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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge

Docket No. 18-ALJ-07-0047-CC
Appellate Case No. 2020-001090

Ex Parte: South Carolina Conservation League, Appellant,

In Re:

KDP, II, LLC, Respondent,

v.

South Carolina Department of Health and Environmental Control, Respondent.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA

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Ex Parte: South Carolina Conservation League, Appellant,

In Re:

KDP, II, LLC, Respondent,

v.

South Carolina Department of Health and Environmental Control, Respondent.

CERTIFICATE OF COUNSEL

I certify that this designation contains no matter which is irrelevant to the appeal.

SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT

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ORDERS

STATE OF SOUTH CAROLINA
ADMINSTRATIVE LAW COURT

KDP, II, LLC, Petitioner, v. SOUTH CAROLINA DEPARTMENT OF HEALTH & ENVIRONMENTAL CONTROL, Respondent.	)	Docket No. 18-ALJ-0047-CC **ORDER** **(Denying Motion to Intervene)**

I. STATEMENT OF THE CASE

This case involves Respondent South Carolina Department of Health & Environmental Control's (Department) delineation of base and setback lines as pertains to beachfront property owned by Petitioner KDP, II, LLC (Petitioner). The matter immediately before the Administrative Law Court (ALC or Court) is a Motion to Intervene filed by the Coastal Conservation League (League). After reviewing the submissions and the applicable law, the League's motion is denied.

II. BACKGROUND

Petitioner owns beachfront property on Kiawah Island, South Carolina, generally referred to as "Captain Sam's Spit" (Property). Petitioner is authorized to develop the Property under the terms of an agreement with Kiawah. On October 6, 2017, the Department published notice of proposed new baselines for all South Carolina beaches. Petitioner disagreed with the Department's proposed baseline and setback line (delineation). At the time, Section 48-39-280(E) provided the following avenue for landowners to present their concerns to the Department about its preliminary determination:

> A landowner claiming ownership of property affected who feels that the final or revised set back line, baseline, or erosion rate as adopted is in error, upon submittal of substantiating evidence, must be granted a review of the setback line, baseline, or erosion rate, or a review of all three ...

FILED

July 10, 2020

SC ADMIN. LAW COURT

S.C. Code Ann. § 48-39-280 (Supp. 2017).[1] On November 20, 2017, Petitioner filed a Request for Final Review Conference before the Department's Board. On January 5, 2018, the Department denied the request. On February 5, 2018, Petitioner filed a Request for Contested Case Hearing with this Court. On October 24, 2018, the Department filed a Motion to Dismiss Petitioner's Request for a Contested Case Hearing arguing that Petitioner failed to exhaust its administrative remedies. On March 29, 2019, the Court issued an order denying the motion.

On June 6, 2019 and at the request of the parties, the Court issued a Consent Order of Stay and Remand. Pursuant to this order, the case was stayed and remanded to the Department to allow Petitioner and the Department to confer so as to allow the Department to make a considered determination of the delineation in accordance with the applicable statutes and regulations. On December 6, 2019 and after the Court granted multiple requests for the extension of deadlines on remand made at the request of the parties, the Department issued a Final Decision on Remand which left unchanged, its delineation that is under appeal. On December 23, 2019, Petitioner filed a Request for a Final Review Conference with the Department's Board. On February 11, 2020, the Department declined to conduct the review. On March 6, 2020, Petitioner filed a Renewed Request for Contested Case Hearing After Remand and Request to Lift Stay. On June 10, 2020, the Court lifted the stay and directed all parties to update their prehearing statements and submit a consent scheduling order by June 30, 2020.

On May 26, 2020, the League filed a motion seeking intervention in this matter. On June 15, 2020, Petitioner submitted a memorandum opposing the motion. On June 24, 2020, the League submitted a return. The Department has not taken a position in this matter.

III. APPLICABLE STANDARD

Citing to Section 48-39-280(E) of the South Carolina Code, Petitioner argues that the Court does not have jurisdiction to permit intervention by the League. On its face, the plain language of

[1] The statute was later amended by 2018 South Carolina Laws Act No. 173 (H. 4683) and effective May 3, 2018 to provide in part that "A landowner claiming ownership of property adversely affected by the establishment of a baseline or setback line, upon submittal of substantiating evidence, must be granted a review of the baseline or setback line. Alternatively, the municipality or county in which the property is situated, acting on behalf of the landowner with his written authorization, or an organization acting on behalf of the landowner with his written authorization, upon submittal of substantiating evidence, must be granted a review of the baseline and setback line …" S.C. Code Ann. § 48-39-280(F)(1) (Supp. 2019).

Section 48-39-280(E) (and now, Section 48-39-280(F)(1)) limits the right to request a department review and contested case to a landowner. The statute is silent, however, as to intervention.

SCALC Rule 20(B) provides that:

> Any person may intervene in a pending contested case hearing upon a showing that:
> (1) the movant will be aggrieved or adversely affected by the final order;
> (2) the interests of the movant are not being adequately represented by the existing parties, or that it is otherwise entitled to intervene;
> (3) that intervention will not unduly prolong the proceedings or otherwise prejudice the right of existing parties.

SCALC Rule 20(C) further provides that a motion to intervene "shall be filed as early in the proceedings as possible to avoid adverse impact on the existing parties or the disposition of the proceedings."

A party seeking to intervene has the burden of showing that intervention is proper. *See In re Horry Co. State Bank*, 361 S.C. 503, 508, 604 S.E.2ed 723, 725 (Ct. App. 2004). For intervention purposes, a person "will be aggrieved or adversely affected by the final order" if final disposition of a matter may impair his ability to protect his interests. ALJD Rule 20(B)(1); *cf*. Rule 24(a)(2), SCRCP; *Berkeley Electric Cooperative, Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 394 S.E.2d 712, 714-715 (1990). Here, the League has not met its burden.

IV. DISCUSSION

A. The League Will Not Be Aggrieved or Adversely Affected by the Final Order in this Case

In its motion, the League states:

> The League seeks intervention in this case because an order moving the beachfront jurisdictional lines seaward on the Spit ***will create the opportunity*** for Petitioner to construct a road to access the proposed lots to be developed and thereby will injure the members of the League who use and enjoy the Spit (emphasis added).

The access road that the League seeks to prevent was permitted in *S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control and Kiawah Dev. Partners, II*, Docket No. 15-ALJ-07-0369-CC (Sept. 24, 2018). The League vigorously contested the issuance of those permits and the case is now on appeal. *See S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control, KDP, II, LLC, and KRA Dev., LP*, Appellate Case No. 2019-000074. Whether a road can or cannot be built is not at issue in this case but rather, the application of the statutory criteria to the facts that govern the setting of jurisdictional lines on beachfront property that is

privately owned. For this same reason, the affidavit[2] submitted with the League's return fails to establish that it will be adversely affected by the final order in this case.

Here, the League has no personal stake in the delineation of the base and setback lines. The injury about which the League and its affiant complain (that the possibility of a seaward movement of the jurisdictional line "will create the opportunity for Petitioner to construct a road"), is neither actual nor imminent but rather conjectural or hypothetical. See generally, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1991); *Sea Pines Ass'n for the Protection of Wildlife, Inc. v. S.C. Dep't of Natural Resources*, 345 S.C. 594, 550 S.E.2d 287 (2001). The League has presented no evidence that a decision by the Court establishing the jurisdictional lines will result in any individualized or particularized harm.

While not determinative of this matter, the Court notes that the legislative scheme that governs who may request a review or a contested case for matters involving the establishment of a baseline or setback line, evidences an intent by the legislature to limit that relief to a landowner or property owner. *See* S.C. Code Ann. §§ 48-39-280(E) (Supp. 2017); 48-39-280(F)(1) and (5) (Supp. 2019); S.C. Code Ann. Regs. § 30-14(F) (2011).[3]

---

[2] The League submitted the affidavit of an individual who resides three miles from the Property and regularly engages in recreational activities either on the beach at or in the vicinity of the Property. The individual states that he testified in a contested case hearing at this Court wherein another judge granted Petitioner a permit to install a sheet pile wall for purposes of erosion control (his affidavit did not mention that the order in that case which is on appeal also authorized the construction of a roadway, stormwater management system, utility lines, gravity sewer, manholes, a pump station, a force main, and water lines in connection with a twenty-six lot residential development on the Property) and that his understanding is that is the location of the jurisdictional lines in this matter would provide additional room to allow for the construction of the road. He concludes that the construction of an access road along with development would diminish his enjoyment of the area and deter the existing wildlife habitat that exists in the area of the Property. Again, the issue in this case does not pertain to the construction of an access road or any permit that would allow for development.

[3] Without any discussion, the League asserts that Regulation 30-14(F)(2) indicates that an "any 'affected person,'" may file an appeal. The League's reference to Regulation 30-14(F) is misplaced. Regulation 30-14(F)(1) specifically limits review by the Department to requests initiated by a "landowner claiming ownership of affected property" or "property owners." While Regulation 30-14(F)(2) provides that "Appeals are governed by R. 30-6," the rules of statutory construction evidence that this was merely a reference intended for purposes of outlining a procedural mechanism for landowners and not conferring standing. *See Atlas Food Systems and Services, Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp*., 319 S.C. 556, 558, 440 S.E.2d 858, 859 (1994) ("The general rule of statutory construction is that a specific statute prevails over a more general one."). Additional support can be discerned from the fact that Regulation 30-6 specifically addresses "Department decision[s] involving the issuance, denial, suspension, or revocation of a permit or certification" and not matters pertaining to the delineation of a base and setback lines. Finally, any such appeal is limited to an affected person **with standing** and not "any 'affected person.'" S.C. Code Ann. Regs. § 30-6 (2011). Although not applicable to this matter, the Court notes that effective June 26, 2020, the text of subsection (F) of Regulation 30-14 has been deleted.

B. The League's Intervention Will Cause Undue Delay and Prejudice Petitioner

The League makes a blanket assertion that its intervention "will not unduly delay or prejudice the adjudication of the rights of the original parties," and that "the proposed intervenor will not seek to prolong the adjudication of any issue." Because of the Department's inability to timely arrive at a final decision as to the delineation of the baseline and set back lines for the Property, Petitioner has been denied a timely final adjudication on the merits for more than thirty-two months. The addition of the League as a party at this late stage would introduce new attorneys and witnesses and added discovery (written and depositions) thereby prolonging the proceedings which have already been unduly delayed through no fault of Petitioner. Intervention by the League would also serve to exponentially increase the time and costs incurred by Petitioner in preparing for and trying this contested matter where any possible interest the League may have is speculative at best.

C. The League's Motion is Untimely

SCALC Rule 20(C) provides that a motion to intervene "shall be filed as early in the proceedings as possible to avoid adverse impact on the existing parties or the disposition of the proceedings." The League asserts that "it was unaware of the existence of this particular appeal" and that even if it had been so aware, it maintains that it would not have been appropriate to intervene during the pendency of a motion to dismiss. This case has been pending with the Court since February 5, 2018 and is a matter of public record. Thus, even if the League did not have actual knowledge of this pending case, the League should have known by the exercise of reasonable diligence that a request for a contested case hearing had been filed and sought to intervene in a timely manner so as to not prejudice existing parties to the litigation.

Moreover, other facts indicate that the League was aware as early as 2016 that the baseline for the Property would be set in 2017. An article in the Post & Courier quoted Dana Beach, the League's executive director as stating, "setting it [the baseline] next year will put the setback line in the river and the baseline 100 feet back in the former dunes." *Hurricane confirms instability of Capt. Sam's Spit*, Post and Courier, October 16, 2016, available online at https://www.postandcourier.com/opinion/editorials/hurricane-confirms-instability-of-capt-sams-spit/article_1cba2d94-9643-11e6-8d44-974a15f79888. html. Mr. Beach's comments were reiterated on November 8, 2016. *See A Wedge in the Sand: Nature Intervenes in Construction Line Controversy: Hurricane Matthew moved the battle lines on Kiawah Island's controversial*

Captain Sam's Spit, The Journal of Light Construction, November 8, 2016, available online at: https://www. jlconline.com/coastal-contractor-news/nature-intervenes-in-construction-line-controversy_o.

As the Court has concluded that: (1) the League's motion is untimely; (2) the League has failed to show that it will be aggrieved or adversely affected by the final order; (3) and that the League's intervention will unduly prolong the proceedings and otherwise prejudice Petitioner, the Court need not address whether the League's interests will be adequately represented by the Department.

V. ORDER

IT IS THEREFORE ORDERED that the Coastal Conservation League's Motion to Intervene in the above-captioned matter is **DENIED.**

AND IT IS SO ORDERED.

SHIRLEY C. ROBINSON
Administrative Law Judge

July 10, 2020
Columbia, South Carolina

CERTIFICATE OF SERVICE

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

Ti'a Smith
Judicial Law Clerk

July 10, 2020
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP, II, LLC, Petitioner, vs. South Carolina Department of Health and Environmental Control, Respondent.	Docket No.: 18-ALJ-07-0047-CC **ORDER**

This matter came before the South Carolina Administrative Law Court ("ALC" or "Court") pursuant to a request for contested case hearing filed on February 5, 2018 by KDP, II, LLC ("Petitioner"). Petitioner is challenging the decision of the South Carolina Department of Health and Environmental Control ("Department") to extend the public comment period for the proposed new locations of the baseline and setback lines and the time for the final establishment of those lines until after December 31, 2017. By request of the parties, on June 6, 2019, this Court issued a Consent Order of Stay and Remand for the Department to make a final determination on whether to adjust the jurisdictional lines on Petitioner's property. On December 6, 2019, the Department issued its Final Decision on Remand, and on December 23, 2019, Petitioner filed its request for final conference review with the Department's Board. On January 16, 2020, the Department filed its Staff response to the request for final conference review. On February 10, 2020, the Department notified Petitioner that it would not conduct a final conference review. Thus, on March 6, 2020, Petitioner filed the present motion before this Court requesting to renew its request for a contested case hearing and to lift the stay. The Department has not filed a response to Petitioner's motion.

In this instance, Petitioner has exhausted its administrative remedies with the Department, and in accordance with the June 6, 2019 consent order, I find that the stay shall be lifted, and this contested case proceeding shall resume.

ORDER

Based upon the foregoing,

IT IS HEREBY ORDERED that Petitioner's Renewed Request for Contested Case Hearing After Remand and Request to Lift Stay is **GRANTED**.

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ADMIN. LAW COURT

IT IS FURTHER ORDERED that within 20 days from the date of this order, the parties shall file updated prehearing statements and a consent scheduling order.

AND IT IS SO ORDERED.

SHIRLEY C. ROBINSON
Administrative Law Judge

June 10, 2020
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has served this order to the above-referenced parties in this case by depositing it in the United States mail, postage prepaid, in an envelope addressed to the party (parties) at the address(es) shown below.
This 10 day of June 2020
By: _____
Judicial Law Clerk

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP II, LLC, Petitioner, vs. SOUTH CAROLINA DEPARTMENT OF HEALTH & ENVIRONMENTAL CONTROL, Respondent.	)	Docket No. 18-ALJ-07-0047-CC **CONSENT ORDER OF STAY AND REMAND** TMS Nos. 207-05-00-001 and 207-05-00-0011

On April 8, 2019, Petitioner, KDP, LLC ("Petitioner") moved this Court to reconsider and delete Footnote 12 (the "Footnote") in this Court's Order of March 28, 2019 (the "Order"), denying the Motion to Dismiss of Respondent, South Carolina Department of Health and Environmental Control ("DHEC" or the "Department"). The Footnote states:

> However, the relief this Court can give Petitioner, at this juncture, is limited to preserving Petitioner's right to a review that contemplates seaward movement of the jurisdictional lines. Because the Department has not issued a final decision on the merits contemplating seaward movement [of the jurisdictional lines at Petitioner's property], this Court cannot make any determinations as to the actual placement of the jurisdictional lines on Petitioner's property. In this respect, Petitioner has not yet exhausted its administrative remedies.

Order, p.16.

The Petitioner's Motion to Reconsider asserts that the Department has already rendered a final determination on the merits on Petitioner's request to move the baseline and setback line seaward of the Department's preliminary delineation rendered October 6, 2017, and therefore the Court should proceed with a *de novo* proceeding.

Petitioner is willing to consent to a remand to allow further consideration by the Department staff and board, without waiver of the positions asserted in its prior filings in this proceeding.

The parties, having conferred, now jointly request and this Court orders:

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SC ADMIN. LAW COURT

1. This contested case proceeding is hereby stayed.

2. This contested case proceeding is hereby remanded to the Department to allow it to make a considered determination in accordance with the applicable statutes and regulations.

3. On remand, Petitioner shall have the opportunity to submit any further information in support of its contentions up to June 5, 2019.

4. After Petitioner has submitted any further information, the Department and the Petitioner shall meet to discuss their respective positions and to determine whether the matter can be resolved by agreement.

5. The Department staff shall issue its determination no later than August 15, 2019.

6. Upon notice that Petitioner has filed a Request for Contested Case Hearing, the stay in this contested case proceeding shall be lifted in this proceeding and this contested case proceeding shall resume.

7. Petitioner's Motion to Reconsider, Alter, or Amend is hereby withdrawn.

BASED UPON THE AGREEMENT OF THE PARTIES IT IS SO ORDERED.

May June 6th, 2019

Shirley C. Robinson
S. C. Administrative Law Judge

WE SO MOVE AND CONSENT:

By: Sallie P Phelan by DW w/permission

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Bradley Churdar
S.C. Department of Health and Environmental Control
2600 Bull Street. Columbia, SC 29201

Attorneys for Respondent SCDHEC

WE SO MOVE AND CONSENT:

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Attorneys for Petitioner KDP II, LLC

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this Order in the above entitled action upon all parties to this cause by depositing a copy hereof in the United States mail, postage prepaid, or in the interagency Mail Service addressed to the party (ies) or their attorney(s) of record.

This 6 day of June, 2019

By: _____
Judicial Law Clerk

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP II, LLC, Petitioner, v. South Carolina Department of Health and Environmental Control, Respondent.	)	Docket No. 18-ALJ-07-0047-CC **ORDER DENYING MOTION TO DISMISS**

STATEMENT OF THE CASE

This matter comes before the South Carolina Administrative Law Court (ALC or Court) pursuant to a Request for Contested Case Hearing filed by KDP II, LLC (Petitioner) challenging the decision of the South Carolina Department of Health and Environment Control (Department) to delay finalizing proposed jurisdictional lines, including baselines,[1] until after April of 2018. Petitioner argues the Department's decision had the *de facto* effect of adopting the 2009 location of the baseline as the location of the "new" baseline. On October 24, 2018, the Department filed a Motion to Dismiss (Motion) pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure (SCRCP). In the Motion, the Department argues Petitioner's case should be dismissed for (1) mootness, (2) lack of a final agency decision and failure to exhaust administrative remedies, and (3) lack of standing. On November 15, 2018, Petitioner filed a Response to the Motion. For the reasons stated below, this Court denies the Department's Motion.

BACKGROUND

Petitioner owns beachfront property on Kiawah Island, South Carolina, generally referred to as "Captain Sam's Spit." The property crossed by jurisdictional lines. In 2017, the Department was in the process of reviewing the jurisdictional lines for South Carolina beaches. At this time, the law prohibited jurisdictional baselines from moving seaward of their position on December 31, 2017. S.C. Code Ann.§ 48-39-280 (Supp. 2017). On October 6, 2017, the Department published

[1] Jurisdictional lines consist of baselines and set-back lines. While Petitioner is specifically appealing the Department's decision as it relates to the baseline only, the Court notes that any revision of the baseline would necessarily affect the set-back line because the two lines are interrelated.

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notice of proposed new baselines for all South Carolina beaches. The public comment period for these proposed jurisdictional lines was scheduled to close on November 6, 2017.

However, on November 3, 2017, the Department issued a public notice in which it stated that based upon the comments it had received, it had decided to extend the public comment period until April 6, 2018. The Department also stated that "[a]s a result of this extension, the Department will begin to adopt final revised beachfront jurisdictional lines in May 2018 with all final revised lines published by December 31, 2018." Further, the Department noted:

> In 2016, S.C. Code Laws §48-39-280 was amended to prohibit the baseline from moving seaward from its position on December 31, 2017. **The Department's decision to adopt revised lines after December 31 affects landowners[2] who own property where the baseline was proposed to move seaward of the existing baseline under the Department's current proposal.**

(emphasis original). The Department also advised:

> If you are a landowner who **owns property where the baseline was proposed to move seaward of the existing baseline**, under the Department's current proposal, or if you are a landowner who contends other information may prove the baseline on your property should move seaward of the existing baseline, please contact the Department with the information requested below[3] **prior to December 4, 2017** to receive information and guidance on board review under S.C. Code Laws §44-1-60. Note that the Department will attempt to proactively reach out to these property owners. S.C. Code Laws §44-1-60(J) states "[a]ny statutory deadlines applicable to permitting and licensing programs administered by the department must be extended to all (sic) for this final review process." It is the Department's position that the December 31 date would be extended for landowners who file a timely request for review under S.C. Code Laws §44-1-60.

(emphasis original). On November 20, 2017, Petitioner filed a Request for Final Review Conference before the Department's Board.

Thereafter, on December 8, 2017, the Department issued a "Notification Letter Pursuant to S.C. Code 44-1-60," which was directed towards landowners who own property where the jurisdictional lines were proposed to move seaward and landowners who contended other information showed the lines should move seaward. The letter advised, in part:

> The Department's decision to adopt revised beachfront jurisdictional lines after December 31, 2017, becomes the final agency decision fifteen (15) calendar days

---

[2] When the Court refers to "affected landowners" it is specifically referring to the affected landowners described here who own properties crossed by jurisdictional lines that were either proposed to move seaward on October 6, 2017, or who believed the lines should move seaward.

[3] "Information requested below" referred to the following information: the property address, name of the owner(s), mailing address of owner(s), contact name, contact telephone number, and contact email address.

> after the mailing date of this Notification Letter unless a written Request for Final Review (RFR) regarding your property is filed. See S.C. Code §44-1-60. It is the Department's position that the December 31, 2017, statutory deadline would be extended to allow for the final review process to be completed. See S.C. Code §44-1-60(J).
>
> To initiate a final review process for your property, an RFR and the required filing fee in the amount of $100 must be received by the Department's Clerk of the Board within fifteen (15) calendar days after the mailing date of this Notification Letter.

In a letter dated January 5, 2018, the Board declined to hold a review conference. The letter noted that, pursuant to section 44-1-60 of the South Carolina Code, if the Board declined in writing to schedule a final review conference, then the staff decision becomes the final agency decision from which a contested case can be requested. On February 5, 2018, Petitioner filed a Request for Contested Case Hearing with this Court.

DISCUSSION

This Court has jurisdiction of this matter pursuant to section 1-23-380 of the South Carolina Code (Supp. 2018) and section 44-1-60 of the South Carolina Code (2018).

The Rules of Procedure for the Administrative Law Court (SCALC Rules) provide "[t]he South Carolina Rules of Civil Procedure . . . may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules." SCALC Rule 68. Rule 12(b)(6) of the South Carolina Rules of Civil Procedure (SCRCP) provides the "failure to state facts sufficient to constitute a cause of action" is an affirmative defense to an action. In other words, "[u]nder Rule 12(b)(6), SCRCP, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action." *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). "Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint." *Baird v. Charleston Cty.*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). "If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." *Brazell v. Windsor*, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009); *see also Spence*, 368 S.C. at 116, 628 S.E.2d at 874 ("A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory.").

I. Jurisdictional Lines

In South Carolina, the General Assembly has established a "policy of beach preservation." S.C. Code Ann. § 48-39-280(A) (Supp. 2018).[4] Pursuant to this policy, the Department is charged with establishing a baseline for each standard erosion zone and each inlet erosion zone. § 48-39-280(A) (Supp. 2018). When this case arose in 2017, section 48-39-280(A) mandated that "the baseline established pursuant to this section must not move seaward from its position on December 31, 2017." S.C. Code Ann. § 48-39-280(A) (Supp. 2017). This requirement was re-iterated in sub-section 48-39-280(C), which stated, in relevant part:

> The department, before July 3, 1991, must establish a final baseline and setback line for each erosion zone based on the best available scientific and historical data as provided in subsection (B) and with consideration of public input. The baseline and setback line must not be revised before July 1, 1998, nor later than July 1, 2000. After that revision, the baseline and setback line must be revised not less than every seven years but not more than every ten years after each preceding revision. The department shall establish the baseline and setback line for all locations where the baseline and setback line were established on or before January 31, 2012. **Nothing in this section allows the seaward movement of the baseline after December 31, 2017.**

S.C. Code Ann. § 48-39-280(C) (Supp. 2017) (emphasis added).

A landowner whose property was affected by the Department's movement of a baseline had the following recourse pursuant to sub-section 48-39-280(E):

> A landowner claiming ownership of property affected who feels that the final or revised setback line, baseline, or erosion rate as adopted is in error, upon submittal of substantiating evidence, must be granted a review of the setback line, baseline, or erosion rate, or a review of all three. The requests must be forwarded to the department board in accordance with Section 44-1-60, and the final decision of the board may be appealed to the Administrative Law Court, as provided in Chapter 23 of Title 1.

S.C. Code Ann. § 48-39-280(E) (Supp. 2017).

The Department adopted regulations corresponding to the above to statutory subsections. Specifically, Regulation 30-14 provides, in relevant part:

> E. Procedures for Adopting Baselines and Erosion Rates (Section 48-39-280).
>
> (1) Following the establishment of the interim baselines, erosion rates, and setback lines pursuant to Section 48-39-280(C) and any amendments or revisions thereto,

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[4] This version of section 48-39-280 became effective on May 3, 2018. 2018 Act No. 173. Previously, at the time this case arose, this section established "[a] forty-year policy of retreat from the shoreline." S.C. Code Ann. § 48-39-280 (Supp. 2017).

the Department will adopt final baselines, erosion rates, and setback lines as part of the state comprehensive beach management plan pursuant to Section 48-39-320. The following procedure will be used for the establishment of final baselines, erosion rates, and setback lines:

(a) The proposed baseline, erosion rate, and setback line for a region, island or part thereof, or other geographic area of South Carolina's ocean shoreline shall be made available to the public for inspection at each of the Department's offices;

(b) the Department shall afford the public a thirty-day comment period;

(c) the Department shall afford the opportunity for a public hearing.

(2) The Department shall, following the consideration of all public comments, adopt in final form the baselines, erosion rates, and setback lines and shall include such information in the state plan.

F. Procedures for Appealing Baselines and Erosion Rates [Section 48-39-280(E)].

(1) Any landowner claiming ownership of affected property who feels that the final or revised setback line, baseline, or erosion rate as adopted is in error, upon submittal of substantiating evidence, within one year of the revision date, must be granted a review of the setback line, baseline, or erosion rate, or a review of all three. The Department shall hear all requests for review. The process is as follows:

(a) Upon receipt of a property owner's request for review of the setback, baseline, or erosion rate, a request will be made of the property owner to provide the Department with substantiating evidence, as required in Section 48-39-280(E). If the property owner does not respond or if there is no evidence at all to support the request, a letter will be sent to the property owner denying the request.

(b) If the Department agrees with the property owner that the lines are in error, the lines will be moved.

(c) If the Department disagrees with the property owner, and believes that the location of the lines is correct, the property owner will be notified in writing. Any appeal of the Department's decision under this section shall be made to the Administrative Law Judge Division.

(2) Appeals are governed by R.30-6.

S.C. Code Ann. Regs. 30-14 (2011).

After the contested decision was rendered in this case, the General Assembly enacted the Beachfront Management Reform Act (Reform Act) on May 3, 2018, which changed the language of section 48-39-280. 2018 Act No. 173. In relevant part, after May 3, 2018, section 48-39-280 was amended to state that "[a] baseline established pursuant to this section must not move seaward" from whichever of the following was the most seaward location:

(a) the location of the baseline as established during the 2008 through 2012 establishment cycle;

(b) the location of the baseline as proposed by the department on October 6, 2017; and

(c) the location of the proposed October 6, 2017, baseline as revised by the department pursuant to a review or an appeal initiated before January 1, 2018.

S.C. Code Ann. § 48-39-280(A)(4) (Supp. 2018).

The General Assembly enacted further guidance on May 3, 2018, in section 48-39-285, which provides:

(A) Notwithstanding the provisions of Section 48-39-280, the department must initiate a new baseline cycle by no sooner than January 1, 2024. Until the department establishes a new baseline and setback line affecting a landowner as part of that establishment cycle, the baseline and setback line in effect for the landowner are the most seaward of the following, respectively:

(1)(a) the baseline established during the 2008 through 2012 establishment cycle; or

(b) the baseline proposed by the department on October 6, 2017; and

(2)(a) the setback line established during the 2008 through 2012 establishment cycle; or

(b) the setback line proposed by the department on October 6, 2017.

(B) *Notwithstanding the provisions of subsection (A) and Section 48-39-280,* if the department, *pursuant to a review or an appeal initiated before January 1, 2018,* revises the baseline proposed on October 6, 2017, to a location seaward of both the baseline established during the 2008 through 2012 establishment cycle and the baseline proposed on October 6, 2017, then both the revised proposed baseline and revised proposed setback line will be in effect for the landowner until the department establishes a new baseline and setback line.

S.C. Code Ann. § 48-39-285 (Supp. 2018) (emphasis added). No regulations were updated or amended after the Reform Act was enacted.

Overall, the statutes provide that if an affected landowner initiated a review or an appeal of the Department's determination of the baseline prior to January 1, 2018, then it is possible, pursuant to section 48-39-285(B), that the baseline can be revised pursuant to that review to move seaward of its location on December 31, 2017.

II. Analysis

The Department filed its Motion pursuant to Rule 12(b)(6), SCRCP, arguing Petitioner has failed to state facts sufficient to constitute a cause of action. In the Motion, the Department specifically argues that Petitioner's case should be dismissed for (1) mootness, (2) lack of a final

agency decision and failure to exhaust administrative remedies, and (3) lack of standing. The Court will address each ground in turn, beginning with the assertion that there is no final agency decision and Petitioner did not exhaust its administrative remedies because this ground appears to get to the heart of the matter.

A. Lack of Final Agency Decision and Failure to Exhaust Administrative Remedies

The Department contends there is no final agency decision regarding the October 6, 2017, proposed jurisdictional lines. The Department emphasizes that the October 6, 2017 jurisdictional lines were "proposed" lines that were neither finalized by Department staff nor the Department Board. The Department contends that at the time Petitioner filed its RFR, no final agency decision existed as to the baselines. Essentially, the Department argues Petitioner contested the wrong Department decision to obtain the relief they are seeking. Finally, the Department contends that when the General Assembly passed the Reform Act on May 3, 2018, it set the jurisdictional baselines, thereby foreclosing the Department from ever issuing a final agency decision on the issue.

In contrast, Petitioner maintains the Department's decision to postpone the determination of the final baseline until well into 2018 was a final decision because it had the effect of finally setting the baseline at its 2009 location. Petitioner further argues the Department itself described its decision as a "final agency decision" in its December 8th letter and indicated affected landowners had fifteen days to appeal the decision.

As our supreme court has explained, "[t]he doctrine of exhaustion of administrative remedies is generally considered a rule of policy, convenience and discretion, rather than one of law, and is not jurisdictional." *Storm M.H. ex rel. McSwain v. Charleston Cty. Bd. of Trustees*, 400 S.C. 478, 487, 735 S.E.2d 492, 497 (2012) (quoting *Ward v. State*, 343 S.C. 14, 17 n. 5, 538 S.E.2d 245, 246 n. 5 (2000)). "Thus, the failure to exhaust administrative remedies goes to the prematurity of a case, not subject matter jurisdiction." *Ward*, 343 S.C. at 17 n.5, 538 S.E.2d 245 at 246 n. 5.

Generally, an aggrieved party must exhaust their administrative remedies "absent circumstances supporting an exception to application of the general rule." *Brown v. James*, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010); *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994) ("The general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to application of the general rule.");

Garris v. Governing Bd. of S.C. Reinsurance Facility, 319 S.C. 388, 390, 461 S.E.2d 819, 821 (1995) ("Relief is not generally available to one who has not exhausted administrative remedies.").

> The doctrine of exhaustion of administrative remedies requires that where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will act. This doctrine is well established, is a cardinal principle of practically universal application, and must be borne in mind by the courts in construing a statute providing for review of administrative action.

Brown, 389 S.C. at 48, 697 S.E.2d at 608 (quoting 2 Am. Jur. 2d *Administrative Law* § 595 (1962)). Indeed, the judicial review provided in section 1-23-380 is predicated, in part, on a party exhausting their administrative remedies. *See* S.C. Code Ann. § 1-23-380 (Supp. 2017) ("A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1."); *see also Garris*, 319 S.C. at 390, 461 S.E.2d at 821 ("Judicial review is appropriate where there is an appeal from a *final* agency order." (emphasis added)).

However, "South Carolina, like most jurisdictions, recognizes exceptions to the exhaustion of administrative remedies requirement." *Brown*, 389 S.C. at 54, 697 S.E.2d at 611. One such exception is when a party demonstrates that the pursuit of administrative remedies would be in vain or futile. *Ward*, 343 S.C. at 19, 538 S.E.2d at 247; *Storm M.H. ex rel. McSwain*, 400 S.C. at 487, 735 S.E.2d at 497 ("A commonly recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act."); *see also Andrews Bearing Corp. v. Brady*, 261 S.C. 533, 536, 201 S.E.2d 241, 243 (1973) ("The adoption of the view that the rule [requiring the exhaustion of administrative remedies] is discretionary in nature is a recognition that situations can exist where failure to exhaust administrative remedies may be excused."). That exceptions to this general rule exist is reflected in section 1-23-380, which notes that "[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." § 1-23-380; *see also Garris*, 319 S.C. at 390, 461 S.E.2d at 821 (holding the aggrieved party failed to exhaust their administrative remedies because "[t]here has been no final order in this case nor any showing that a final agency decision will not provide an adequate remedy").

Regarding the exception of futility, it can be demonstrated "by a showing comparable to the administrative agency taking 'a hard and fast position that makes an adverse ruling a certainty.'" *Brown*, 389 S.C. at 54, 697 S.E.2d at 611. Further, "[a]nother exception to the

exhaustion requirement is recognized when an agency has acted outside of its authority." *Id.* at 55, 697 S.E.2d at 611–12.

Our supreme court's decision in *Brown v. James* is particularly relevant here. In *Brown*, a teacher received a notice that her teaching contract would not be renewed in a letter dated April 12, 2007. *Brown*, 389 S.C. at 45, 697 S.E.2d at 606. Within fifteen days of receiving that letter, the teacher requested an opportunity to be heard to which she was entitled under the Employment and Dismissal Act. *Id.* Thereafter, the school Board voted to terminate the teacher's contract on April 24, 2007, without the teacher's knowledge and before a hearing could be held. *Id.* Although the Board made an effort to move forward with a hearing after it had already made its decision, a hearing was never held, and the Board blamed this, in part, on the teacher's failure to communicate about her deposition. *Id.* at 45-46, 697 S.E.2d at 606-07. The teacher appealed the non-renewal of her contract to the circuit court and the Board argued the teacher had failed to exhaust her administrative remedies because a hearing was never held. *Id.* at 46, 697 S.E.2d at 607.

Based upon this factual scenario, the supreme court held the teacher properly brought her case before the circuit court and did not have to exhaust her administrative remedies because (1) the Board's decision to terminate her constituted a decision on the merits and was immediately reviewable and (2) she showed that to proceed would have been futile. *Id.* at 51, 697 S.E.2d at 609. As to the first ground for its decision, the supreme court noted that "when the Board voted to accept [the] recommendation for the nonrenewal of [the teacher's] contract prior to conducting a hearing, its decision had an immediate effect on [the teacher's] legal rights. *Id.* at 52, 697 S.E.2d at 610. Further, the supreme court agreed with the teacher's argument that she "was not required to participate in a hearing after a final determination had already been made regarding the nonrenewal of her teaching contract, as such a pursuit would constitute a futile act." *Id.* at 55, 697 S.E.2d at 612. The supreme court further held that "[t]he fact that an administrative hearing was not conducted below rests with the Board's failure to follow procedure as prescribed in the Employment and Dismissal Act, and not in any failure of [the teacher] to exhaust her administrative remedies." *Id.* at 54, 697 S.E.2d at 611. In finding the teacher had shown exceptions to the rule, the supreme court cited Article 1, section 22 of the South Carolina Constitution, which provides:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both

> prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

S.C. Const. art. I, § 22.

Thus, while a party is required to exhaust his administrative remedies before her action is ripe for judicial review, exceptions to this rule exist where such exhaustion is (1) futile or (2) a final decision on the merits has essentially been made immediately affecting the rights of the petitioner. Applying this rule to the case at bar, I find the filings indicate the Department's decision was essentially a final agency decision as to the placement of the baseline on Petitioner's property, and it would have been futile for Petitioner to wait to challenge the Department's decision if it wished to adequately preserve its rights.

i. Final Agency Decision

Initially, I find that once the Department chose to extend the comment period beyond December 31, 2017, it foreclosed the possibility that Petitioner's jurisdictional lines could move seaward.[5] The Department's decision was, therefore, the equivalent of making a determination that Petitioner's baseline would not move seaward. *See Brown*, 389 S.C. at 54, 697 S.E.2d at 611 (holding futility can be demonstrated "by a showing comparable to the administrative agency taking 'a hard and fast position that makes an adverse ruling a certainty' "). This would certainly suggest that waiting for the Department to make a final decision after the comment period closed

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[5] Notably, the Department's decision to extend the comment period appears to have exceeded its authority. *See Brown*, 389 S.C. at 55, 697 S.E.2d at 611–12 (holding "[a]nother exception to the exhaustion requirement is recognized when an agency has acted outside of its authority"). Once the Department established the proposed baselines, Regulation 30-14(E)(b) provided the Department "shall afford the public a thirty-day comment period." The word "shall" indicates a mandatory action. *Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) ("Under the rules of statutory interpretation, use of words such as "shall" or "must" indicates the legislature's intent to enact a mandatory requirement."). The Department's decision to extend the comment period several months past the regulatorily prescribed thirty days pushed back its other duties, including its duty to adopt final baselines after it finished reviewing the comments. *See* Reg. 30-14(E); *see also Home Med. Sys., Inc. v. S.C. Dep't of Revenue*, 382 S.C. 556, 564, 677 S.E.2d 582, 587 (2009) (holding "regulations authorized by the Legislature have the force of law") (internal quotation marks and citation omitted)). Prior to the Department's decision, it would have been possible for the jurisdictional lines to be finalized before the statutory deadline. Further, this Court found no statutory or regulatory authority which allows the Department to extend the comment period beyond thirty days.

However, the Department appeared to take the position in its notification letters that it had the authority to, at least, extend the statutory deadline for Petitioner under § 44-1-60(J). Section 44-1-60(J) provides, in relevant part: "Any statutory deadlines applicable to permitting and licensing programs administered by the department must be extended to all for this final review process." The Court finds the authority granted to the Department under this section applies to "permitting" and "licensing" programs, and the Court does not interpret the establishment of jurisdictional lines as a permitting or licensing program. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."); *Id.* ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.").

in April 2018 would be futile if Petitioner wished to preserve its right to have the opportunity of the jurisdictional lines moving seaward.[6]

However, it is important to note that, technically, the Department's decision did not deprive Petitioner of a final agency decision on the merits regarding the jurisdictional lines on its property. *See S.C. Baptist Hosp. v. S.C. Dep't of Health & Envtl. Control*, 291 S.C. 267, 270, 353 S.E.2d 277, 279 (1987) ("It would be premature for a court to decide the merits of a dispute when the agency responsible for making the decision has not yet had an opportunity to decide the merits of the case."). To this point, the Department indicated in the notification letters that it expected to finalize the jurisdictional lines by December 2018 and would have presumably issued final agency decisions as to the placement of the lines by that time. Nevertheless, the Department's decision deprived Petitioner of a review on the merits that would *contemplate seaward movement of the jurisdictional line*. Thus, unlike in *Brown*, where the Board's decision to terminate the teacher clearly denied the teacher *her statutory right* to a hearing on the merits before she was terminated, here, it is unclear whether the Department's decision infringed on Petitioner's rights. Specifically, we are faced with the question of whether Petitioner had, or has, *a legal right* to a review on the merits that *contemplates seaward movement of the jurisdictional lines* before the statutory deadline of December 31, 2017, or despite it.

This case is replete with difficult legal issues surrounding the interaction and harmonious application of existing law and amended law (the Reform Act) to the facts of this case. *See Hodges v. Rainey*, 341 S.C. 79, 91, 533 S.E.2d 578, 584 (2000) ("The goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd."). One such legal issue is whether Petitioner was entitled to have the baseline re-established before December 31, 2017, considering the Department was not statutorily obligated to re-establish the baseline before December 31, 2017.[7] In other words, if the

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[6] Based upon the filings, it appears the last time Petitioner's baseline was established was in 2009. Therefore, Petitioner's property could have been ripe to have its baseline re-established pursuant to section 48-39-280 as early as 2016, seven years after 2009. § 48-39-280 (Supp. 2017) (providing "the baseline and setback line must be revised not less than every seven years but not more than every ten years after each preceding revision"). Additionally, in 2016, section 48-39-280 was amended to require the Department to "establish the baseline and setback line for all locations where the baseline and setback line were established on or before January 31, 2012" and "[n]othing in this section allows the seaward movement of the baseline after December 31, 2017." § 48-39-280 (Supp. 2017); *see* 2016 Act No. 197. Thus, pursuant to section 48-39-280, the Department could have waited ten years, or until 2019, to re-establish Petitioner's baseline; however, it chose to initiate the process before then.

[7] While the language of section 48-39-280 (as it existed in 2016-2017) certainly suggested that the Department was to initiate the process of re-establishing baselines in 2016 and be mindful of the December 31, 2017 deadline, the

Department had not begun the re-establishment process until 2018, would Petitioner have had a right to bring its case before December 31, 2017, to ensure it received the benefit of the jurisdictional lines moving seaward? Or, would Petitioner have simply lost out on whatever property gains it would have made had the Department completed its re-establishment process before the December 31, 2017, statutory deadline?

Although the Court finds this thought experiment intriguing, it finds that it is not necessary to reach this conundrum in light of the very specific circumstances of these cases. Specifically, the Court finds Petitioner secured a right to review that contemplated seaward movement of the jurisdictional lines under the then-existing, and now current statutory framework for the following three reasons: (1) the Department began the re-establishment process before the statutory deadline when seaward movement was contemplated; (2) the Department represented to Petitioner (as discussed *infra*) that its notification letters constituted a final agency determination for the purpose of preserving a review that contemplated seaward movement of the jurisdictional lines; and (3) the General Assembly amended the statutory scheme through the Reform Act to allow for affected landowners, like Petitioner, who filed RFRs before January 1, 2018, to proceed with reviews that contemplated seaward movement of the jurisdictional lines after December 31, 2017.

There is a specific period of time when Petitioner probably did not have a right to a review contemplating seaward movement of the jurisdictional lines –January 1, 2018 (after the statutory deadline) through May 3, 2018 (passage of the Reform Act). However, once the Reform Act became effective, Petitioner reaped the benefit of the General Assembly's clear intention to allow seaward movement of the jurisdictional lines for affected landowners who had requested a review before January 1, 2018. *See* § 48-39-280, § 48-39-285; *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.").

Accordingly, I find the Department's decision to extend the comment period and postpone finalizing the jurisdictional lines until after December 31, 2017, had an "immediate effect" on Petitioner's legal right to a review that contemplated seaward movement of the jurisdictional lines.

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language of this section did not overtly require the Department to finish its establishment cycle by December 31, 2017. As previously mentioned, pursuant to section 48-39-280, the Department had up to ten years to re-establish the baseline on Petitioner's property, or potentially up to 2019.

