered testimony in
19 and then -- and I know the argument you made and
20 I'm just presenting this from my perspective, it
21 appears that all that testimony could come in
22 and then The Court would decide, as I do with
23 all, in any other cases, in my conclusions of
24 law, I determine whether or not The Court has
25 jurisdiction on various issues. I do that all



1 the time. And then if I determine The Court
2 doesn't have jurisdiction, I simply do not
3 consider the evidence for which I do not have
4 jurisdiction in deciding the case. So would
5 that not be a proper resolution if I just let it
6 in now?

7 **MS. ARMSTRONG:** That's fine with me, Your Honor.

8 **MR. WALKER:** KDP is fine with that approach, Your
9 Honor. We think it works.

10 **MR. GRESSETTE:** Certainly, Your Honor.

11 **THE COURT:** Well, I actually did something that
12 works.

13 **MR. CHURDAR:** So that we would just address that in
14 proposed final orders then?

15 **THE COURT:** Yeah, in your conclusions of law, if you
16 argue that it is not something that I have
17 jurisdiction, then I've got enough sense to
18 figure out that which it applies to. And if you
19 don't think I do, you can at least make sure
20 that I do by explaining it. And I will make an
21 appropriate decision thereafter.

22 **MS. ARMSTRONG:** That's fine to handle it that way

23 **MR. WALKER:** Sure.

24 **THE COURT:** All right. Then what other issue was
25 there out there?



1 ORAL MOTION FOR REBUTTAL WITNESS:

2 **MS. ARMSTRONG:** Well, we have a couple of issues now,
3 Your Honor. So I'd like to make an oral motion
4 for a rebuttal witness.

5 **THE COURT:** Okay. I mean, I think I -- I thought I
6 already ruled on it, but maybe you haven't made
7 a motion, so.

8 **MS. ARMSTRONG:** I have made a motion, so I'm not
9 asking -- I was not real sure on -- Mr. Walker
10 stood up and I wasn't sure if ---

11 **THE COURT:** Okay. Well, I want you to be able to
12 preserve the record. One way of doing that is
13 that you could just make a motion that
14 incorporates everything that we've just
15 considered. Or if you want to make the
16 arguments all over again, I'll hear them.

17 **MS. ARMSTRONG:** Yeah, so I'm -- I would like to -- I
18 guess you denied my -- I never actually made a
19 request for a rebuttal witness.

20 **THE COURT:** I know, I know, that's why I'm saying
21 that.

22 **MS. ARMSTRONG:** Okay.

23 **THE COURT:** I'm all in favor of you preserving the
24 record.

25 **MS. ARMSTRONG:** Okay. So I'm making a motion to



1 offer a rebuttal witness, Susan Davis, from DNR.
2 **THE COURT:** And you -- okay. And you explained what
3 she would testify to earlier. So do you want to
4 refresh me or you want to just go with -- that's
5 what I was saying, do you want ---

6 **MS. ARMSTRONG:** Her exact ---

7 **THE COURT:** --- we can go with what ---

8 **MS. ARMSTRONG:** --- testimony would be in rebuttal to
9 Dr. Folk's opinion about the impacts on piping
10 plovers and loggerhead sea turtles and the
11 Department's opinion about the proposed project.
12 Dr. Folk also said that he didn't think it was
13 going to have -- it generally wasn't going to
14 have an adverse impact on any species at all and
15 then that's -- the DNR letter or testimony would
16 be in rebuttal to that. And I mean, without
17 saying what that testimony's going to be, that's
18 the nature of the rebuttal testimony.

19 **THE COURT:** Okay.

20 **MR. WALKER:** Your Honor, we oppose the motion. I'm
21 not going to take the Court's time to repeat
22 what I said.

23 **THE COURT:** Fair enough. Just out of an abundance of
24 caution, I am going to take a short, and I mean
25 a short break and I'm going to go to my office



1 just to think through this and make sure and
2 then I'll -- I thought you said there are
3 issues, what are the other issues?

4 **EVIDENTIARY MATTERS:**

5 **MS. ARMSTRONG:** We just have some other -- a couple
6 of other evidentiary matters that we want the
7 Court to rule on.

8 **THE COURT:** Well, do I need to ---

9 **MS. ARMSTRONG:** It's part of our -- it's part of
10 rebuttal. I guess that's -- Ms. Davis wasn't
11 the only thing. We've also got two pieces of
12 evidence that we're going to offer into evidence
13 as rebuttal testimony and evidence.