Moreover, the Department represented its notification letters of November 3rd and December 8th to be final agency decisions. It is clear from the filings that the Department knew its decision to postpone finalizing the baselines would function as a decision denying seaward movement of the jurisdictional lines for affected landowners. This is evidenced by the Department's November 3, 2017 letter in which the Department stated, in bold, "**The Department's decision to adopt revised lines after December 31 affects landowners who own property where the baseline was proposed to move seaward of the existing baseline under the Department's current proposal.**" (emphasis original). The Department thereafter sent a further notification to these "affected landowners" on December 8, 2017, informing them that the Department "decision to adopt revised beachfront jurisdictional lines after December 31, 2017" would become the "final agency decision" fifteen days after the mailing of "this Notification letter" pursuant to § 44-1-60 [describing the administrative review process].[8] In both letters, the Department stated that it was its position that the December 31st statutory deadline restricting any further seaward movement would be extended for affected landowners who filed a timely request for review.

In the December 8th letter, the Department encouraged affected landowners to review the proposed baseline positions on their properties and advised them how to make a request for final review for their properties before the agency decision became the final agency decision. The letter advised affected landowners that "[t]o initiate a final review process for your property, an RFR and the required filing fee in the amount of $100 must be received by the Department's Clerk of the Board within fifteen (15) calendar days after the mailing date of this Notification Letter."

The Court finds that these notices issued by the Department strongly suggested to affected landowners that its decision to extend the comment period and not finalize jurisdictional lines prior to December 31, 2017, while not actually a final agency decision as to the placement of the baselines, would *serve* as the final agency decision as to the placement jurisdictional lines for the

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[8] The Court notes that the Department attached the November 3, 2017, notification letter to its Agency Information Sheet (AIS) as the final agency decision in this case (although it maintains this decision is not a final agency decision as to the placement of the baseline on Petitioner's property). The Court was initially predisposed to find the Department's December 8, 2017 notification letter to be the "final agency decision" because it specifically said it would become as much fifteen days after its issuance. However, since the Department appears to treat the December 8th letter in its AIS as an expansion or further explanation of its November 3rd letter, the Court will treat both letters as encompassing the final agency decision in these cases. Therefore, the fact that Petitioner requested its review after the November 3rd letter, but not again after the December 8th letter, does not impact Petitioner's ability to exhaust its administrative remedies because the Department has treated both letters as its final agency decision.

purpose of preserving affected landowners' right to eventually challenge the jurisdictional lines after the comment period was over and the Department concluded re-establishment of the lines. Indeed, when the Department notified affected landowners of their right to request a review, the Department couched it in its December 8th letter as initiating a "final review process for your *property*," which does not suggest that a landowner filing a request for review is merely challenging the Department's decision to extend the comment period. Rather, this language indicates that the affected landowner is initiating a substantive review of the baseline on their property.

The above statements indicate an intention, on the behalf of the Department, to preserve affected landowners' rights to a review of the revised baselines although the review technically would not become ripe until after the December 31, 2017 statutory deadline. It further appears that the Department advised affected landowners that if they filed RFRs for their properties within fifteen days of the December 8th letter, then the Department would treat the RFRs as ripe for the purpose of preserving the affected landowners' right to review past the statutory deadline.[9] Therefore, not only did the Department's decision not to finalize the jurisdictional lines before December 31, 2017, function as a final agency decision, but the Department itself was representing this decision as a final agency decision related to the placement of the jurisdictional lines.[10] Then, when the Department's Board declined review the Department's decision, the decision became the final agency decision for the purposes of judicial review. § 44-1-60 ("If the board declines in writing to schedule a final review conference or if a final review conference is not conducted within sixty calendar days, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person requests pursuant to subsection (G) a contested case hearing before the Administrative Law Court.").

For the abovementioned reasons, I find Petitioner's case should not be dismissed for failure to exhaust administrative remedies because the filings suggest Petitioner meets an exception to

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[9] At the time this contested case arose, there was no authority for the Department to suggest to affected landowners that it could toll or otherwise suspend a review on the merits past December 31, 2017, such that the baseline on this property could move seaward after December 31, 2017. Once the Reform Act was passed in May 2018, the General Assembly added a provision to essentially allow the Department to fulfill its representation that it would conduct meaningful reviews of properties after December 31, 2017, if an RFR was filed before January 1, 2018. This issue will be further discussed in the section discussing mootness below.

[10] The Court emphasizes that its decision finding the November 3rd and December 8th notification letters to be, essentially, the final agency decision in these cases for the purpose of Petitioner exhausting its administrative remedies is limited to these specific circumstances and this Petitioner.

this rule and Petitioner has presented a plausible claim for relief. *See Andrews Bearing Corp.*, 261 S.C. at 536, 201 S.E.2d at 243 ("The adoption of the view that the rule [requiring the exhaustion of administrative remedies] is discretionary in nature is a recognition that situations can exist where failure to exhaust administrative remedies may be excused."); *Storm M.H. ex rel. McSwain*, 400 S.C. at 487, 735 S.E.2d at 497 ("A commonly recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act."); *Brazell*, 384 S.C. at 515, 682 S.E.2d at 826 ("If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper.").

B. Mootness

The Department argues that these cases should be dismissed for failure to state facts sufficient to constitute causes of action because the issue raised by Petitioner is moot. The Department contends that when the General Assembly passed the Reform Act, the Reform Act established the most seaward jurisdictional lines for Petitioner's property and the Department cannot revise the lines any sooner than 2024. The Department further contends that the comment period was "negated by this legislative action, which resulted in the immediate establishment of the jurisdictional baseline and setback line by the General Assembly without further comment or review." The Department contends Petitioner can receive no relief since passage of the Reform Act.

Petitioner argues, and this Court agrees, that the Department failed to give effect to the full text of sections 48-39-280 and 48-39-285 under the Reform Act. The Reform Act clearly provides a remedy for affected landowners, like Petitioner, who were impacted by the Department's failure to finish RFRs before the statutory deadline of December 31, 2017. Specifically, the Act provides:

> A baseline established pursuant to this section must not move seaward from whichever of the following was the most seaward location:
>
> (a) the location of the baseline as established during the 2008 through 2012 establishment cycle;
>
> (b) the location of the baseline as proposed by the department on October 6, 2017; and
>
> *(c) the location of the proposed October 6, 2017, baseline as revised by the department pursuant to a review or an appeal initiated before January 1, 2018.*

§ 48-39-280(A)(4) (emphasis added). Further, section 48-39-285 provides:

> (A) Notwithstanding the provisions of Section 48-39-280, the department must initiate a new baseline cycle by no sooner than January 1, 2024. Until the department establishes a new baseline and setback line affecting a landowner as part of that establishment cycle, the baseline and setback line in effect for the landowner are the most seaward of the following, respectively:
>
> > (1)(a) the baseline established during the 2008 through 2012 establishment cycle; or
> >
> > (b) the baseline proposed by the department on October 6, 2017; and
> >
> > (2)(a) the setback line established during the 2008 through 2012 establishment cycle; or
> >
> > (b) the setback line proposed by the department on October 6, 2017.
>
> *(B) Notwithstanding the provisions of subsection (A) and Section 48-39-280, if the department, pursuant to a review or an appeal initiated before January 1, 2018, revises the baseline proposed on October 6, 2017, to a location seaward of both the baseline established during the 2008 through 2012 establishment cycle and the baseline proposed on October 6, 2017, then both the revised proposed baseline and revised proposed setback line will be in effect for the landowner until the department establishes a new baseline and setback line.*

§ 48-39-285 (emphasis added).

The language of the General Assembly is clear and unambiguous and allows for seaward movement of the jurisdictional lines past where the lines were fixed on December 31, 2017, if a review was initiated before January 1, 2018. Petitioner initiated its review before January 1, 2018, and therefore it is possible for Petitioner to receive the relief requested under the Reform Act.[11] Accordingly, I do not find that the Act rendered Petitioner's case moot and decline to dismiss these actions on this ground.[12]

C. Standing

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[11] Indeed, if the Reform Act had not been passed, then relief for Petitioner would have been impossible under the old statutory scheme, which made no allowances for seaward changes or revisions after December 31, 2017. Rather than causing these contested cases to be moot, the Reform Act extended a lifeline to Petitioner and similarly situated parties. Moreover, as Petitioner observed, it would be "puzzling, to say the least" for the Department to assert this appeal is moot when this is exactly the type of appeal the General Assembly contemplated in preserving when it passed the Reform Act.

[12] However, the relief this Court can give Petitioner, at this juncture, is limited to preserving Petitioner's right to a review that contemplates seaward movement of the jurisdictional lines. Because the Department has not issued a final decision on the merits contemplating seaward movement, this Court cannot make any determinations as to the actual placement of the jurisdictional lines on Petitioner's property. In this respect, Petitioner has not yet exhausted its administrative remedies. *See S.C. Baptist Hosp.*, 291 S.C. at 270, 353 S.E.2d at 279 ("It would be premature for a court to decide the merits of a dispute when the agency responsible for making the decision has not yet had an opportunity to decide the merits of the case.").

The Department argues that even if this Court finds the Department's decision to extend the comment period was a final agency decision and this case is not moot, this action should be dismissed because Petitioner does not have standing. The Department specifically argues Petitioner does not have constitutional standing because Petitioner has not shown an "injury in fact."[13] The Department maintains "there is no concrete or actual injury to the Petitione[r] caused by the extension of the public comment period."

In contrast, Petitioner argues it has statutory standing pursuant to the Reform Act. Petitioner also maintains it has constitutional standing (and can show injury in fact) because Petitioner's property will be significantly affected by the location of the jurisdictional lines, which determine the useable area of the property. Petitioner also notes the Department, in its notification letters, identified Petitioner and other similarly situated individuals as adversely impacted landowners.

"Standing, a fundamental prerequisite to instituting an action, may exist by statute, through the principles of constitutional standing, or through the public importance exception." *Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). "The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute." *Freemantle v. Preston*, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012). "Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation." *Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518. Nevertheless,

> [i]f . . . a statute does not clearly and specifically address who may bring suit pursuit to it . . . . case law seems to suggest that the traditional constitutional standing analysis still applies. Thus, the specificity of a statutory standing provision may be critical to determining whether statutory standing exists and, if not, whether a constitutional analysis is appropriate.

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[13] In *Sea Pines Association for Protection of Wildlife, Inc. v. South Carolina Department of Natural Resources*, 345 S.C. 594, 550 S.E.2d 287 (2001), the South Carolina Supreme Court adopted the federal test for "constitutional standing" as set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The three elements of the test are:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 504 U.S. at 560-561 (citations omitted).

Richard H. Seamon, Paige J. Gossett, & John D. Geathers, *Administrative Agencies – General Concepts and Principles*, *in* South Carolina Administrative Practice and Procedure 1, 76-77 (Randolph R. Lowell ed., 2013).

In this case, there is no need to conduct an analysis of constitutional standing because Petitioner is conferred standing by statute. Specifically, at the time this contested case was initiated, section 48-39-280(E) provided:

> A landowner claiming ownership of property affected who feels that the final or revised setback line, baseline, or erosion rate as adopted is in error, upon submittal of substantiating evidence, must be granted a review of the setback line, baseline, or erosion rate, or a review of all three. The requests must be forwarded to the department board in accordance with Section 44-1-60, and the final decision of the board may be appealed to the Administrative Law Court, as provided in Chapter 23 of Title 1.

§ 48-39-280(E) (Supp. 2017). This statute clearly gives standing to a landowner who owns a property that is affected by a decision establishing jurisdictional lines. In this case, Petitioner owns beachfront property that is crossed by jurisdictional lines and, as discussed above, the Court finds the Department issued a final agency decision in this matter. Therefore, Petitioner is a landowner with affected property who is able to contest the Department's decision pursuant to section 48-39-280(E).[14] Accordingly, the Court denies the Department's Motion to Dismiss as to this ground as well.

ORDER

IT IS HEREBY ORDERED that the Department's Motion to Dismiss is **DENIED**.

AND IT IS SO ORDERED.

SHIRLEY C. ROBINSON
Administrative Law Judge

March 28, 2019
Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served in a copy of the above entitled action upon all parties to the action by depositing a copy thereof in the United States mail, postage prepaid, in the envelope addressed to the party (ies) or their attorney(s).

This 28 day of March, 2019

By: _____

[14] The Court notes Petitioner would also have statutory standing pursuant to subsection 48-39-280(F) (Supp. 2018), which replaced section 48-39-280(E) (Supp. 2017) when the Reform Act was passed in 2018.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, vs. South Carolina Department of Health and Environmental Control and Kiawah Development Partners, II, Respondents.	)	Docket No. 15-ALJ-07-0369-CC **FINAL ORDER**

APPEARANCES:

Amy E. Armstrong & Jessie A. White for Petitioner South Carolina Coastal Conservation League

Brad Churdar for Respondent South Carolina Department of Health and Environmental Control

G. Trenholm Walker & Tom Gressette for Respondent KDP, II, LLC/KRA Development, LP

STATEMENT OF THE CASE

This matter comes before the South Carolina Administrative Law Court (the ALC or the Court) pursuant to Petitioner South Carolina Coastal Conservation League's (Coastal's) request for a contested case hearing pursuant to section 1-23-600(A) of the South Carolina Code (Supp. 2017) and section 44-1-60 of the South Carolina Code (2018). Coastal challenges the South Carolina Department of Health and Environmental Control's (the Department's) decision to issue Kiawah Development Partners, II (KDP) a NPDES Stormwater Construction Permit (SCR100913), a Water Supply Construction Permit (3039S-WS), a Wastewater Construction Permit (38828-WW), and a Coastal Zone Consistency Certification (CZCC) for KDP's proposed project on Captain Sam's Spit (the Spit), part of Kiawah Island, South Carolina. Collectively, the permits authorize the construction of a roadway, stormwater management system, utility lines, gravity sewer, manholes, a pump station, a force main, water lines, and a steel sheet pile wall (SSPW) in connection with a twenty-six lot residential development on the Spit.

FILED
September 24, 2018
SC ADMIN. LAW COURT

On June 12, 2015, Coastal requested the Department's Board (the Board) conduct a final review conference of the Department's staff decision to issue the above-referenced permits and CZCC. On July 6, 2015, the Board declined to conduct a final review conference, making the staff decision the final agency decision pursuant to section 44-1-60(f) of the South Carolina Code (2018). Thereafter, on August 5, 2015, Coastal filed this request for a contested case hearing. A hearing on this matter was held before the ALC in Columbia, South Carolina, from August 21-25, 2017, to August 28-29, 2017.

ISSUES[1]

1. Whether the Department's decision to issue the permits and CZCC in this case was improper because the issuance of the permit and CZCC result in violations of the following provisions of the South Carolina Coastal Zone Management Act (CZMA) and the Coastal Zone Management Plan (CZMP):
    a. CZMP Policy III.C.3.I(7)
    b. CZMP Chapter IV.A.2.a.8
    c. CZMP Chapter III.C3.XII.A, B & D
    d. Section 48-39-30 of the South Carolina Code
    e. Section 48-39-150(A) of the South Carolina Code
2. Whether the Department's issuance of the CZCC is fundamentally inconsistent with its denial of critical area permit OCRM-08-117-E dated December 18, 2008, and the Board's decision to overturn the Department staff decision to issue a certification for a 340-foot sheet pile wall along the Kiawah River.
3. Whether the Department's issuance of the CZCC is fundamentally inconsistent with the South Carolina Supreme Court's decision in *Kiawah Development Partners, II v. South Carolina Department of Health and Environmental Control*, 411 S.C. 16, 766 S.E.2d 707 (2014) (*Kiawah II*).

[1] In the section of its Prehearing Statement discussing the issues to be raised, KDP expressed that it "intends to raise a question as to the standing of [Coastal] in this case." However, KDP never filed a motion to dismiss based on standing, nor did KDP raise or argue the issue of standing at trial. However, KDP submitted a proposed final order to this Court in which it argued Coastal did not have standing to bring this action. Based upon KDP's failure to express more than an intention to raise this issue in its Prehearing Statement and its failure to argue the issue at trial, this Court deems the issue of standing, if it ever was an issue, abandoned and declines to address it. *See, e.g., Caines v. Marion Coca Cola Bottling Co.*, 196 S.C. 502, 14 S.E.2d 10, 11 (1941) ("A Court is not warranted in submitting to a jury, by instructions, an issue raised by a pleading which is abandoned in open Court by the party pleading it, and in support of which no evidence is presented.").

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and taking into consideration the burden of persuasion and the credibility of the witnesses, I make the following findings of fact by a preponderance of the evidence:

Background

This is not the first time these parties have come before the Court in reference to KDP's proposed development of Captain Sam's Spit. A similar case came before this Court in 2010, and a decision in that case was recently issued by the South Carolina Supreme Court.[2] The primary differences between the 2010 case and the case at bar are the types of permits requested and the type of erosion control structure proposed by KDP to facilitate development of the Spit. Pursuant to its plan for development, on August 8, 2011, KDP submitted an application to the Department for coverage under the NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities and for a Coastal Zone Consistency Certification for its proposed residential development on the Spit. On April 1, 2013, KDP submitted a construction application for Water/Wastewater Facilities to the Department for approval of the water and sewer infrastructure necessary to service the same twenty-six lots. On May 28, 2015, the Department granted the permits and issued a CZCC.

Specifically, the Department issued a Wastewater Construction Permit for the construction of 1,644 linear feet of eight-inch PVC gravity sewer, eleven manholes, one duplex pump station, and 465 linear feet of four-inch force main to serve twenty-six residential lots and a community dock site. The Department also issued a Water Supply Construction permit for the construction of 5,000 linear feet of ten-inch PVC water line and seven fire hydrants to serve twenty-six residential lots, a pump station, and one community dock site. Both the water and wastewater will be served by Kiawah Island Utility, LLC. The Department next approved the construction of a 2,380-linear-foot steel sheet pile wall associated with the proposed development. Finally, the Department also issued a CZCC subject to the following conditions:[3]

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[2] *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, Op. 27790 (S.C. Sup. Ct. filed April 18, 2018); *see also Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 766 S.E.2d 707 (2014).

[3] In issuing the CZCC, the Department considered the following Resource Policies from the CZMP: (1) Residential Development; (2) Transportation Facilities; (3) Recreation and Tourism; (4) Public Services and Facilities (Sewage Treatment, Solid Waste Disposal, Public/Quasi-Public Buildings, Dams and Reservoirs, Water Supply); (5) Activities in Areas of Special Resource Significance (Barrier Islands, Dune Areas, Navigational Channels, Public Open Spaces

1. The permittee must submit an updated Critical Area Line for review and approval 30 days prior to initiation of construction. Impacts to tidelands critical area associated with any aspect of construction or construction related activities is not authorized.

2. The 2,380 linear feet of erosional riverbank of the Kiawah River must be stabilized by the construction of an in-ground steel sheet pile wall (SSPW). The sheet pile wall must be constructed in accordance with and per the phasing detailed in the construction drawings last revised April 10, 2015, and signed by Tony M. Woody, PE on April 13, 2015. The erosion control structure must be installed and the surrounding area stabilized before construction of any portion of the project (roadways, utilities, residential development, etc.) can occur.

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

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

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

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

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

8. In the event that any historic or cultural resources and archaeological or paleontological remains are found during the course of work, the applicant must notify the State Historic Preservation Office and the South Carolina Institute of Archaeology and Anthropology pursuant to South Carolina Code of Laws. Historic or cultural resources consist of those sites name to the National Register and those

and Wetlands); and (6) Stormwater Management (Runoff, Bridge Runoff, Golf Course Management, Mines, Landfills).

sites that are eligible for the National Register and other areas of special historic significance. Archaeological remains consist of any material made or altered by man, which remain from past historic or prehistoric times (i.e., older than 50 years). Examples include old pottery fragments, metal, wood, arrowheads, stone implements or tools, human burials, historic docks, structures, or non-recent vessel remains. Paleontological remains consistent of old animal remains, original or fossilized, such as teeth, tusks, bone, or entire skeletons.

General Characteristics and Geomorphology of the Spit

Kiawah Island is a ten-mile barrier island off the South Carolina coast. Kiawah Island is approximately ninety percent developed and contains both residential and limited commercial development. At the southwest end of Kiawah Island is Captain Sam's Spit, an undeveloped, drumstick-shaped piece of land that is connected to Kiawah Island by a narrow strip of land referred to as "the neck." The Spit is bounded on the northeast by Kiawah Island, the southeast by the Atlantic Ocean, the southwest by Captain Sam's Inlet and Seabrook Island, and the northwest by the Kiawah River.

The Spit contains dune areas on the ocean side, a sandy bank and brackish vegetation and marsh areas along the backside of the Spit next to the river, and a small inland maritime forest. Just above the neck of the Spit lies Beachwalker Park (the Park). The Park is a popular public park facility operated by Charleston County Parks and Recreation Commission (Charleston County). Charleston County leases the land for the park from KDP. The park consists primarily of a large parking lot, rest rooms and other facilities, and a boardwalk that leads to the front beach.

In 1999, the Department established a baseline and set-back line on the Spit, effectively opening the Spit for development. The last critical line on the Spit was certified by the Department in June 2016. As of 2016, the Spit had approximately 174 acres of highland, and approximately 44.03 acres of that highland was buildable area above the baseline and critical line.[4]

The Spit is a geomorphological land form called a down drift spit. Down drift spits commonly form off barrier islands where the longshore sediment transport system is pushing sand from north to south. Experts from both Coastal and KDP agreed Kiawah Island, including the Spit, has been accreting over the last fifty to one hundred years and advancing in a southwesterly direction towards Seabrook Island. Dr. Tim Kana, who was qualified as an expert in coastal

[4] Previously, in 2006, the Spit contained 40.301 acres of buildable highland. In 2011, as a result of the adjustment of the baseline seaward in 2009, the Spit contained 43.36 acres of buildable highland. Overall, the amount of buildable highland has slowly, but steadily increased.

geology and coastal processes, explained[5] the accretion is largely due to the huge volume of sand released from sand shoals in the mouth of the Stono River and which comes ashore on the beach at Kiawah Island.[6] The volume of accretion that has occurred at Kiawah Island over the last few decades is exceptional for the East Coast. Due to the southward movement of sand down the coast, Kiawah will keep accreting "for several decades." Because of the accretion, the Spit migrates towards Seabrook Island at a rate of approximately 200 feet per year. Further, although sea levels are rising at a rate of approximately three millimeters (the width of a "couple of [stacked] nickels") each year, the rate of accretion at the Spit is currently outpacing the rate of sea level rise.

The Spit is located next to an inlet (Captain Sam's Inlet), which is a dynamic area in the coastal zone. Tides interact with the river at inlet locations to create more intense erosion, particularly during storm events. Dr. Kana agreed the Spit is geographically and morphologically unstable and that inlets are the most dynamic part of barrier islands. He nonetheless explained that a hurricane is going to have a devastating effect no matter what part of the island it hits. Dr. Kana remarked it is for this reason "I don't own any coastal property because all parts of the coast are vulnerable." Although the Spit is located in a dynamic area, it shows signs of stability. For example, the presence of several dune rows on the Spit, including some dunes as high as fourteen feet, indicate stability of the shoreline in those locations over time. Furthermore, even Coastal's expert, Dr. Young, agreed that the presence of vegetation and a maritime forest on the Spit indicates the central and western parts of the Spit are stable. Additionally, even though the Spit sustained 120 feet of erosion as a result of Hurricane Matthew, the Spit has already regained much of its beach due to the extraordinary accretion rates along Kiawah Island.

Erosion of the Riverbank

The Kiawah River is currently eroding the backside of the Spit. The photographic evidence portrays the collapse of portions of the riverbank over time, including the loss of some trees and vegetation for most of the length of the riverbank where the proposed SSPW would be installed. A vertical sand escarpment extends down most of the riverbank in this area, ranging in elevation from approximately two feet to around ten feet, with the escarpment generally getting smaller

[5] When this court uses the term "explained" regarding a witness, it is accepting that testimony as a finding of fact.

[6] Dr. Kana is a preeminent expert in the field of coastal geology and processes. I found his testimony was more detailed and comprehensive than Coastal's expert's testimony. Therefore, I found his testimony to be particularly persuasive.

towards the southwest from Beachwalker Park to the end of the Spit. Although the Kiawah River is eroding the backside of the Spit, the neck and the Spit have been steadily accreting on the oceanfront side, moving seaward. In fact, the rate of accretion along the beach is equal to or greater than the rate of erosion along the riverbank.

In the past two-hundred years, the Spit has "breached," or became disconnected at the neck from the larger part of Kiawah Island two or three times, most recently in 1949. However, since 1949, the Spit has not breached and has steadily accreted. The exceptional level of accretion at Kiawah has thus reduced the vulnerability of the neck to a breach. Indeed, although the neck sustained erosion during Hurricane Matthew in 2015, it remained intact. And, despite the erosion as a result of Hurricane Matthew, the neck has generally stayed the same width over time and has migrated seaward. Moreover, if the erosion was stopped on the Kiawah River side of the neck, the neck of the Spit would widen due to the continued accretion.

Although the neck has maintained a consistent width, because the baseline is affixed the buildable width of the neck has narrowed as the neck and Spit have moved oceanward. In August 2006, the buildable width at the narrowest location on the neck was 97.52 feet. In contrast, in August 2010, this same location measured 64.43 feet; in June 2011 it measured 60.26 feet; in October 2014 it measured 39.41 feet; in June 2015 it measured 37.06 feet; and in May 2016, when the most recent Department critical line was certified, it measured 29.25 feet.

Another factor that is artificially impacting the geomorphology of the Spit is the periodic relocation of Captain Sam's Inlet. The inlet has been relocated several times beginning in 1983, then in 1996, and most recently in 2015 to replenish the sand on Seabrook Island's beach. Dr. Kana, who has been involved in the relocations, explained that the inlet has been relocated by cutting a channel across the tip of the Spit and diverting the Kiawah River through that new channel and sealing up the old one, effectively resulting in the detachment of the tip of the Spit every time the inlet is relocated.[7] The detachment shortens the length of the Spit resulting in the sand in the detached tip of the Spit moving towards the beach of Seabrook Island and renourishing it. Each time the inlet is moved, it begins to slowly return to its original location, moving east to west, and requiring the inlet to be relocated once again in a continuous cycle.

[7] Interestingly, these relocations involved a significant impact to an area of public use upon the Spit and an area in which the dolphins strand feed. The relocations also appear to have directly cut through a federally designated habitat for piping plovers.

The Proposed Project

KDP proposes to initially build a twenty-six-lot residential development on 12.8 acres of the Spit called Cape Charles, Phase 1. Ultimately, KDP intends to build out the development to fifty homes total, disturbing a total of approximately twenty acres. In order to stabilize the neck and facilitate development on the Spit, KDP proposes to install a 2,380-foot steel sheet pile to stop erosion along the Kiawah River.

The Town of Kiawah Island's (Town's) Planning Commission approved the preliminary subdivision plat, including the road and lots for Cape Charles, Phase 1, on September 4, 2013. The proposed development also complies with the zoning ordinances of the Town of Kiawah Island, which has zoned the Spit for limited residential development. Additionally, the proposed subdivision for Cape Charles, Phase 1 is authorized by the Amended and Restated Development Agreement (Development Agreement) between the Town and KDP dated December 5, 2013.[8]

Under the terms of the Development Agreement, KDP must employ environmentally sensitive approaches to its development on the Spit to minimize the impacts of development. In addition, KDP is required to construct new beach parking spaces on Captain Sam's Spit west of Beachwalker Park for the benefit of the members of the of the Kiawah Island Community Association (KICA). The Development Agreement requires that KDP impose a permanent restriction prohibiting any alteration of the natural areas of Captain Sam's Spit that are outside the lots and the rights of way of the roads and any other community improvements. Further, KDP agreed to impose a restrictive covenant on all remaining highlands ensuring they remain non-developed green space thereby preserving this area in a natural state forever. Currently, KDP plans to convey a conservation easement covering the remaining undeveloped highland to the Kiawah Island Natural Conservancy. Thus, the Development Agreement will immediately prohibit the development of ten or more acres of land that could otherwise be developed today based on the current location of the setback line and critical line.

[8] The Development Agreement specifically allows the development of up to fifty residential lots on twenty acres of the Spit. KDP obtained this right to develop a limited portion of the Spit in negotiations in 2005 associated with a prior development agreement in return for relinquishing the right to build a hotel on the west end of Kiawah Island near Captain Sam's Spit, just to the east of Beachwalker Park. The Development Agreement specifies that the rights accorded KDP under its terms constitute vested rights for the development of the property.

Development Methods

The storm water management system for the entrance road, infrastructure, and twenty-six lots has been engineered according to best management practices in a manner to prevent run-off into the river. The stormwater management techniques designed for this development are more environmentally sensitive than usual. KDP will not only use best management practices to limit or eliminate the amount of runoff that goes to the adjacent rivers or ocean, they will install a swale system along the roads, which will eliminate a "curb and gutter." Additionally, shallow bioretention ponds will allow runoff to infiltrate into the ground rather than running over the land into adjacent water bodies. The natural vegetation will not be disturbed where possible and pervious surfaces will be used where possible. All of the project's facilities are designed to avoid the critical area and any wetlands.

KDP will take other **extensive** actions to reduce the impact of the future twenty-six houses.[9] The project is low density single-family residential development. The houses will be limited in size and can be no more than one and one-half stories high even though the Development Agreement would allow up to two-and-a-half stories. The houses will be embedded in the vegetation to the extent possible. Houses will be made of natural materials. Lots will share driveways. An effort will be made to minimize impervious surfaces. No lawns will be allowed and landscaping will be limited to indigenous plants. Home sites have been located to avoid known wildlife areas. Home sites will be situated to minimize the removal of vegetation and KDP will make efforts to limit alteration of the existing topography.

The development will be landward of the dune ridges running parallel to the beach and from 200 feet to 1,000 feet landward of the beach. The boardwalks to the beach will be communal and spaced every 500 to 700 feet. Rather than allow individual docks for the lots on the river side, there will be either one or two community docks. The lots will be served by the public water and wastewater systems of Kiawah Island Utility and no septic tanks will be allowed. The project land will be encumbered by its own set of restrictive covenants that enact the environmentally sensitive measures.

[9] Mark Permar testified that he has been involved in the development of Kiawah Island since 1979 and the entire island is "sensitive" and required development that responded to "unique sensitivity issues," including fresh water wetlands, tidal marshes, a chain of hummocks, Ocean Park, and other unique natural conditions. He testified he has previously dealt with developing narrow properties surrounded by critical area.

The proposed project will be accessed through the neck of the Spit by way of an "access corridor." The access corridor will be used to accommodate the access road, stormwater system, and underground utilities. However, the width of the access corridor is constrained by the critical line on the river side of the Spit and the set-back line on the ocean side. As previously mentioned, the width of the access corridor has been steadily shrinking as the critical line moves oceanward due to the erosion of the riverbank while the set-back line remains fixed. The access road would be elevated to an extent that a seven-foot high king tide would not top the road. As proposed, the road would be twenty feet wide without a variance, and KDP does not have a variance at this time. Nevertheless, the Development Agreement would allow a sixteen-foot wide road, and the width of the road could be narrowed by using a guardrail instead of a shoulder. Rick Karkowski, the project engineer, explained that "given some adjustment to the design as permitted we could make the project still work as intended" based upon the Department's most recent critical line certified in June 2016.

Steel Sheet Pile Wall (SSPW)

To stabilize the access corridor and protect the neck from the erosional effects of the river, the Department has authorized KPD to install a 2,380-foot steel sheet pile wall on the highland outside of the critical area. The in-ground SSPW would be installed on the river side of the neck beginning at Beachwalker Park and continuing southeast down the Spit. The SSPW would be constructed of interlocking forty-foot long steel sheet piles that would be treated with two coats of coal tar epoxy and would be driven into the ground. A galvanized channel wale would be installed horizontally across the wall and would be anchored to the land at least every six feet along the length of the wall. The top elevation of the wall would be approximately 6.5 feet above mean sea level.

As permitted, the wall would be built in two phases. The first phase would encompass construction of the wall near the neck and the residential area. The second phase would be installed later and would begin at the neck and run northwest up to the southeast corner of the parking area at Beachwalker Park. Regarding the placement of the SSPW in relation to the critical line through the access corridor, the SSPW would be five feet away from the June 2016 critical line at its closest point.

Coastal does not challenge the engineering of the SSPW, but rather its placement in relation to the critical line and its effect on the environment. Coastal contends the wall will eventually

become a part of the Kiawah River shoreline. Therefore, Coastal asserts that if the SSPW is installed, the riverbank along the neck will erode until it is gone and the SSPW is exposed. The Court finds the Kiawah River is likely to continue to erode the riverbank along the Spit and it is likely that if the SSPW is installed, the continued erosion will eventually result in some loss of the riverbank and exposure of the SSPW to some degree. However, the extent to which the SSPW would be exposed in the future is unknown.

The Location of the Critical Line

Coastal contends that due to the instability of the neck and continued movement of the critical line oceanward, the proposed location of the SSPW and road as of April 10, 2015, now falls within the critical area.[10]

Coastal provided the expert testimony of Alan Wood in support of this contention. Wood delineated a critical line on the Spit in March 2017 and, based on this delineation, he identified six areas where he believed the proposed road servicing the development would cross the critical line as he delineated it. However, KDP's expert, John Byrnes, explained he believed only two of the cross-over areas identified by Wood were actually critical areas.[11]

In resolving the conflict between the experts' testimony, I find Byrnes well-qualified in his field of expertise, having extensive experience with critical line delineations over his career. Furthermore, based upon this Court's review of the photos of the areas and testimony from both experts, Byrnes's testimony was more consistent with the photographic evidence depicting the areas in question. Consequently, the Court finds that the critical line should be adjusted to reflect the two changes in areas four and six. Nevertheless, based upon the evidence in the record, installation of the road, storm water system, and in-ground SSPW are currently feasible within the critical line with some adjustments. Therefore, modification of the critical line to include the two areas designated by Byrnes to be critical areas does not currently endanger the viability of the project and thus does not warrant denial of the permit.

[10] The Department approved the proposed location on May 28, 2015, and this is the most recent proposal approved by the Department.

[11] Though Byrnes testified that section four and six were in the critical area, admittedly his testimony regarding section four is confusing. See Tr. p. 1525, l:23 to p. 1526, l:1.

Importantly, a condition of the CZCC is that KDP must submit an updated critical line to the Department for its review thirty days prior to the initiation of construction.[12] Thus, if, at the time of re-certification, parts of the proposed project have moved into the critical area, KDP will not be able to move forward without resolving that issue.

Coastal also presented the testimony of Cecelia Dailey and Richard Porcher, PhD, concerning whether the proposed homes would be built in the critical area. Though both individuals appeared to be sincerely concerned about development upon the Spit, nether were experts in critical line delineation. Furthermore, Dr. Porcher and Dailey timed their visits to the Spit to coincide with king tides on October 17, 2016, and November 15, 2016, because they wanted to inspect these areas to see where water might be during these significantly higher tides. Dailey testified to her observations and what she did when she was walking the Spit with Dr. Porcher.[13] Dr. Porcher testified that as he moved up a slough[14] on the backside of the Spit, he observed several areas that concerned him because he believed the development was proposed for areas that would be affected by water in the slough. However, Dr. Porcher was not able to confirm the precise location of the water he observed in the slough, only its general location. He also opined that as a botanist, he would be concerned about the destruction of a slough because it is a conduit for organic material from the end of the slough to the estuary, providing material for the food chain along the way. Nevertheless, Porcher confirmed he has never delineated a critical line and does not know the legal definition of tidelands or wetlands. In fact, he was not aware of the location of the critical line in this case.

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[12] The Court finds that Condition 1 of the CZCC in this case requires that KDP provide a current survey with certification of the critical line within thirty days of commencement of construction. Condition 1 further prohibits any construction or construction activities in the critical area. Because of the ongoing erosion, it is possible that the critical line may have moved oceanward enough to narrow the neck to a point where development is no longer feasible. However, based upon the current certified critical line from 2016, the Court finds the development will not take place in the critical area.

[13] Dailey took photographs of Dr. Porcher's efforts to measure water depths at various points around the Spit and used a handheld GPS device to document where the measurements were taken. Dailey then entered the GPS coordinates into Google Earth and, using the aerial image of the Spit supplied by Google Earth, dropped a numbered pin at each location where a photograph was taken. Dailey also testified she then used PhotoShop® to manipulate images of the proposed project and overlay them on the Google Earth aerial images to show the pins in relation to the proposed project. However, Coastal provided no foundation for accuracy of Google Earth and was unable to qualify Dailey as an expert in importing data into Google Earth to create visual representations. KDP objected to the admission of the aerial imagery from Google Earth and the overlays. The Court ultimately determined that the pinpoints upon the Google Earth photo were admissible to reflect the approximate position where the photos were taken.

[14] Dr. Porcher described a slough as a low area that goes into the highland area.

The Court finds that the inundation of the uppermost reaches of a tidal slough during a king tide is not indicative of whether a location should be classified as critical area. Notably, Coastal's own expert, Wood, testified that areas inundated only during king tides would not be considered part of the critical area. Rather, the location must be inundated by the normal tide once or twice per week for it to be considered critical area based on tidal inundation. Yet, there was no proof that the areas photographed by Dailey are inundated by a normal tide once or twice a week. Furthermore, Porcher described the presence of brackish plants as he moved inland down the slough. Accordingly, the Court finds that the areas in the upper reaches of the sloughs walked by Dr. Porcher and Dailey are not characterized the presence of purely saltwater vegetation that would indicate the presence of tidelands as defined by section 48-39-10(G) of the South Carolina Code.

Economic Impact of the Development

The estimated gross revenues from Phase 1 of the Cape Charles development are $109 million. Additionally, the remaining twenty-four lots of Phase 2 are projected to raise total gross revenues to $210 million. The projected annual real property tax revenue at buildout of fifty homes is $5 million per year based on current millage rates. The construction of fifty houses would also provide employment for contractors over the ten years projected until build out is complete. Therefore, the development will have a significant economic impact in the area both in the jobs created during the build-out and the expansion of the tax base—a significant expansion in the overall amount of taxes collected even in if the actual expansion of the base is relatively small.

Threatened and Endangered Species

Chris Joyner, the manager of the Department's Coastal Zone Consistency Section, explained that when the Department conducts its consistency review, it relies on the United States Fish and Wildlife Service (USFWS) and the South Carolina Department of Natural Resources (SCDNR) to identify and designate critical habitats for threatened and endangered species pursuant to the Endangered Species Act (ESA) and state law that may be affected by a proposed project. Here, USFWS and SCDNR identified two federally threatened species in the vicinity of the proposed project: the loggerhead sea turtle and the piping plover, a shorebird. Furthermore, because portions of the Spit were identified as critical habitat for piping plovers and loggerhead sea turtles, the Department generally identified the Spit as a Geographic Area of Particular Concern (GAPC) under the state's Coastal Zone Management Plan (CZMP).

The designated habitat boundaries for piping plovers are established by 50 C.F.R. 17 (Federal Register Vol 66, No. 132. Page 36038). This Federal Regulation describes the federally designated habitat for piping plovers as SC Unit 10, which includes the following:

> SC Unit 10. Seabrook Island. 117 ha (290 ac) in Charleston County. This unit runs from just 0.16 km (0.10 mi) north of Captain Sams Inlet to the southwest approximately 3.4 km (2.1 mi) along the Atlantic Ocean shoreline.

Federal Register Vol 66, No. 132, Page 36069. Accordingly, the piping plover territory extends one tenth of a mile north of Captain Sam's Inlet and does not include the development area. Moreover, piping plovers generally inhabit an area that is oceanward of the baseline. In this instance, the footprint of the development will be located one to five dune rows away from the beach. Regarding loggerhead sea turtles, the beach-dune system immediately seaward of the proposed home sites is a suitable nesting habitat for loggerhead sea turtles.

In response to the concerns raised by USFWS and SCDNR as to both species, the Department included Conditions 5 and 6 in the CZCC. Condition 5 provides:

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

Condition 6 provides:

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

In sum, the footprint of the development will not overlap with the critical habitat area for piping plovers. Similarly, the development will not be located in loggerhead sea turtle nesting areas. But, to the extent the proximity of the proposed development and its features could impact these species, the Court finds the conditions adopted by the Department as part of the CZCC will minimize any potential impacts on both species. Also, the Court finds there is no current risk of a taking of either species under the ESA and any future risk of a taking is speculative.

Other Species

Evidentiary Issues

Coastal offered evidence that the proposed project will affect diamondback terrapins and bottlenose dolphins. The Department objected to any testimony in this regard, arguing that consideration of these non-threatened and non-endangered species would fall under CZMP Policy

II.C3.VII ("Wildlife and Fisheries Management"), which the Department did not find applicable to this project and which Coastal never raised as an issue in its prehearing statement. KDP appeared to join the Department in its position. The Department further argued that because the Department did not even consider this section in its decision-making process and Coastal failed to raise it, the Court was without jurisdiction to consider how the project would affect diamondback terrapins and bottlenose dolphins and any discussion of these species would be prejudicial.[15]

Coastal argued it was not necessarily raising the issue under the CZMP's Wildlife and Fisheries Management section, but rather discussing diamondback terrapins and bottlenose dolphins as "natural resources," and the effect of development on these natural resources is a "cumulative impact" that would flow from the project. It further argued the Department was not prejudiced as it was present at the deposition of Coastal's experts in this regard and was therefore on notice of the testimony about these species.

In response to the Department's objection to the testimony and jurisdictional argument, the Court allowed the testimony of three experts to be proffered regarding diamondback terrapins and bottlenose dolphins. The three experts were Dr. Robert F. Young for Coastal, Dr. Whit Gibbons for Coastal, and Dr. Travis Folk[16] for KDP. The Court informed the parties it would resolve the issue of whether to consider the testimony in its final order. Accordingly, it is necessary to address the admission of this testimony.

The South Carolina Court of Appeals' decision in *Sierra Club v. South Carolina Department of Health & Environmental Control* is instructive in this case. 387 S.C. 424, 693 S.E.2d 13 (Ct. App. 2010). In *Sierra Club*, the Court of Appeals found that Sierra Club had

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[15] Curtis Joyner testified the Department did not consider the development's potential effects on diamondback terrapins and bottlenose dolphins in its decision-making process because the development does not involve a plan to manage fish or wildlife resources. Joyner testified he generally believes diamondback terrapins and bottlenose dolphins are coastal resources, but the management of wildlife is outside the scope of the Department's authority and the Department relies on the SCDNR to identify species of concern during the permitting process. He explained that SCDNR did not identify diamondback terrapins or bottlenose dolphins as species of concern in the permitting area.

[16] Dr. Folk was also the subject of an objection from Coastal, who filed a Motion in Limine before trial to exclude his testimony, arguing KDP failed to disclose all relevant discovery related to Dr. Folk or properly disclose him as an expert to testify about diamondback terrapins, thus, Coastal would be prejudiced if his testimony was allowed at the hearing. Coastal again objected to his testimony as a preliminary matter at trial. The Court considered Coastal's objections and offered several opportunities for Coastal to depose Dr. Folk during trial to cure any discovery issues; however, Coastal never took advantage of the opportunities to depose Dr. Folk. After trial, Coastal filed a Motion to Compel or, in the Alternative, to Strike or Exclude Evidence, arguing the same issues. The Court denied Coastal's Motion in an Order dated January 22, 2018, and again in an Order denying Coastal's subsequent Motion for Reconsideration.

sufficiently raised an issue simply by citing generally to regulations 61–72 and 61–63 of the South Carolina Code of Regulations. These regulations consisted of hundreds of pages and an immense number of potential issues, placing the responding party in a difficult position. Therefore, following the Court of Appeals issuance of *Sierra Club*, the ALC amended its rules and required that the parties must set forth the issues with "particularity" in pre-hearing Statements. SCALC Rule 14. Indeed, Coastal followed that requirement of particularity when it stated its issues in its pre-hearing statement as follows: "[w]hether the proposed project violated the following provisions of the S.C. Coastal Zone Management Act and CZMP" and then proceeded to list specific provisions of the CMA and CZMP, not to include CZMP Policy III.C3.VII, which governs Wildlife and Fisheries Management.

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

Nevertheless, the Court finds it has jurisdiction to review the issue of the impact of the proposed project on non-threatened and non-endangered species such as diamondback terrapins and bottlenose dolphins because the impact on these species could be considered part of the long-range, cumulative effects of the project. *See* CZMP Policy III.C.3.I(7). Unlike the Wildlife and Fisheries Management section, Coastal specifically raised an issue with the Department's application of CZMP Policy III.C.3.I(7) requiring the Department to evaluate the "long-range cumulative effect of the project, when reviewed in the context of other possible development and the general character of the area." CZMP Policy III.C.3.I(7). While the connection between diamondback terrapins and bottlenose dolphins and the long-range cumulative effects of a project in the context of "other possible development and the general character of the area" is tenuous, the Court will consider the testimony on these species. *Id.* Additionally, Coastal also raised the application of section 48-39-30 of the South Carolina Code as an issue in its pre-hearing statement, which includes subsection (B)(2), stating it is this state's policy to "protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations." S.C. Code Ann. § 48-39-30(B)(2). Furthermore, Coastal also raised section 48-39-150(A) of the

South Carolina Code in its Pre-hearing Statement, which includes consideration of the extent a project would "affect the production of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural resources in a particular area including but not limited to water and oxygen supply." S.C. Code Ann. § 48-39-150(A)(3). Whether these last two sections warrant this Court's review is debatable in light of the Department's position. Nonetheless, the Court will review the testimony on diamondback terrapins and bottlenose dolphins.

Diamondback Terrapins

Coastal contends that the proposed project will affect diamondback terrapins. In support of this contention, Coastal offered the testimony of Whit Gibbons, PhD, who was qualified as an expert in herpetology, including diamondback terrapins. Dr. Gibbons explained that diamondback terrapins are present along the East Coast. Though diamondback terrapins are not officially threatened or endangered pursuant to the ESA, he opined that they are threatened "in the generic sense." However, the Court finds that under current South Carolina law, a person can possess two terrapins for non-commercial purposes. *See* S.C. Code Ann. § 50-5-2300(A) (2008). Moreover, the threats to diamondback terrapins are quite diverse, including not just development, but also crab pots, roads, dogs, and racoons. In fact, crab traps may be the worst threat to the terrapins.

Turning to this case, Dr. Gibbons testified the proposed development of Captain Sam's Spit as authorized by the Department will result in severe adverse impacts to terrapins who utilize the Spit as their prime nesting habitat. That conclusion was based upon the premise that the Spit is "the prime nesting area" for diamondback terrapins in the Kiawah River and tidal creeks. And though Dr. Gibbons testified to various unspecified observations of turtles upon the Spit, the cogency of that premise was primarily supported by a focused study of terrapins nesting on the Spit that took place in 1991. However, a study which noted a population of nesting terrapins upon the Spit twenty-seven years ago is not reliable to conclude that activity is still occurring, or at least the extent of that activity, at this time. In fact, Dr. Gibbons explained that nesting patterns vary. Thus, it is difficult to determine where the turtles are currently nesting upon the Spit and the extent to which that nesting is occurring.

Moreover, assuming that terrapins nest upon the 174-acre Spit, the issue is whether the SSPW will impede their nesting. Here again, Dr. Gibbons testimony, though apparently genuine, was not persuasive. He explained that terrapins will not cross a barrier to reach high ground for nesting that is even a few inches high, regardless of the barrier's material. Similarly, Dr. Folk

explained terrapins would not be able to cross much of the current natural escarpment that is present where the SSPW would be placed. Yet here, the vast majority of the riverbank where the SSPW would be placed has an escarpment of greater than a few inches high. Recognizing the inability of terrapins to cross the natural escarpment that already exists leads to the question of where a terrapin would naturally seek to enter the Spit. Dr. Gibbons provided that answer. While terrapins do not nest in mud flats or salt marsh, they will cross them to access other areas. There is a significant expanse of such areas on the Spit that would be unobstructed by the SSPW. Moreover, when terrapins meet a barrier, they may go back and forth along it for a little while and then go back to the water and try again. Dr. Gibbons's testimony suggests that the area where the SSPW is proposed to be installed is not an area where terrapins would access the Spit to nest because of the natural escarpment and, even if it were a previous path to a nest, there are other suitable access areas on the Spit.

Furthermore, Dr. Travis Folk explained that the proposed project will not negatively impact diamondback terrapins living in and around the Kiawah River. Even with the installation of the SSPW, there will still be areas suitable for the terrapins to access the Spit for nesting south of the wall towards Captain Sam's Inlet.

In sum, diamondback terrapins are not a threatened or endangered species within the meaning of the ESA. As to the impact of the SSPW on the terrapins, while the SSPW would create a barrier the terrapins will be unable to cross, the natural escarpment located in the area where the wall would be built already creates a natural vertical barrier. In fact, both experts agreed that vertical barriers of more than a few inches, regardless of the material, can create a barrier for terrapins. Therefore, the Court finds the impact of the SSPW on the accessibility of the Spit for terrapins nesting will be minimal at most. Moreover, the SSPW will not completely eliminate access to potential nesting area on the Spit because the SSPW will not extend the entire length of the river-side of the Spit. In fact, Dr. Folk explained that the wall will extend less than half the length of the current access area for terrapins along the river.

Also, neither expert was able to reasonably determine the population of terrapins present at the Spit. This information is necessary to judiciously determine what impact the SSPW and development would have on the terrapin population. In other words, how can the Court determine whether the development would detrimentally effect diamondback terrapins if it cannot determine to what degree the population level would be affected or diminished? If Coastal had sufficiently

shown that the SSPW completely eliminated access to the Spit and that the Spit was the primary nesting habitat in the area for terrapins, then this Court would be inclined to agree the development would have a detrimental effect. However, under the evidence presented, any affect upon an unknown population of terrapins nesting at the Spit is speculative, especially considering the impediment terrapins already face crossing the natural escarpment where the wall is proposed to be installed. I therefore find there was no evidence submitted to support the contention that the SSPW and development will have a detrimental effect on diamondback terrapins.

Bottlenose Dolphins

Coastal contends that the proposed project will affect bottlenose dolphins because it will impair their ability to "strand feed." In support of this contention, Coastal presented the testimony of Dr. Robert F. Young. He explained that the feeding behavior known as "strand feeding" occurs when a group of dolphins rush a bank and the wave created by the rush essentially throws fish out of the water and onto the shore. The dolphins then strand themselves on the bank to reach the fish and then slither back into the water. The behavior takes places at lower tides, when the river bank/beach is exposed.

However, Dr. Young has never personally studied or observed the dolphins in the vicinity of the Kiawah River and the Spit. Rather, Dr. Young's opinions about the dolphins located in the Kiawah River were formed from information he collected in conversations with Captain Chad Hayes and researchers at the National Oceanic and Atmospheric Association (NOAA). Importantly, the NOAA researchers' observations were based, in part, upon information gathered from surveying the general public who were in the vicinity of the Spit. The depth of NOAA's reliance upon those anecdotal observations was never explained. Accordingly, the reliability of the NOAA information is questionable considering there was no testimony that the people surveyed could properly identify bottlenose dolphins, strand feeding, or other dolphin behaviors. Nevertheless, Coastal presented the testimony of Captain Hayes, Richard Thomas, and George Meriwether concerning dolphins feeding along the river side of the Spit. Based upon Dr. Young's description of strand feeding, the observations of Captain Hayes, Thomas, and Meriwether was strand feeding presumably by bottlenose dolphins.

Having established that dolphins strand feed at the Spit, the Court turns to Dr. Young's opinion concerning the impact of the SSPW on the dolphins. Dr. Young opined that if the SSPW was installed and erosion eventually eliminated the riverbank that is currently present, the dolphins

would not be able to strand feed in locations where the wall becomes exposed because strand feeding requires the presence of a riverbank. Dr. Young opined that loss of the riverbank would significantly impact the dolphins because the dolphins would potentially lose a substantial part of their diet, which could cause them to completely change their foraging tactics. However, the evidence simply did not establish that premise.

Richard Thomas, a witness for Coastal, testified to observing dolphins strand feeding at Captain Sam's Inlet at the southern tip of the Spit (an area that will not be affected by the proposed project). Indeed, when asked by Ms. White if the dolphins strand feed "in the same location," he answered, "No, not at all." Furthermore, Chad Hayes, also a Coastal witness, testified that he has observed dolphins strand feeding along the Spit. He testified he observed strand feeding used to take place closer to the inlet on either side of the river, but now it has moved towards the neck of the Spit. Hayes further testified he has noticed an increased public presence on the end of the Spit, and more people utilizing the river. With that increase he has witnessed "a lot more harassing events of the animals, people trying to get too close to take a picture, or just paddle with them."

Dr. Folk, who was qualified, in part, as an expert in wildlife population dynamics with an emphasis on the quantitative analysis of populations, explained that if the installation the SSPW causes the dolphins in the Kiawah River area to lose a feeding site, it will not have a negative impact on that population of dolphins. Based upon the peer-reviewed scientific literature on bottlenose dolphins, Dr. Folk was unable to identify any literature concluding the removal of a **single** feeding site would negatively impact a dolphin population.

In sum, bottlenose dolphins engage in strand feeding along the river side of the Spit primarily at low tide. Furthermore, if the erosional process of the Kiawah River results in the elimination of a portion of riverbank and exposure of the wall, then the strand feeding area for bottlenose dolphins may be partially eliminated depending upon the extent of the degradation of the shoreline. Nevertheless, bottlenose dolphins are not a threatened or endangered species within the meaning of the ESA. Additionally, the evidence did not establish that the eventual elimination of a portion of the riverbank would significantly impact their food sources in the area or even the number of dolphins in the area. Rather, in the area of the Spit there are other locations that the dolphins do or could utilize to strand feed. In fact, the SSPW will not run the entire length of the Spit on the side of the river in which it would be installed. Moreover, the significance of strand feeding as a source of food for dolphins was palpably speculative. Therefore, the evidence failed

to establish that the proposed installation of a SSPW will have a detrimental impact on that population of dolphins.

General Character of the Area

In conducting its CZCC review, the Department considered a policy requiring it to review the long-range, cumulative effects of the project in the context of other possible development and the general character of the area. Whether the Department properly interpreted this policy and is entitled to deference in its application of the policy is at issue in this case. Therefore, the Court makes the following findings concerning the Department's interpretation and application of this policy.

Curtis Joyner[17], who has extensive experience with the Department in coastal resource management, explained that with regard to determining the scope of the "area" reviewed under this policy, although the Department may have only considered the Spit itself when determining the general character of the area during a previous review in 2008, the application of the "general character of the area" standard found in CZMP Policy III.C.3.I(7) includes more than just the specific project site. He explained that "in a review of a certain area, I can't discount an adjacent area. It's all area generally." When Coastal asked whether there was a "set standard" for determining the scope of the area the Department reviews, Mr. Joyner responded that

> [t]here's no set standard. You know, as we all – for those of us who use and interact with the enforceable policies, they're very broadly written. I don't believe there's a definition of how specific we need to be.

Following that analysis, Mr. Joyner explained that he "included parts of Seabrook and the rest of Kiawah" in the area reviewed since "Seabrook is immediately across the Kiawah River from Captain Sam's Spit and Kiawah, parts of it are directly connected, too." The Department's staff memorandum found that "while there will be impact in transforming a portion of the pristine natural [Spit] into residential development," the "**current general character** of Kiawah Island is beachfront development consisting of both single-family and multi-family habitable structures."[18] (emphasis added). The Department found Seabrook Island to be residential in nature too.

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[17] I found Mr. Joyner to be a credible and persuasive witness.

[18] It is notable that Mr. Joyner responded "yes" to the question, "the wall is going to change the character of **that** area" (emphasis added). However, I find that in the context of that question and considering his testimony as a whole, his answer was only referring to a change the character of the shoreline where the SSPW would be exposed from the erosion. He was not suggesting that the SSPW will change the character of the general area.

Coastal's witness Bill Eiser, who used to work for the Department, also conceded that some limited development in character with the area would be proper.

Therefore, residential development for the Spit is in keeping with the general character of the area.

Public Access

There are two areas of public use at issue in this case. Beachwalker Park is a popular public park facility just northwest of the neck of the Spit. The Park is well-used by the public for access to recreation on Kiawah beach and the Spit. Therefore, the Park is a valuable asset for granting the public access to use of the open spaces on Kiawah beach and the Spit. However, the continued erosion of the riverbank caused by the Kiawah River is currently threatening the public's use of Beachwalker Park. In fact, in May 2012, Charleston County wrote KDP notifying them that erosion of the riverbank next to the park was causing concern for the safety of humans and vehicles and thus negatively affecting the way that Charleston County was operating and serving those who use the park. Indeed, the Town of Kiawah Island's emergency vehicular access from the end of Beachwalker Park to the beach had to be moved inland from its original location along the riverbank because of the ongoing erosion. Furthermore, since Charleston County does not own the land, the protection of the Park would be tied to KDP receiving a permit that it will utilize.

There is also evidence that the public uses the riverbank of the Spit near the proposed project; but, this use is only occasional, e.g. for beaching kayaks, mostly at low tide when the bank is more accessible. For instance, George Finly, a member of Coastal, testified that when he utilizes the Kiawah River for kayaking he "occasionally" uses the area of the riverbank of the Spit. However, he explained you cannot really use the riverbank at "high, high tide, but maybe low you can." Furthermore, there is marsh that separates the Southwest end of the Spit that is primarily used by the public from the shoreline in the area of the proposed project. Therefore, the shoreline at the end of the Spit is more significantly used by the public. In other words, the public primarily uses the beach and the southwest end of the Spit for recreation.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, I conclude the following as a matter of law:

Standard of Review

Pursuant to the Administrative Procedures Act, the ALC is the fact finder in this case and conducts its review *de novo*. *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 512,

560 S.E.2d 410, 413 (2002); *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 9, 698 S.E.2d 612, 616 (2010). The burden of proof in a contested case hearing is by the preponderance of the evidence. *Nat'l Health Corp. v. S.C. Dep't of Health & Envtl. Control*, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989). "In general, the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of proof." *DIRECTV, Inc. & Subsidiaries v. S.C. Dep't of Revenue*, 421 S.C. 59, 78, 804 S.E.2d 633, 643 (Ct. App. 2017), *reh'g denied* (Jan. 11, 2018). When applicable, the Court "shall give consideration to the provisions of § 1-23-330 with regards to the Department's specialized knowledge." S.C. Code Ann. § 44-1-60(F)(2) (2018).

Additionally, "[t]he qualification of a witness as an expert in a particular field is within the sound discretion of the trial judge." *Smoak v. Liebherr-America Inc.*, 281 S.C. 420, 422, 315 S.E.2d 116, 118 (1984). Where the expert's testimony is based upon facts sufficient to form the basis for an opinion, the trier of fact determines its probative weight. *Berkeley Electric Coop. v. Pub. Service Comm'n*, 304 S.C. 15, 402 S.E. 2d 674 (1991). Furthermore, the trier of fact is not compelled to accept an expert's testimony, but he may give it the weight and credibility the he determines it deserves. *Florence County Dep't of Social Services v. Ward*, 310 S. C. 69, 425 S. E.2d 61 (Ct. App.1992). The trier of fact may accept one expert's testimony over that of another. *S.C. Cable Television Ass'n v. Southern Bell Telephone and Telegraph Co.*, 308 S. C. 216, 417 S. E.2d 586 (1992).

The Court now turns to consideration of the laws and policies which Coastal contends were violated. Nevertheless, in addressing these concerns, the Court notes that other than citing the law itself and then generally asserting a violation of what was cited, very little reasoning was presented in Coastal's proposed order to support this Court's adoption of its views. In fact, the greatest explanation was given regarding CMP Policy IV.C.4. which, as explained below, is inapplicable to this case.[19]

NPDES, Stormwater, Water Supply, and Wastewater Construction Permits

Pursuant to the National Pollutant Discharge Elimination System (NPDES) implemented under the Clean Water Act (33 U.S.C.A § 1251 *et seq.*), and in conjunction with this State's Pollution Control Act (S.C. Code Ann § 48-1-10 *et seq.* (2008 & Supp. 2017)), a permit is required

[19] In cases before the ALC these proposed orders are even more significant because they not only serve as the written explanation of a party's legal position but they also often serve as a party's closing argument, as they did in this case.

"for the discharge of 'pollutants' from any 'point source' into 'waters of the State' and into 'waters of the United States.'" S.C. Code Ann. Regs. 61-9.122.1(b)(1) (2011). Point sources include discharges of storm water as set forth in regulations 61-9.122.26 and 61-9.122.30 through 61-9.122.36. S.C. Code Regs. Ann. 61-9.122.26, 61-9.122.30-61-9.122.36 (2011). Furthermore, under this State's Stormwater Management and Sediment Reduction Program, unless exempted, "a person may not undertake a land disturbing activity without first submitting a stormwater management and sediment control plan to the appropriate implementing agency and obtaining a permit to proceed." S.C. Code Ann. § 48-14-30 (2008).

Compliance with the NPDES requirements and state stormwater management requirements is accomplished in one permitting action, the issuance of a "General Permit" known as the "NPDES General Permit for Stormwater Discharges, from Large and Small Construction Activities." The Department administers the NPDES General Permit for Storm Water Discharges. S.C. Regs. Ann. 61-9.122.26 and 61-9.122.28 (2011).

Here, the site improvements associated with the development of Cape Charles, Phase 1, triggered the requirement for a General Permit. Furthermore, because the proposed activity is located within one of the eight coastal counties that comprise the state's coastal zone, the Department's Office of Ocean and Coastal Resource Management (OCRM) must review the project to determine consistency with the policies and procedures of the CZMP. S.C. Code Ann. § 48-39-80 (2008); *see also* S.C. Code Ann. § 48-39-10(B) (2008) (listing the eight counties defining the coastal zone).

The site improvements also triggered the need for a Water Supply Construction Permit, which is also administered by the Department. S.C. Code Ann. § 44-55-40 (2018)) (granting the Department authority to permit extension of public drinking water system); S.C. Code Ann. § 44-55-822 (2018) (granting the Department authority to issue approval for wastewater systems for platted subdivisions).

Coastal does not challenge the technical or engineering aspects of the Department's decision to grant these permits; rather, Coastal challenges these permits in the context of its argument that the development, as a whole, is not consistent with the CZMA or CZMP.

Coastal Zone Consistency Certification

The Coastal Zone Management Act (CZMA) was enacted in 1977. Under the CZMA, the Department[20] was charged with developing and administering a Coastal Zone Management Program (CZMP). § 49-8-39-80. The Department was also required to "[d]evelop a system whereby the [D]epartment shall have the authority to review all state and federal permit applications in the coastal zone,[21] and to certify that these do not contravene the management plan." § 48-39-80(B)(11). A Coastal Zone Management Program was thereafter developed and approved by the General Assembly.[22] The Department determines whether a project is consistent with the CZMP by issuing a Coastal Zone Consistency Certification (CZCC). Here, because KDP had to seek federal and state permits for the proposed project, the Department was required to determine whether the issuance of the permits for the development was consistent with the CZMP. S.C. Code Ann. § 48-39-80 (2008).

In implementing the CZMA, the General Assembly declared it is the "basic state policy . . . to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State." S.C. Code Ann. § 48-39-30(A) (2008). The General Assembly then further outlined specific polices, to include the following policies:

> (1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;
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> (2) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations;

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[20] This duty to oversee this program is currently with the Department's Office of Coastal and Resource Management (OCRM), formerly known as the South Carolina Coastal Council.

[21] The "coastal zone" includes the counties of Beaufort, Berkeley, Charleston, Colleton, Dorchester, Horry, Jasper and Georgetown. S.C. Code Ann. § 48-39-(10)(B) (2008).

[22] *See* South Carolina Coastal Zone Management Program Document, available at http://www.scdhec.gov/HomeAndEnvironment/Water/CoastalManagement/CoastalZoneManagement/CoastalManagementProgram/. This web address provides access to the CZMP through the Department's website and, due to the cumbersome nature of the site address, shall not be repeated in other citations to the CZMP in this order; however, all references to sections of the CZMP in this order can be accessed through this web address.

S.C. Code Ann. § 48-39-30(B) (2008). A review of this State's policy shows the general goal of this state in adopting the CZMA and adopting the CZMP is to balance economic and social development of the coastal zone with preservation of this state's coastal resources. *Kiawah Dev. Partners, II*, 411 S.C. at 41, 766 S.E.2d at 721 (finding "we believe the CZMA was intended to achieve a balance between environmental and public considerations on the one hand and economic and private considerations on the other"). It is notable that in discussing a consistency review, the manager of the Department's Coastal Zone Consistency Section characterized this review as a "management technique." That comment does not discount the Department's role, but it recognizes that the Department does not strictly regulate development. Rather, the Department, and in turn this Court, must balance the competing interest set forth in the CZMA. Moreover, as in this case, even if the CZCC is denied, that does not preclude development upon the Spit. It simply precludes the construction of the development as currently proposed by KDP.

Coastal challenges the Department's determination that the proposed project is consistent with four specific sections of the CZMP. The Court will address each in turn.

CZMP Policy III.C.3.I(7)

Coastal argues the proposed project violates CZMP Policy III.C.3.I(7) because it will have long-term, cumulative impacts on the general character of the area. Chapter Three of the CZMP includes "Guidelines for All Projects," which is a list of "general considerations" the Department "will be guided by" in reviewing and certifying projects in the coastal zone. CZMP Policy III.C.3.I. The seventh consideration on this list is "[t]he possible long-range, cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area."[23] CZMP Policy III.C.3.I(7).

In *Kiawah Development Partners II v. South Carolina Department of Health & Environmental Control*, 411 S.C. 16, 766 S.E.2d 707 (2014) (*Kiawah II*), one of the issues before the Supreme Court was the interpretation of regulation 30-11(C)(1), which contains almost identical language to CZMP Policy III.C.3.I(7). Therefore, the Supreme Court's review of

[23] The Court notes that "[t]he possible long-range, cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area" is a *consideration* for the Department. CZMP Policy III.C.3.I(7). The Department is not required to deny a consistency certification if long-range, cumulative effects are found to be present. This is in keeping with the CZMP as a whole, which provides for a framework on how to identify and ultimately balance and weigh competing uses and the values of preservation versus development. *See* § 48-39-30(B).

regulation 30-11(C)(1) provides guidance as to the interpretation and application of CZMP Policy III.C.3.I(7).[24] In *Kiawah II*, the Department interpreted regulation 30-11(C)(1) as "requiring it to consider not only a proposed project's impact on the critical area, but also the project's impacts on upland areas within the larger coastal zone." 411 S.C. 16, 32, 766 S.E.2d 707, 717. In contrast, this Court had rejected the Department's interpretation and concluded:

> The pertinent inquiry is the cumulative impacts of the project within the critical area, not the impact of future development on the high ground outside the critical area. In other words, the area for which [the Department] has regulatory authority is the critical area, not the high ground outside the critical area.

Upon review, the Supreme Court determined "[t]he language of regulation 30–11(C)(1) is ambiguous in terms of the scope of the 'area' [the Department] may consider in making permitting decisions." *Id.* at 33, 766 S.E.2d at 717. It then reversed this Court holding that the Department's interpretation of regulation 30-11(C)(1) was entitled to deference because the agency's interpretation was not "arbitrary, capricious, nor manifestly contrary to the statute." *Id.* at 35, 766 S.E.2d at 719. Specifically, it found "[the Department's] interpretation is sound because it cannot be expected to protect the coastal zone as instructed by the General Assembly if it cannot consider how projects within the critical area may affect the broader coastal zone." *Id.* at 36, 766 S.E.2d at 719. Accordingly, the Supreme Court upheld the Department's interpretation of regulation 30-11(C)(1) to allow it to consider impacts to upland areas when determining the long-range, cumulative effects of a proposed project. With *Kiawah II* in mind, this Court reviews the proposed project.

Here, the determination of the "long-range, cumulative effects" is made "in the context of" both the possibility of other development and the general character of the area. The Court thus must first clarify the context of this review to make a determination of the "long-range, cumulative effects" of the project. As to the "possibility of other development," the proposed project currently consists of Phase 1 of a development, but is projected to ultimately result in a Phase 2. Accordingly, approval of Phase 1 is likely to lead to the development of Phase 2. Therefore, this Court's analysis of the long-range, cumulative effects, if any, takes into consideration the overall impact of both phases, to include a total of fifty houses and the disturbance of approximately

[24] Regulation 30-11(C)(1) of the South Carolina Code of Regulations (2011) provides that in review of critical area permits, the Department must consider "[t]he extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area."

twenty acres. However, there is no evidence in the record to show that the proposed project will spur further development of the surrounding area beyond Phase 2. Nor is there any evidence that the development of Cape Charles will interact or overlap with other current or potential developments in the area such that it would produce "long-range, cumulative effects" within the context of "other possible development." In fact, further development of the Spit beyond what is proposed in Phases 1 and 2 is not possible because the remainder of the undeveloped portion of the Spit will be put under a conservation easement and, pursuant to current South Carolina law, even if the Spit continues to accrete, development will never be able to occur oceanward of the current baseline as of December 31, 2017. *See* S.C. Code Ann. § 48-39-280 (Supp. 2017). Consequently, this project will not lead to further development of the Spit. *Cf. Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 68, 663 S.E.2d 497, 503 (Ct. App. 2008) (upholding the denial of a dock permit, in part, based on the long-term, cumulative effects that would flow from allowing a dock to be built down a ditch/drainage easement because it "would open it up to others being able to build a dock down any ditch that runs to the Intracoastal Waterway").

Next, determining the possible effects of the project in the context of the "general character of the area," requires both a legal and factual consideration of what constitutes the general character of the area. As already noted, the Supreme Court in *Kiawah II* considered the meaning of the scope of the "area" to be ambiguous, and thus determined the Department's interpretation of the "area" of its review was entitled to deference. Therefore, the Court will first determine whether the Department's legal interpretation of the "area" of its review is likewise entitled to deference.

In this case, the Department interpreted the scope of the "area" encompassing its review to include not just the Spit, but the surrounding area, *i.e*. Kiawah Island and the portion of Seabrook Island directly across from the Spit. Upon review of the Department's interpretation of this ambiguous policy, this Court concludes, like the Supreme Court concluded in *Kiawah II*, that the Department's interpretation of the scope of the area to be considered in determining the general character of the area under CZMP Policy III.C.3.I(7) has a rational basis and is entitled to deference.[25] *See Kiawah II*, 411 S.C. at 35, 766 S.E.2d at 719. Clearly, the policy does not

[25] When determining whether an agency interpretation is entitled to deference, our courts have often considered whether the agency interpretation is long-standing and has been openly known for a sufficient period of time to be "acquiesced in by the General Assembly." *Etiwan Fertilizer Co. v. South Carolina Tax Commission*, 217 S.C. 354, 60 S.E.2d 682 (1950) ("We have held in many cases that where the construction of the statute has been uniform for

establish a "bright line" standard for delineating the scope of the area. However, this determination is inherently a factual case-by-case determination which involves consideration of the various aspects of the area, including an area's geographic proximity to other areas. As Mr. Joyner explained, "for those of us who use and interact with the enforceable policies, they're very broadly written." The Department's interpretation allows the exercise of discretion in recognition of the fact that landscapes are unique and what constitutes the scope of the general area in one situation may not be the same for another geographic location or project. Furthermore, it is also obvious that the character of area to be considered is the "general" character of the area and not just the character of the "project area." *See Young v. S.C. Dep't of Health & Envtl. Control*, 383 S.C. 452, 462, 680 S.E.2d 784, 789 (Ct. App. 2009) (upholding the ALC's conclusion that there were no long-range, cumulative effect where "[a]s noted by the ALC, the *area surrounding Young's property* is not a 'pristine wilderness, unmarked by docks and piers, but is a creek familiar with development, including docks with boatlifts and other boat storage methods.'" (emphasis added)); *Kiawah II*, 411 S.C. at 36, 766 S.E.2d at 719. (noting the Department "cannot be expected to protect the coastal zone as instructed by the General Assembly if it cannot consider how projects within the critical area may affect the broader coastal zone"). The Court thus finds the Department's interpretation is not arbitrary, capricious, nor manifestly contrary to the regulation.

The Department's factual assessment of the scope of the area was also supported by the evidence. The Department limited the area of review to adjacent areas and did not arbitrarily include an area like Myrtle Beach that has little to no connection to the area of the proposed development. On the other hand, the Department considered more than just the specific project site in determining the "general character of the area." Mr. Joyner explained he "included parts of Seabrook and the rest of Kiawah" in his CZCC decision since "Seabrook is immediately across the Kiawah River from Captain Sam's Spit and Kiawah, parts of it are directly connected, too." The Department's inclusion of the mainland of Kiawah Island in its review is not only rational considering the Spit is part of Kiawah Island, but it also logical. Additionally, including the portion

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many years in administrative practice, and has been acquiesced in by the General Assembly for a long period of time, such construction is entitled to weight, and should not be overruled without cogent reasons."). Though the Supreme Court's deference analysis in *Kiawah II* did not focus on whether the Department's interpretation was long-standing, the Court's lack of consideration of that issue should not be interpreted as dismissing that requisite in a deference analysis. Rather, in *Kiawah II* the issue of whether the Department's interpretation of regulation 30-11(C)(1) was long-standing was never raised and, therefore, not an issue this court or the Supreme Court ever considered. Likewise, it was not raised in this case.

of Seabrook Island directly across from the Spit is also rational and logical considering their proximity. Therefore, I find that the Department's geographical determination of the scope of the area was a reasonable interpretation of CZMP Policy II.C.3.I.(7) as applied to the facts of this case. Accordingly, the Court finds the appropriate scope of the area to review under CZMP Policy II.C.3.I.(7) is the Spit, the rest of Kiawah Island, and the part of Seabrook Island directly across the river from the Spit.

Having defined the scope of the area, the Court also agrees with the Department's factual determination that the general character of the area is residential. The Spit is part of Kiawah Island, which consists primarily of residential development with some limited commercial development. Significantly, there is also residential community on Seabrook Island across from the Spit. Likewise, there is a development on the mainland of Kiawah Island just north of Beachwalker Park and condominiums are currently slated to be built near the neck. Accordingly, the Court finds the general character of the area is residential

Having determined the general character of the area, the Court turns to a consideration of the long-range, cumulative effects of the proposed project in the context of that determination. Obviously, transformation of a small portion of the Spit from a natural area to a residential area will inherently result in a long-range effect. But in the context of this case, the development of the proposed project, which is residential, will be consistent with the surrounding area, which is residential. Moreover, the transformation will not be without regard for the environment in which the homes will be placed. KDP offered considerable proof as to the environmentally sensitive nature of the proposed residential development and the extensive precautions it will take to avoid altering the landscape and vegetation to the extent possible. This sensitive development of the area is likewise consistent with the rest of the development on Kiawah Island. Further, the area to be transformed is a relatively small portion of the Spit. Therefore, this proposed development will be in keeping with other developments on Kiawah Island and the general character of the area, while preserving a sizeable portion of the Spit in its natural state.

Of greater concern are the long-range, cumulative effects of the SSPW. It is reasonably certain that the Kiawah River's erosive forces will eventually cause the SSPW to be exposed to some degree, resulting in a loss of riverbank where the SSPW is exposed. This is a long-range effect. However, when the loss of riverbank will occur and the percentage of the SSPW that will eventually be exposed is speculative. Consequently, the initial installation of the SSPW does not

trigger the need for a critical area permit or review of regulations associated with the critical area. However, impact to the critical area and public open spaces along the riverbank where the SSPW will be installed is reasonably foreseeable, thereby bringing this consideration under the terms of this provision. This Court will thus consider the impact on the riverbank in its review of the cumulative effects of the SSPW because the riverbank is part of the public trust and a public open space.

The South Carolina Supreme Court noted in *Kiawah II* that the public's interest in public trust lands must be "the lodestar" that guides the court's legal analysis. *Kiawah Dev. Partners, II*, 411 S.C. at 29, 766 S.E.2d at 715. The Supreme Court also recognized in *Kiawah II* that "permitting alteration of the tidelands may be in the public's interest in limited circumstances" with the understanding that "the State enacted statutes and promulgated regulations [the CZMZ and CZMP] which generally prohibit alterations to the tidelands except when the public interest requires otherwise."[26] *Id*.

Here, it is clear the Spit is a very popular and well-used destination for public recreation of all kinds. The importance of access to the Spit via Beachwalker Park to the public is evident. Overall, the testimony indicated the public primarily utilizes the beachfront and the Kiawah River for recreation. Coastal provided testimony that some people "occasionally" use the riverbank on the Spit, primarily as a place where kayakers can pull up their boats to rest or otherwise get out and see the area. However, the riverbank is, to a large degree, the less utilized public area of the Spit. And the use of the riverbank of the Spit is primarily at the southern end of the Spit which is the opposite end of where the SSPW is proposed to be installed.

It is also clear that erosion caused by the Kiawah River is threatening the continued, safe public access at Beachwalker Park. Indeed, access to the Spit from the Park is via the beachfront because the tall natural escarpment along the Park would currently prevent an adventurer from accessing the riverbank from the park. Furthermore, the photographic evidence in the record shows the Park has already lost several parking spots due to the encroaching escarpment.

Considering the threat to public access that further erosion of the riverbank currently poses, the Court finds the installation of the SSPW will greatly benefit the public in that it will stop further erosion near the park and stabilize the area, protecting the public's access to the Spit. Additionally,

[26] This begs the question, especially in the context of critical area permits, if construction or repair of a private dock or bulkhead would ever be granted considering these structures usually are not in the broader public's interest.

the substantial benefit the public will gain by having continued, protected access to the Spit with the installation of the SSPW outweighs the partial loss of a less-utilized riverbank in these limited circumstances. *See Kiawah Dev. Partners, II*, 411 S.C. at 29, 766 S.E.2d at 715 (recognizing "permitting alteration of the tidelands may be in the public's interest in limited circumstances"). Moreover, the SSPW will not run the entire length of the riverbank and it is speculative as to how much of the SSPW will eventually be exposed; therefore, public access to the river bank will remain.

Furthermore, the installation of the SSPW will likely halt the natural seaward migration of the riverbank where the wall is installed and thus halt, to some degree, the natural erosive process. However, it is unclear the extent of the effect halting migration in this limited area will have within the context of the general character of the area. In addition to the speculative nature of the effects of halting migration in a limited area, the Court cannot help but note that the Spit is already being heavily altered by the artificial relocation of Captain Sam's Inlet every few years. This relocation process involves detaching the entire end of the Spit from the rest of it, which most certainly impacts the natural erosion patterns and migration of the Spit. In comparison, the effects of the SSPW seem minimal. Accordingly, the Court finds any long-term, cumulative effects on the area due to the SSPW's impact on the Spit's natural migration are unclear and less impactful than the periodic relocations of Captain Sam's Inlet.

The Court also finds that any long-range, cumulative effects on the surrounding wildlife as part of the general character of the area are speculative at this time. The testimony provided by Coastal failed to show by a preponderance of the evidence that the presence of the proposed development and SSPW would materially affect the populations of piping plovers, loggerhead sea turtles, diamond back terrapins, or bottlenose dolphins in the area.

Based on the above, the Court does not find the proposed project will have any negative long-term, cumulative effects to such a degree or amount that would render the proposed project inconsistent with CZMP Policy III.C.3.I(7).

CZMP Chapter IV.A.2.a.8

Coastal alleges the Department's decision is contrary to CZMP Policy IV.A.2.a.8 because "Captain Sam's Spit is designated as a Geographic Area of Particular Concern" due to "the existence of endangered species habit [sic] and the CZMP makes it a priority to protect that

habitat." This policy discusses threatened or endangered species in the context of GAPCs; specifically:

> Policy has been affirmed by both the Federal government and State government in South Carolina that conservation of the natural ecosystem upon which endangered and threatened species depend is a high priority. Untempered economic growth and development can result in the depletion or extinction of various species of fish, wildlife and plants. These species of fish, wildlife and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to our people, our Nation, and to the international community.
>
> The United States has committed itself through numerous treaties with other countries to a pledge of conservation involving migratory birds, fisheries and wildlife preservation, for example. The scope of our responsibility as people and a Nation to protect the delicate balance of the natural ecosystem is demonstrated by these treaties of Federal and State legislation. **As a result, the South Carolina Coastal Council will recognize all designated threatened and endangered species habitats as Geographic Areas of Particular Concern.**

CZMP Policy IV.A.2.a.8 (emphasis added). Additionally, within this policy section is a list of Priority of Uses, which consist of the following:

> The following are the uses of priority for all areas identified or designated as critical habitats for threatened and endangered species, beginning with the use of highest priority:
>
> > I) Uses which are compatible with all regulations and management programs developed to protect any designated habitat area under the Federal or State Endangered Species Acts;
> >
> > 2) Uses which maintain the natural functions of areas identified or designated as critical habitat areas of species listed on the State or Federal threatened or endangered species lists; IV-I7
> >
> > 3) Non-structural, non-intensive uses which do not create irretrievable damage to any species listed as a threatened species.

CZMP Policy IV.A.2.a.8.

It is important to note that development is not banned in GAPCs, rather these "certain areas are of even more, special significance, and warrant particular attention to their preservation and development." CZMP Policy IV.A.1. Helping to elucidate a review under this section is the directions for implementation, which provide:

> Special management consideration will be given to those areas designated as GAPCs through the process of issuance of permits in the critical areas, and review and certification of permits in the coastal zone. When a project overlaps with, is **adjacent to**, or significantly affects a GAPC, **the Council will carefully evaluate the project based on the criteria listed as the priority of uses which specifically**

> **address each type of GAPC. A project would be prohibited if it would permanently disrupt the uses of priority for the designated area.** A project would be strongly discouraged or the permit conditioned if the project would interrupt, disturb or otherwise significantly impact the priority uses of the designated area. For example, in consideration of the permit for a project adjacent to a State Park which would significantly interfere with the primary recreational activities of that GAPC, every effort would be made to preserve this highest priority use of the park. Although all listed priority uses would receive protection, the Council would be committed to especially safeguard the highest priority use.

CZMP Policy IV.A.1.

Further elucidating this Court's review is the South Carolina Court of Appeals' decision in *DuRant v. South Carolina of Health and Environmental Control*, 361 S.C. 416, 604 S.E.2d 704, (Ct. App. 2004). In *Durant*, the Court of Appeals reviewed an application for a dock permit adjacent to a state park and determined review under the GAPC policies was appropriate and the Department had the authority to prohibit the dock if it would "permanently disrupt the use of priority for the designated area." *Id.* at 423, 604 S.E.2d at 708. In *DuRant*, the Court of Appeals upheld the denial of the dock permit because "construction of the dock would permanently disrupt the ability of the Department to utilize the State Park for recreational and educational opportunities along the Oaks Creek marsh." *Id.* at 423, 604 S.E.2d at 708.

The Court initially finds that the Spit contains a GAPC. As provided above, this state recognizes "all designated threatened and endangered species habitats as Geographic Areas of Particular Concern." The Spit contains habitat for two threatened species as defined under the ESA: the loggerhead sea turtle and the piping plover. The areas where these species are found on the Spit are designated as critical habitat for these species; therefore, these areas of critical habitat are GAPCs. CZMP Policy IV.A.2.a.8. While the footprint of the development does not directly overlap with the critical habitats for these species, it is adjacent to these habitats. Therefore, the Court further finds an evaluation of the proposed project under the GAPC policies is appropriate. *See DuRant*, 361 S.C. at 423, 604 S.E.2d at 708.

This Court starts its review by looking at the priority of uses for this particular area, with special concern for safeguarding the "highest priority use." CZMP Policy IV.A.1. The highest priority use in this case is "[u]ses which are compatible with all regulations and management programs developed to protect any designated habitat area under the Federal or State Endangered Species Acts." CZMP Policy IV.A.2.a.8. The Court finds the proposed project is compatible with all regulations and management programs developed to protect any designed habitat area.

In this case, the critical habitat for piping plovers is located on the southwestern portion of the Spit oceanward of the baseline. No portion of the footprint for the proposed project will overlap with this area. Similarly, the critical habitat for loggerhead sea turtles is located in the beach/dune system seaward of the proposed project. Therefore, the proposed project will not have a direct impact on the critical habitat areas for these species. Furthermore, based on the evidence there is not a current risk of a taking of either of these species under the ESA as a result of the proposed project, and any future taking is speculative at this time.

The second priority use for this area is "[u]ses which maintain the natural functions of areas identified or designated as critical habitat areas of species listed on the State or Federal threatened or endangered species lists." As stated above, the proposed project will not directly impact the critical habitats for the piping plover or loggerhead sea turtle. Additionally, while there is some evidence that the installation of the SSPW may have an effect on the migration of the Spit, there was no evidence introduced into the record to show that the natural functions in the critical habitat areas for these species would be affected. Moreover, the Court notes the relocation of the inlet is significantly more likely to disrupt the natural function of the area utilized by piping plovers, as Dr. Kana alluded to in his testimony. Accordingly, the Court finds the proposed project is consistent with the second priority use.

The third priority use for this area is "[n]on-structural, non-intensive uses which do not create irretrievable damage to any species listed as a threatened species." Here, the development will include structural uses, to include houses, however the structures will consist of a residential LID. Further, the development will not be located in the critical habitat for the species at issue. Moreover, the indirect effect of any such development is mitigated by Conditions 5 and 6 of the CZCC, requiring certain types of lighting and limiting access ways. The Court finds there is no evidence that the proposed project will result in "irretrievable damage" to the identified threatened species.

Overall, the proposed project will not permanently disrupt the priority of uses for a GAPC of this type such that denial of the CZCC is warranted. CZMP Policy IV.A.1. Further, based on the location of the development in relation to the identified critical habitats and the mitigating techniques that will be used in the development, "strong discouragement" from development is also unwarranted. CZMP Policy IV.A.1.

CZMP Chapter III.C3.XII.A, B & D

Policy III.C.3.XII identifies "areas of special resource significance" because these areas are "unique and either environmentally fragile or economically significant to the coastal area and the State." CZMP Policy III.C.3.XII. These areas include barrier islands, dune areas (outside the critical areas), navigation, public open spaces, and wetlands (outside the critical areas). *Id.* "Because of this sensitivity and their role as an integral part of the coastal ecosystem, alteration in these areas are likely to have direct effects on the critical areas," and, for this reason, the CZMP provides additional policies governing these areas. *Id.* Coastal challenges the Department determination that the proposed project is consistent with three of these policy areas, to include: barrier islands, dune areas, and public open spaces. The Court finds the proposed project is consistent with these policy areas for the reasons stated below.

Barrier Islands

In reviewing permits associated with barrier islands, the Department considers the following additional policies:

> 1) Construction and development on barrier islands shall retain to the extent feasible existing dune ridges, drainage patterns and natural vegetation in landscaping and construction plans in order to maintain the value of the island as a storm buffer. Intensive or high density type development may not be suitable on some barrier islands which are less stable or more prone to erosion or other hazard risks; these factors must be taken into consideration when alternative development plans are formulated.
>
> 2) Because of their proximity to and strong ecological relationship with the critical areas of the coastal zone, project proposals for activities on barrier islands must demonstrate reasonable precautions to prevent or limit any direct negative impacts on the adjacent critical areas (beaches, primary dunes, coastal waters and wetlands).
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> 3) New road or bridge projects involving the expenditure of public funds to provide access to previously undeveloped barrier islands will not be approved unless an overwhelming public interest can be demonstrated, for example, provision of access to a public recreation area or other facility. Preference will be given to ferry access in those instances where public funds cannot be expended for road access.
>
> 4) The extension of public services, such as sewer and water facilities, to barrier islands should only be proposed in a comprehensive approach which considers the natural "carrying capacity" of the island to support development and which integrates these facilities to parallel the level of access which is available to the island.
>
> 5) The Coastal Council encourages and supports State, local and private efforts to acquire coastal barrier islands for inclusion in preservation and protection

> programs. Public recreational benefit should be one primary motivation for these efforts, and where appropriate, barrier islands should be maintained for recreational use, based on the capacity of individual areas to accommodate human activity.