14 **THE COURT:** Well, let me go ahead and hear those
15 too.

16 **PETITIONER'S EXHIBIT NUMBER 19:**

17 **MS. ARMSTRONG:** Okay. The -- there is an Exhibit
18 Number 19, which is the DNR letter. There's
19 actually an e-mail contained in that set of
20 documents from Tara Maddock of DHEC to Susan
21 Davis at DNR and we would -- it's got opinions
22 about impacts to piping plovers, loggerhead sea
23 turtles, Wilson's plover, and leatherback
24 turtles, and we would offer that into evidence
25 as an admission of a party opponent.



1 THE COURT: DNR?

2 MS. ARMSTRONG: No, DHEC. It's an e-mail from DHEC.

3 THE COURT: Oh, DHEC, okay.

4 MS. ARMSTRONG: And we would admit that as ---

5 THE COURT: Can you hand that up?

6 MS. ARMSTRONG: --- seek to admit that as an
7 admission of a party opponent and -- actually --
8 -

9 THE COURT: Wait a second, we may have it up here.
10 Right here. All right. Next?

11 MS. ARMSTRONG: Ms. White?

12 CURTIS JOYNER'S DEPOSITION TESTIMONY EXCERPTS:

13 MS. WHITE: We were also proposing to introduce some
14 excerpts from Curtis Joyner's deposition
15 testimony, also as admissions of a party
16 opponent, and we have provided those excerpts to
17 counsel for KDP and DHEC yesterday.

18 THE COURT: Well, I'm going to go ahead and ask the
19 obvious question that I'm going to hear over
20 here anyway, and that is why did you not offer
21 that in the case in chief?

22 MS. WHITE: Well, the excerpts that we selected were
23 -- are in response to what was testified to
24 particularly by Mr. Pantlik about the timeliness
25 of the application process and the contingency,



1 which ---

2 **THE COURT:** Particularly or specifically? I mean, is
3 that all it relates to or is there more to it
4 than that? When you say ---

5 **MS. WHITE:** And to the interactions between Mr.
6 Pantlik and DHEC or the applicant KDP and DHEC
7 ---

8 **THE COURT:** Okay.

9 **MS. WHITE:** --- in the review process.

10 **THE COURT:** All right. Do you have the numbers ---

11 **MS. WHITE:** And we were ---

12 **THE COURT:** --- or the specific ---

13 **MS. WHITE:** Well, the evidentiary rule was admission
14 of a party opponent and then pursuant to the
15 civil -- Rule of Civil Procedure 32(a)(4).

16 **THE COURT:** Were you going to tell me what that Rule
17 was or ---

18 **MS. WHITE:** Oh, sorry, I thought you might be
19 pulling it up. It just says -- if part of a
20 deposition is offered into evidence by a party,
21 an adverse party may require him to introduce
22 any other part which ought in fairness to be
23 considered with the part introduced and any
24 party may introduce any other parts. And that's
25 why we ---



1 **THE COURT:** Well, did they offer part of the ---

2 **MS. WHITE:** Well, that's why we told them the
3 excerpts yesterday that we were planning to
4 introduce on rebuttal.

5 **THE COURT:** Okay. Okay.

6 **MR. WALKER:** Your Honor, you correctly anticipated
7 that we don't think it's proper. The Rule
8 allowing deposition experts -- excerpts actually
9 refers to offered in the case in chief and this
10 is not offered in the case in chief.

11 **THE COURT:** Where is it? Let me find that Rule.

12 **MS. WHITE:** If I might just also interject ---

13 **MR. CHURDAR:** 32(a)(5).

14 **MS. WHITE:** 32(a)(5) is not the rule I cited to,
15 which is specific because -- Mr. Walker's
16 correct, 32(a)(5) does refer to the case in
17 chief, but I referenced 32(a)(4) which does not
18 specifically limit the introduction of
19 deposition testimony to the case in chief.

20 **MR. WALKER:** Well, it refers to excerpts to be
21 offered at trial.

22 **THE COURT:** Well, let me just read it real quick.
23 Oh, I utilized that earlier in this case. Yeah,
24 I think.

25 **MR. WALKER:** I'm sorry?



1 **THE COURT:** I thought I utilized that Rule earlier in
2 this case.