CZMP Policy III.C.3.XII(A).

The policy on barrier islands applies because the Spit is part of Kiawah Island, which is a barrier island. I find the proposed project is consistent with the barrier island policies for the following reasons. As to Policy 1, the Spit is more prone to erosion than other coastal areas; therefore, it is important to make sure any development is sensitive to the needs of a dynamic area. Here, the proposed project is responsive to the needs of the dynamic landscape into which it will be integrated and is consistent with this policy for the following reasons. This proposed project is designed to retain the natural landscape and vegetation to the extent possible—the storm water management system, infrastructure, and lots have been engineered according to the best management practices to prevent run-off into the river. All of the development's facilities have been designed to avoid critical areas and wetlands. The proposed project will be consistent with this policy in that it will be low density, not "intensive" or "high density." Additionally, impervious surfaces will be minimized, homes will be built with as little destruction to the surrounding vegetation as possible, and homes will be prevented from having lawns or other landscaping that would significantly alter the native vegetation and environment. Finally, the project will not interfere with the dune ridges along the beach. Overall, the proposed project is designed to impact the native environment as little as possible to retain the natural dune and water drainage systems as much as possible to preserve the natural systems in place and the development is therefore consistent with this policy.

As to Policy 2, no part of the development as currently proposed directly impacts the critical area or crosses a critical area. Further, any indirect effects will be minimized by the environmentally sensitive design of the development and the preservation of the remaining land on the Spit which will be protected by a conservation easement.

Regarding Policy 3, Coastal did not show that any public funds will be expended to complete the road from the mainland of Kiawah Island to the Spit. To the extent any public funds are expended on the road adjacent to and affecting Beachwalker Park near the neck of the Spit, building and/or further fortifying the road in this area is in the public's interest as demonstrated by the heavy public use of the Park as a recreational destination. Additionally, the Spit is part of

Kiawah Island, which is already developed. Accordingly, the road to the Spit does not fall under the category of providing access to a previously undeveloped barrier island under this policy.

Similarly, as to Policy 4, while utility access will be new to the Spit, it will not be new to Kiawah Island, of which the Spit is a part. Additionally, there is no evidence in the record to indicate the size of the proposed utility services would be beyond the carrying capacity of Kiawah Island and the Spit.

As to Policy 5, there was no evidence regarding Coastal or any other private organization seeking to acquire Captain Sam's Spit for inclusion in a preservation or protection program. Nevertheless, to the extent objectives of this policy could apply to consideration of a barrier island that is private property, the installation of the SSPW will protect the public's access to Beachwalker Park and the Spit, thus preserving the public's access for recreational use in accordance with the policy. Furthermore, if the project is approved, KDP asserts it will convey a conservation easement covering the remaining undeveloped highland to the Kiawah Island Natural Conservancy.

Dune Areas

Primary, ocean-front dunes are considered "critical areas" under the South Carolina Coastal Management Act. CZMP Policy III.C3.XII.B. Regarding secondary dunes, "[t]he [Department] has no direct jurisdiction over proposed activities in these areas but does have review and certification authority with regard to the major permits of other State agencies." CZMP Policy III.C3.XII.B. The additional policy considerations for these sensitive, non-critical secondary area dunes include:

> 1) Because of their proximity to and strong physical and ecological relationship with the beach and primary sand dune critical areas of the coastal zone, project proposals in secondary sand dunes must demonstrate reasonable precautions to prevent or limit any direct negative impacts on the adjacent 111-71 critical areas.
>
> 2) Special attention must be given in new construction activities in ocean-front areas to prevent or mitigate negative impacts on adjacent property owners, specifically, increased erosion or loss of protective dune formations on adjacent lots due to unnecessary destruction of or encroachment onto stable dunes.
>
> 3) Project proposals in ocean-front and sand dune areas must conform to the policies of the Beach Erosion, and Beach and Shoreline Access sections of the program, as well as other applicable Resource Policies.

CZMP Policy III.C3.XII.B.

There are two further recommended policies in this section as well, which provide:

1) Local governments with coastal shorefronts are encouraged to develop and implement strong local zoning and building ordinances for beach and sand dune areas.

2) Property owners, development interests and local governments are encouraged to institute and observe set-backs or buffer zones for construction in beach and dune areas.

CZMP Policy III.C3.XII.B.

The proposed project is consistent with these policies. The footprint of the development does not overlap with or disturb any dunes, either primary or secondary. Rather, Coastal's evidence concerned the potential for erosion on the river side due to the imposition of the SSPW. Moreover, there was no evidence that the proposed project would lead to the destruction, erosion, or development encroachment onto dunes on the Spit so as to compromise the dune areas sought to be protected by this policy. Additionally, there was no evidence that adjacent land owners, the only one of whom is Charleston County Parks via a lease from KDP, would be affected. The Court finds the proposed project complies with this policy and all other associated resource policies and programs. Further, the local government of Kiawah Island has approved this project, which is in compliance with the local ordinances and applicable set-backs.

Public Open Spaces

Coastal argued in its prehearing statement that the proposed project violates CZMP Policy III.C3.XII.D because it fails to protect "public recreational activities." CZMP Policy III.C3.XII.D provides, generally, that "[t]he values of public recreational and open space areas throughout the coastal zone cannot be overemphasized." CZMP Policy III.C3.XII.D. Public open spaces provide "recreational and aesthetic opportunities and amenities which are both desired and needed by the people." CZMP Policy III.C3.XII.D. The Department is required to review any permits in light of the following policies when proposed activities are located in, or would directly affect, public open space areas:

1) Project proposals which would restrict or limit the continued use of a recreational open area or disrupt the character of such a natural area (aesthetically or environmentally) will not be certified where other alternatives exist.

2) Efforts to increase the amounts and distribution of public open space and recreational areas in the coastal zone are supported and encouraged by the Coastal Council.

CZMP Policy III.C3.XII.D.

Policy 1 prohibits certification of a project that restricts the use of a recreational open area or disrupts the character of a natural open area if an alternative to that restriction or disruption exists. Clearly, the riverbank is both a recreational and a natural open space area. Though the proposed project will not initially limit the use of any recreational or natural open space areas along the riverbank, eventually a portion of the riverbank adjacent to the SSPW will likely be eliminated due to erosion. This potential loss is clearly an important consideration under this policy. Nevertheless, this loss must be weighed in light of the whether other alternatives exist. Here, no evidence was presented on this specific issue and policy section of the CZMP by Coastal—including "alternatives" of any nature. CZMP Policy III.C.3.XII.D.

Moreover, presuming, without finding, that the no alternative consideration is applicable to this policy, the alternative of doing nothing does not protect the public's interest in the continued use of Beachwalker Park. Therefore, following this analysis, the Court must weigh a public loss of the riverbank against the public gain of protecting Beachwalker Park. Indeed, it is this balance of seeking the greater public benefit that the Supreme Court emphasized in *Kiawah II*.

As explained above, Beachwalker Park is a significant gateway for public access to Kiawah beach and the Spit. Due to the significant erosion along the riverbank adjacent to Beachwalker Park, some parking for the general public has been lost resulting in fewer people having access to the beach. The proposed project would greatly assist in preserving that important public benefit. Therefore, though erosion as a result of the installation of the SSPW will likely reduce the amount of river shoreline available to the public at the neck of the Spit,[27] that loss of use is offset by the protection of the public's use of Beachwalker Park. Accordingly, when considering the portion of the affected space in the context of the overall amount of public open space on the Spit, the Court finds the public's use and enjoyment of the Spit will not be so disrupted such that the proposed development contravenes this policy.

Concerning the disruption of the aesthetic character of the shoreline which is an open area, as addressed above, balancing the benefits to the public, the preservation of Beachwalker Park is a greater benefit.[28] In fact, if some action is not taken, Beachwalker Park will continue to

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[27] As the testimony indicated, the riverbank is only occasionally used by the public compared to the rest of the Spit.

[28] Interestingly, Coastal has emphasized the public's use of the Spit to support its contention that the Spit should be preserved in its "pristine" state for the public to enjoy. However, obviously the greater the use of an area, the less an area can be considered pristine. Indeed, pristine which means "not spoiled, corrupted, or polluted (as by civilization)"

deteriorate, and the public's current access to the open spaces will be further jeopardized. Furthermore, it is important to recognize that the highland of the Spit is not an open space, but is privately owned property without restrictions at this point. *See* Black's Law Dictionary (10th ed. 2014) (defining "open space" to mean "[u]ndeveloped (or mostly undeveloped) urban or suburban land that is set aside and permanently restricted to agricultural, recreational, or conservational uses."); S.C. Code Ann. § 12-43-222 (2014) (granting property tax reduction for open space); *Florida v. White,* 526 U.S. 559 (1999) (noting the distinction between a warrantless seizure in an open area and a seizure made on private premises). Nevertheless, even if this aspect is considered, only a small part of the Spit will be transformed into a residential area. And, the portion that is proposed to be developed would be developed in an environmentally sensitive approach incorporating limited impact development practices to minimize the impact of development. When fully implemented, it will result in only about twenty acres of residential development leaving the remaining 150 acres of the Spit to be preserved in a natural state.

As to Policy 2, the public will benefit from the protection of Beachwalker Park, which facilitates the public's access to recreational open space on Kiawah Island. Furthermore, the public will be benefitted by the addition of a conservation easement that will protect the remaining undeveloped highland on the Spit, thus preserving and creating public open space in keeping with this policy.

In sum, this Court's decision concerning this difficult issue was made after much refection Nevertheless, in the end, Coastal failed to show by a preponderance of the evidence that the proposed project contravenes this policy section.

CZMP Chapter IV.C.4

This section of the CZMP includes the policies accompanying the CZMP's Erosion Control Program. In its prehearing statement, Coastal argues the proposed project violates this policy section because it "fails to consider the extent of up or downdrift damage due to installation of the structures; it is not part of a comprehensive erosion control program to ensure that it does not cause adverse effects on adjoining property owners or accelerate erosion; and it fails to promote the use of natural features of the system, rather than artificial protections."

is the antithesis of significant public use. Nevertheless, neither party presented arguments addressing the interrelation between the public use and the pristine nature of the Spit. Therefore, the Court has not considered this issue.

The Erosion Control Program (ECP) refers to erosion control structures along South Carolina beaches, to include seawalls, bulkheads, revetments, and groins. For instance, in its introduction the ECP states: "The South Carolina Coastal Management Act (Act 123 of the 1977 South Carolina General Assembly) mandates the Coastal Council to develop a comprehensive **beach erosion** control policy. . . ." CZMP Chapter IV.C.1 (emphasis added). Throughout the remaining ECP, it refers to erosion control for beaches and the coastline. It even refers to the specific types of shoreline to be protected as "1) arcuate strand, 2) cuspate delta, 3) beach-ridge barrier, and 4) transgressive barrier." Here, there was no evidence that the proposed project involved an erosion control structure along the beach/oceanward-side of the Spit. Therefore, this provision is inapplicable to this case.

Section 48-39-150(A)

Coastal argues that the proposed project violates the provisions in section 48-39-150(A) of the South Carolina Code in the following ways:

> The project's impact on the production of fish, shrimp, oysters, crabs, clams, other marine life, wildlife or other natural resources; the extent to which the activity could cause erosion; the extent to which the development could affect the habitats for rare and endangered species; the extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state; the extent to which the project will affect the value and enjoyment of adjacent owners; and the extent to which it would affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources.

Pursuant to section 48-39-150(A), when reviewing the merits of each application, the Department must consider the policy considerations of sections 48-39-20 and 48-39-30, and "be guided" by the following considerations, in relevant part:

> (3) The extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural resources in a particular area including but not limited to water and oxygen supply.
>
> (4) The extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water.
>
> (5) The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources.
>
> (6) The extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina's coastal zone.

(7) The extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state.

S.C. Code Ann. § 48-39-150(A) (2008).

First, as to sub-section (3), the proposed project will not have a material adverse effect on the production of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural resources, particularly considering production typically relates to commercial use. At trial, evidence was limited to the potential effect of the proposed project on piping plovers, loggerhead sea turtles, diamondback terrapins, and bottlenose dolphins. None of these species are produced commercially. However, to the extent this sub-section includes the natural reproduction of "marine life or wildlife or other natural resources," the Court will consider the potential impact of this project on these species. § 48-39-150(A)(3).

As discussed above concerning GAPCs, the proposed project is located near, but not within the critical habitat areas for piping plovers and loggerhead sea turtles. As such, the proposed project will have no direct effect on these species. Furthermore, based on the evidence, there is not a current risk of a taking of either of these species under the ESA as a result of the proposed project, and any future taking is speculative at this time. To the extent that lighting from the proposed residential development could adversely affect the loggerheads' ability to locate its nesting area and/or ocean, evidence was presented to show that Conditions 5 and 6 of the CZCC will reduce, if not eliminate, these concerns. These conditions also aim to reduce or eliminate any potential indirect effects on the piping plovers. Thus, it does not appear that the project will significantly affect the reproduction of these species. Nor will the project significantly affect the habitats of these endangered special pursuant to sub-section (6).

Next, Coastal failed to show that the proposed project will have a material adverse effect on the reproduction of either diamondback terrapins or bottlenose dolphins. While the SSPW would impact the diamondback terrapins' ability to access the area behind the SSPW, the evidence established that the natural vertical escarpment present along much of the area where the SSPW will be installed is already too high for the terrapins to cross. Moreover, the SSPW will not extend the entire length of the river-side of the Spit. Accordingly, access areas on the river-side of the Spit will remain. In addition, the evidence did not establish whether terrapins are currently nesting in the area of the proposed installation of the SSPW or that the Spit is the only nesting area utilized by terrapins in the area. Therefore, any material adverse effects on the population, which is unknown, is speculative.

Similarly, although evidence was presented that bottlenose dolphins utilize the Spit for strand feeding, the evidence was speculative as to how the potential elimination of part of this strand feeding area due to the SSPW would impact the overall population. In other words, the evidence simply did not establish that the strand feeding that occurs along the portion of the Spit where the SSPW will be installed is a significant part of the dolphins' diet. To the contrary, the evidence established that the dolphins may adapt without impact.

Regarding subsection (4), clearly there is a natural system of erosion currently occurring at the Spit. Specifically, the Kiawah River is eroding the backside of the Spit. However, there is no evidence in the record to show the SSPW will "cause erosion"—rather the installation of the SSPW will allow the natural cycle of erosion to continue until it is exposed, at which time changes to the natural erosion pattern are unclear.[29] No testimony was offered regarding "shoaling of channels or creation of stagnant water." § 48-39-150(A)(4). Overall, the Court finds the proposed project is consistent with this section.

Addressing subsection (5), the Court finds the proposed project will not affect existing public access to tidal and submerged lands, etc. to an extent that requires the CZCC to be denied. As already discussed, it is likely that some public trust land—specifically a portion of the riverbank—will eventually be eliminated because the Kiawah River will continue to erode the riverbank along the Spit. However, the SSPW will not eliminate the entire riverbank, and the most well-used portions of the Spit—the beach and southern tip of the Spit—will remain intact for the public to enjoy. Considering the significant benefit to the public that the SSPW will provide in protecting and stabilizing public access to the Spit at Beachwalker Park, the Court finds the relatively small loss of access to the riverbank does not outweigh the benefits.[30] Moreover, the development will not impede the public's ability to use the Spit for recreation, including walking, biking, kayaking, boating, and fishing, among other activities. The Court finds the proposed project is consistent with this section.

Finally, as to subsection (7) the Court finds the economic benefits of developing the upland area compared to the benefits of preserving the riverbank does not necessitate denial of the CZCC. The evidence established that the economic benefit of developing the upland area to include real

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[30] This benefit is more fully explained in the Public Open Spaces Section.

property tax revenues estimated at $5 million per year when the development is built out to fifty homes. Furthermore, the construction would last around ten years, with the associated contracts precipitating increased spending, job creation, and economic activity in the surrounding area during that time. The evidence thus established the State/County would receive approximately $109 million in gross revenue, reaching a total of $210 million in gross revenues after the completion of phase 2. No contrary testimony was presented.

Though significant, this economic benefit does not exclusively justify the loss of a portion of the riverbank; however, it is a factor that legally and factually cannot be ignored. It also noteworthy that only 12.8 acres of the almost over 150 acres that constitutes the Spit will be developed and the remaining un-developed portion of the Spit will be placed under a conservation easement.[31] Therefore, a significant amount of the Spit will be preserved and retain is natural character.

The goals of the CZMP are to balance development with preservation and conservation. The Court finds the proposed project's disturbance of a relatively small area paired with the significant projected revenues, and considering that a significant portion of the Spit that will remain untouched, is an illustration of the type of balance the CZMP tries to achieve. The court thus finds the proposed project is thus consistent with this section.

Section 48-39-30

Section 48-39-150(A) instructs the Department to be guided by the policy statements in section 48-39-30. S.C. Code Ann.§ 48-39-150(A). Coastal argues in its pre-hearing statement that the proposed project violates section 48-39-30 because it:

> [v]iolates the State policies of protecting sensitive and fragile areas from inappropriate development; of protecting resources of the coastal zone; and protection of the quality of the coastal environment. This certification is inconsistent with § 48-39-30 in that the basic state policy behind the Act is to protect the quality of the coastal environment and to promote the economic and

[31] Though the Court recognizes preservation has its own benefits, the evaluation of those benefits is more complicated than it would appear. If the Court were to consider the benefit of leaving the entire Spit in its unaltered state, it would be ignoring the fact that the Spit is private property that could be otherwise altered at any time. For example, even if the permits at issue were denied and even if the owners decided not to build a single home upon the Spit, the owners could still alter the property significantly by removing the trees and vegetation in keeping with the applicable laws. Moreover, an access road has already been created. Therefore, in this instance, the "pristine" and "unaltered state" of the Spit could be subject to further alteration at any time, rendering the Court's valuation of it in its "unaltered state" less meaningful. Nevertheless, consideration of this quagmire is not necessary in light of the evidence in this case. With the exception of the access road, even considering the entire Spit as un-altered, the Court finds the economic and public benefits outweigh the need to preserve the Spit in its current state.

> social improvement of the coastal zone which explicitly requires DHEC to consider impact on the larger coastal zone, including potential development on adjacent uplands such as that proposed by the applicant.

Section 48-39-30 constitutes the General Assembly's "legislative declaration of state policy." This declaration of policy provides, in applicable part:

> (A) The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State.
>
> (B) Specific state policies to be followed in the implementation of this chapter are:
>
> > (1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;
> >
> > (2) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations;
> >
> > (5) To encourage and assist state agencies, counties, municipalities and regional agencies to exercise their responsibilities and powers in the coastal zone through the development and implementation of comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation.

S.C. Code Ann. § 48-39-30 (2008).

As previously discussed, these policy statements require a balancing of economic and social development with environmental preservation. In reviewing this section in *South Carolina Wildlife Federation v. South Carolina Coastal Council*, the South Carolina Supreme Court commented that:

> evidence of purely economic benefit . . . does not support the stated purpose of the Coastal Management Program to protect, restore, or enhance the resources of the State's coastal zone for present and succeeding generations. This public interest must counterbalance the goal of economic improvement.

296 S.C. 187, 190, 371 S.E.2d 521, 523 (1988). The Supreme Court went on to emphasize that "evidence of purely economic benefit is insufficient as a matter of law to establish an overriding public interest." *Id.*

This proposed project balances these competing goals consistent with the aims of this policy. As explained above, the proposed project will increase tax revenues in the area, create jobs, and otherwise contribute to the economic and social improvement of citizens of this state. The Spit, which is a valuable coastal resource, will be improved with "due consideration for the environment" and within the framework provided by the CZMP. Specifically, as previously found the proposed project will be accomplished in a low-impact, low density, and environmentally sensitive manner. No portion of the proposed project falls within the critical area.

Furthermore, the development plan provides that a significant portion of the Spit will be protected under a conservation easement, balancing development with preservation and helping to protect this state's resources. While there was testimony that the Spit is a dynamic and fragile resource, Coastal did not show that it is inappropriate for development. To the contrary, Chris Joyner, explained that the purpose of the CZMP is not to prohibit development on barrier islands; rather, it is a collection of "management techniques to manage the potential effects of development upon coastal resources." Also, Coastal's own expert conceded that some limited development of the Spit in character with the area would be proper. This evidence certainly influences the determination of how much development is appropriate.

Here, the evidence established that the installation of the SSPW will stabilize the neck, preventing the erosion of any potential road that is constructed to access the Spit that might otherwise render development unfeasible. Moreover, the public's access to this Spit and public trust lands will be enhanced and preserved by the SSPW, which will halt the erosion currently threatening the public's access at Beachwalker Park. Finally, these policies refer to the involvement of local municipalities. The Town of Kiawah Island has worked extensively with KDP to ensure that the development is appropriate for the area and that certain conditions are in place to minimize any negative effects of the development. For all the reasons above, this Court finds the proposed project is not contrary to the state policies listed in section 48-39-30, but rather is in keeping with the competing goals of these policies.

Conclusion

Overall, the Court finds that the proposed project is consistent with the CZCC. Importantly, the Court finds the conditions attached to the Department's CZCC are integral to ensuring that the proposed project remains consistent with the policies of the CZMP and should be incorporated into this Court's order.

Consistency with Previous Department Decisions and *Kiawah II*

Coastal contends that the Department's approval of the proposed project is inconsistent with the Department's previous decision in 2008 denying KDP's permit application for a 2,700 combination bulkhead-revetment in the critical area because it found the bulkhead-revetment contravened several sections of the CZMP, including consideration of the extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area.[32]

Coastal maintains the circumstances in *Kiawah II* are essentially the same as in this case because: 1) all projects would occur on a barrier island designated as an Area of Special Resource Significance and a GAPC; 2) all projects would involve construction of a wall along the neck of the Spit along the Kiawah River; 3) all projects would be for the purpose of stabilizing the bank for road and infrastructure construction in connection with residential development.; 4) all project would have an impact on endangered Piping Plovers, threatened Wilson's Plovers, threatened Red Knots and the Diamondback Terrapin;[33] and 5) all projects would encourage development in a pristine barrier island, fail to protect barrier island and dune habitat, and have adverse impacts on a public recreational open space. However, after drawing this comparison, Coastal failed to make any legal arguments or cite any case law in its prehearing statement, at trial, or in its proposed order as to how this comparison legally precludes this Court's *de novo* review of a different permit application involving a completely different erosion control structure outside the critical area. Accordingly, the Court finds this issue essentially abandoned. *See Oien Family Invs., LLC v. Piedmont Mun. Power Agency*, Op. No. 5576 (S.C. Ct. App. filed July 18, 2018) ("Because OFI did not cite to any authority and failed to present further argument as to how this ruling was an abuse of the circuit court's discretion or otherwise legally erroneous, we find it has abandoned this issue on appeal.").

Similarly, in its prehearing statement Coastal generally argues the Department's decision in this case is "fundamentally inconsistent" with the Supreme Court's decision in *Kiawah II*, but failed to articulate with specificity why the Department's decision is inconsistent with *Kiawah II*

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[32] When it raised this issue in its prehearing statement, Coastal also referred to another Department decision denying an application for a 340-foot sheet pile wall in 2009; however, Coastal provided no testimony or evidence regarding this 2009 decision at trial. Therefore, the Court will not consider it, and will limit its review of this issue as it relates to the Department's 2008 decision denying the combination bulkhead/revetment.

[33] No evidence was presented at trial concerning Wilson's Plovers or Red Knots.

in its prehearing statement, at trial, or in its proposed order. In its prehearing statement, it merely states:

> The policies of the Coastal Management Program Document must be applied to this proposed stormwater permit in the same manner as they were applied to the critical area permitting decision in [*Kiawah II*]. The agency concluded the project in [*Kiawah II*] would contravene numerous policies found in the CZMP document. Specifically, the policies found at Chapter II.C.3.XII.A, B & D, Chapter IV.A.2.a.8.

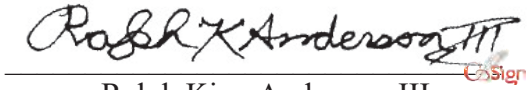
Petitioner's Prehearing Statement, p. 4. With such a broad allegation accompanied by no legal or factual analysis of what the inconsistency is or why it matters to this Court's *de novo* review, the Court is left to speculate as to what argument Coastal was trying to make. Rather than invent an argument for Coastal, this Court finds this issue is, likewise, abandoned. *See Oien Family Invs., LLC, supra.*

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby:

ORDERED that the Department's issuance of NPDES Stormwater Construction Permit (SCR100913), Water Supply Construction Permit (3039S-WS), Wastewater Construction Permit (38828-WW), and Coastal Zone Consistency Certification (CZCC-13-0336) subject to the Department's conditions, are approved.

AND IT IS SO ORDERED.



Ralph King Anderson, III
Chief Administrative Law Judge

September 24, 2018
Columbia, South Carolina

CERTIFICATE OF SERVICE

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

E. Harvin Belser Fair
Judicial Law Clerk

September 24, 2018
Columbia, South Carolina

PLEADINGS

Healthy People. Healthy Communities.

Line Report: Proposed Baseline and Setback Line
Kiawah Island
October 6, 2017
Revised May 3, 2018
Revised December 18, 2019
Revised February 11, 2020

Background

South Carolina Code of Laws §48-39-280, as amended, requires the Department of Health and Environmental Control's Office of Ocean and Coastal Resource Management (OCRM or Department) to establish and periodically review the position of the two lines of beachfront jurisdiction (the baseline and the setback line) once every seven to ten years. For all oceanfront land that is developed or potentially could be developed, the average annual shoreline change rate, also known as the average long-term erosion rate, is also reviewed during this timeframe. The purpose of these jurisdictional lines is to implement §48-39-280(A), which states:

> "A forty-year policy of retreat from the shoreline is established. The department must implement this policy and utilize the best available scientific and historical data in the implementation. The department must establish a baseline which parallels the shoreline for each standard erosion zone and each inlet erosion zone. Subject to Section 48-39-290(D), the baseline established pursuant to this section must not move seaward from its position on December 31, 2017."

The baseline is the more seaward of the two jurisdictional lines. Seaward of the baseline, permitted activities are limited to wooden walkways, small wooden decks, fishing piers, golf courses, normal landscaping, groins, activities authorized by emergency orders, beach renourishment projects, and structures authorized by a special permit. The setback line is the landward line of beachfront jurisdiction. Between the baseline and setback line, the Department exercises regulatory permitting authority for such activities as habitable structures and associated infrastructure, decks, gazebos, other public access structures, and sand dune management. Seaward of the setback line, construction of new shore-parallel erosion control structures (i.e. seawalls, revetments or bulkheads) is prohibited. However, existing erosion control structures may be maintained or repaired with prior authorization by the Department.[1]

[1] S.C. Code Ann. §48-39-290(A).

As part of the process of delineating these jurisdictional lines, the Department has collected beach survey data statewide since 1988 at monitoring stations that are typically spaced 2,000 feet apart. Sections of the coast that are not likely to be developed, such as Cape Romain National Wildlife Refuge, are not surveyed. Surveys begin landward of the primary oceanfront sand dune, if one exists, and extend down the beach and offshore. In addition to this beach erosion monitoring data, the Department utilizes recent dune field topographic data such as Light Detection and Ranging (LIDAR), elevation measurements collected with a survey-grade GPS unit, vegetation measurements collected with a mapping-grade GPS unit, current and historical aerial photographs dating back at least 40 years that show the shoreline location, and previous shoreline change analysis data or reports. These data were viewed and analyzed using ESRI's Geographic Information System (GIS) software.

Process for Establishing the Baseline Position

To establish the baseline position, the shoreline must first be classified as an inlet zone or a standard zone. Areas that are close to inlets with non-parallel offshore bathymetric contours and non-parallel historical shoreline positions are classified as inlet zones, while all other areas are classified as standard zones. Inlet zone classifications are further refined as either unstabilized, or stabilized by jetties, terminal groins, or other structures.

In stabilized inlet zones and standard zones, the baseline is located at the crest of the primary oceanfront sand dune using beach survey data or dune field topographic data such as LIDAR. The primary oceanfront sand dune is defined as a dune with a minimum height of 3 feet, as measured vertically from the crest to the toe of the dune. This dune must also form a continuous line for 500 shore parallel feet.[2] If the shoreline has been altered naturally or artificially by the construction of erosion control devices, groins, or other man-made alterations, the baseline must be established where the crest of the primary oceanfront sand dune would be located if the shoreline had not been altered.[3]

To calculate a dune crest position at an armored[4] location, the volume of sand on the beach seaward of the erosion control structure is determined from survey data and then compared to the volume of sand from a nearby unarmored reference profile that displays a representative sand dune. The reference profile is overlaid on the armored profile in such a way that the measured sand volumes match, and then the dune crest position can be transferred from the reference profile to the armored profile. This calculated dune crest position then becomes the baseline.

In unstabilized inlet zones, the baseline is established at the most landward shoreline position at any time during the past 40 years, unless the best available scientific and

[2] S.C. Code Regs. 30-1(D)(43).
[3] S.C. Code Ann. §48-39-280(A)(1).
[4] S.C. Code Ann. §48-39-250(5).

historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position. This baseline position is established by analyzing shorelines created from historical aerial photographs or shoreline data collected in the field, and identifying the most landward shoreline position.[5]

Process for Establishing the Setback Line Position

The setback line position is dependent on the baseline position and the average annual shoreline change rate, also known as the average long-term erosion rate. The shoreline change rate is calculated using available historical shoreline data and GIS software. The setback line is established landward of the baseline a distance which is 40 times the average annual shoreline change rate or not less than 20 feet.[6]

During this line review, the shoreline change rate calculation was performed using AMBUR (Analyzing Moving Boundaries using R), a tool available through the R-forge statistical environment. Shoreline change analysis was performed every 200 feet. Once the shoreline change rates were calculated, they were analyzed and grouped using the ESRI ArcGIS spatial statistics tool called 'Grouping'. The values within each group were averaged to obtain an annual shoreline change rate. This rate was multiplied by 40 to generate the setback distance from the baseline.

Kiawah Island Baseline

Kiawah Island is a 10-mile long barrier island in Charleston County, located between Seabrook Island and Captain Sam's Inlet to the southwest and Stono Inlet and Folly Beach to the northeast.

Southern Unstabilized Inlet Zone Adjacent to Captain Sam's Inlet

The section of shoreline from the mouth of Captain Sam's Spit to OCRM Monument 2625 near Beachwalker Park is classified as an unstabilized inlet zone. In this zone, the baseline is set at the most landward point of erosion in the last 40 years. Specifically, the baseline position is comprised of a wet/dry shoreline position from 1983 and historical vegetation line positions from 1988 and 1998.

Central Standard Zone

The central portion of Kiawah Island between OCRM Monument 2625 and OCRM Monument 2740 is classified as a standard zone. In this zone, the baseline is set at the primary dune crest as identified in 2010 LIDAR data and verified in the field in August, September, and November 2016 by OCRM staff using survey-grade GPS equipment.

[5] S.C. Code Ann. §48-39-280(A)(2).
[6] S.C. Code Ann. §48-39-280(B).

Northern Unstabilized Inlet Zone Adjacent to Stono Inlet

At the northeastern end of the island, the section of shoreline from that starts between OCRM Monument 2735 and 2745E, and extends to the end of the island at Stono Inlet is classified as an unstabilized inlet zone. In this zone, the baseline is set at the most landward point of erosion in the last 40 years. Specifically, the baseline position is comprised of vegetation line data collected by OCRM staff in August 2016, a wet/dry shoreline position from 1983, and historical vegetation line positions from 1977, 1988, 1998, 2006, and 2011.

Kiawah Island Setback Line

The following table identifies average annual shoreline change rates, from south to north.

Location Description	Shoreline Change Rate (ft/year) *	Multiplier	Setback Distance (ft)
Wrapping the south end of Kiawah north to Boardwalk #2	^	N/A	20
Transition north for 200 feet, then north for 390 feet	-0.8304	40	33
Transition north for 198 feet, then north for 382 feet	-1.2405	40	50
Transition north for 196 feet, then north for 380 feet	-1.5008	40	60
Transition north for 196 feet, then north for 414 feet	-1.8219	40	73
Transition north for 215 feet, then north for 221 feet to Boardwalk #8-A	-2.0655	40	83
Transition north for 215 feet, then from Boardwalk #8 north for 398 feet	-2.3645	40	95
Transition north for 188 feet, then north for 1,844 feet	-2.7273	40	109
Transition north for 196 feet, then from Low Oak Woods Road north for 3,423 feet	-2.9206	40	117
Transition north for 201 feet, then north for 605 feet	-2.5532	40	102
Transition north for 195 feet, then north for 797 feet	-2.2903	40	92
Transition north for 206 feet, then north for 412 feet	-1.9039	40	76
Transition north for 201 feet, then north for 401 feet	-1.5246	40	61
Transition north for 192 feet, then north for 1,030 feet	-1.1831	40	47
Transition north for 222 feet, then north for 839 feet to Nicklaus Lane	-0.8308	40	33
Transition north for 185 feet, then north for 526 feet	-0.6336	40	25
Transition north for 182 feet, then north and wrapping the north end of Kiawah	^	N/A	20

***** A negative number indicates erosion.
^ When this symbol is present, it indicates that the minimum setback is required. The shoreline change rate in these areas is between -0.5 and +31.0 ft/year.

Final Product

Once the location of these proposed new beachfront jurisdictional lines is determined, this "line report" is prepared documenting how the new line positions were established. The

proposed lines are then released for a 30-day public comment period, and a public hearing is held for public review and comment on the proposed line positions. The proposed lines are also made available for public review on the South Carolina Beachfront Jurisdiction viewer (https://gis.dhec.sc.gov/shoreline). Once the lines are adopted as final, the final versions can also be seen on the South Carolina Beachfront Jurisdiction viewer. The line coordinates are also made available on the DHEC web site in a format that allows them to be downloaded and imported into computer-generated plats by surveyors.

Addendum 1

Act # 173 of 2018 known as the "Beachfront Management Reform Act" was signed into law on May 3, 2018 by Governor Henry McMaster. In accordance with the Act, the state's beachfront jurisdictional lines, administered by DHEC's Office of Ocean and Coastal Resource Management, have been established for all beachfront areas of the state as follows.

The baseline is established at the most seaward position of either the current baseline set during the 2008 through 2012 cycle; or the baseline proposed by the department on October 6, 2017.

The setback line is established at the most seaward position of either the current setback line set during the 2008 through 2012 cycle; or the setback line proposed by the department on October 6, 2017.

These jurisdictional lines will be in effect until the completion of the establishment cycle initiating on or after January 1, 2024.

Additional information including survey packets with coordinates is available through the DHEC State Beach Jurisdictional Lines web page at: www.scdhec.gov/beachfrontlines

Addendum 2: December 2019

The shoreline change rates, also known as the long term erosion rates (LTER), provided above, are based on distances along the beach from south to north. The above shoreline change rates only include the erosional areas along a beach that have a setback distance greater than the minimum of 20 feet. Shoreline change rates for all areas (erosional and accretional) are now available through DHEC OCRM's Beachfront Jurisdictional Lines web application (https://gis.dhec.sc.gov/shoreline/). Shoreline change rates for specific segments of the beach can be obtained by locating and clicking on the setback line within the web application. Additional instructions are provided within the web application.

Please note that for the 2016-2018 jurisdictional line review cycle, the baselines and setback lines were established by Act 173 of 2018. The setback line is typically established landward of the baseline a distance of 40 times the shoreline change rate (or long term erosion rate). However, the setback distance established by Act 173 may not reflect the published shoreline change rate.

Addendum 3: February 2020

PLEASE BE ADVISED: Baselines and setback lines for Captain Sam's Spit on Kiawah Island are pending litigation for the 2016-2018 establishment cycle. Until such time as the baselines and setback lines are finalized in this area, the 2008-2012 baselines and setback lines are in effect pursuant to SC Code of Laws Section 48-39-280(C).

EXHIBIT A

Healthy People

PUBLIC NOTICE

PROPOSED BEACHFRONT JURISDICTIONAL LINES
EXTENSION OF PUBLIC COMMENT PERIOD
UNTIL APRIL 6, 2018

Based on comments received from landowners, community leaders, the conservation community, and others during the 30-day public comment period, the Department of Health and Environmental Control (Department) is extending the public comment period for the Proposed Beachfront Jurisdictional Lines (the "current proposal"), until **April 6, 2018**. As a result of this extension, the Department will begin to adopt final revised beachfront jurisdictional lines in May 2018 with all final revised lines published by December 31, 2018. A tentative adoption schedule for each beach will be available on the DHEC website on November 13, 2017.

The Department is extending the comment period to allow interested persons time to meet with Department staff, understand the Department's methodology in setting the jurisdictional lines and bring any additional information to the Department's attention for consideration. Comments may be submitted online or in writing. Please visit www.scdhec.gov/beachfrontlines for more information.

In 2016, S.C. Code Laws §48-39-280 was amended to prohibit the baseline from moving seaward from its position on December 31, 2017. **The Department's decision to adopt revised lines after December 31 affects landowners who own property where the baseline was proposed to move seaward of the existing baseline under the Department's current proposal.** To view the proposed lines for your property, please visit https://gis.dhec.sc.gov/shoreline/

If you are a landowner who **owns property where the baseline was proposed to move seaward of the existing baseline**, under the Department's current proposal, or if you are a landowner who contends other information may prove the baseline on your property should move seaward of the existing baseline, please contact the Department with the information requested below **prior to December 4, 2017** to receive information and guidance on board review under S.C. Code Laws §44-1-60. Note that the Department will attempt to proactively reach out to these property owners. S.C. Code Laws §44-1-60(J) states "[a]ny statutory deadlines applicable to permitting and licensing programs administered by the department must be extended to all (sic) for this final review process." It is the Department's position that the December 31 date would be extended for landowners who file a timely request for review under S.C. Code Laws §44-1-60.

EXHIBIT A

To receive information and guidance on board review, please provide the following information via electronic mail [ocrm-comments@dhec.sc.gov] or phone (843-953-0200) prior to December 4, 2017:

- Property Address
- Name of Owner(s)
- Mailing Address of Owner(s)
- Contact Name
- Contact Telephone Number
- Contact Email Address

EXHIBIT B

STATE OF SOUTH CAROLINA

BEFORE THE BOARD OF

THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

KDP, II, LLC

Affected Property Owner-Requestor,

vs.

The South Carolina Department of Health and Environmental Control

Respondent.

Re: 2017 Beachfront Jurisdictional Line Determinations (S.C. Code § 48-39-280)

Charleston County: TMS Nos. 207-05-00-001 and 207-05-00-0011

OCRM Survey Profile Stations: 2615, 2620, 2625

INTRODUCTION

Pursuant to S.C. Code Ann. §44-1-60, KDP, II, LLC ("KDP") hereby requests that the Board of the Department of Health and Environmental Control (the "Department") conduct a Final Review Conference of the final determination made by the Department in its notice issued on November 3, 2017, (the "Notice"), concerning the new beachfront jurisdictional lines under S.C. Code Ann. § 48-39-280 that were proposed on October 6, 2017. The Notice extended the comment period for the proposed new lines until April 6, 2018. The Department has since issued a separate communication with a tentative adoption date of August 24, 2018, for Kiawah Island.

Under the provisions of S.C. Code Ann. Section 48-39-280, as amended in 2016, the *de facto* legal effect of this Notice is the Department's final determination to adopt the location of the existing baseline, established in 2009, as the location of the new baseline

for properties in those instances where the owner believes the final location of the new baseline should be seaward of the existing baseline, because the statute prohibits the baseline moving seaward after December 31, 2017.[1]

KDP is the owner of land on western end of Kiawah Island called Captain Sams Spit, comprised of the land south of Beachwalker Park (i.e., generally from Department monument station 2625 extending West to Captain Sams Inlet, also identified by TMS parcel numbers 207-05-00-001 and 207-05-00-0011)(hereinafter the "Property").

Based on the criteria set forth in S.C. Code Ann. § 48-39-280 as well as related statutes and regulations, the new baseline should be seaward of the existing (2009) location for the reasons set forth below. Because of the fully substantiated history of accretion of the Property over the last 70 years, KDP does not take issue with the Department's preliminary determination that the setback line on the Property should be situated at the minimum distance of 20 feet behind the baseline and does not seek at this time a final review conference of that preliminary determination of Department as to the Property.

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[1] The Notice recognizes this final consequence and states, in part, the following: "In 2016, S.C. Code Laws §48-39-280 was amended to prohibit the baseline from moving seaward from its position on December 31, 2017. The Department's decision to adopt revised lines after December 31 affects landowners who own property where the baseline was proposed to move seaward of the existing baseline under the Department's current proposal. ... If you are a landowner who owns property where the baseline was proposed to move seaward of the existing baseline, under the Department's current proposal, or if you are a landowner who contends other information may prove the baseline on your property should move seaward of the existing baseline, please contact the Department with the information requested below prior to December 4, 2017 to receive information and guidance on board review under S.C. Code Laws §44-1-60."

BASIS FOR REQUEST FOR FINAL REVIEW CONFERENCE

Failure to Follow Statutorily Prescribed Methods

The statute and regulations governing the location of the baseline and setback line emphasize that the primary factor for consideration is the beach survey monument data gathered by the Department every six months. Based on the limited information the Department has provided KDP, it appears that the Department deviated from this mandate and relied on other information and methodology not referenced by the statute and regulations.

The following statutory and regulatory provisions give priority to the survey monument information in the adjustment of the lines:

> (D) ***In order to locate the baseline and the setback line***, the department must establish monumented and controlled survey points in each county fronting the Atlantic Ocean. ***The department must acquire sufficient surveyed topographical information on which to locate the baseline.*** Surveyed topographical data typically must be gathered at two thousand foot intervals. However, in areas subject to significant near-term development and in areas currently developed, the interval, at the discretion of the department, may be more frequent. ***The resulting surveys must locate the crest of the primary oceanfront sand dunes to be used as the baseline for computing the forty-year erosion rate***. In cases where no primary oceanfront sand dunes exist, a study conducted by the department is required to determine where the upland location of the crest of the primary oceanfront sand dune would be located if the shoreline had not been altered.

SC Code Section 48-39-280 (D).

> (a) The changing nature of the shoreline or long-term stability of beachfronts can now be documented by use of the monitoring and archival system now in place. Twice a year beachfront profile stations, established to third order survey accuracy, will be surveyed and the results recorded and stored. Comparing these surveys seasonally and over the years will provide a long-term view of what is happening at a particular point along the coast. ***This information will be the cornerstone for the development of a scientific method for locating baselines and establishing erosion rates.***

SC Code of Regs Ann. Section 30-21(C)(1)(a).

> (f) Goal: Improve Coastal Data Base
>
> These policies will be implemented by Council staff who will conduct the beach surveys and enter the results of each survey into a computerized data base. This will be an ongoing activity that the staff of the Council will continually upgrade. ***The monitoring plan will provide the Council with a means to establish historic trends and to establish setback lines and better regulate development along the coastline. Data obtained from the monitoring program will be used to adjust the lines*** and evaluate the success of renourishment projects as required under Section 30-14 of the Administrative Procedures Section.

SC Code of Regs Ann. Section 30-21(C)(2)(f).

The Department's four-page "Line Report: Proposed Baseline and Setback Line Kiawah Island, October 6, 2017" (the "Report") indicates that the Department did not use the beach survey monument data for the Property as the primary basis for its determinations.

In describing how it set the proposed baseline in the unstabilized inlet zone, the Department states that it relied on vegetation line positions from aerial imagery, a process that has no basis in the controlling statute. The statute governing the location of the baseline in the unstabilized inlet zone makes no reference to fixing the baseline at a line of vegetation:

> The baseline for inlet erosion zones that are not stabilized by jetties, terminal groins, or other structures must be determined by the department as ***the most landward point of erosion*** at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position.

S.C. Code Ann. §48-39-280 (A)(2)(double emphasis added).

Vegetation lines do not equate to the most landward point of erosion, or even the most landward shoreline.[2] There also has been no information provided to verify the accuracy of these aerial images supposedly showing these lines of vegetation including their resolution and whether they were orthorectified. KDP would also note that it made FOIA requests for all documents the Department was relying upon in setting the new jurisdictional lines and the agency did not disclose the use of a 1983 wet/dry shoreline referenced by the Report as the partial basis for the location of the baseline on the Property. While KDP received such digital files that depict these lines, KDP has no information on their derivation nor their inherent position error.

Most important of all, the Report incorrectly states that "in unstabilized inlet zones, the baseline is established at the most landward shoreline position." Section 48-39-280 (A)(2) clearly and unambiguously states the baseline in unstabilized inlet zones "***must*** be determined by the department as the most ***landward point of erosion*** at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position." The most landward point of erosion is NOT the same as the most landward shoreline.

It is undisputed that the Property is consistently accretional. Thus, using the most landward shoreline instead of the most landward point of erosion in a 40-year period leads to a result that is not in conformity with the mandate of this statute. The Department should first have determined if the Property suffered a trend of erosion under normal conditions during the prior 40 years. If the Department had done so, it would have determined that

[2] Vegetation lines have customarily been used by the Department in setting the Baseline, and KDP agrees that vegetation lines may be used under some circumstances as a proxy for relative shoreline movement, but vegetation lines are not the shoreline nor do they equate to the most landward point of erosion.

there has been no such trend of erosion, recognized the unbroken trend of accretion, and set the baseline in conformity with that finding based upon surveyed profile data and aerial imagery.

Turning to the determination of the baseline in the standard zone, the Report refers to the use of the beach survey data "OR LIDAR" in determining the crest of the primary dune in the standard zone. There is no provision in the statutes or regulations authorizing the use of LIDAR as a substitute for the beach survey data accumulated by the agency. LIDAR is a secondary source and may provide pertinent information, but LIDAR readings are not the approved determinant for establishing the baseline in the standard zone. LIDAR topographic data may well overlook seaward primary dunes that field surveys disclose. The method used for the stabilized zone is important, given the justified adjustment to the boundary of the unstabilized zone and standard zone on the Property described below.

Unstabilized Inlet Zone vs Standard Zone

The Report fails to state whether the Department made a current determination of the locations of the standard zone and the unstabilized inlet zone along the shoreline of the Property. To date KDP has not received any information that shows that the Department considered any near-shore bathymetry as would be necessary for such a determination. The Report merely states without explanation that "[t]he central portion of Kiawah Island between OCRM Monument 2625 and OCRM Monument 2740 is classified as a standard zone." The Department's designation of the location of these two zones appears not to have changed since the original jurisdictional lines were adopted in 1989.

SC Code Section 48-39-270 gives the following definitions of standard zone and inlet zone:

> (6) A standard erosion zone is a segment of shoreline which is subject to essentially the same set of coastal processes, has a fairly constant range of profiles and sediment characteristics, and is not influenced directly by tidal inlets or associated inlet shoals.
>
> (7) An inlet erosion zone is a segment of shoreline along or adjacent to tidal inlets which is influenced directly by the inlet and its associated shoals.

The July 2016 Inlet Relocation Monitoring Report of CSE documenting shoreline conditions a year after the re-location of Captain Sams Inlet in the summer of 2015 included extensive bathymetric data. The bathymetric transects along Property and digital terrain model for the Property, both from July 2016 Inlet Relocation Monitoring Report of CSE are attached as Exhibit 1. These studies have the benefit of providing the bathymetry for a considerable distance offshore. The studies show a common beach profile for the standard zone. As expressed in the CSE report, the shoreline to a location that is west of Monument 2615, "is subject to essentially the same set of coastal processes, has a fairly constant range of profiles and sediment characteristics, and is not influenced directly by" Captain Sams Inlet or its shoals.

Additionally, the attached Exhibit 2 shows the bathymetry along the Property in 2017. The geomorphology does not suggest influence of the tidal inlet east of Profile 2620. The bathymetry is slightly curved and arcuate which reflects the general curvature of the shoreline. There can be no question that the shoreline east of Profile 2620 is in the standard zone. Whether the standard zone is deemed to start East of Profile 2615 or East of Profile 2620 is less important than the Department's failure to undertake this threshold analysis required by the controlling statutes and regulations to determine if a

particular location on the beachfront is in the standard zone or unstabilized inlet zone and, accordingly, whether the baseline is the most landward point of erosion or the primary dune.

KDP knows of no information that refutes the bathymetric profile data contained in the enclosures. In fact, the Department's "DHEC - OCRM Beach Erosion Research & Monitoring Profile Viewer" (B.E.R.M. Explorer) demonstrates that is a constant range of profiles for Stations 2620 and 2625 for the years 2014 thru 2016. The profile drawing displayed from the B.E.R.M. Explorer shows bathymetry readings taken extend to a point approximately 3,000 feet offshore. If the Department has bathymetric readings that counter those of CSE, KDP asks that they be provided.

The Department's Location of the Baseline is Incorrect

Within the unstablized inlet zone, the Department used vegetation lines to guess at the most landward shoreline over the last forty years. The Department did not attempt to determine the most landward point of erosion over the last 40 years as the statute dictates.

It has been documented in geologic studies of the area that at Kiawah, there is an abundant sediment supply in the form of the shoals and ebb tidal delta associated with the Stono River. In addition, it is believed that much of Kiawah's sand supply has been incorporated from the erosion of Morris Island and Folly Beach. As the predominant longshore sediment transport is from east to west, this supply of sand has provided general stability to the beach at Kiawah. A study of sand budgets on Kiawah noted that the volume of sand in these updrift shoals on Kiawah is approximately ten (10X) times the volume of sand contained on the beach at Kiawah Island.

It is without dispute that the Property has been accreting along with the rest of Kiawah Island. Year after year, the Department has described Kiawah Island as one of the healthiest beaches in South Carolina. the Department has singled out in particular the western end that includes the Property. All of the Department's publicly available State of the Beaches Reports from 2001 through 2009 contain in their introductory paragraph for Kiawah Island the following: "Kiawah is one of the most stable barrier islands in the state, although the eastern and western ends of the island are more dynamic due to their proximity to inlets."

Attached as Exhibit 3 is the beach profile survey data of the Department from 1988 to 2017 that shows the average annual rate of accretion at the stations on the Property along with an aerial that shows the exact location of the monitoring stations. The annual average rate of accretion ranges from a low of around five feet per year at Profile 2625 to a high of around ten to twelve feet per year at Station K-21. These monument survey beach profiles fully substantiate this unbroken trend of accretion. KDP further notes that, on its Beach App, the Department indicates that Profiles 2625 and 2620 have had annual accretion rates of 5.22 ft/yr and 8.50 ft/yr, respectively.

The only erosional events that have been documented on the Property's shoreline over the last 40 years are: (1) some modest erosion on the far western end next to the inlet resulting from the relocation of the inlet to the east in the summer of 2015, (2) the storm surge of Hurricane Matthew in October of 2016, and (3) the storm surge of Hurricane Irma in September 2017. These are one-time events and are not reflective of whether the trend of this particular beachfront is accretional or erosional over the last forty years. Since KDP understands the Department is not considering Hurricane Irma, the

most landward point of erosion over the last 40 years is the escarpment after Hurricane Matthew as shown on the aerial image that is Exhibit 4.

It also must be noted that the Department's determination that the baseline should remain in the virtually same location as 2009 is arbitrary and capricious and without factual foundation. The Department's monument survey data, confirmed by aerial imagery, demonstrates the beach is accreting. Even if a low average annual accretion rate of 6 feet per year was used, the baseline should have moved at least 54 feet seaward (9 years X 6ft/yr) using the Department's incorrect benchmark of the most landward shoreline. The Department's analysis completely ignores the best scientific and historical information, fully corroborated by its beach monument survey data, that the reach of the beach along this shoreline is accreting on an annual basis, which is also confirmed by the Department's setting the setback line the minimum distance of 20 feet landward of its preliminary baseline.

Finally, as just discussed, the primary zone should be extended to the southwest of Profile 2625 to at least to Profile 2620 and possibly to Profile 2615. Along this shoreline the crest of the primary dune is the baseline. Instead of using the statutory criterion of setting the baseline in the standard zone at the crest of the primary dune, the Department incorrectly set it at the most landward shoreline over the last 40 years according to data sources other than those prescribed by the controlling statutes and regulation.

CONCLUSION

For these reasons, KDP requests that the Board grant a final review conference of the final determination of the location of the new baseline on the Property effectively implemented by the Notice, reverse this final determination, and set the baseline at the location shown of Exhibit 4 or, in the alternative, at the crest of the primary dune along the shoreline within the revised location of the standard zone.

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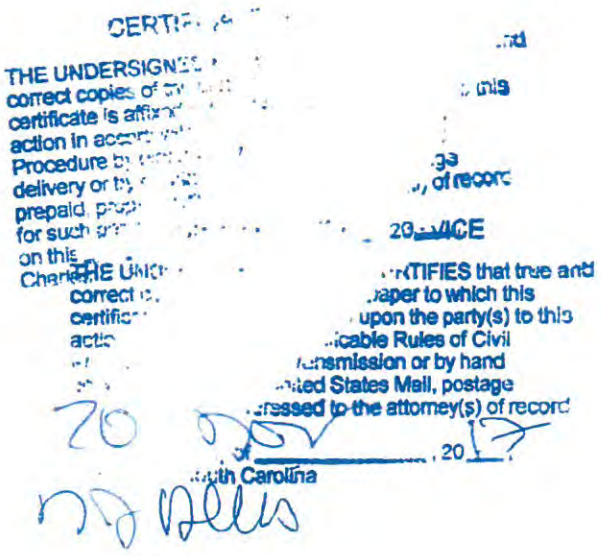
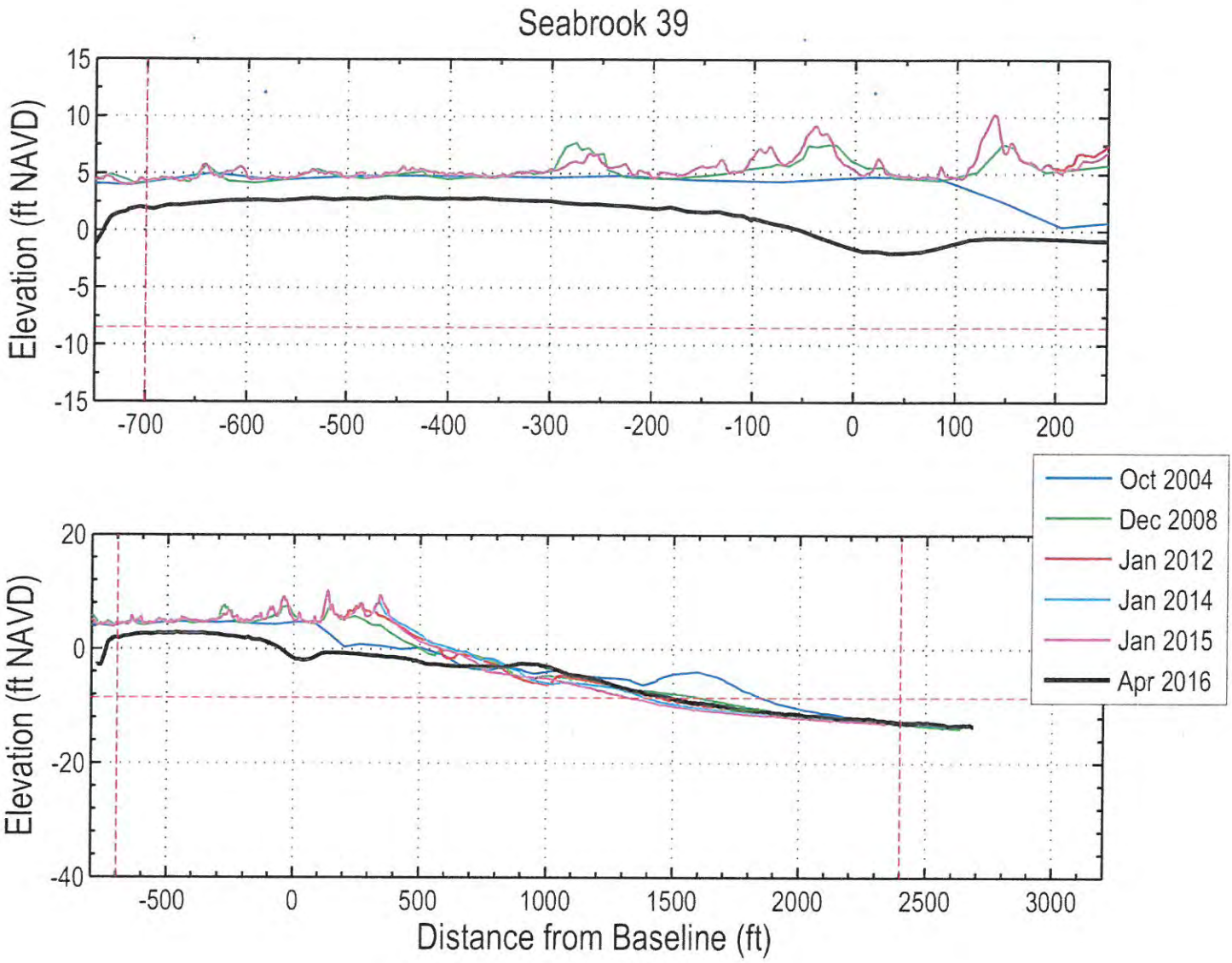


TABLE OF EXHIBITS

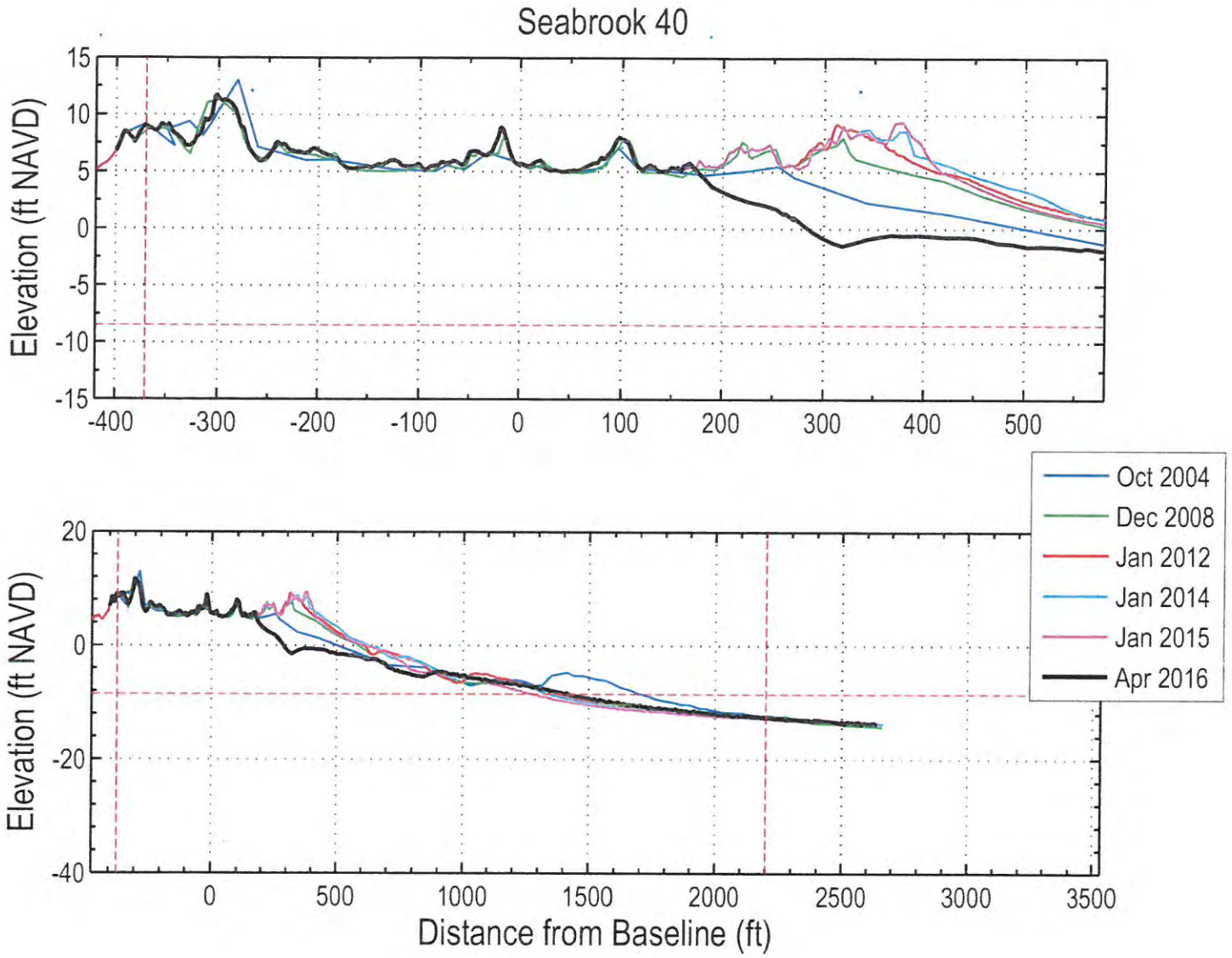
Exhibit 1	Bathymetric Transects along Property and Digital Terrain Model for the Property, both from July 2016 Inlet Relocation Monitoring Report of CSE
Exhibit 2	2017 Bathymetry for Property
Exhibit 3	The Department beach profile data for the average annual rate of accretion at the stations on the Property from 1988 to 2017 with aerial showing location of stations
Exhibit 4	Aerial showing most landward point of erosion

EXHIBIT B
Exhibit 1



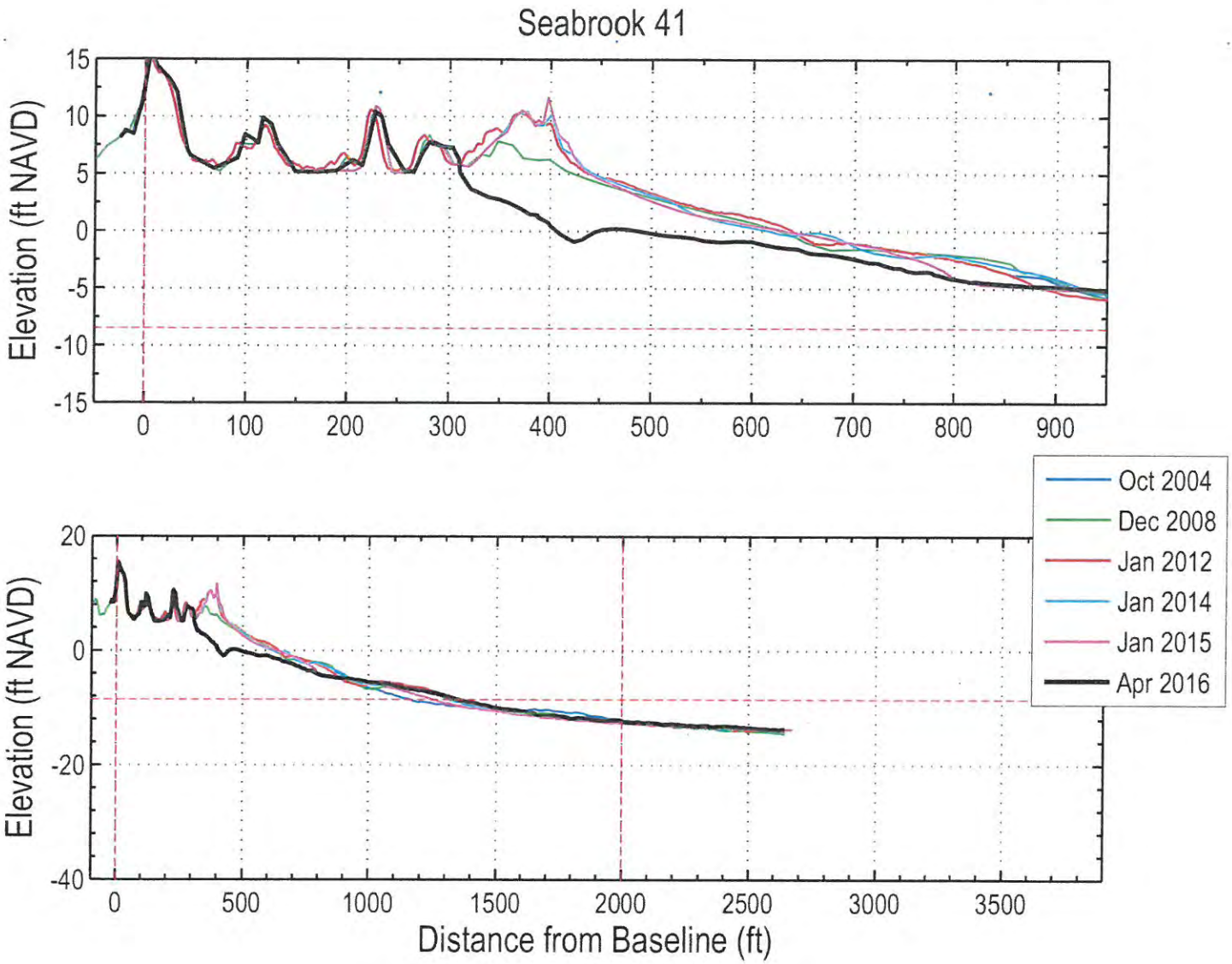
Date	Unit Vol (cy/ft)
Jan 2006	779.4
Nov 2006	810.0
Dec 2007	742.8
Dec 2008	744.8
Nov 2010	786.2
Jan 2012	765.2
Jan 2014	773.1
Jan 2015	749.8
Apr 2016	556.4

EXHIBIT B
Exhibit 1



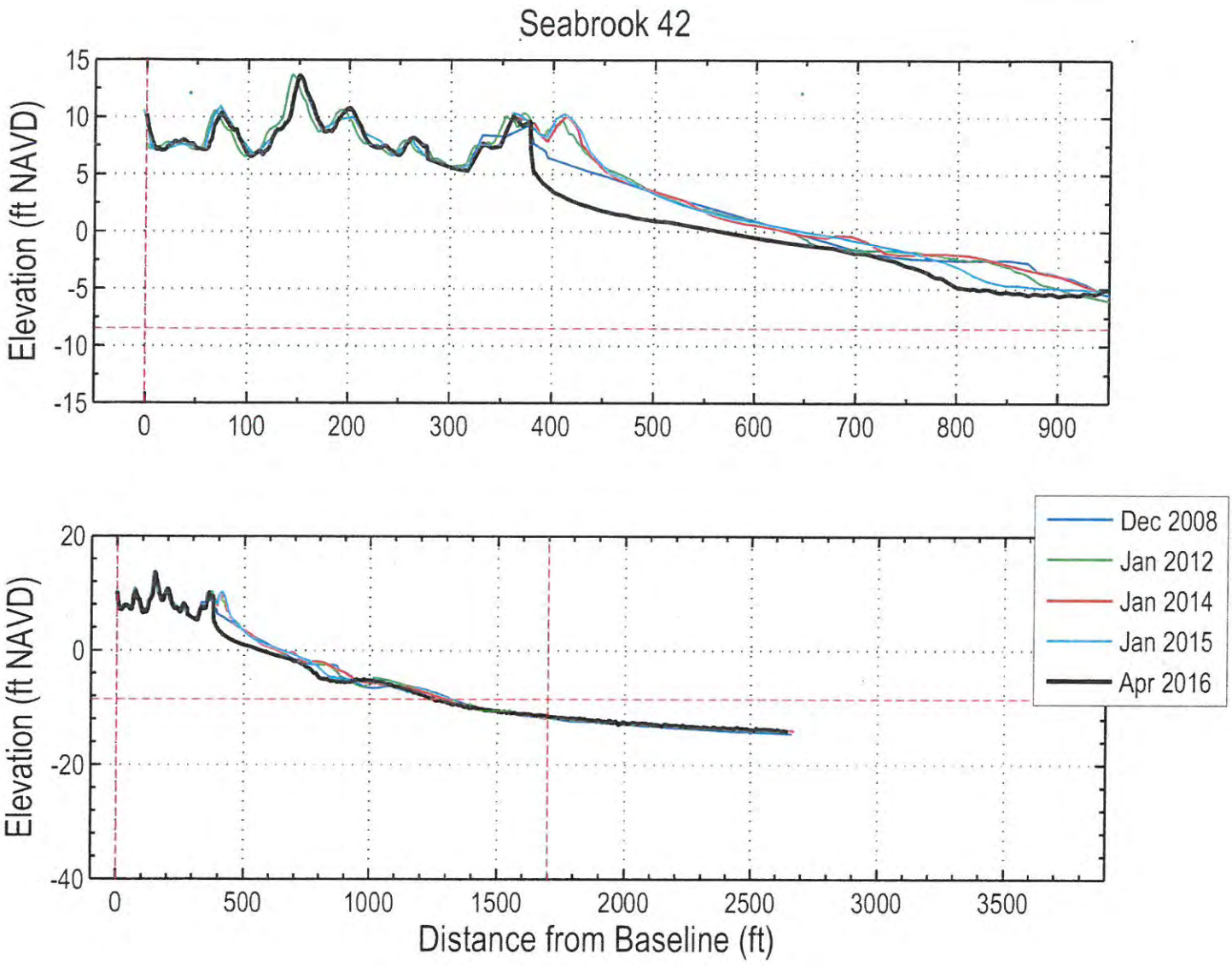
Date	Unit Vol (cy/ft)
Jan 2006	644.4
Nov 2006	668.8
Dec 2007	630.5
Dec 2008	596.7
Nov 2010	646.5
Jan 2012	624.1
Jan 2014	627.4
Jan 2015	608.3
Apr 2016	521.6

EXHIBIT B
Exhibit 1



Date	Unit Vol (cy/ft)
Jan 2006	432.6
Nov 2006	467.5
Dec 2007	449.2
Dec 2008	424.4
Nov 2010	445.2
Jan 2012	438.0
Jan 2014	431.8
Jan 2015	420.2
Apr 2016	373.5

EXHIBIT B
Exhibit 1



Date	Unit Vol (cy/ft)
Jan 2006	424.7
Nov 2006	458.5
Dec 2007	460.7
Dec 2008	441.3
Nov 2010	467.9
Jan 2012	448.4
Jan 2014	449.4
Jan 2015	439.8
Apr 2016	403.3

EXHIBIT B
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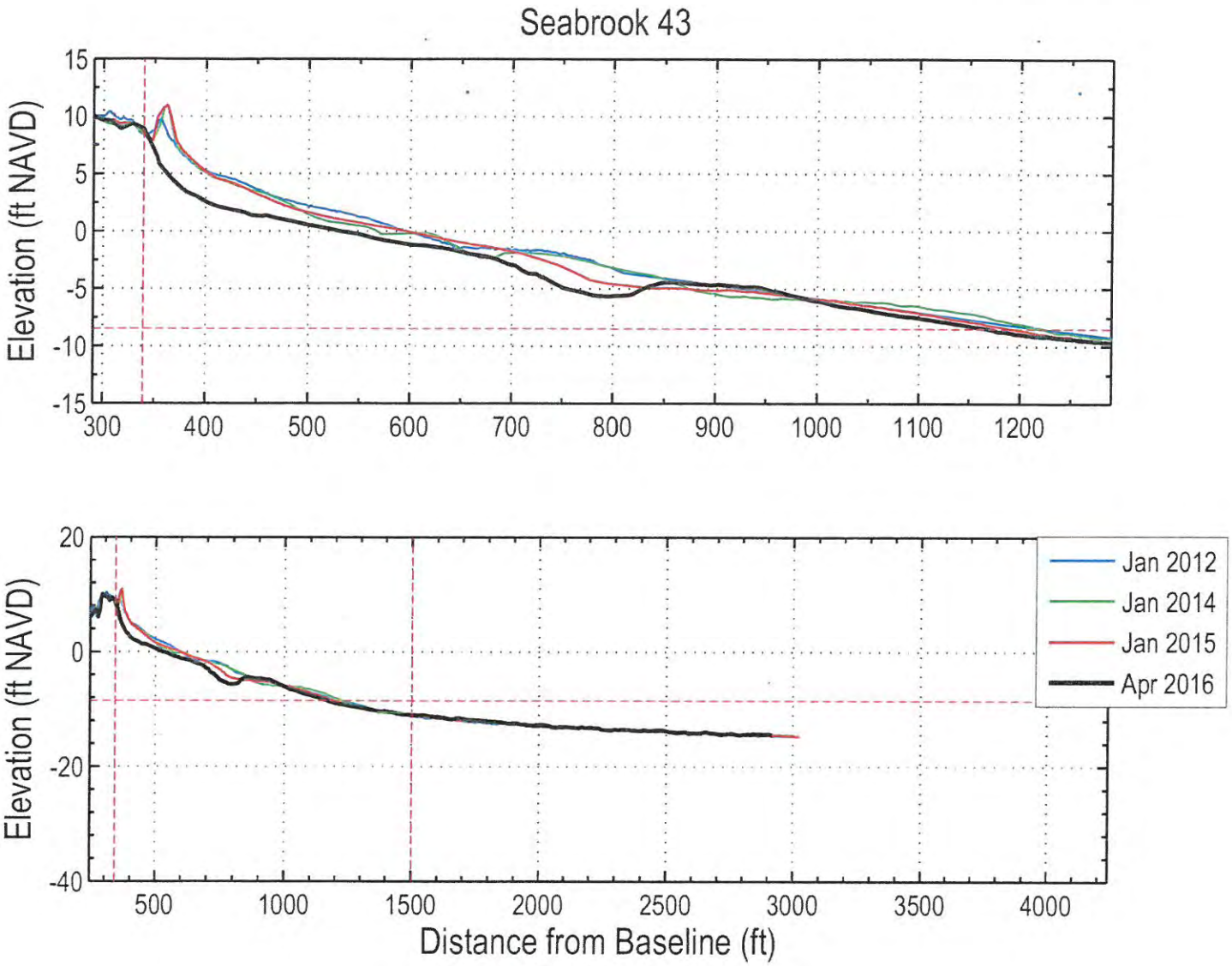
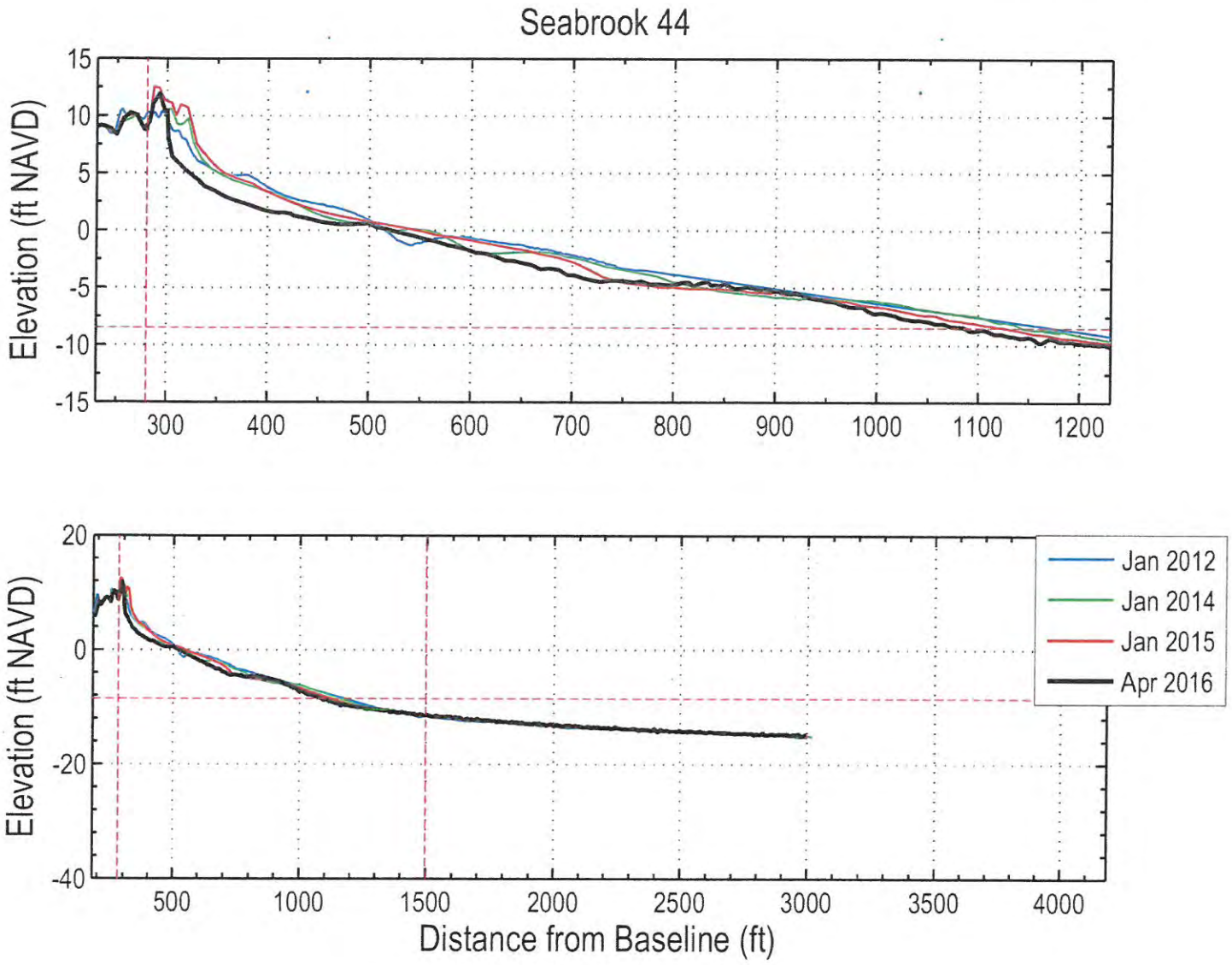


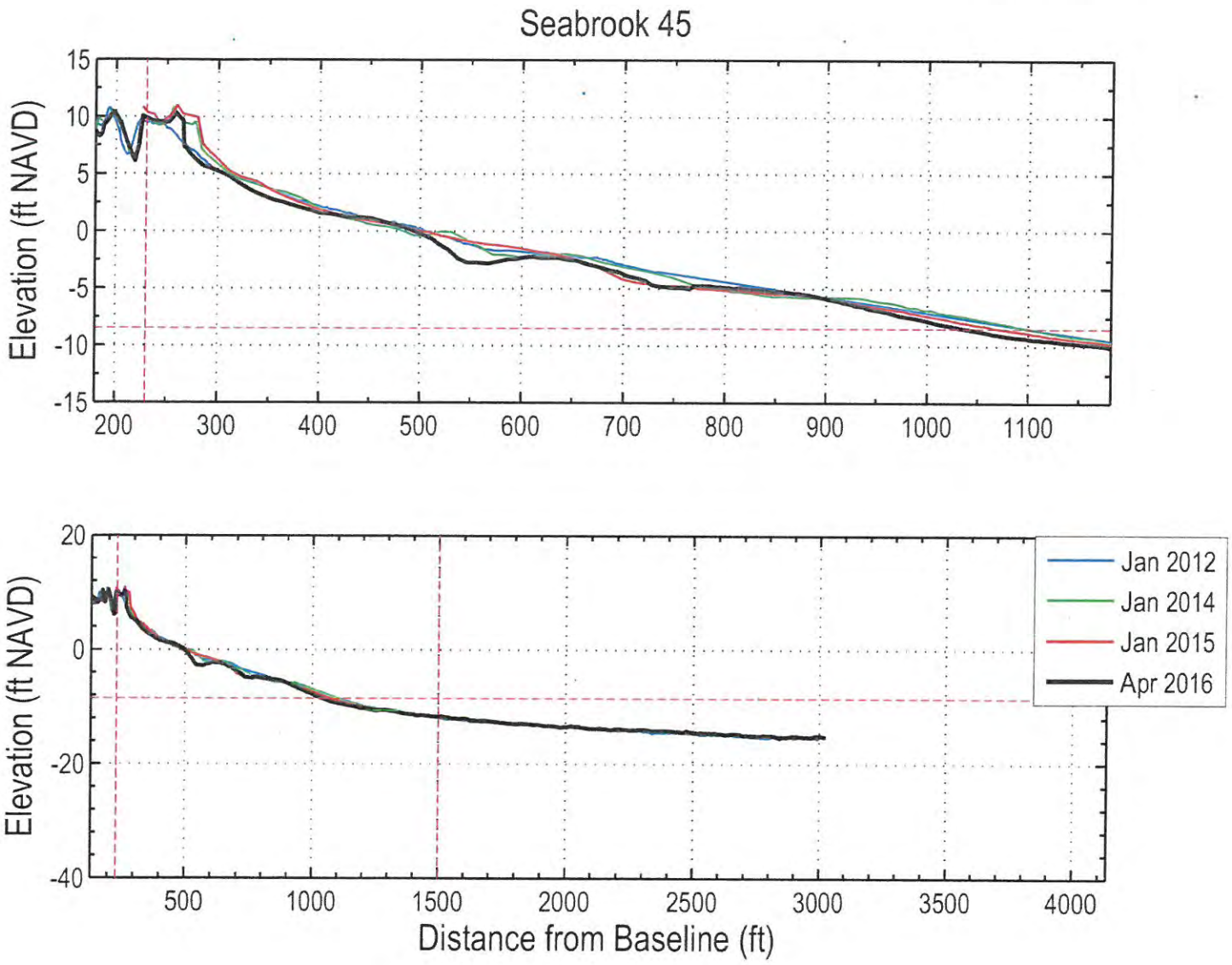
Date	Unit Vol (cy/ft)
Nov 2010	219.4
Jan 2012	205.6
Jan 2014	200.5
Jan 2015	196.3
Apr 2016	168.4

EXHIBIT B
Exhibit 1

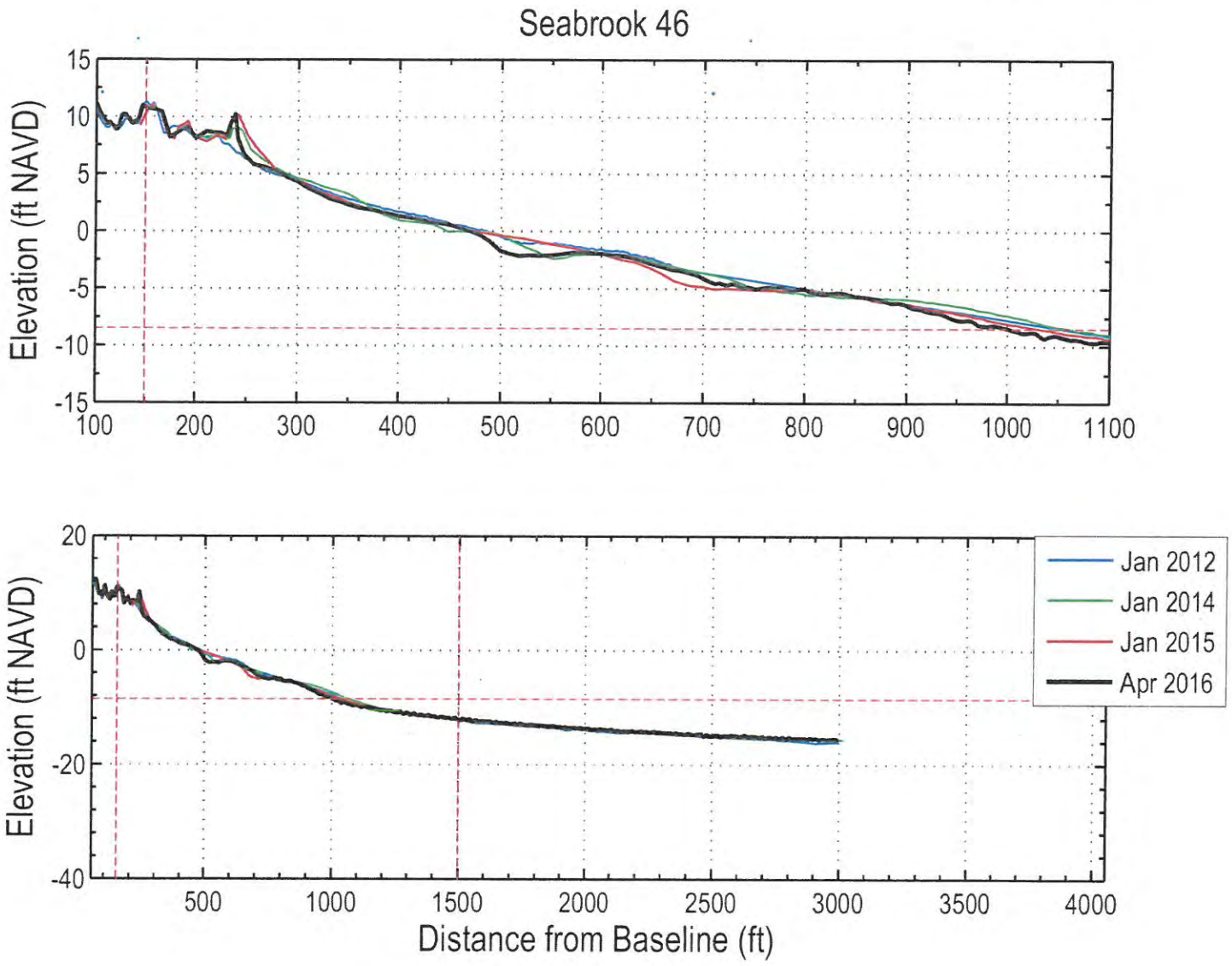


Date	Unit Vol (cy/ft)
Nov 2010	222.6
Jan 2012	214.0
Jan 2014	206.6
Jan 2015	206.2
Apr 2016	183.6