3 **MR. WALKER:** You did. We also would submit that it's
4 not rebuttal. These subjects were covered with
5 Curtis Joyner and with other witnesses that they
6 presented. They also cross-examined Mr.
7 Pantlik. We didn't put up any proof about what
8 went on, at least on this one subject. They
9 cross-examined on it. We didn't put up any
10 proof, so it's not rebutting anything that came
11 up for the first time in our case. They
12 examined, I think, Mr. Joyner on it. The other
13 subjects that she's designated are all about the
14 drama at DHEC that we talked about earlier as
15 not being relevant to The Court's determination,
16 so it should -- if they wanted to bring this
17 out, they should have designated it in their
18 case in chief. It's not responsive ---

19 **THE COURT:** But it says if only part of a deposition
20 is offered in evidence by a party. When was the
21 deposition offered into evidence?

22 **MR. WALKER:** They're offering it in rebuttal.

23 **THE COURT:** I know, but when was the -- it starts off
24 with only a part of a deposition, so when was
25 Mr. Joyner's deposition offered into evidence?



1 **MS. WHITE:** I believe ---

2 **MR. WALKER:** I see what you're saying. Yeah, I don't
3 think that that Rule applies, I agree, because
4 ---

5 **THE COURT:** No, I'm asking a question. I'm not
6 making a statement.

7 **MS. WHITE:** We're offering it right now, Your Honor.
8 That's what we're doing.

9 **THE COURT:** But that says if only -- it says, if only
10 a part of a deposition is offered in evidence by
11 a party, an adverse party may require the
12 introduction of any and other -- any other part
13 which ought to in fairness be considered with
14 the part introduced.

15 **MS. WHITE:** Yes.

16 **THE COURT:** If there's been no part introduced -- if
17 there's been no part of the deposition already
18 introduced, this Rule is just completely
19 inapplicable.

20 **MS. WHITE:** We're moving -- that's the entire purpose
21 of what this -- we're moving ---

22 **THE COURT:** Well, that would make the rule -- that
23 would make the -- that would turn that rule into
24 silliness because that would be, oh, I'm going
25 to offer the deposition in part and since I'm



1 offering the deposition in part, I can present
2 part of the deposition into evidence. I mean,
3 the logic of that is astounding.

4 **MS. WHITE:** I'm not sure I read it the same way Your
5 Honor does. But we're moving -- we are trying
6 to introduce part of it into evidence right now
7 and because we anticipated we might be doing
8 this, we told counsel for KDP and DHEC what
9 parts we were planning to move in case they also
10 in fairness wanted to include other parts.

11 **THE COURT:** All right. As officers of the Court, I
12 require y'all to tell me if I'm missing
13 something.

14 **MR. WALKER:** No, I think you've got it. What she's
15 referring to is once a deposition is offered in
16 the sense that ---

17 **THE COURT:** Part.

18 **MR. WALKER:** --- if you're examining -- this deals --
19 I've always understood this Rule, if I'm
20 examining a witness and I call to the witness'
21 attention on the stand a part of a deposition --
22 -

23 **THE COURT:** And you introduce part of it.

24 **MR. WALKER:** --- I introduce part of it to the
25 witness, and the opposing counsel thinks in



1 fairness that something else needs to be
2 introduced, then that can be introduced at the
3 same time when I'm examining the witness. But
4 they're in a different category. They're down
5 at (5), excerpts from depositions.

6 **EXCERPT RULING OF THE COURT:**

7 **THE COURT:** All right. On that one, I deny your
8 request.

9 **MS. WHITE:** Okay.

10 **PROFFER OF DEPOSITION TRANSCRIPT:**

11 **MS. ARMSTRONG:** We're going to -- then we'd like to
12 make a proffer of the entire deposition
13 transcript.

14 **THE COURT:** That's fine. I'm going to step out to
15 consider real quickly the motion and this
16 comment letter that you want also considered.

17 **(A short break was taken from 5:27 p.m. until 5:31**
18 **p.m.)**

19 **COURT REPORTER:** All rise.

20 **RULING OF THE COURT:**

21 **THE COURT:** All right. To make it simple, I deny the
22 motion. By denying the motion, that denies the
23 entrance of that. Anyway, and I think that ends
24 that issue. And you can -- and you're
25 proffering -- well it's already in evidence, so



1 you're proffer's already accomplished via the
2 motion. So is there anything else?

3 **MS. ARMSTRONG:** So I think we covered the Joyner
4 exhibit.

5 **THE COURT:** The Joyner.

6 **MS. ARMSTRONG:** The Joyner deposition that The Court
7 has marked and now we've offered -- made a
8 proffer of.

9 **THE COURT:** Yeah, I know now.

10 **PROFFERED TESTIMONY OF MS. DAVIS:**

11 **MS. ARMSTRONG:** And we'd like to proffer Ms. Davis
12 tomorrow.

13 **THE COURT:** Well, you've proffered her. I mean, I
14 know I did the ---

15 **MS. ARMSTRONG:** I want to ---

16 **THE COURT:** I know I did the --- I did an odd proffer
17 by doing Q and A but the proper procedure, if
18 you look over the rules, the proper procedure
19 for proffer is -- at least one of them, is to
20 tell The Court that which the evidence -- what
21 the evidence would be. So you have proffered
22 that testimony. Do you want me to show you the
23 rule?

24 **MS. ARMSTRONG:** Where is the rule?

25 **THE COURT:** Well, I don't know if it's The Court's



1 job to show ---

2 **MS. ARMSTRONG:** Well, okay. I mean, then, you
3 offered to but that's fine. I ---

4 **MR. WALKER:** Your Honor, and if there's any question
5 about the sufficiency of the proffer, we'll
6 stipulate to -- that the testimony would be as
7 proffered by ---

8 **THE COURT:** Yes.

9 **MR. WALKER:** --- Ms. Armstrong. I don't want there
10 to be any suggestion that we are trying to do
11 some -- something devious procedurally. We
12 aren't.

13 **THE COURT:** Well I -- I certainly wouldn't want to do
14 that either. It's in the Rules so I'll just go
15 with that. All right. Anything else? Let's
16 see, what other legal ruling have I left out?

17 **MS. ARMSTRONG:** Sir, I think I do -- just to make it
18 clear for the record, the other piece of the
19 proffer for Ms. Davis is that the testimony that
20 DNR strongly discourages the development of
21 sensitive coastal barrier habitats, especially
22 those in dynamic inlets, such as Captain Sam's
23 Spit inlet.

24 **THE COURT:** Okay. Did you want to present anything?

25 **MR. WHITEHEAD:** Your Honor, I was just gonna ask to



1 confirm that upon the ruling of your motion the
2 subpoena that has been issued is therefore
3 released or quashed effectively for Ms. Davis.

4 **THE COURT:** Okay. I don't know if I'm quashing the
5 subpoena. I deny her being called so that
6 apparently ends the necessity.

7 **MR. WHITEHEAD:** Thank you, Your Honor.

8 **THE COURT:** Did you wish to weigh in on these legal
9 arguments?

10 **MR. WHITEHEAD:** No, Your Honor.

11 **COURT REPORTER:** Could I have your name? I'm sorry.

12 **MR. WHITEHEAD:** Van Whitehead.

13 **COURT REPORTER:** Thank you.

14 **THE COURT:** He doesn't know who he's representing
15 because he ... All right. Anything else?

16 **PETITIONER'S EXHIBIT NUMBER 40:**

17 **MS. ARMSTRONG:** We -- Exhibit 40 is one that we were
18 to redact and just have not ---

19 **THE COURT:** Oh, yeah.

20 **MS. ARMSTRONG:** --- have not done that yet. And I
21 can -- it's gonna take me a few minutes to do.
22 So we can ---

23 **THE COURT:** Let's do that. You wanna just do that
24 now?

25 **MS. ARMSTRONG:** It's an 11, 12 page -- well, I can go



1 ahead and do it now, sure.

2 **MR. WALKER:** Well, Ms. Armstrong and I just talked
3 about it. And I think the ruling was that the
4 Petitioners were to identify the portions of the
5 technical summary of review that referred to
6 public use. That was the question. And rather
7 than have her scratch through the whole
8 document, I'm fine with just her highlighting
9 what she -- what refers to public use for The
10 Court. So that's fine. Either way she wants to
11 do it is good.

12 **THE COURT:** Ms. Armstrong, do you -- does that seem -
13 --

14 **MS. ARMSTRONG:** Yeah. I mean I'm fine doing that. I
15 think, you know, the other one thing I'm
16 grappling with is that if -- I mean, this the
17 agency's 2008 permitting decision. So redacting
18 everything would mean you wouldn't even know
19 what it is. And so ---

20 **THE COURT:** Well, I thought -- my thought when the
21 all occurred was you just put that heading in
22 there and you move on from there. If y'all
23 struggle with this at all, we could leave the
24 record open and let y'all confer on this. So it
25 -- I'm just trying to clean up all loose ends.



1 **MS. ARMSTRONG:** Yeah. I mean, I'd like to too. So
2 highlighting the things that are just factually
3 what they applied for, what they got and the
4 areas that we think are relevant to the public
5 use. That's ...