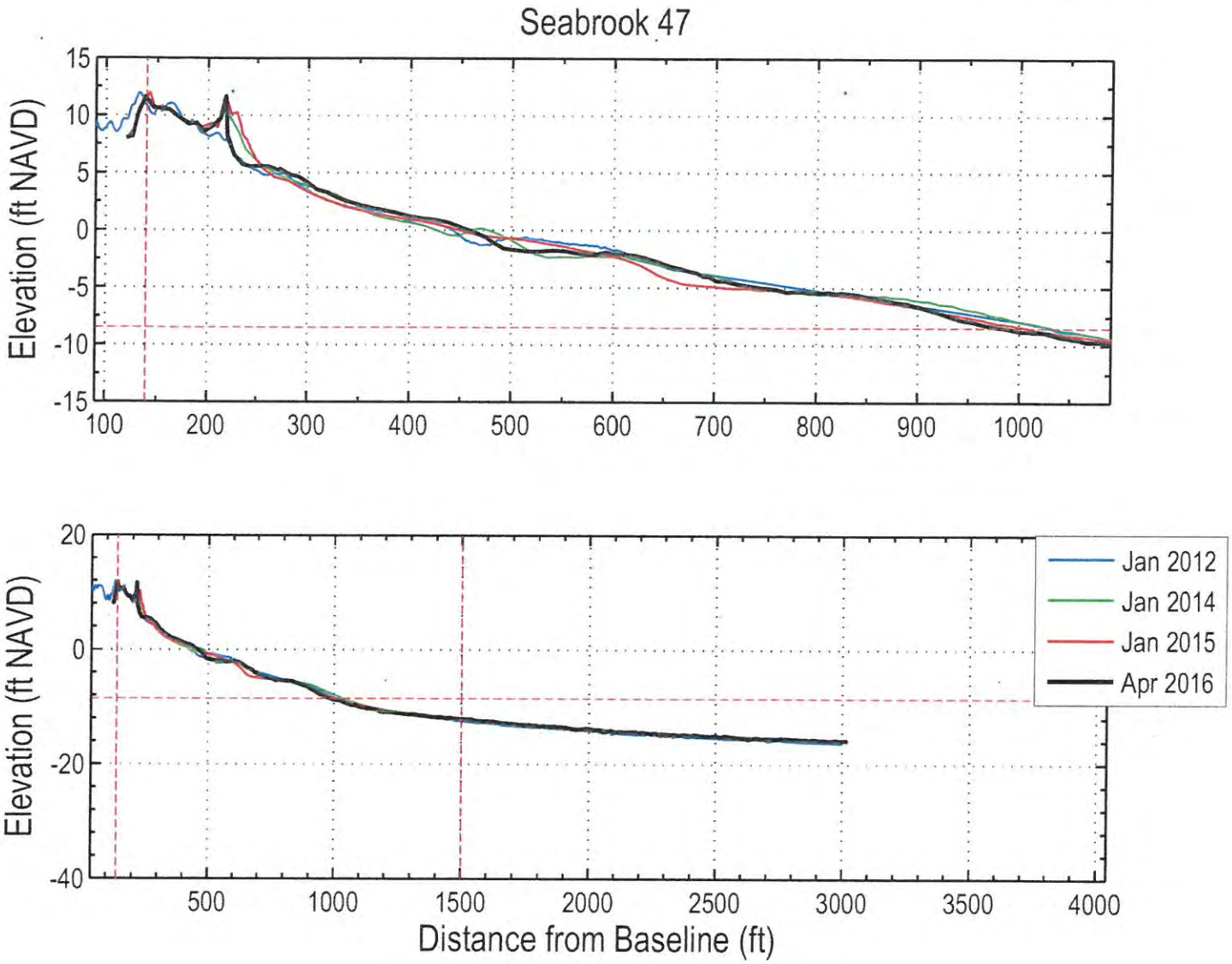
EXHIBIT B
Exhibit 1



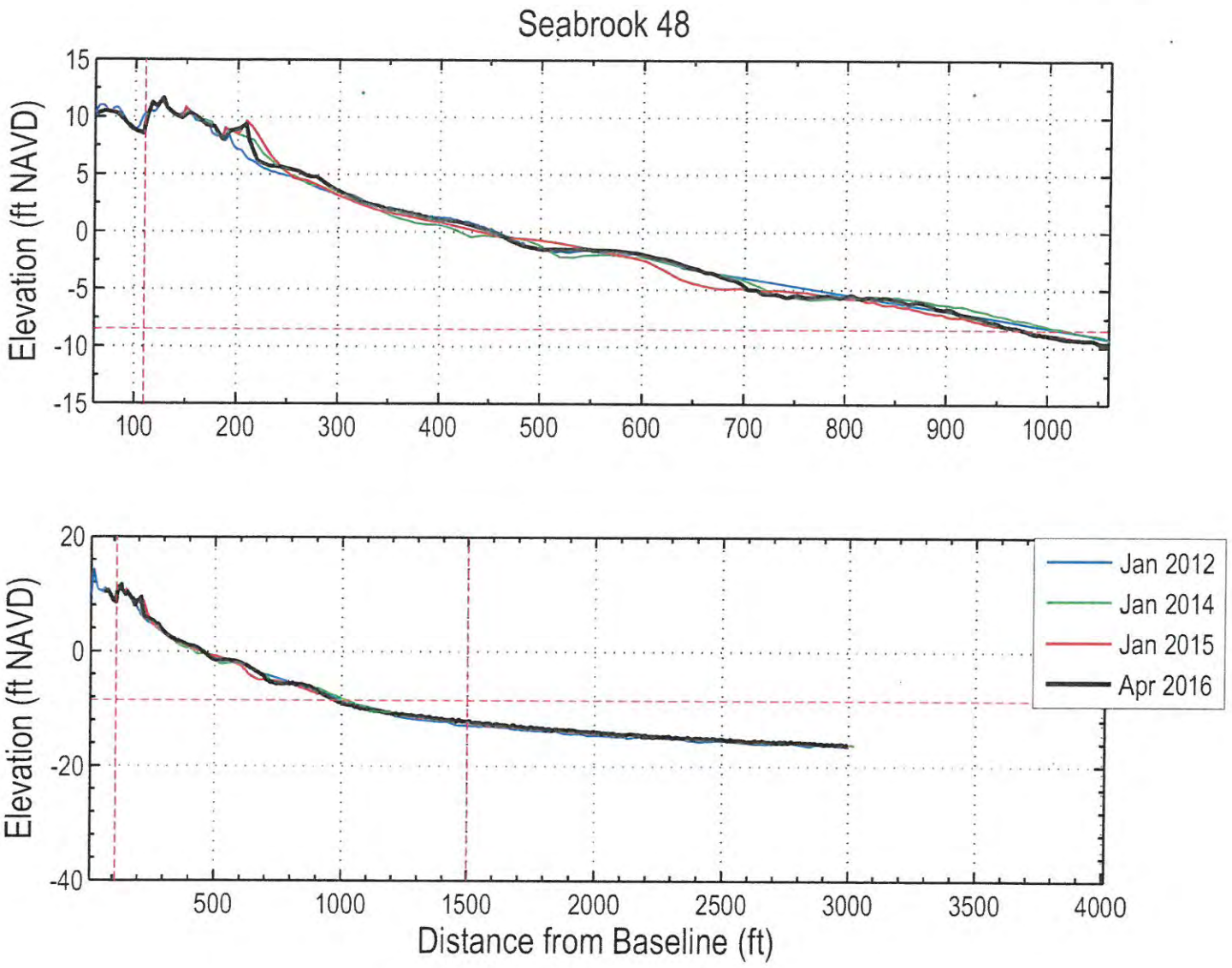
Date	Unit Vol (cy/ft)
Nov 2010	216.6
Jan 2012	213.8
Jan 2014	212.8
Jan 2015	210.3
Apr 2016	198.4



Date	Unit Vol (cy/ft)
Nov 2010	239.9
Jan 2012	245.4
Jan 2014	244.4
Jan 2015	239.8
Apr 2016	235.6

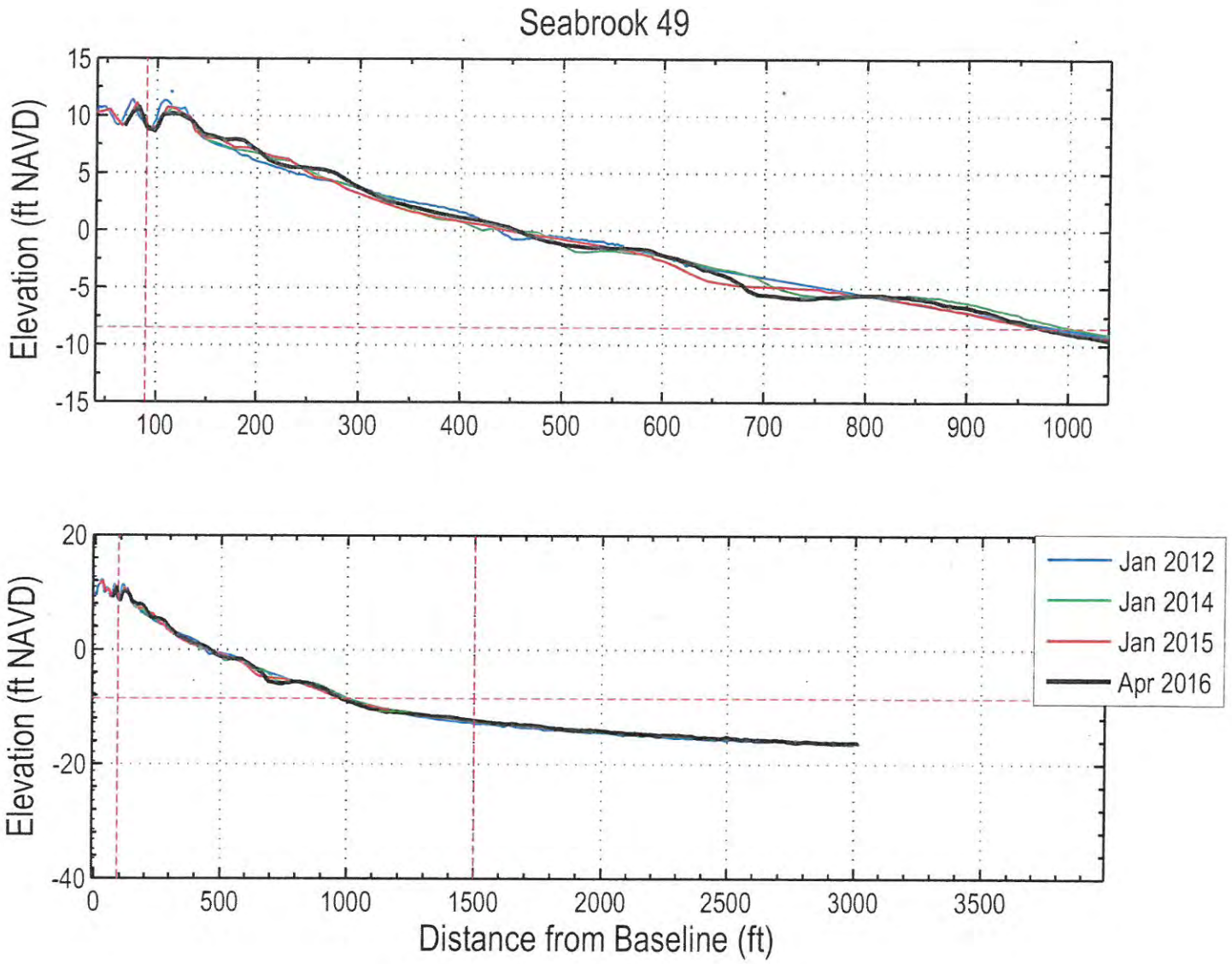


Date	Unit Vol (cy/ft)
Nov 2010	233.5
Jan 2012	239.2
Jan 2014	240.5
Jan 2015	235.8
Apr 2016	237.8

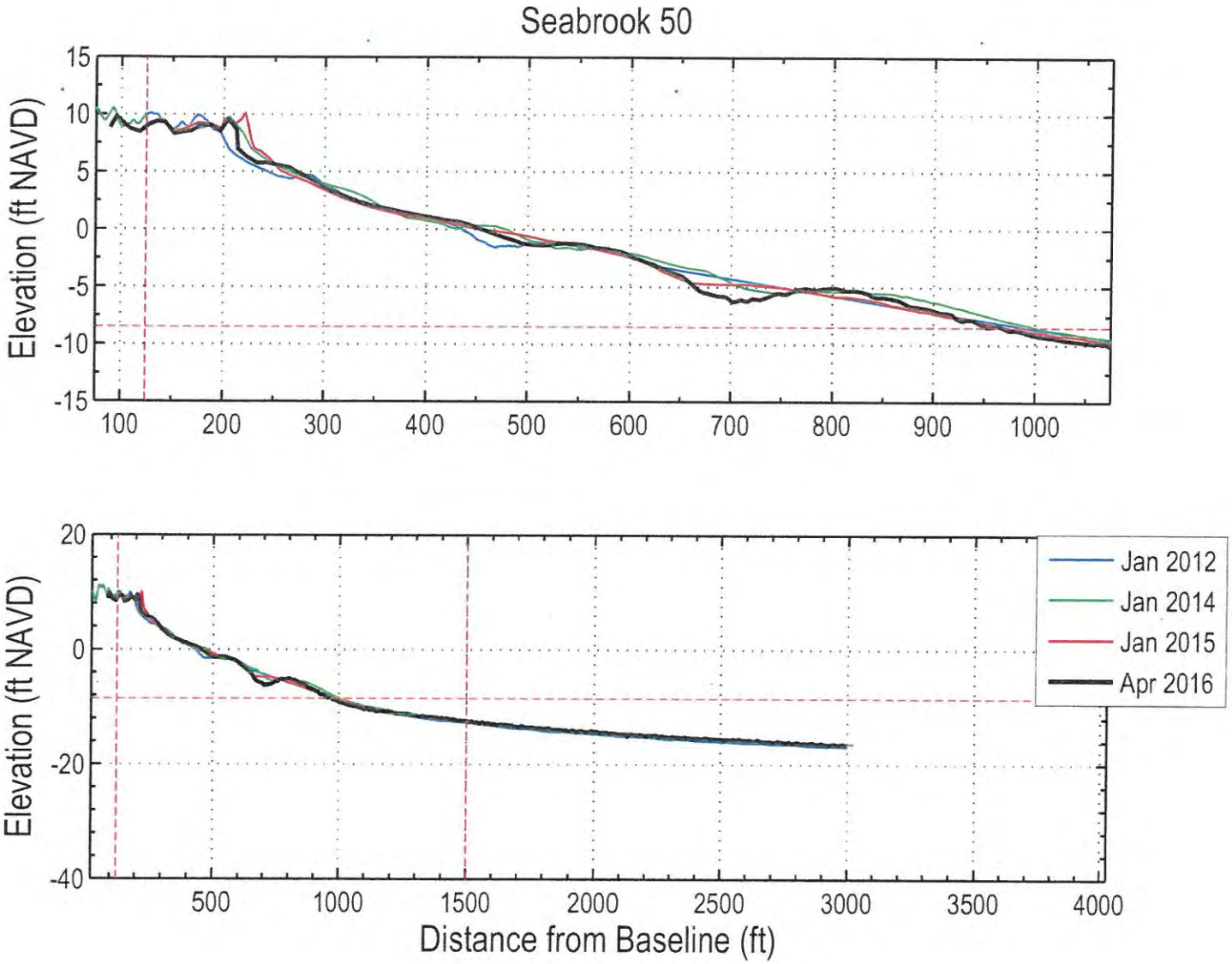


Date	Unit Vol (cy/ft)
Nov 2010	241.1
Jan 2012	251.4
Jan 2014	250.8
Jan 2015	246.8
Apr 2016	252.3

EXHIBIT B
Exhibit 1



Date	Unit Vol (cy/ft)
Nov 2010	247.1
Jan 2012	260.2
Jan 2014	258.9
Jan 2015	253.6
Apr 2016	257.7



Date	Unit Vol (cy/ft)
Nov 2010	228.9
Jan 2012	235.1
Jan 2014	245.4
Jan 2015	238.0
Apr 2016	235.4

EXHIBIT B
Exhibit 1

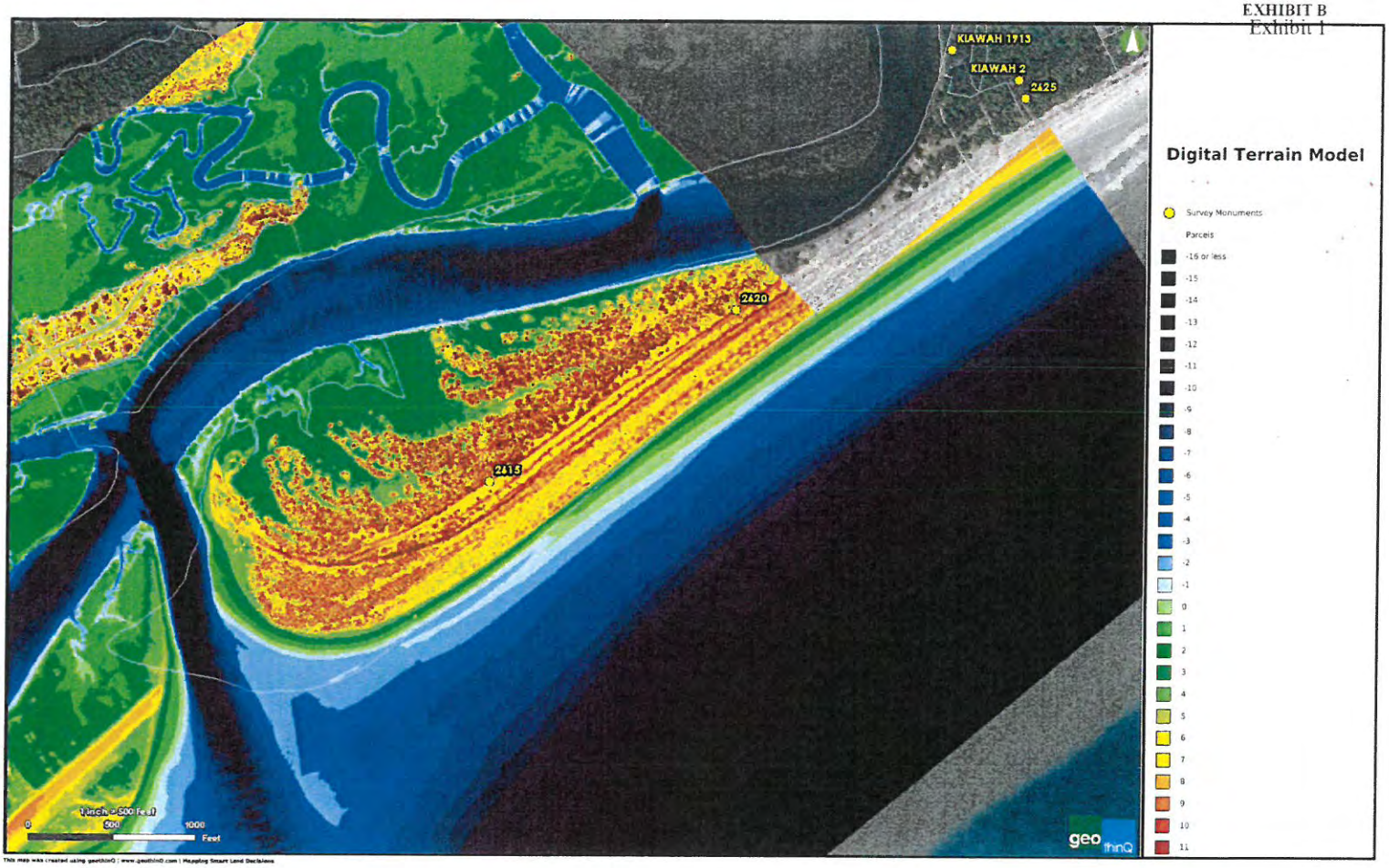
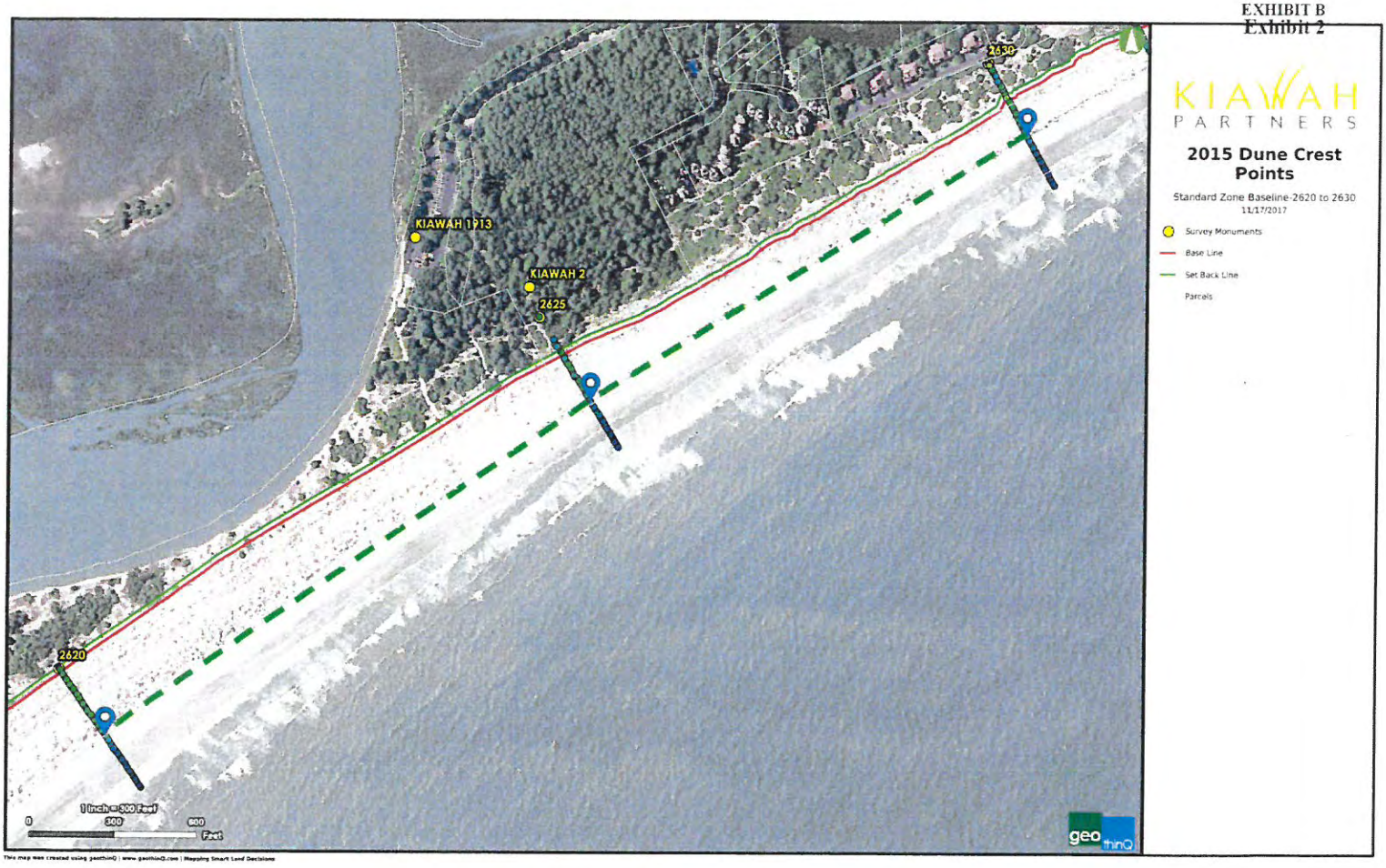
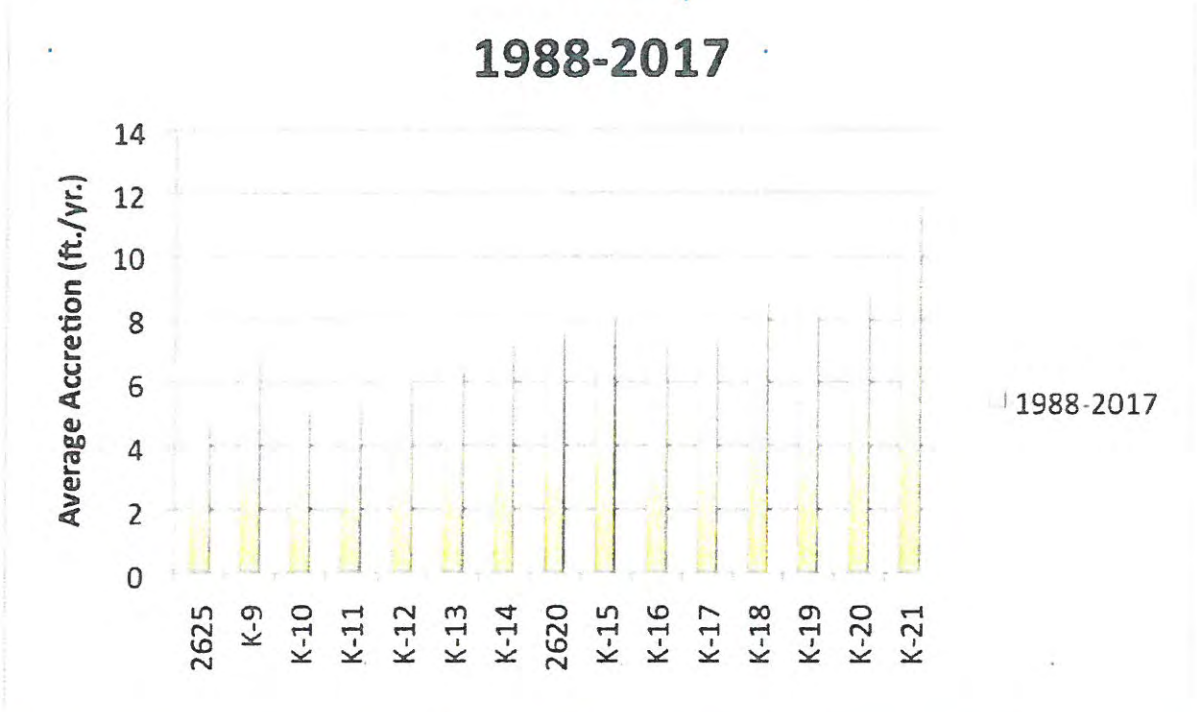


EXHIBIT B
~~Exhibit 2~~



EXH 3


1988-2017
Average Accretion (ft./yr.)
14
12
10
8
6
4
2
0
2625
K-9
K-10
K-11
K-12
K-13
K-14
2620
K-15
K-16
K-17
K-18
K-19
K-20
K-21
1988-2017

Profile Locations
ADDRESS
KIAWAH 1913
KIAWAH 2
2627
K-9
K-10
K-11
K-12
K-13
K-14
2620
K-15
K-16
K-17
K-18
K-19
2615
K-20
K-21
Hybrid

EXHIBIT B

EXH 4

EXHIBIT C

Board:
Allen Amsler, *Chairman*
Ann B. Kirol, DDS, *Vice Chair*
L. Clarence Batts, Jr., *Secretary*
R. Kenyon Wells
Charles M. Joye II, P.E.
David W. Gillespie, MD

January 5, 2018

Electronic Mail Delivery and US Mail Certified 9214 8969 0099 9790 1410 5711 87
G. Trenholm Walker (walker@WGFLLAW.com)
Walker Gressette Freeman Linton, LLC
Post Office Box 22167
Charleston, SC 29413

Electronic Mail Delivery
Sara P. Bazemore (bazemosp@dhec.sc.gov)
SCDHEC – Office of General Counsel
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

RE: **17-RFR-42 Kiawah Island Inn**
17-RFR-43 The Ocean Course Golf Club
17-RFR-44 Captain Sam's Spit
17-RFR-45 Kiawah Resort Associates – Beachfront Jurisdictional Lines

Dear Counsel of Record:

The South Carolina Board of Health and Environmental Control will not conduct a Final Review Conference on the above-referenced matters.

CONTESTED CASE GUIDANCE

S.C. Code Section 44-1-60 provides that if the Board declines in writing to schedule a final review conference, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court (ALC) within thirty calendar days after notice is mailed to the applicant, permittee, licensee, and affected person that the Board declined to hold a final review conference.

A request for a contested case hearing before the Administrative Law Court must be filed within the time allowed and in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

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

Board:
Allen Amsler, *Chairman*
Ann B. Kirol, DDS, *Vice Chair*
L. Clarence Batts, Jr., *Secretary*
R. Kenyon Wells
Charles M. Joye II, P.E.
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January 5, 2018

Electronic Mail Delivery and US Mail Certified 9214 8969 0099 9790 1410 5711 87
G. Trenholm Walker (walker@WGFLLAW.com)
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Sara P. Bazemore (bazemosp@dhec.sc.gov)
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South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: http://www.scalc.net. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,

Lisa Lucas Longshore

Lisa Lucas Longshore
Clerk
S.C. Board of Health and Environmental Control

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

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP II, LLC, Petitioner, vs. SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, Respondent, In Re: DHEC Case No. 17-RFR-44	)	**REQUEST FOR CONTESTED CASE HEARING** DATE: February 5, 2018 DOCKET NO. 2018- ALJ -

Under S.C. Code Ann. §44-1-60(G) and S.C. Code Ann. §48-39-280(E), notice is hereby given that the Petitioner, KDP II, LLC, does hereby appeal and request a contested case hearing concerning the final decision of the South Carolina Department of Health and Environmental Control ("DHEC") in DHEC Case No. 17-RFR-44 extending the public comment period for DHEC's proposed new locations of the baseline and setback line and the time for the final establishment of those lines until after December 31, 2017. This decision constituted a de facto final denial of the Petitioner's request to move the baseline seaward of its existing location as of December 31, 2017, as part of the re-delineation of the baseline under S.C. Code Ann. § 48-39-280 despite the factual and legal basis for adjustment of the baseline seaward of its current location.

DHEC published its proposed new beachfront jurisdictional lines on October 6, 2017, also providing notice at that time of a 30-day public comment period with a final determination of the new jurisdictional lines before December 31, 2017. On November 3, 2017, DHEC issued a second notice extending the public comment period and final determination of those

jurisdictional lines until well after December 31, 2017 (copy attached as Exhibit A). Petitioner timely filed a written Request for Final Review Conference with the DHEC Board on November 20, 2017 (copy attached as Exhibit B). The DHEC Board declined Petitioner's request for review, by letter dated January 5, 2018 (copy attached as Exhibit C).

The grounds for Petitioner's appeal and request for contested case hearing are set forth in Exhibit B.

The Petitioner seeks a ruling by the Administrative Law Court, based on the facts and law, setting the baseline applicable to Petitioner's property seaward of its location as of December 31, 2017, and reversing the final decision of DHEC refusing to adjust the location of the baseline seaward.

Respectfully Submitted

WALKER GRESSETTE FREEMAN & LINTON, LLC

BY: /s/ Trenholm Walker

G. Trenholm Walker (SC Bar #5777)
Post Office Box 22167
Charleston, SC 29413
Telephone: 843-727-2200
Fax: 843-727-2238
walker@wgfllaw.com

ATTORNEYS FOR PETITIONER

February 5, 2018

Charleston, S.C.

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2018, in Charleston, South Carolina, I served a copy of the foregoing Request for Contested Case Hearing on all other parties by depositing the same in the United States mail, first class, postage paid, to the following:

Sara P. Bazemore (bazemosp@dhec.sc.gov)
SCDHEC - Office of General Counsel
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

Lisa Lucas Longshore
Clerk
South Carolina Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

EXHIBIT A

Healthy People

PUBLIC NOTICE

PROPOSED BEACHFRONT JURISDICTIONAL LINES
EXTENSION OF PUBLIC COMMENT PERIOD
UNTIL APRIL 6, 2018

Based on comments received from landowners, community leaders, the conservation community, and others during the 30-day public comment period, the Department of Health and Environmental Control (Department) is extending the public comment period for the Proposed Beachfront Jurisdictional Lines (the "current proposal"), until **April 6, 2018**. As a result of this extension, the Department will begin to adopt final revised beachfront jurisdictional lines in May 2018 with all final revised lines published by December 31, 2018. A tentative adoption schedule for each beach will be available on the DHEC website on November 13, 2017.

The Department is extending the comment period to allow interested persons time to meet with Department staff, understand the Department's methodology in setting the jurisdictional lines and bring any additional information to the Department's attention for consideration. Comments may be submitted online or in writing. Please visit www.scdhec.gov/beachfrontlines for more information.

In 2016, S.C. Code Laws §48-39-280 was amended to prohibit the baseline from moving seaward from its position on December 31, 2017. **The Department's decision to adopt revised lines after December 31 affects landowners who own property where the baseline was proposed to move seaward of the existing baseline under the Department's current proposal.** To view the proposed lines for your property, please visit https://gis.dhec.sc.gov/shoreline/

If you are a landowner who **owns property where the baseline was proposed to move seaward of the existing baseline**, under the Department's current proposal, or if you are a landowner who contends other information may prove the baseline on your property should move seaward of the existing baseline, please contact the Department with the information requested below **prior to December 4, 2017** to receive information and guidance on board review under S.C. Code Laws §44-1-60. Note that the Department will attempt to proactively reach out to these property owners. S.C. Code Laws §44-1-60(J) states "[a]ny statutory deadlines applicable to permitting and licensing programs administered by the department must be extended to all (sic) for this final review process." It is the Department's position that the December 31 date would be extended for landowners who file a timely request for review under S.C. Code Laws §44-1-60.

EXHIBIT A

To receive information and guidance on board review, please provide the following information via electronic mail [ocrm-comments@dhec.sc.gov] or phone (843-953-0200) prior to December 4, 2017:

- Property Address
- Name of Owner(s)
- Mailing Address of Owner(s)
- Contact Name
- Contact Telephone Number
- Contact Email Address

EXHIBIT B

STATE OF SOUTH CAROLINA

BEFORE THE BOARD OF

THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

KDP, II, LLC

Affected Property Owner-Requestor,

vs.

The South Carolina Department of Health and Environmental Control

Respondent.

Re: 2017 Beachfront Jurisdictional Line Determinations (S.C. Code § 48-39-280)

Charleston County: TMS Nos. 207-05-00-001 and 207-05-00-0011

OCRM Survey Profile Stations: 2615, 2620, 2625

INTRODUCTION

Pursuant to S.C. Code Ann. §44-1-60, KDP, II, LLC ("KDP") hereby requests that the Board of the Department of Health and Environmental Control (the "Department") conduct a Final Review Conference of the final determination made by the Department in its notice issued on November 3, 2017, (the "Notice"), concerning the new beachfront jurisdictional lines under S.C. Code Ann. § 48-39-280 that were proposed on October 6, 2017. The Notice extended the comment period for the proposed new lines until April 6, 2018. The Department has since issued a separate communication with a tentative adoption date of August 24, 2018, for Kiawah Island.

Under the provisions of S.C. Code Ann. Section 48-39-280, as amended in 2016, the *de facto* legal effect of this Notice is the Department's final determination to adopt the location of the existing baseline, established in 2009, as the location of the new baseline

for properties in those instances where the owner believes the final location of the new baseline should be seaward of the existing baseline, because the statute prohibits the baseline moving seaward after December 31, 2017.[1]

KDP is the owner of land on western end of Kiawah Island called Captain Sams Spit, comprised of the land south of Beachwalker Park (i.e., generally from Department monument station 2625 extending West to Captain Sams Inlet, also identified by TMS parcel numbers 207-05-00-001 and 207-05-00-0011)(hereinafter the "Property").

Based on the criteria set forth in S.C. Code Ann. § 48-39-280 as well as related statutes and regulations, the new baseline should be seaward of the existing (2009) location for the reasons set forth below. Because of the fully substantiated history of accretion of the Property over the last 70 years, KDP does not take issue with the Department's preliminary determination that the setback line on the Property should be situated at the minimum distance of 20 feet behind the baseline and does not seek at this time a final review conference of that preliminary determination of Department as to the Property.

---

[1] The Notice recognizes this final consequence and states, in part, the following: "In 2016, S.C. Code Laws §48-39-280 was amended to prohibit the baseline from moving seaward from its position on December 31, 2017. The Department's decision to adopt revised lines after December 31 affects landowners who own property where the baseline was proposed to move seaward of the existing baseline under the Department's current proposal. ... If you are a landowner who owns property where the baseline was proposed to move seaward of the existing baseline, under the Department's current proposal, or if you are a landowner who contends other information may prove the baseline on your property should move seaward of the existing baseline, please contact the Department with the information requested below prior to December 4, 2017 to receive information and guidance on board review under S.C. Code Laws §44-1-60."

BASIS FOR REQUEST FOR FINAL REVIEW CONFERENCE

Failure to Follow Statutorily Prescribed Methods

The statute and regulations governing the location of the baseline and setback line emphasize that the primary factor for consideration is the beach survey monument data gathered by the Department every six months. Based on the limited information the Department has provided KDP, it appears that the Department deviated from this mandate and relied on other information and methodology not referenced by the statute and regulations.

The following statutory and regulatory provisions give priority to the survey monument information in the adjustment of the lines:

> (D) ***In order to locate the baseline and the setback line***, the department must establish monumented and controlled survey points in each county fronting the Atlantic Ocean. ***The department must acquire sufficient surveyed topographical information on which to locate the baseline.*** Surveyed topographical data typically must be gathered at two thousand foot intervals. However, in areas subject to significant near-term development and in areas currently developed, the interval, at the discretion of the department, may be more frequent. ***The resulting surveys must locate the crest of the primary oceanfront sand dunes to be used as the baseline for computing the forty-year erosion rate***. In cases where no primary oceanfront sand dunes exist, a study conducted by the department is required to determine where the upland location of the crest of the primary oceanfront sand dune would be located if the shoreline had not been altered.

SC Code Section 48-39-280 (D).

> (a) The changing nature of the shoreline or long-term stability of beachfronts can now be documented by use of the monitoring and archival system now in place. Twice a year beachfront profile stations, established to third order survey accuracy, will be surveyed and the results recorded and stored. Comparing these surveys seasonally and over the years will provide a long-term view of what is happening at a particular point along the coast. ***This information will be the cornerstone for the development of a scientific method for locating baselines and establishing erosion rates.***

SC Code of Regs Ann. Section 30-21(C)(1)(a).

> (f) Goal: Improve Coastal Data Base
>
> These policies will be implemented by Council staff who will conduct the beach surveys and enter the results of each survey into a computerized data base. This will be an ongoing activity that the staff of the Council will continually upgrade. ***The monitoring plan will provide the Council with a means to establish historic trends and to establish setback lines and better regulate development along the coastline. Data obtained from the monitoring program will be used to adjust the lines*** and evaluate the success of renourishment projects as required under Section 30-14 of the Administrative Procedures Section.

SC Code of Regs Ann. Section 30-21(C)(2)(f).

The Department's four-page "Line Report: Proposed Baseline and Setback Line Kiawah Island, October 6, 2017" (the "Report") indicates that the Department did not use the beach survey monument data for the Property as the primary basis for its determinations.

In describing how it set the proposed baseline in the unstabilized inlet zone, the Department states that it relied on vegetation line positions from aerial imagery, a process that has no basis in the controlling statute. The statute governing the location of the baseline in the unstabilized inlet zone makes no reference to fixing the baseline at a line of vegetation:

> The baseline for inlet erosion zones that are not stabilized by jetties, terminal groins, or other structures must be determined by the department as ***the most landward point of erosion*** at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position.

S.C. Code Ann. §48-39-280 (A)(2)(double emphasis added).

Vegetation lines do not equate to the most landward point of erosion, or even the most landward shoreline.[2] There also has been no information provided to verify the accuracy of these aerial images supposedly showing these lines of vegetation including their resolution and whether they were orthorectified. KDP would also note that it made FOIA requests for all documents the Department was relying upon in setting the new jurisdictional lines and the agency did not disclose the use of a 1983 wet/dry shoreline referenced by the Report as the partial basis for the location of the baseline on the Property. While KDP received such digital files that depict these lines, KDP has no information on their derivation nor their inherent position error.

Most important of all, the Report incorrectly states that "in unstabilized inlet zones, the baseline is established at the most landward shoreline position." Section 48-39-280 (A)(2) clearly and unambiguously states the baseline in unstabilized inlet zones "***must*** be determined by the department as the most ***landward point of erosion*** at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position." The most landward point of erosion is NOT the same as the most landward shoreline.

It is undisputed that the Property is consistently accretional. Thus, using the most landward shoreline instead of the most landward point of erosion in a 40-year period leads to a result that is not in conformity with the mandate of this statute. The Department should first have determined if the Property suffered a trend of erosion under normal conditions during the prior 40 years. If the Department had done so, it would have determined that

[2] Vegetation lines have customarily been used by the Department in setting the Baseline, and KDP agrees that vegetation lines may be used under some circumstances as a proxy for relative shoreline movement, but vegetation lines are not the shoreline nor do they equate to the most landward point of erosion.

there has been no such trend of erosion, recognized the unbroken trend of accretion, and set the baseline in conformity with that finding based upon surveyed profile data and aerial imagery.

Turning to the determination of the baseline in the standard zone, the Report refers to the use of the beach survey data "OR LIDAR" in determining the crest of the primary dune in the standard zone. There is no provision in the statutes or regulations authorizing the use of LIDAR as a substitute for the beach survey data accumulated by the agency. LIDAR is a secondary source and may provide pertinent information, but LIDAR readings are not the approved determinant for establishing the baseline in the standard zone. LIDAR topographic data may well overlook seaward primary dunes that field surveys disclose. The method used for the stabilized zone is important, given the justified adjustment to the boundary of the unstabilized zone and standard zone on the Property described below.

Unstabilized Inlet Zone vs Standard Zone

The Report fails to state whether the Department made a current determination of the locations of the standard zone and the unstabilized inlet zone along the shoreline of the Property. To date KDP has not received any information that shows that the Department considered any near-shore bathymetry as would be necessary for such a determination. The Report merely states without explanation that "[t]he central portion of Kiawah Island between OCRM Monument 2625 and OCRM Monument 2740 is classified as a standard zone." The Department's designation of the location of these two zones appears not to have changed since the original jurisdictional lines were adopted in 1989.

SC Code Section 48-39-270 gives the following definitions of standard zone and inlet zone:

> (6) A standard erosion zone is a segment of shoreline which is subject to essentially the same set of coastal processes, has a fairly constant range of profiles and sediment characteristics, and is not influenced directly by tidal inlets or associated inlet shoals.
>
> (7) An inlet erosion zone is a segment of shoreline along or adjacent to tidal inlets which is influenced directly by the inlet and its associated shoals.

The July 2016 Inlet Relocation Monitoring Report of CSE documenting shoreline conditions a year after the re-location of Captain Sams Inlet in the summer of 2015 included extensive bathymetric data. The bathymetric transects along Property and digital terrain model for the Property, both from July 2016 Inlet Relocation Monitoring Report of CSE are attached as Exhibit 1. These studies have the benefit of providing the bathymetry for a considerable distance offshore. The studies show a common beach profile for the standard zone. As expressed in the CSE report, the shoreline to a location that is west of Monument 2615, "is subject to essentially the same set of coastal processes, has a fairly constant range of profiles and sediment characteristics, and is not influenced directly by" Captain Sams Inlet or its shoals.

Additionally, the attached Exhibit 2 shows the bathymetry along the Property in 2017. The geomorphology does not suggest influence of the tidal inlet east of Profile 2620. The bathymetry is slightly curved and arcuate which reflects the general curvature of the shoreline. There can be no question that the shoreline east of Profile 2620 is in the standard zone. Whether the standard zone is deemed to start East of Profile 2615 or East of Profile 2620 is less important than the Department's failure to undertake this threshold analysis required by the controlling statutes and regulations to determine if a

particular location on the beachfront is in the standard zone or unstabilized inlet zone and, accordingly, whether the baseline is the most landward point of erosion or the primary dune.

KDP knows of no information that refutes the bathymetric profile data contained in the enclosures. In fact, the Department's "DHEC - OCRM Beach Erosion Research & Monitoring Profile Viewer" (B.E.R.M. Explorer) demonstrates that is a constant range of profiles for Stations 2620 and 2625 for the years 2014 thru 2016. The profile drawing displayed from the B.E.R.M. Explorer shows bathymetry readings taken extend to a point approximately 3,000 feet offshore. If the Department has bathymetric readings that counter those of CSE, KDP asks that they be provided.

The Department's Location of the Baseline is Incorrect

Within the unstablized inlet zone, the Department used vegetation lines to guess at the most landward shoreline over the last forty years. The Department did not attempt to determine the most landward point of erosion over the last 40 years as the statute dictates.

It has been documented in geologic studies of the area that at Kiawah, there is an abundant sediment supply in the form of the shoals and ebb tidal delta associated with the Stono River. In addition, it is believed that much of Kiawah's sand supply has been incorporated from the erosion of Morris Island and Folly Beach. As the predominant longshore sediment transport is from east to west, this supply of sand has provided general stability to the beach at Kiawah. A study of sand budgets on Kiawah noted that the volume of sand in these updrift shoals on Kiawah is approximately ten (10X) times the volume of sand contained on the beach at Kiawah Island.

It is without dispute that the Property has been accreting along with the rest of Kiawah Island. Year after year, the Department has described Kiawah Island as one of the healthiest beaches in South Carolina. the Department has singled out in particular the western end that includes the Property. All of the Department's publicly available State of the Beaches Reports from 2001 through 2009 contain in their introductory paragraph for Kiawah Island the following: "Kiawah is one of the most stable barrier islands in the state, although the eastern and western ends of the island are more dynamic due to their proximity to inlets."

Attached as Exhibit 3 is the beach profile survey data of the Department from 1988 to 2017 that shows the average annual rate of accretion at the stations on the Property along with an aerial that shows the exact location of the monitoring stations. The annual average rate of accretion ranges from a low of around five feet per year at Profile 2625 to a high of around ten to twelve feet per year at Station K-21. These monument survey beach profiles fully substantiate this unbroken trend of accretion. KDP further notes that, on its Beach App, the Department indicates that Profiles 2625 and 2620 have had annual accretion rates of 5.22 ft/yr and 8.50 ft/yr, respectively.

The only erosional events that have been documented on the Property's shoreline over the last 40 years are: (1) some modest erosion on the far western end next to the inlet resulting from the relocation of the inlet to the east in the summer of 2015, (2) the storm surge of Hurricane Matthew in October of 2016, and (3) the storm surge of Hurricane Irma in September 2017. These are one-time events and are not reflective of whether the trend of this particular beachfront is accretional or erosional over the last forty years. Since KDP understands the Department is not considering Hurricane Irma, the

most landward point of erosion over the last 40 years is the escarpment after Hurricane Matthew as shown on the aerial image that is Exhibit 4.

It also must be noted that the Department's determination that the baseline should remain in the virtually same location as 2009 is arbitrary and capricious and without factual foundation. The Department's monument survey data, confirmed by aerial imagery, demonstrates the beach is accreting. Even if a low average annual accretion rate of 6 feet per year was used, the baseline should have moved at least 54 feet seaward (9 years X 6ft/yr) using the Department's incorrect benchmark of the most landward shoreline. The Department's analysis completely ignores the best scientific and historical information, fully corroborated by its beach monument survey data, that the reach of the beach along this shoreline is accreting on an annual basis, which is also confirmed by the Department's setting the setback line the minimum distance of 20 feet landward of its preliminary baseline.

Finally, as just discussed, the primary zone should be extended to the southwest of Profile 2625 to at least to Profile 2620 and possibly to Profile 2615. Along this shoreline the crest of the primary dune is the baseline. Instead of using the statutory criterion of setting the baseline in the standard zone at the crest of the primary dune, the Department incorrectly set it at the most landward shoreline over the last 40 years according to data sources other than those prescribed by the controlling statutes and regulation.

CONCLUSION

For these reasons, KDP requests that the Board grant a final review conference of the final determination of the location of the new baseline on the Property effectively implemented by the Notice, reverse this final determination, and set the baseline at the location shown of Exhibit 4 or, in the alternative, at the crest of the primary dune along the shoreline within the revised location of the standard zone.

WALKER GRESSETTE FREEMAN & LINTON, LLC

By: G. Trenholm Walker

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ATTORNEYS FOR REQUESTOR
KDP. II, LLC

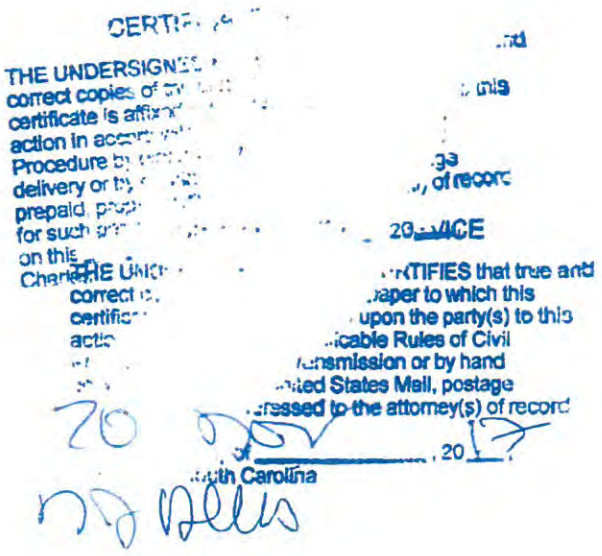
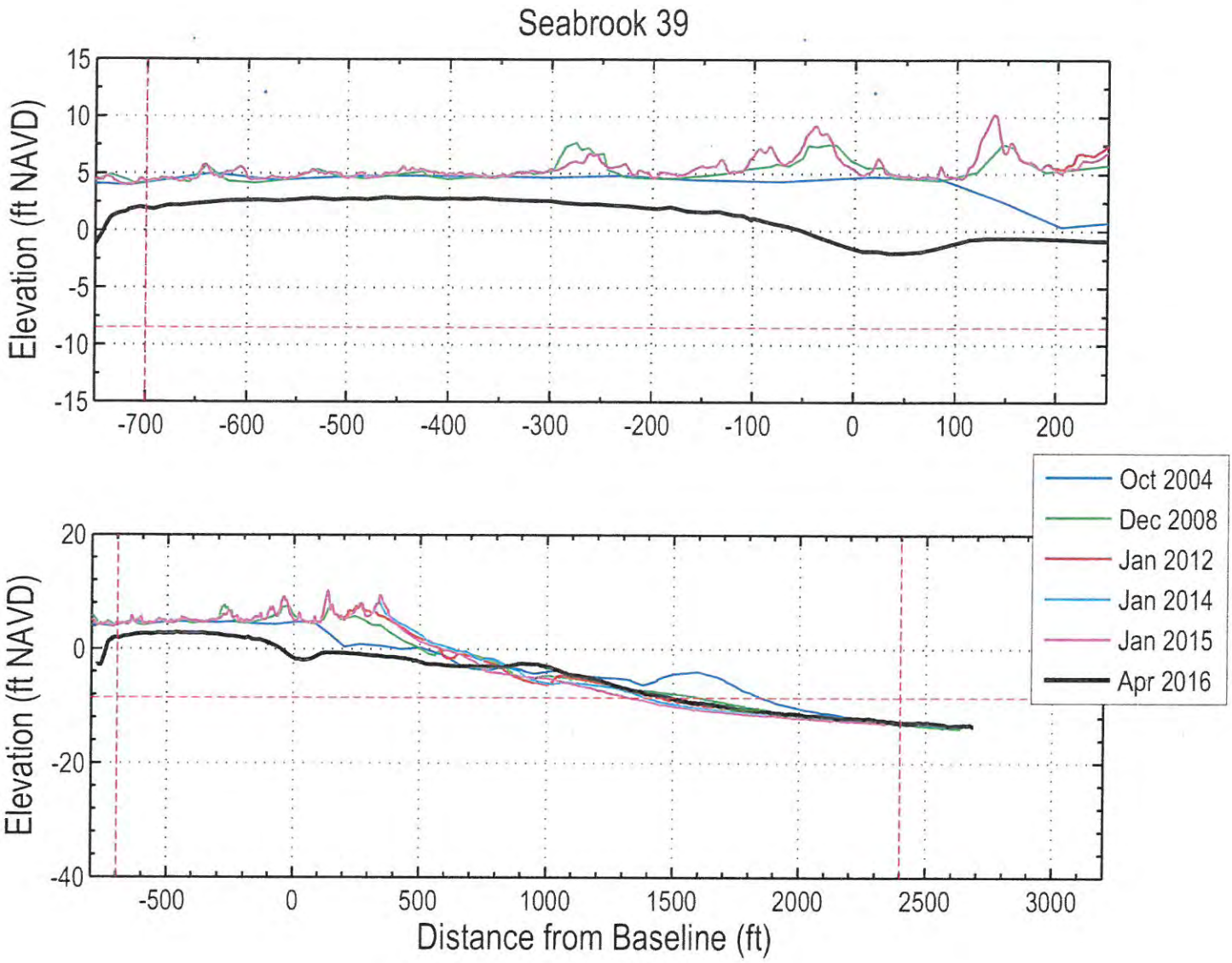


TABLE OF EXHIBITS

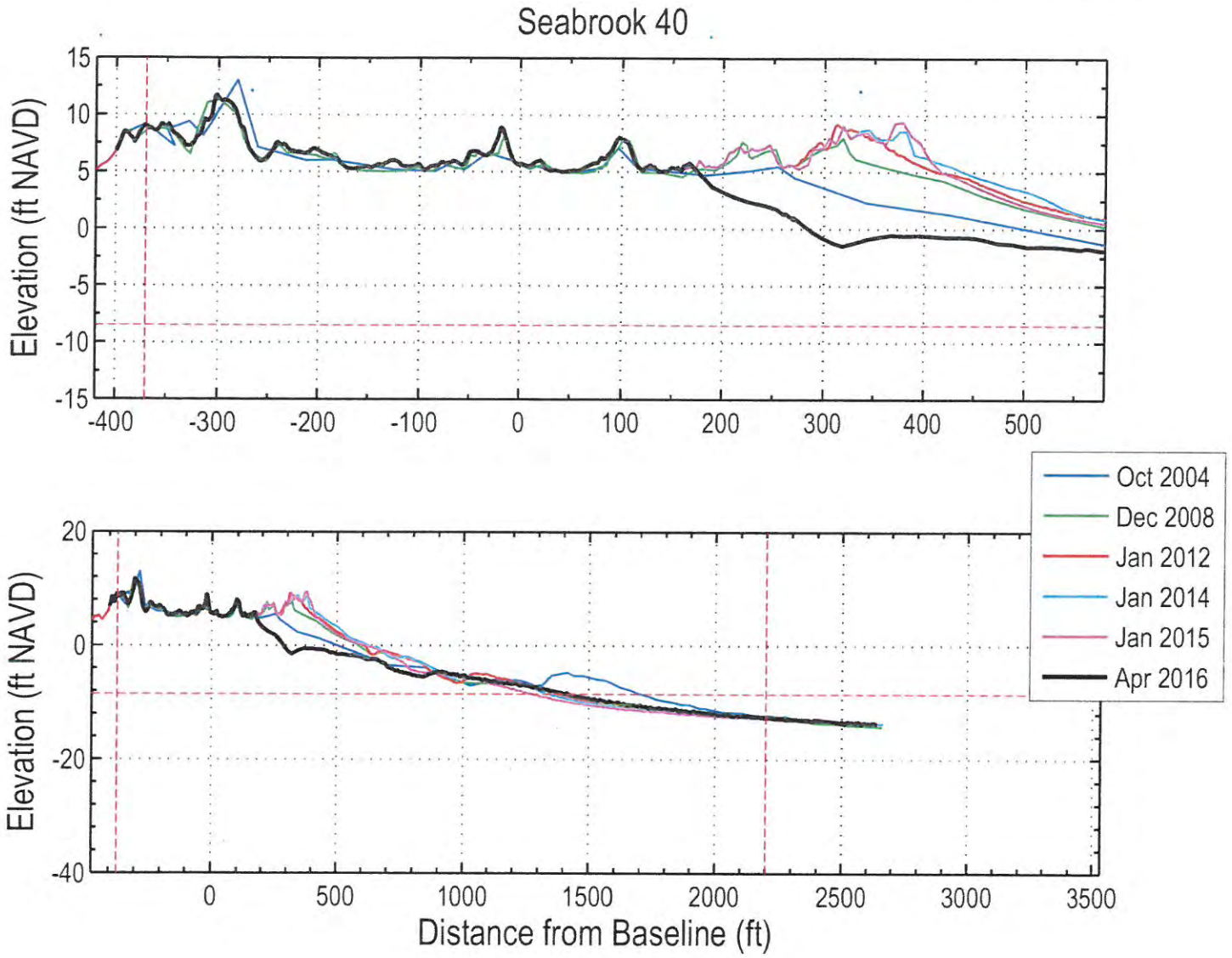
Exhibit 1	Bathymetric Transects along Property and Digital Terrain Model for the Property, both from July 2016 Inlet Relocation Monitoring Report of CSE
Exhibit 2	2017 Bathymetry for Property
Exhibit 3	The Department beach profile data for the average annual rate of accretion at the stations on the Property from 1988 to 2017 with aerial showing location of stations
Exhibit 4	Aerial showing most landward point of erosion

EXHIBIT B
Exhibit 1



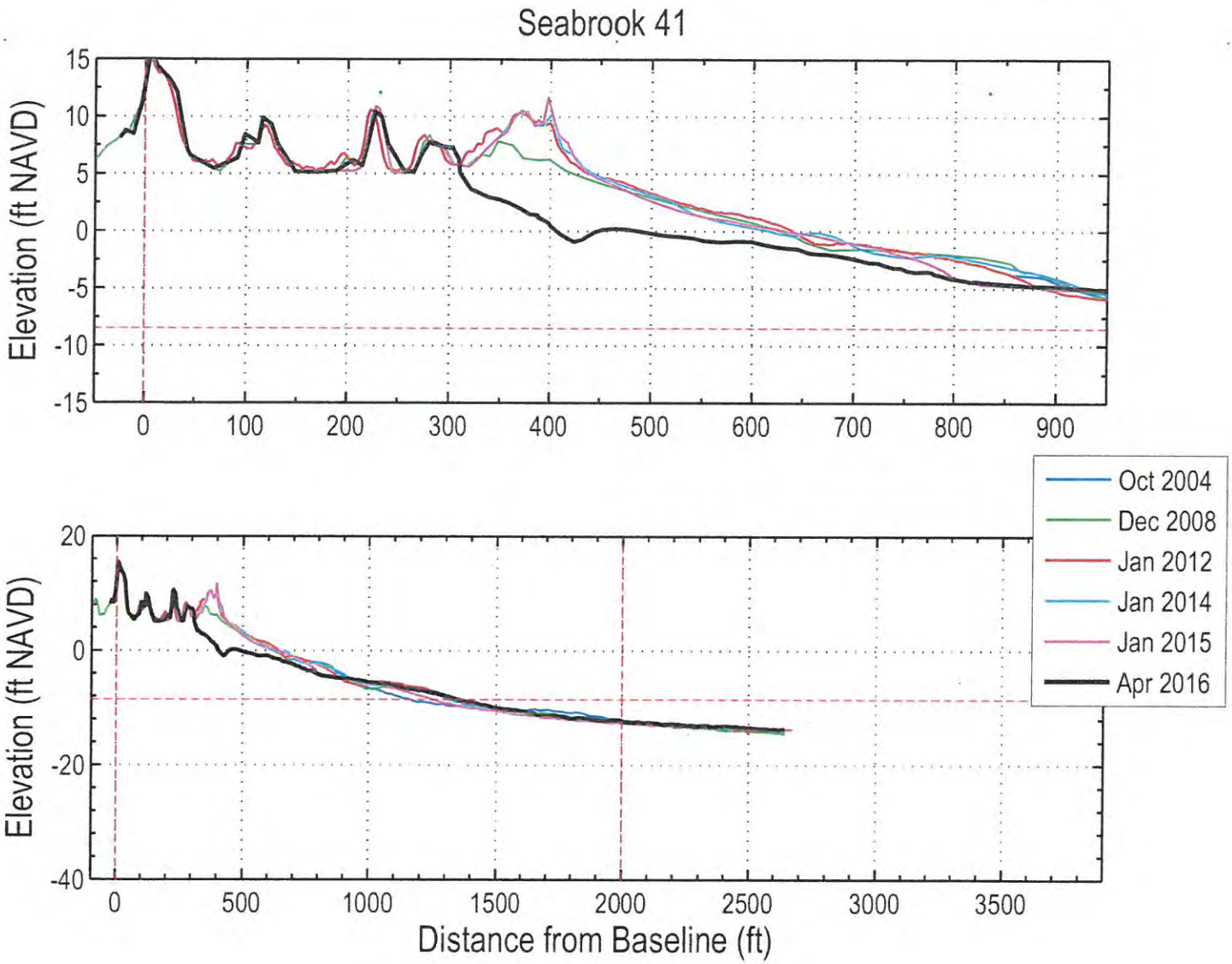
Date	Unit Vol (cy/ft)
Jan 2006	779.4
Nov 2006	810.0
Dec 2007	742.8
Dec 2008	744.8
Nov 2010	786.2
Jan 2012	765.2
Jan 2014	773.1
Jan 2015	749.8
Apr 2016	556.4

EXHIBIT B
Exhibit 1



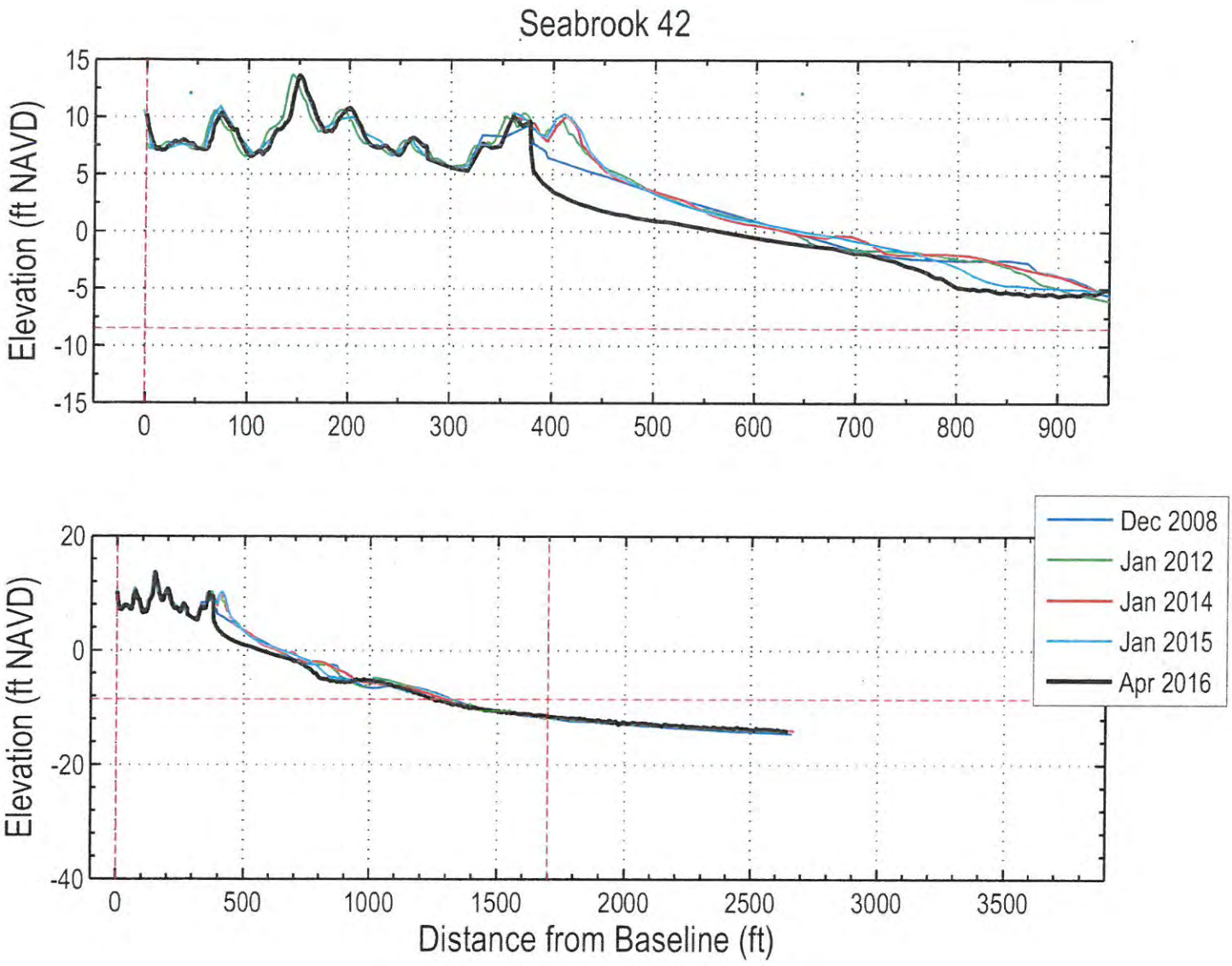
Date	Unit Vol (cy/ft)
Jan 2006	644.4
Nov 2006	668.8
Dec 2007	630.5
Dec 2008	596.7
Nov 2010	646.5
Jan 2012	624.1
Jan 2014	627.4
Jan 2015	608.3
Apr 2016	521.6

EXHIBIT B
Exhibit 1



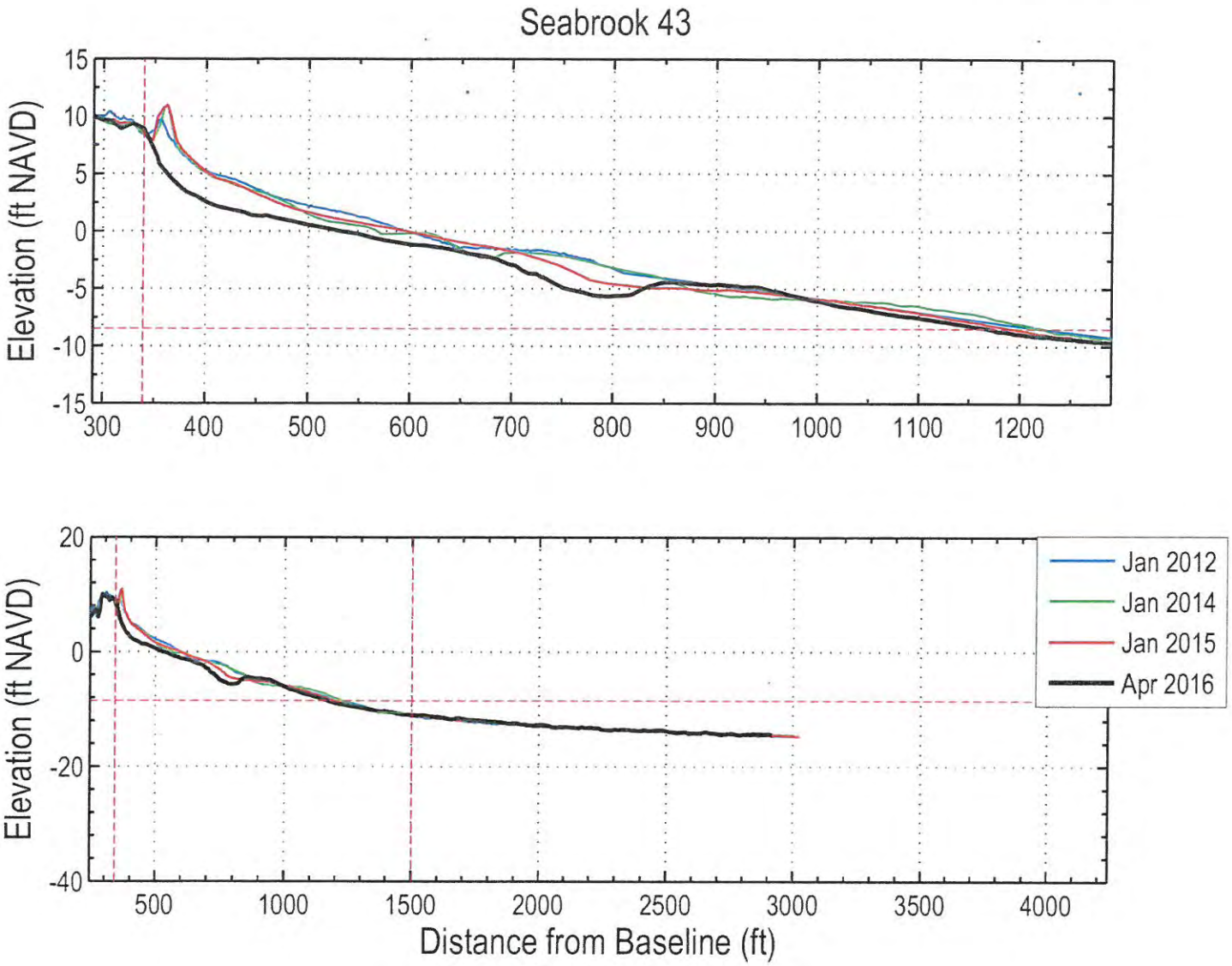
Date	Unit Vol (cy/ft)
Jan 2006	432.6
Nov 2006	467.5
Dec 2007	449.2
Dec 2008	424.4
Nov 2010	445.2
Jan 2012	438.0
Jan 2014	431.8
Jan 2015	420.2
Apr 2016	373.5

EXHIBIT B
Exhibit 1

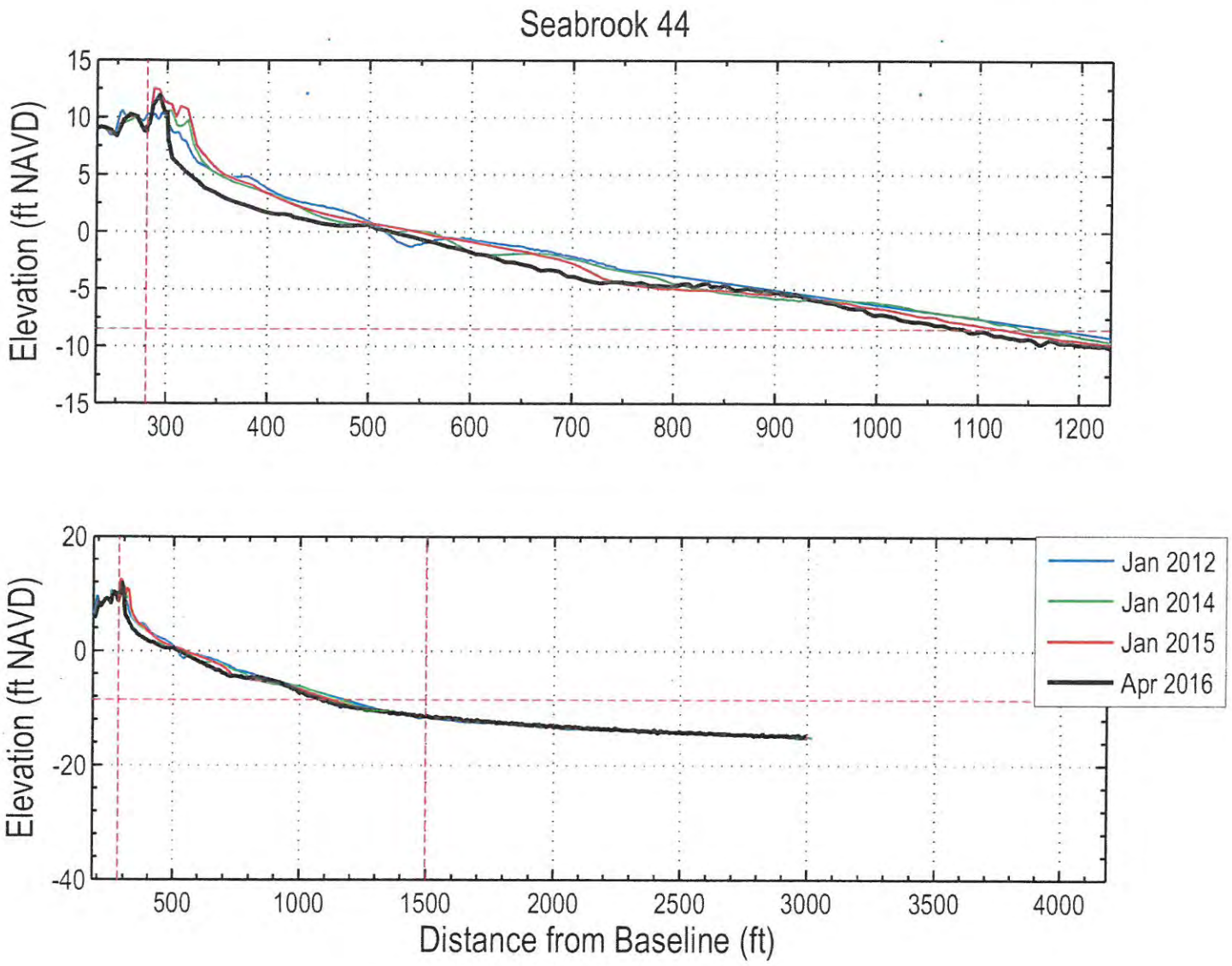


Date	Unit Vol (cy/ft)
Jan 2006	424.7
Nov 2006	458.5
Dec 2007	460.7
Dec 2008	441.3
Nov 2010	467.9
Jan 2012	448.4
Jan 2014	449.4
Jan 2015	439.8
Apr 2016	403.3

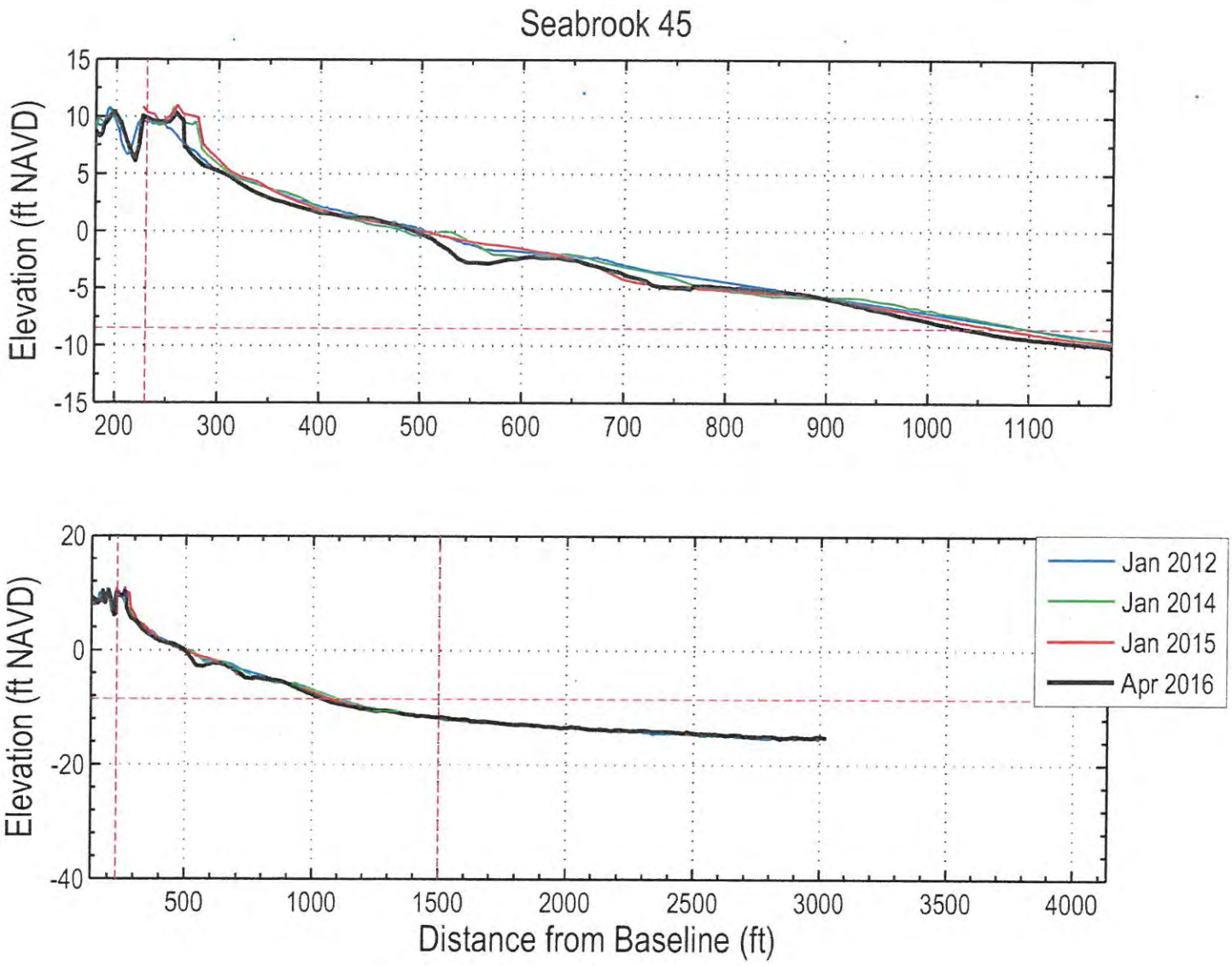
EXHIBIT B
Exhibit 1



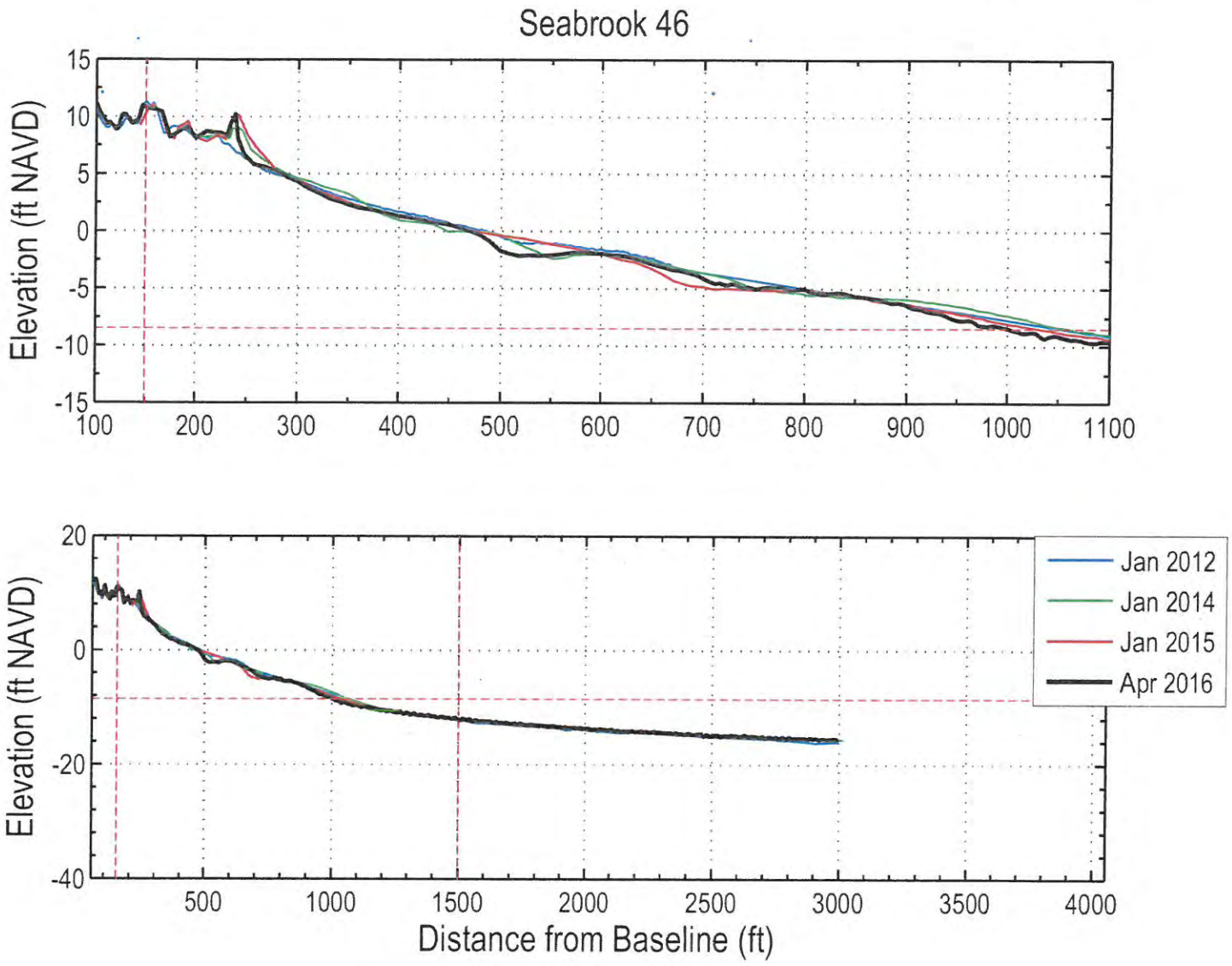
Date	Unit Vol (cy/ft)
Nov 2010	219.4
Jan 2012	205.6
Jan 2014	200.5
Jan 2015	196.3
Apr 2016	168.4



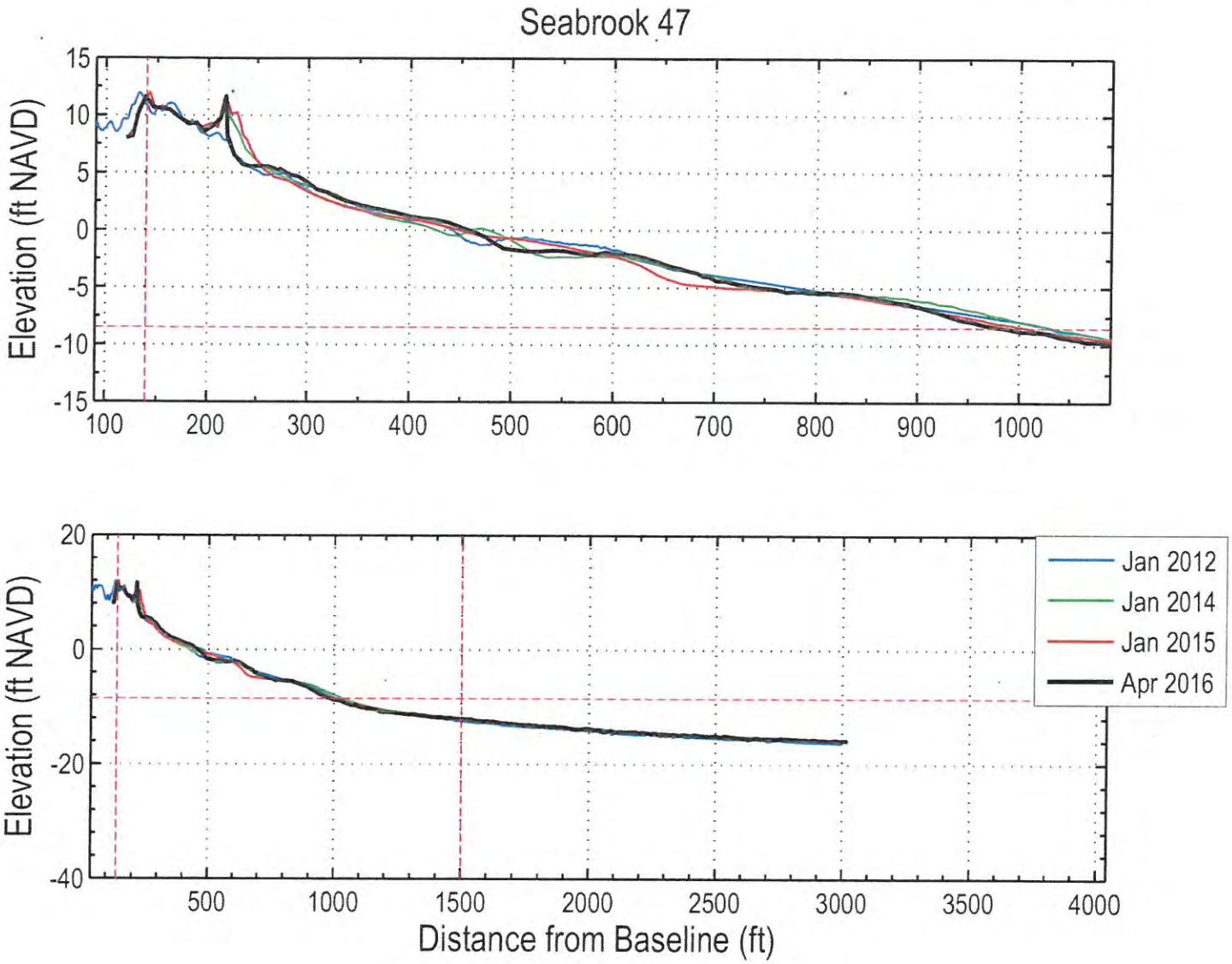
Date	Unit Vol (cy/ft)
Nov 2010	222.6
Jan 2012	214.0
Jan 2014	206.6
Jan 2015	206.2
Apr 2016	183.6



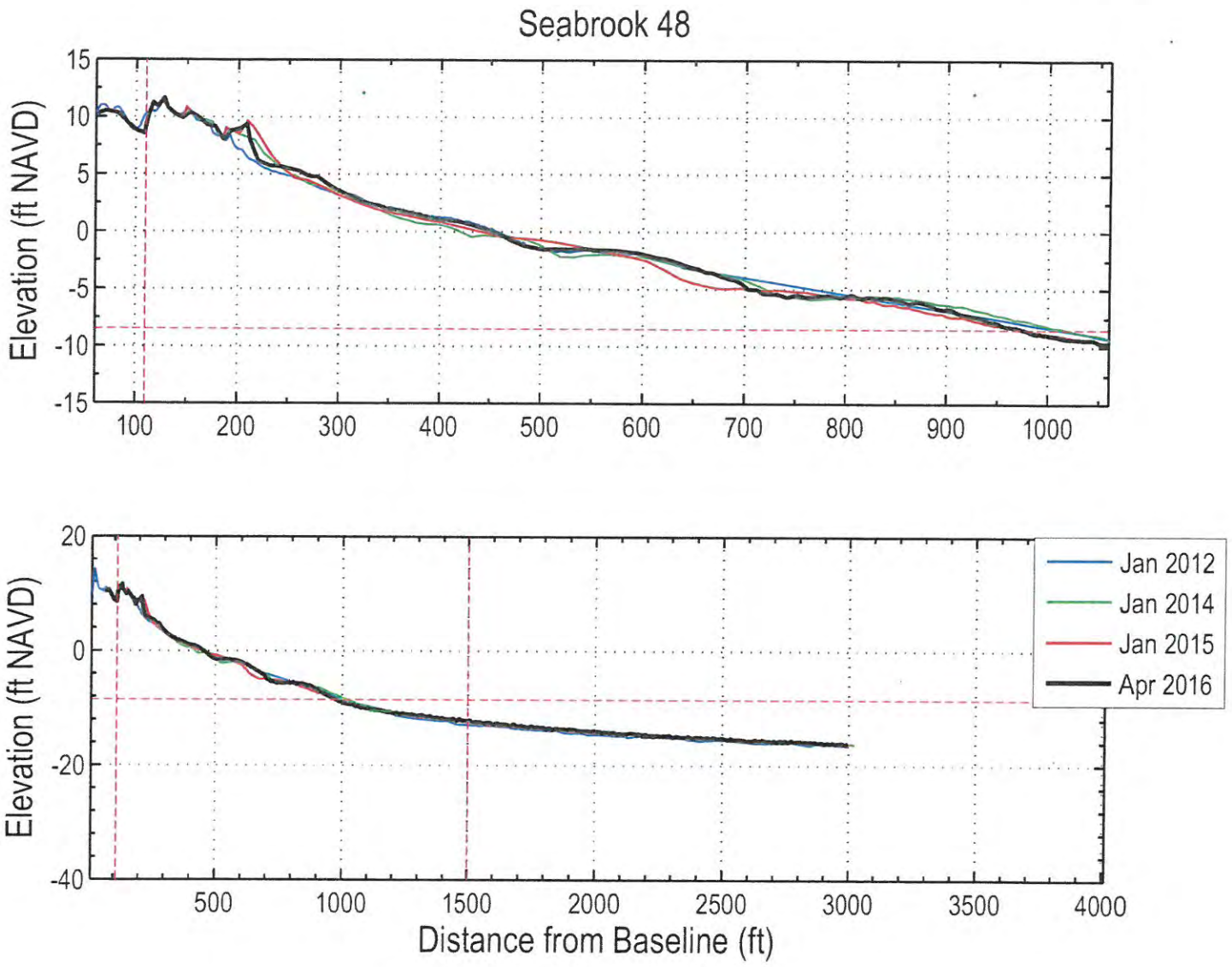
Date	Unit Vol (cy/ft)
Nov 2010	216.6
Jan 2012	213.8
Jan 2014	212.8
Jan 2015	210.3
Apr 2016	198.4



Date	Unit Vol (cy/ft)
Nov 2010	239.9
Jan 2012	245.4
Jan 2014	244.4
Jan 2015	239.8
Apr 2016	235.6