6 **MR. WALKER:** Well, I don't think it's what she thinks
7 is relevant to public use. Because she might
8 just say I think the whole things related to
9 public use.

10 **MR. ARMSTRONG:** Well ---

11 **MR. WALKER:** I think she needs to show us what in
12 there addresses public use and had to do with
13 the public use of the shoreline.

14 **THE COURT:** I can -- I've got two options. Probably
15 more, but I'm going with two. I can take a
16 break and allow you to do that now.

17 **MS. ARMSTRONG:** Okay.

18 **THE COURT:** Or we can hold the record open. It's
19 whichever one y'all want to do.

20 **MR. WALKER:** I think we've got a third one.

21 **MS. ARMSTRONG:** I'd just assume ---

22 **THE COURT:** Well I knew there was others. I said I
23 was going with two.

24 **MR. WALKER:** Which is just to leave it to The Court
25 to determine what portions of this Exhibit ---



1 **THE COURT:** No. I'm going -- I want y'all to take a
2 position. So, I mean, I want her to take a
3 position and you respond to that position.

4 **MR. WALKER:** That's very good. I ---

5 **THE COURT:** So, I hereby reject number three and
6 we're back to two. Okay. Anything else -- was
7 there anything else that I haven't -- because
8 I'm letting all the proffered testimony in. I
9 resolved -- I'm going to consider the proposed
10 ---

11 **MR. WALKER:** KDP can think of nothing else at this
12 moment.

13 **MR. GRESSETTE:** And, Your Honor, if we take a break
14 for the exhibit ---

15 **THE COURT:** Yeah, that's what I'm talking about.

16 **MR. GRESSETTE:** --- I'll also confirm the court
17 reporter, double check exhibits and make sure
18 that nothing else is -- is left out and that
19 we're all on the same page.

20 **THE COURT:** All right.

21 **MR. CHURDAR:** I'm not aware of any other evidentiary
22 issues.

23 **THE COURT:** Okay. Well then I will take a break and
24 let y'all highlight away.

25 **(A break was taken from 5:38 p.m. until 6:05 p.m.)**



1 COURT REPORTER: All rise.

2 THE COURT: All right, y'all.

3 MS. ARMSTRONG: Well, as probably the Court's not
4 surprised to hear ---

5 THE COURT: Y'all didn't agree.

6 MS. ARMSTRONG: --- have disagreement on what relates
7 to public use and public open space. So ---

8 THE COURT: I thought y'all were going to come to an
9 agreement on those.

10 MS. ARMSTRONG: No.

11 THE COURT: Hope springs eternal.

12 MS. ARMSTRONG: So I've highlighted in yellow what I
13 believe is relevant and related to public open
14 space and public use and Mr. Walker has
15 highlighted in pink what he thinks relates to
16 public open space and use. And I'm not sure how
17 else to handle it other than to provide that to
18 The Court.

19 THE COURT: Are there any of them that overlap and
20 create another color?

21 MR. WALKER: I'm willing to accept one other place --
22 I'm sorry, the first one you had.

23 THE COURT: Well when you highlight over her yellow
24 does it create another color that I can go by?
25 Like a green?



1 MR. WALKER: Greenish. You know, even the colors
2 don't get together.

3 MS. ARMSTRONG: Well, I mean, we moved the whole
4 thing into evidence so if it's got pink on it,
5 you can assume that we're okay with that.

6 THE COURT: Okay. That's a good point.

7 MS. ARMSTRONG: The problem is the yellow part that
8 we think also relates to public open space.

9 THE COURT: Okay.

10 MS. ARMSTRONG: That is not agreed to.

11 THE COURT: Well, do you want me to look at it now
12 or?

13 MR. WALKER: I'm fine with your looking at it and let
14 us know what you ---

15 THE COURT: Okay.

16 MR. WALKER: --- want to do.

17 THE COURT: You okay with that Ms. Armstrong?

18 MS. ARMSTRONG: Sure. I mean, we already ...

19 MR. WALKER: The one qualification ---

20 THE COURT: Oh, it's 25(B).

21 MR. WALKER: It was the technical ---

22 THE COURT: Do you know what I'm talking about?

23 MR. WALKER: What was your exhibit number that you
24 offered ---

25 THE COURT: No, no. That's the answer. I said



1 25(B), does anyone know what I'm talking about?

2 **MR. GRESSETTE:** It's the rule.

3 **THE COURT:** Yeah, for proffer.

4 **MR. GRESSETTE:** I don't know ---

5 **THE COURT:** And what rule? Administrative Law Court
6 Rules.

7 **MS. ARMSTRONG:** I'm sorry, were you asking a
8 question.

9 **THE COURT:** No, I was answering one.

10 **MS. ARMSTRONG:** Okay.

11 **THE COURT:** The proffer.

12 **MS. ARMSTRONG:** Whose question?

13 **THE COURT:** An issue about proffering, 25(B). Do you
14 wanna read it for us?

15 **MR. GRESSETTE:** Yes, sir. It says, hearing
16 procedures evidence, objections, whenever
17 evidence is ruled inadmissible, the party
18 offering that evidence may submit an offer of
19 proof on the record. The party making the offer
20 of proof for excluded oral testimony shall
21 briefly summarize the testimony.

22 **THE COURT:** And here endeth the lesson. All right.
23 So back to that -- back to this.

24 **MR. WALKER:** Where we ended up was that there was a
25 document or I had put up a limited portion of



1 the technical review summary from the 2008
2 proceeding that dealt with the extension of the
3 baseline and setback lines, the last paragraph
4 the technical summary review. We dealt with
5 that by saying the whole paragraph should come
6 in under the rule that it relates to it. Then
7 there came -- there was an argument made by the
8 petitioner to put the whole exhibit in because
9 in my back and forth with Mr. Eiser, I brought
10 out that he had testified in the prior case that
11 the public use of the shoreline was minimal and
12 not enough to deny the permit because he had
13 said in this case he had what we consider to be
14 contradictory testimony. Based on that
15 petitioner said, well we can put anything --
16 he's raised the prior permit, blah, blah, blah.
17 And I believe The Court said, well let's look at
18 what is responsive to the public use, all
19 inclusive on public use. And I think what The
20 Court's gonna find is that from the respondent's
21 standpoint, public use is -- we were referring
22 to public use of the river shoreline. And the
23 petitioner believes that anything dealing with
24 open space, you're talking about armoring or any
25 of that is -- relates to public use. So that,



1 I think, is the major difference of approach as
2 to the highlighting you're gonna look at.

3 **THE COURT:** Okay.

4 **MR. WALKER:** And I'm not saying that to advance one
5 or the other, just to tell you what I understand
6 to be the different frameworks with which we
7 approached it.

8 **(Petitioner's Exhibit Number 40 was marked for**
9 **identification purposes.)**

10 **THE COURT:** Yeah. I'm glad you refreshed my memory
11 because I -- I didn't remember it all. Do you
12 wish to respond to that?

13 **MS. ARMSTRONG:** No.

14 **THE COURT:** Okay. Mr. Churdar?

15 **MR. CHURDAR:** No.

16 **THE COURT:** Okay.

17 **MR. WALTER:** Thank you, Your Honor.

18 **THE COURT:** What we normally do, the proposed orders
19 30 days from the -- from today's hearing or if
20 you request a transcript, 30 days from the date
21 the transcript is made available to you.
22 Meaning it is -- you can receive it. If you
23 choose not to receive it then the clock still
24 starts running from that day. All right.

25 **ADMISSION OF FOLK CV INTO EVIDENCE:**



1 **MR. GRESSETTE:** Your Honor, I forgot at the end of
2 the testimony of Dr. Folk, I've moved into
3 evidence his CV. That was when we had the
4 discussion of a proffer. I'd like for it to be
5 included in the record.

6 **THE COURT:** Any objection, Ms. Armstrong?

7 **MS. ARMSTRONG:** They've already closed their case.

8 **THE COURT:** Yeah.

9 **MR. ARMSTRONG:** So yeah, we would.

10 **MR. WHITE:** That's fine. No problem.

11 **THE COURT:** Okie dokie.

12 **MR. GRESSETTE:** Thank you, Your Honor.

13 **MR. WALKER:** Thank you very much for a very long and
14 I have to say exhausting trial.

15 **THE COURT:** Well, I'm sorry about that for everybody.

16 **MR. WALKER:** I appreciate everything that you've
17 given the parties.

18 **THE COURT:** Okay. This hearing is adjourned. Thank
19 y'all.

20 **(There being nothing further, the hearing concluded at**
21 **6:11 p.m.)**



CERTIFICATE

This is to certify that Day One of the within hearing consisting of two hundred twenty eight (228) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said hearing was reported by the method of Stenomask with Backup.

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Court Reporter

Notary Public for South Carolina
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Court Reporter

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