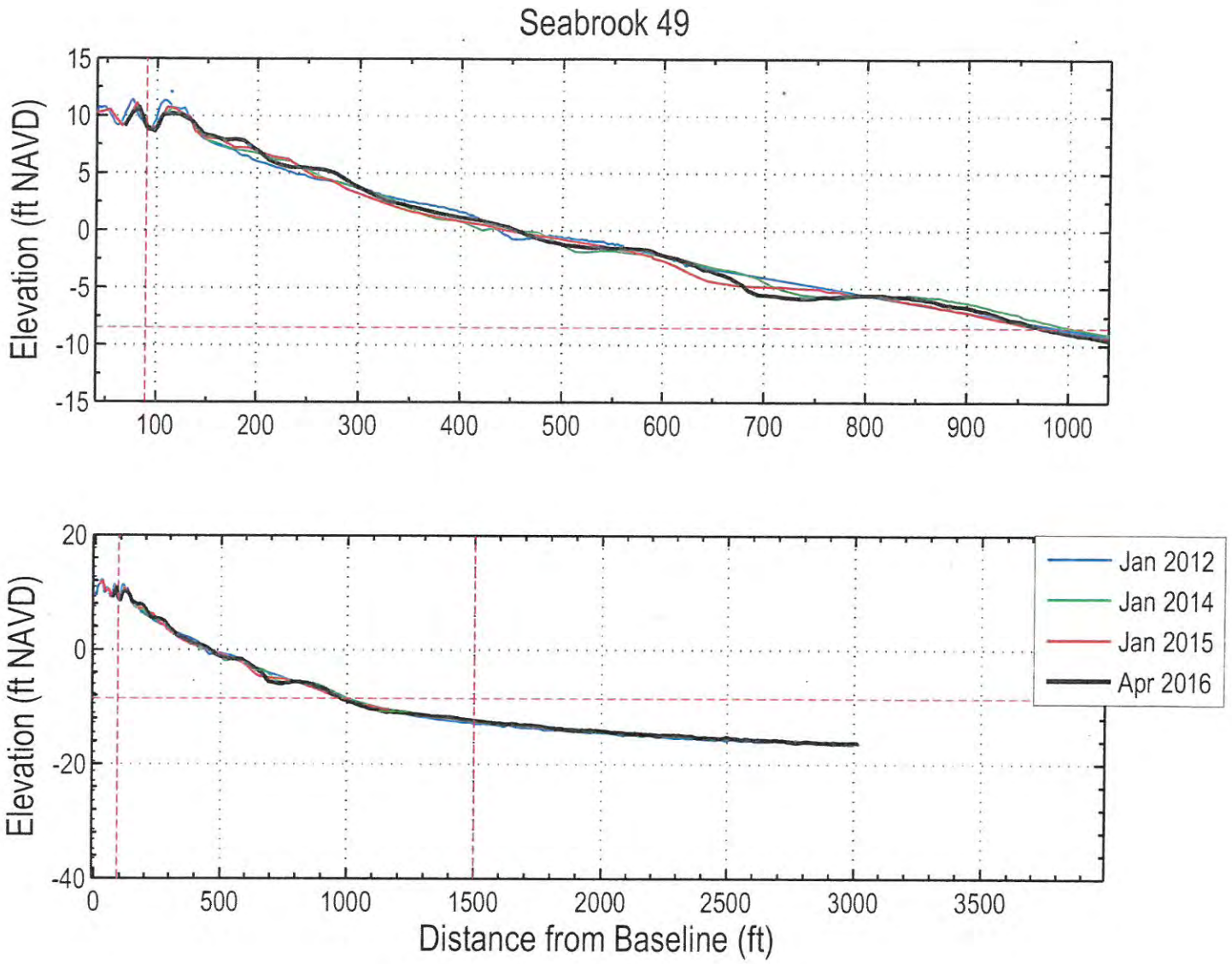


Date	Unit Vol (cy/ft)
Nov 2010	233.5
Jan 2012	239.2
Jan 2014	240.5
Jan 2015	235.8
Apr 2016	237.8

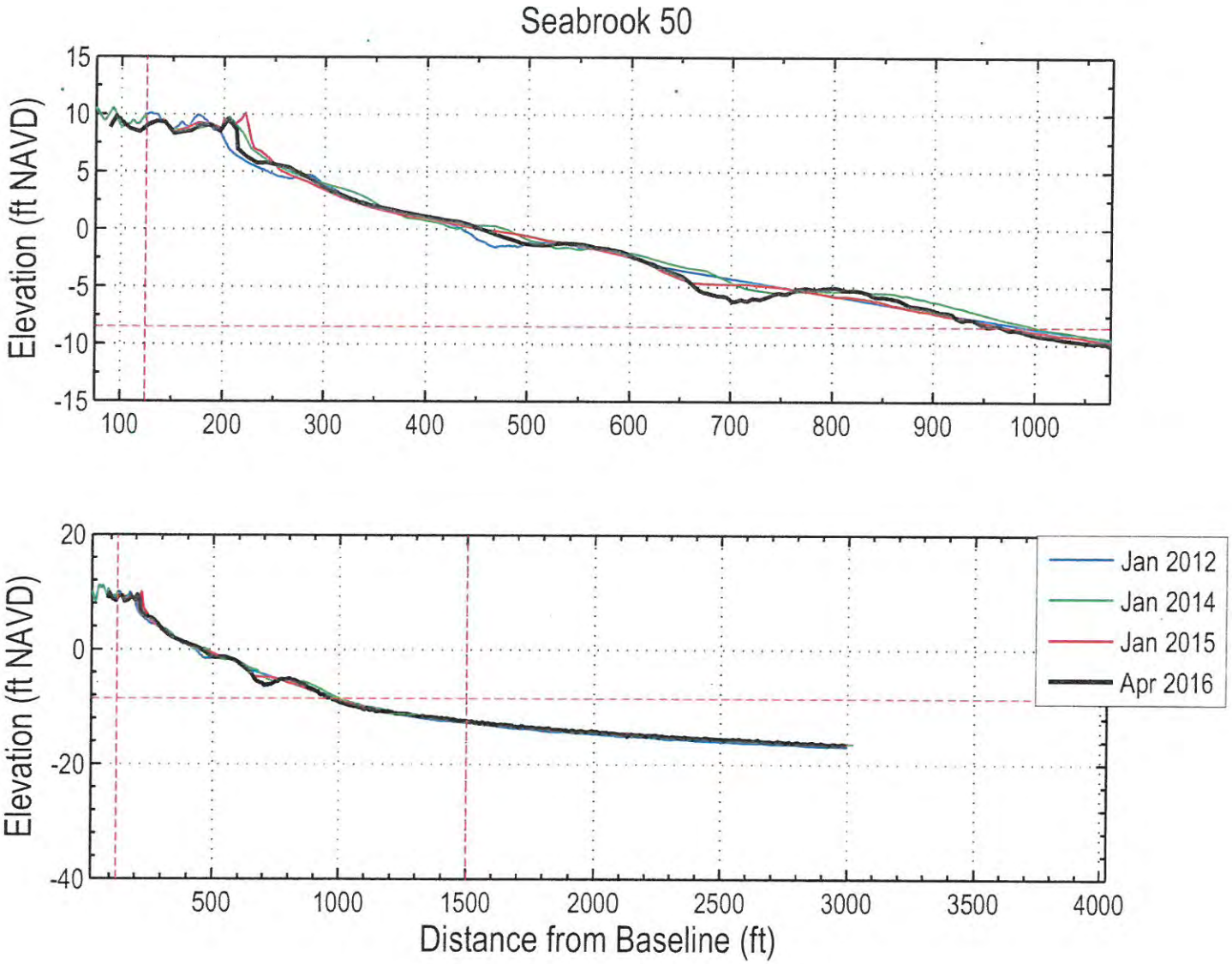


Date	Unit Vol (cy/ft)
Nov 2010	241.1
Jan 2012	251.4
Jan 2014	250.8
Jan 2015	246.8
Apr 2016	252.3

EXHIBIT B
Exhibit 1



Date	Unit Vol (cy/ft)
Nov 2010	247.1
Jan 2012	260.2
Jan 2014	258.9
Jan 2015	253.6
Apr 2016	257.7



Date	Unit Vol (cy/ft)
Nov 2010	228.9
Jan 2012	235.1
Jan 2014	245.4
Jan 2015	238.0
Apr 2016	235.4

EXHIBIT B
Exhibit 1

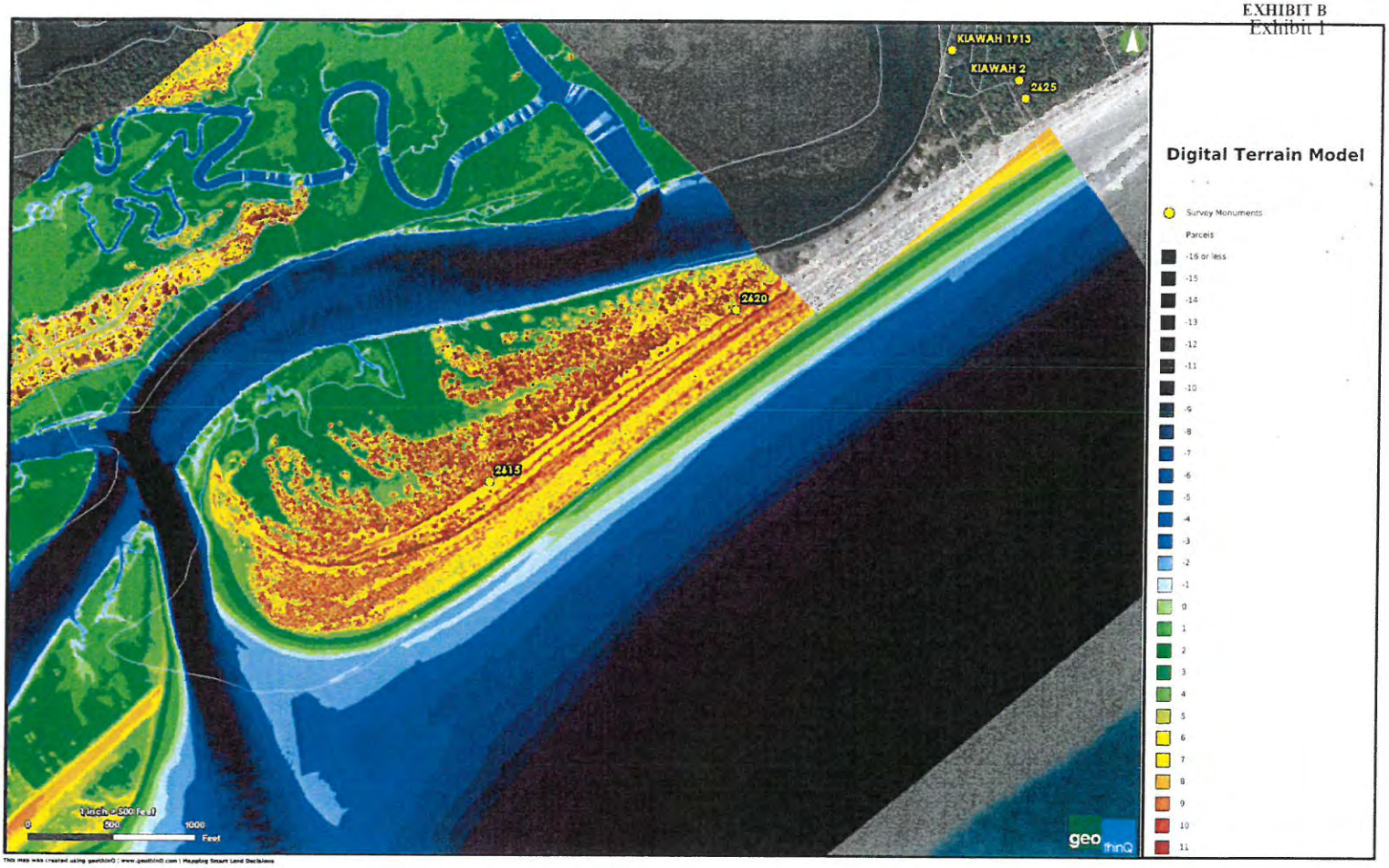
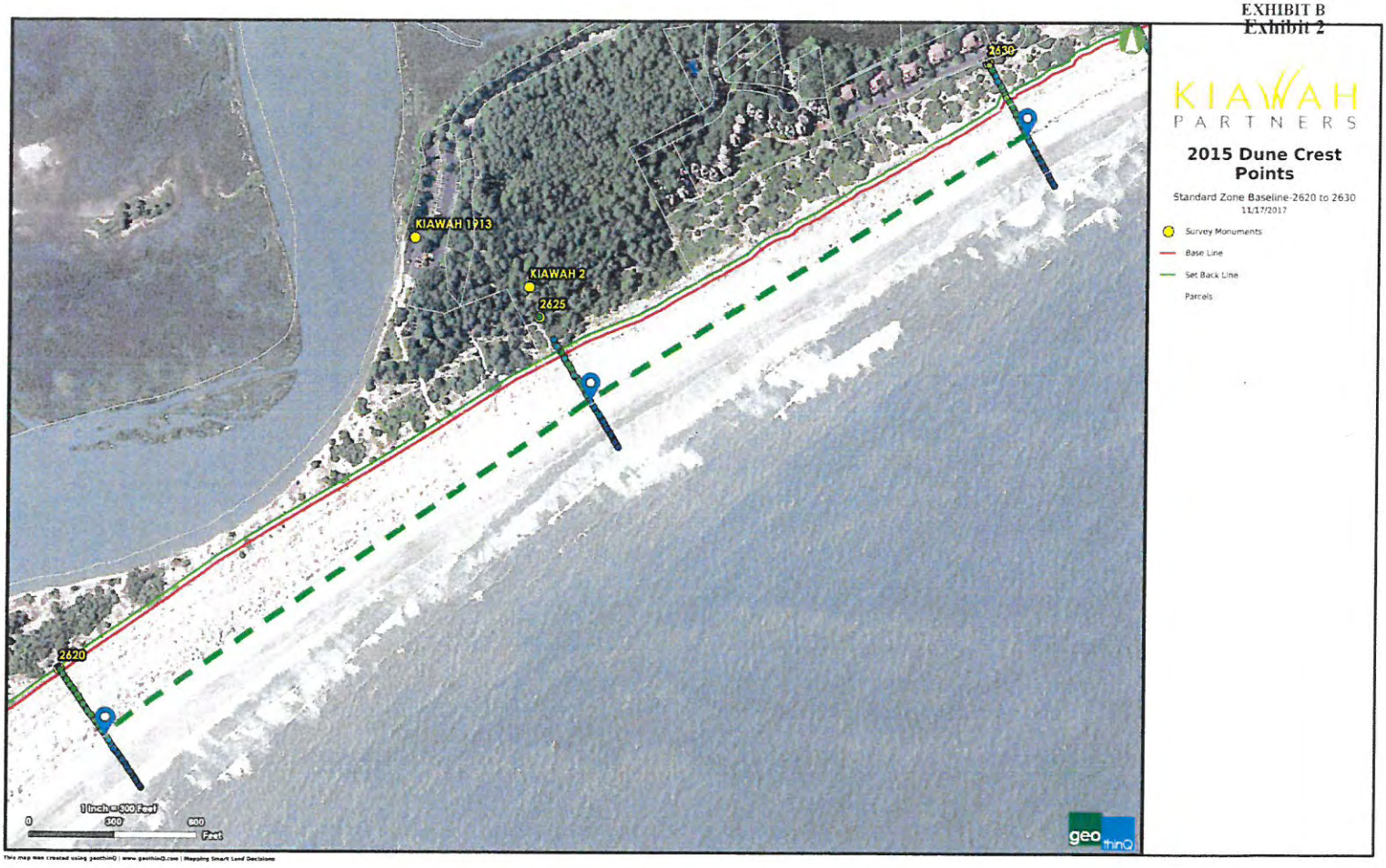
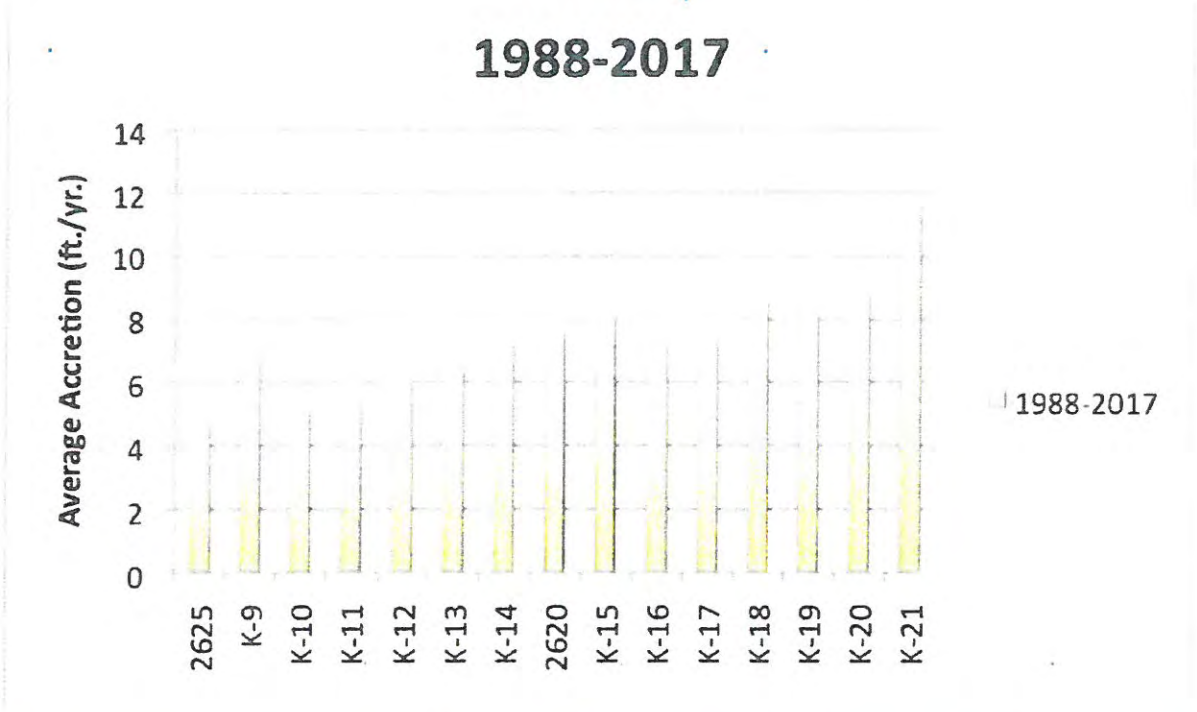


EXHIBIT B
~~Exhibit 2~~



EXH 3


1988-2017
Average Accretion (ft./yr.)
14
12
10
8
6
4
2
0
2625
K-9
K-10
K-11
K-12
K-13
K-14
2620
K-15
K-16
K-17
K-18
K-19
K-20
K-21
1988-2017

Profile Locations
ADDRESS
KIAWAH 1913
KIAWAH 2
2627
K-9
K-10
K-11
K-12
K-13
K-14
2620
K-15
K-16
K-17
K-18
K-19
2615
K-20
K-21
Hybrid

EXHIBIT B

EXH 4

EXHIBIT C

Board:
Allen Amsler, *Chairman*
Ann B. Kirol, DDS, *Vice Chair*
L. Clarence Batts, Jr., *Secretary*
R. Kenyon Wells
Charles M. Joye II, P.E.
David W. Gillespie, MD

January 5, 2018

Electronic Mail Delivery and US Mail Certified 9214 8969 0099 9790 1410 5711 87
G. Trenholm Walker (walker@WGFLLAW.com)
Walker Gressette Freeman Linton, LLC
Post Office Box 22167
Charleston, SC 29413

Electronic Mail Delivery
Sara P. Bazemore (bazemosp@dhec.sc.gov)
SCDHEC – Office of General Counsel
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

RE: **17-RFR-42 Kiawah Island Inn**
17-RFR-43 The Ocean Course Golf Club
17-RFR-44 Captain Sam's Spit
17-RFR-45 Kiawah Resort Associates – Beachfront Jurisdictional Lines

Dear Counsel of Record:

The South Carolina Board of Health and Environmental Control will not conduct a Final Review Conference on the above-referenced matters.

CONTESTED CASE GUIDANCE

S.C. Code Section 44-1-60 provides that if the Board declines in writing to schedule a final review conference, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court (ALC) within thirty calendar days after notice is mailed to the applicant, permittee, licensee, and affected person that the Board declined to hold a final review conference.

A request for a contested case hearing before the Administrative Law Court must be filed within the time allowed and in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

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

EXHIBIT C

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: http://www.scalc.net. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,

Lisa Lucas Longshore

Lisa Lucas Longshore
Clerk
S.C. Board of Health and Environmental Control

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

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP II, LLC, Petitioner, vs. South Carolina Department of Health and Environmental Control, Respondent.	)	Docket No. 18-ALJ-07-0047-CC **MOTION TO DISMISS OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL**

Respondent South Carolina Department of Health and Environmental Control ("DHEC" or "Department"), by and through the undersigned counsel, respectfully moves this Court to dismiss the above captioned case pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, on the grounds that Petitioner's action fails to allege facts sufficient to constitute a cause of action against the Department.

FACTS

Petitioner, KDP II, LLC challenged the decision of SCDHEC to extend the public comment period for proposed beachfront jurisdictional lines on Kiawah Island, South Carolina. This contested case stems from Petitioner's Request for Final Review filed with the South Carolina Board of Health and Environmental Control filed on November 20, 2017.

On October 6, 2017, Respondent SCDHEC proposed the revision of the jurisdictional baseline and setback line at the Petitioner's property located on Captain Sams Spit located on the western end of Kiawah Island, South Carolina ("Property"). The Petitioner filed an appeal to the Department Board on November 20, 2017 based upon Department staff's decision to extend the public comment period. The Department Board declined to hold a Final Review Conference on January 5, 2018. Petitioner filed this Request for Contested Case on February 5, 2018.

Mootness

Petitioner's action is based upon the Department's decision to extend the public comment period and due to the enactment of 2018 Act No. 173, §4, eff May 3, 2018 Petitioner's action has been rendered moot. "A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." Curtis v. State, 345 S.C. 557, 567-68, 549 S.E.2d 591, 596 (2001) (quoting Mathis v. South Carolina State Highway Department, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

The South Carolina General Assembly passed The Beachfront Management Reform Act, effective May 3, 2018, which established the baseline and setback line in effect for landowners as the most seaward of the baseline and setback line established during the 2008 through 2012 establishment cycle, or as proposed by SCDHEC on October 6, 2017. Therefore, the baseline and setback line in effect for Petitioner's Property are established pursuant to S.C. Code Ann. § 48-39-285, until Respondent SCDHEC revises the jurisdictional lines no sooner than 2024. The SCDHEC's comment period for revision of the jurisdictional baseline and setback line was negated by this legislative action, which resulted in the immediate establishment of the jurisdictional baseline and setback line by the General Assembly without further comment or review.

Petitioner's Request for Contested Case asserts the Department's decision to extend the public comment period "constituted a de facto final denial of Petitioner's request to move the baseline seaward of its existing location as of December 31, 2017." The Miriam Webster dictionary defines the term 'de facto' to mean 'actual' or 'exercising power as if legally constituted.' The only actual decision and the only legal power exercised was the Department's decision to extend the public comment period. The extension of the public comment period only

had the effect of extending the public comment period. Further, Petitioner's Request for Contested Case asks this Court for a ruling "reversing the final decision of DHEC refusing to adjust the location of the baseline seaward." The Department did not refuse to adjust the location of Petitioner's baseline seaward. Rather the Legislature made a decision to enact The Beachfront Management Reform Act thereby establishing the location of the jurisdictional lines.

Therefore, due to this legislative action, this Court cannot grant effective relief to Petitioner and Petitioner's challenge of the extension of the comment period is therefore moot.

Lack of a Final Agency Decision and Failure to Exhaust Administrative Remedies

If this Court is to find this matter is not moot the Department contends there is no final agency action in regard to the October 6, 2017 ***proposed*** lines. These ***proposed*** lines were sent out for public comment and review and were neither finalized by Department staff nor the Department Board. The baseline and setback lines, set through the enactment of 2018 Act No. 173, allowed property owners the benefit of the most seaward of the lines set by the Department in the 2008 through 2012 establishment cycle or the proposed October 6, 2017 lines. The Petitioner would either benefit from a seaward movement of these lines based upon the proposed October 2017 lines or would maintain the use of the lines set in the 2008 through 2012 establishment cycle.

S.C. Code Ann § 48-39-280 was revised pursuant to 2018 Act No. 173, §4, eff May 3, 2018. The revision to this statute pertains to appeal procedures pertaining to the Department's establishment of the baseline and setback line. However, the matter before this Court was appealed prior to this statutory change. Both the previous statutory language as well as the revised language required the affected property owner to initiate review by the Department Board within one year

of the staff decision.[1] The one year requirement for a request for final review under the previous language began after a "final or revised" line was adopted and under the revised language the one year requirement begins once a decision to establish a baseline or setback was made by Department staff. Accordingly any argument by Petitioner pertaining to the lines set by the Department in the 2008 through 2012 establishment cycle is time-barred and Department staff has not made a decision pertaining to the October 2017 ***proposed*** lines and pursuant to S.C. Code Ann. § 48-39-285 the Department cannot establish such a line prior to January 1, 2024. Petitioner failed to obtain a decision by Department staff regarding the location of the baseline and setback lines on their property to properly receive a Department decision.

Only a party who has exhausted available administrative remedies, including the opportunity to obtain DHEC Board review, may pursue further review of a Department decision. *See* S.C. Code Ann. § 1-23-380 (mandating compliance with specified procedures to obtain DHEC and ALC review, authorizing judicial review only to "[a] party who has exhausted all administrative remedies within the agency").

S.C. Code Ann. § 48-39-285 sets the baseline and setback line to be the most seaward location of either the lines established during the 2008 through 2012 establishment cycle or the lines proposed by the Department on October 6, 2017. These lines were established by the Legislature through the enacted of 2018 Act No. 173, eff May 3, 2018, rather than a Department decision to review and finalize established lines.

[1] The Department contends the last baseline and setback lines established by the Department were the lines set in the 2008 through 2012 establishment cycle. The lines noticed on October 6, 2017 were proposed lines that neither constitute a staff decision nor a final agency decision.

Injury

If this Court is to find Petitioner's action pertains to more than the extension of the public comment period and that the proposed lines put forth in October of 2017 was a final agency decision and may be appealed, Petitioner lacks standing to sustain this appeal.

The constitutional minimum of standing has three components:

> First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be "fairly...trace[able] to the challenged action of the defendant, and not...th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision.

Smiley v. S.C. Dep't of Health & Envtl. Control, 374 S.C. 326, 329, 649 S.E.2d 31, 32-33 (2007) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

Petitioner's action in this matter is based upon the Department's decision to extend the public comment period. There is no concrete or actual injury to the Petitioner caused by the extension of the public comment period. As the legislation clearly sets forth, Petitioner would either benefit by the baseline and setback line set by the Legislature or such lines would remain at the same location as set by the Department in the 2008 through 2012 establishment cycle. In either case, whichever line is seaward, the location of the lines is not fairly traceable to the challenged action. Further, assuming there is an injury, redressing the Department's decision to extend the public comment period would not cure such injury.

Accordingly, based upon the Department's arguments set forth above, Petitioner has not established the injury requirement to establish standing in this matter.

CONCLUSION

NOW, THEREFORE, Respondent SCDHEC prays for an order from this Court holding that the above-entitled action be dismissed with prejudice based upon the arguments raised above. The Department respectfully requests that all other deadlines, including discovery, be held in abeyance pending this Court's order.

Nathan M. Haber
Attorney for Respondent SCDHEC

10/24, 2018

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KIAWAH RESORT ASSOCIATES, LP, Petitioner, vs. SOUTH CAROLINA DEPARTMENT OF HEALTH & ENVIRONMENTAL CONTROL, Respondent.	Docket No. 18-ALJ-07-0046-CC **KIAWAH RESORT ASSOCIATES, LP, RETURN TO RESPONDENT'S MOTION TO DISMISS** TMS Nos. 207-05-00-018 (Parcel 13)
KDP II, LLC, Petitioner, vs. SOUTH CAROLINA DEPARTMENT OF HEALTH & ENVIRONMENTAL CONTROL, Respondent.	Docket No. 18-ALJ-07-0047-CC **KDP II, LLC'S RETURN TO RESPONDENTS' MOTION TO DISMISS** TMS Nos. 207-05-00-001 and 207-05-00-0011 (Captain Sams Spit)
KIAWAH RESORT ASSOCIATES, LP, Petitioner, vs. SOUTH CAROLINA DEPARTMENT OF HEALTH & ENVIRONMENTAL CONTROL, Respondent.	Docket No. 18-ALJ-07-0083-CC **KIAWAH RESORT ASSOCIATES, LP, RETURN TO RESPONDENTS' MOTION TO DISMISS** TMS No. 207-08-00-009 (14 Eugenia)

TO: BRADLEY D. CHURDAR and NATHAN M. HABER, ATTORNEYS FOR RESPONDENT

Petitioners KDP, II, and Kiawah Resort Associates, LP (jointly "Petitioners") submit this Return in opposition to the Motion to Dismiss of Respondent, South Carolina Department of

Health and Environmental Control ("DHEC" or the "Department"). Petitioners are owners of beachfront parcels on Kiawah Island. The location of the baseline and setback line significantly influences the value and uses of their respective beachfront properties.

DHEC's Motion seeks the dismissal of these contested case proceedings on the supposed basis "that Petitioner's action fails to allege facts sufficient to constitute a cause of action against the Department." Motion, p. 1. The Department asserts three particular grounds for dismissal: (1) mootness, (2) lack of a final agency decision and failure to exhaust administrative remedies, and (3) [absence of] injury.

As shown in this Return and the Return of other petitioners in other similar contested case proceedings, the Department omits reference to the portions of the recent legislation that expressly preserve these appeals. This same legislation authorizes both the Department to adjust the baseline and setback line under these circumstances and, more specifically, this Court to make a final determination as to the proper location of the baseline and setback line on the beachfront properties of the numerous petitioners. The Petitioners herein as well as the other petitioners exhausted their administrative remedies and filed their requests for contested case hearings before January 1, 2018, which is the only prerequisite for preserving their rights under the legislation.

For the reasons described below the Court should deny the Motion.

Background

The legal genesis of this appeal goes back to 2016. That year the South Carolina General Assembly made a significant revision to S.C. Code Section 48-39-280 that governs the delineation of the baseline and setback line on the beaches of South Carolina. Prior to the 2016 amendment, Section 48-39-280 instructed the Department to establish the baseline and setback line along the coast every eight to ten years, moving it seaward or landward based on the criteria in the statute.

The amendment in 2016 (1) changed the delineation cycle to every seven to ten years and (2) specified that the baseline could not move seaward from its location on December 31, 2017.[1] The Department completed the last delineation cycle on Kiawah Island in 2009.

There is no doubt Department understood the amendment to Section 48-39-280 in 2016 necessitated that it make preliminary and final determinations of the beachfront jurisdictional lines before December 31, 2017: "**There is a legislative deadline** to complete the process by December 31, 2017, in order to allow any seaward movement of the lines in this revision." Department publication titled "Beachfront Jurisdictional Line Review October 2017," pp. 6 and 34 (emphasis in original) (Copy attached as Exhibit 1). In this same publication, the Department stated, "It is DHEC's position that **property owners have up to one year to request a review** of the lines by DHEC's governing board; the property owner may appeal that board decision to the S.C. Administrative Law Court." Id at 34.

On October 6, 2017, the Department released its preliminary determinations of the location of the baselines and setback lines for beachfront properties. The Department established a public comment period until November 3, 2017 and stated it would render a determination of the final jurisdictional lines before December 31, 2017.

Because of the public outcry, on November 3, 2017, the Department issued a notice that it was extending the comment period until April 6, 2018, with a tentative final adoption date of August 24, 2018 for Kiawah Island. In its notice of November 3, 2017, the Department recognized the adverse effect its postponement would have on certain beachfront owners like these Petitioners:

> In 2016, S.C. Code Laws §48-39-280 was amended to prohibit the baseline from moving seaward from its position on December 31, 2017. **The Department's**

[1] "...Subject to Section 48-39-290(D), the baseline established pursuant to this section must not move seaward from its position on December 31, 2017." S.C. Code Section 48-39-280 (A), as amended effective June 3, 2016 (emphasis added).

> **decision to adopt revised lines after December 31 affects landowners who own property where the baseline was proposed to move seaward of the existing baseline under the Department's current proposal.** ... If you are a landowner who owns property where the baseline was proposed to move seaward of the existing baseline, under the Department's current proposal, **or if you are a landowner who contends other information may prove the baseline on your property should move seaward of the existing baseline, please contact the Department with the information requested below prior to December 4, 2017 to receive information and guidance on board review under S.C. Code Laws §44-1-60.**

DHEC Notice of November 3, 2017 (emphasis added) (copy attached as Exhibit 2).

A month later the Department sent a letter to coastal property owners, including Petitioner Kiawah Resort Associates, LP, to alert them again that the postponement of the comment period and final delineation could adversely affect them and that they should initiate an appeal if they wanted to contest the preliminary delineation:

> **Therefore, landowners who may have benefited from a proposed seaward movement of the baseline on their property under the Department's October 6, 2017 proposal or who contend other information demonstrates the baseline on their property should move seaward of the existing baseline may be impacted by the extension of the public comment period and the Department's decision to adopt revisions to the beachfront jurisdictional lines after December 31, 2017.** (emphasis in original)
>
> The Department's decision to adopt revised beachfront jurisdictional lines after December 31, 2017, **becomes the final agency decision fifteen (15) calendar days after the mailing date of this Notification Letter** unless a written Request for Final Review (RFR) regarding your property is filed. See S.C. Code §44-1-60. It is the Department's position that the December 31, 2017, statutory deadline would be extended to allow for the final review process to be completed. See S.C. Code §44-1-60(J). (emphasis added)

Letter of December 8, 2017, attached as Exhibit 3.

As evident from the second paragraph of the above excerpt, the Department considered its decision to postpone the adoption of the final jurisdictional lines until after December 31, 2017, to be a "final agency decision" unless appeal were taken within 15 days. The Department's letter of December 8, 2017, enclosed an instruction sheet called a "Guide to Board Review" outlining the

steps a property owner should take within 15 days to seek review by the DHEC Board under S.C. Code Section 44-1-60.

Petitioners heeded the Department's warnings and timely filed requests for final review conferences with the DHEC Board. The requests for final review conference asserted that the postponement of the final determination of the baseline had the de facto effect under the 2016 amendment to Section 48-39-280 of a final determination establishing the baseline at its location on December 31, 2017, i.e., its location as determined in 2009. All three requests asserted that the baseline should be moved seaward of its 2009 location and asked the Board to grant that relief. Each request for final review conference included an extensive discussion of the proof supporting the adjustment of the baseline seaward and requested the Board set the line at a specific location, the same relief requested from this Court in these contested case proceedings.

The DHEC Board declined to conduct final review conferences. In its letters to the Petitioners notifying them of the denial, the Board stated that its decision constituted a final agency decision that was subject to appeal:

> S.C. Code Section 44-1-60 provides that **if the Board declines in writing to schedule a final review conference, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court (ALC)** within thirty calendar days after notice is mailed to the applicant, permittee, licensee, and affected person that the Board declined to hold a final review conference. A request for a contested case hearing before the Administrative Law Court must be filed within the time allowed and in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address: ...

Letters of Longshore dated January 5, 2018, and January 26, 2018, copies attached as Exhibits 4 and 5 respectively (emphasis added).

Petitioners filed their Requests for Contested Case Hearing in the ALC within 30 days of receipt of these notices. They seek the same relief in this proceeding – an adjustment of the

location of baseline seaward of its 2009 location – for the reasons set forth in the attachments to their respective Requests for Contested Case Hearing and Prehearing Statements.

Argument

On May 3, 2018, the governor signed into law the South Carolina Beachfront Management Reform Act ("Reform Act") that substantially overhauled the existing statutes governing the Department's cyclical setting of the baseline and setback line. The 2018 amendments to Section 48-39-280 as well as the adoption of Section 48-39-285 make clear that these Petitioners and the other petitioners have the right to continue their appeals and have this Court determine the correct location of the jurisdictional lines on their properties.

In the Motion, DHEC points out the 2018 amendments to Section 48-39-280 include those specifying the baseline and setback lines are to be set at the most seaward of the preliminary delineation of October 6, 2018, or the prior determination in 2009. DHEC forgets to mention the section of the amendments that vests this Court with authority to make a binding determination of the proper locations of the baseline and setback lines in a contested case hearing:

> (4) A baseline established pursuant to this section must not move seaward from the most seaward location of the following:
>
> (a) the location of the baseline as established during the 2008 through 2012 establishment cycle;
>
> (b) the location of the baseline as proposed by the department on October 6, 2017; and
>
> **(c) the location of the proposed October 6, 2017, baseline as revised by the department pursuant to a review or an appeal initiated before January 1, 2018.**

Section 48-39-280(A)(4) as amended in 2018 (emphasis added).

Similarly, the Department fails to mention Section 48-39-285, a new statute that was also part of the 2018 legislative modifications:

> (A) Notwithstanding the provisions of Section 48-39-280, the department must initiate a new baseline cycle by no sooner than January 1, 2024. Until the department establishes a new baseline and setback line affecting a landowner as part of that establishment cycle, the baseline and setback line in effect for the landowner are the most seaward of the following, respectively:
>
> (1)(a) the baseline established during the 2008 through 2012 establishment cycle; or
>
> (b) the baseline proposed by the department on October 6, 2017; and
>
> (2)(a) the setback line established during the 2008 through 2012 establishment cycle; or
>
> (b) the setback line proposed by the department on October 6, 2017.
>
> **(B) Notwithstanding the provisions of subsection (A) and Section 48-39-280, if the department, pursuant to a review or an appeal initiated before January 1, 2018, revises the baseline proposed on October 6, 2017, to a location seaward of both the baseline established during the 2008 through 2012 establishment cycle and the baseline proposed on October 6, 2017, then both the revised proposed baseline and revised proposed setback line will be in effect for the landowner until the department establishes a new baseline and setback line.**

Section 48-39-285 (emphasis added).

This section instills in the Department the authority to adjust seaward the preliminary baseline it delineated on October 6, 2017, for property owners who initiated an appeal before January 1, 2018, as occurred in these three cases.

DHEC's entire argument hinges on the false premise that the 2018 legislation specified only two alternatives for locating the baseline and setback line: their final locations as established from 2008 through 2012, or the preliminary determinations on October 6, 2017. But, the 2018 legislative amendments provide a third alternative. If a property owner appealed before January 1, 2018, this Court can make a determination of the proper location of the jurisdictional lines after receiving evidence in the contested case hearing or the Department can reach an agreement with the appealing property owner adjusting the lines.

It is puzzling, to say the least, how the Department can assert these appeals are moot in the face of the 2018 legislation that specifically addressed and preserved these appeals. These are the only appeals that the General Assembly could have been contemplating in providing that the outcome of an appeal taken before December 31, 2017, will determine the new location of the jurisdictional lines if this Court's ruling sets the baseline and setback line seaward of the 2009 lines or their location in the preliminary determination of October 6, 2017.

The Department's interpretation of the 2018 legislation manages to defy all the following fundamental rules of statutory construction:

> The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011). The statutory language must be construed in light of the intended purpose of the statute. Id. This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless. See Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Defense, 380 S.C. 219, 670 S.E.2d 371 (2008) (in construing a statute, this Court will reject an interpretation which leads to an absurd result that could not have been intended by the General Assembly); Gordon v. Phillips Utils., Inc., 362 S.C. 403, 608 S.E.2d 425 (2005) (it is presumed that the General Assembly intended to accomplish something by its choice of words and would not do a futile thing); Denene, Inc. v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002) (this Court must presume the General Assembly did not intend a futile act, but rather intended its statutes to accomplish something); Hinton v. S.C. Dep't of Probation, Parole and Pardon Servs., 357 S.C. 327, 592 S.E.2d 335 (Ct.App.2004) (the Court should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless).

Florence County Democratic Party v. Florence County Republican Party, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012)

The Department's illogical construction of the 2018 legislation completely undermines its claim of mootness. The opposite is true. The 2018 legislation plainly establishes the viability of these appeals. The determination of this Court will have the practical legal effect of re-setting the baseline and setback line on Petitioners' properties. This Court can grant effectual relief. These contested case proceedings are not moot.

In fact, Section 48-39-280 (F)(1) guarantees an affected property owner the right to appeal and review of the agency's delineation of the jurisdictional lines on his property:

> (F)(1) **A landowner claiming ownership of property adversely affected by the establishment of a baseline or setback line, upon submittal of substantiating evidence, must be granted a review of the baseline or setback line**.... A review is initiated by filing a request for a review conference with the department board via certified mail within one year of the establishment of the baseline or setback line and must include a one hundred-dollar-review fee per property.

Section 48-39-280 (F)(1) (double emphasis added).

Petitioners submitted extensive information substantiating the seaward movement of the baseline with their requests for final review conference and their requests for contested case hearing. Petitioners are statutorily entitled to a contested case hearing to determine the correct location of the baseline and setback line on their properties.

Contrary to the next argument made by the Department, the Petitioners have exhausted their administrative remedies. They have taken all the steps Section 44-1-60 requires, which happens to be the same process the Department instructed them to take to preserve their rights, before it changed its mind and filed the Motion to Dismiss. Petitioners timely sought a final review conference by the Department's Board. The Board refused the request and informed Petitioners of their right to seek a contested case hearing before this Court, which they did. There are no other administrative processes left except the completion of these contested case proceedings before the ALC.

The agency decision under review is also final. The Department's decision to postpone the determination of the final baseline until well into 2018 had the effect of finally setting the baseline at its 2009 location. In its letter of December 8, 2017, the Department described the postponement of the final determination of the baseline until after December 31, 2017, as the final agency decision unless appealed to the DHEC Board in 15 days. The Department went so far as

to caution property owners who believed that the baseline should be moved seaward of its current location or the proposed locations that they should proceed to appeal under Section 44-1-60. That is exactly what Petitioners did. Moreover, the letter communicating the decision of the DHEC Board not to grant a final review conference specifically stated that its decision constituted the final agency action. The mere fact that the legislature determined that the proposed line would count as the final line if it was seaward of the 2009 line shows the General Assembly considered the proposed lines to be a final determination of their location this cycle.

DHEC makes another surprising argument in asserting that the 2018 legislative amendments are not retroactive. As previously stated, this argument defies all the basic tenets of statutory construction. Moreover, the 2018 legislation fits squarely within the test for whether a new law is retroactive or prospective only:

> [T]he general rule is that **statutes that are primarily procedural in nature and do not create new substantive rights are retroactive.** Generally, statutes are applied prospectively. However, **they may be applied retroactively if (1) a specific provision or clear legislative intent requires retroactive application or (2) no clear expression of legislative intent is present but the statute is remedial or procedural in nature.**

State v. Hilton, 406 S.C. 580, 586-7, 752 S.E.2d 549, 552 (Ct. App. 2013) (internal citations omitted) (emphasis added).

The 2018 legislation is largely procedural in nature and contains specific provisions evidencing a clear legislative intent that it be applied retroactively to appeals of the preliminary delineation of October 6, 2017, that were filed before January 1, 2018.

The Petitioners also have standing. "Standing may be acquired: (1) by statute; (2) through the rubric of 'constitutional standing;' or (3) under the 'public importance' exception." ATC South, Inc. v. Charleston Cty., 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008).

The 2018 legislation plainly preserves the right to appeal of those beachfront owners who appealed the preliminary baseline determinations released on October 6, 2017, before January 1, 2018. The statute specifically vests them with statutory standing.

Petitioners also have constitutional standing. "To establish constitutional standing, a plaintiff must first show he has suffered an 'injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" Freemantle v. Preston, 398 S.C. 186, 192-3, 728 S.E.2d 40, 43 (2012). The Department's latest position that there is no "injury" is undermined by the notice of November 3, 2017, and the letter of December 8, 2017. Both of these stated that property owners who believed their baseline should be seaward of the location set in 2009 would be adversely impacted.

Petitioners' property will be significantly affected by the location of the jurisdictional lines. The location of the baseline and setback line are the primary determinants of what can be built on beachfront property and what portions are useable. The owner is clearly impacted by where these lines are set.

For the foregoing reasons and those set forth in the Return of other petitioners confronting the same Motion, the Petitioners respectfully submit the Motion should be denied.

WALKER GRESSETTE FREEMAN & LINTON, LLC

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ATTORNEYS FOR PETITIONERS
KDP II, LLC and KIAWAH RESORT
ASSOCIATES, LP.

November 15, 2018

Charleston, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that on **November 15, 2018**, in Charleston, South Carolina, I served a copy of the foregoing **RETURN TO RESPONDENT'S MOTION TO DISMISS** by depositing the same in the United States mail, first class, postage paid, to the following:

Bradley D. Churdar, Esq.
Nathan M. Haber, Esq.
South Carolina Department of Health & Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

Nancy Jane Dennis
Paralegal

EXHIBIT
tabbies
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Beachfront Jurisdictional Line Review

October 2017

Why is DHEC updating the lines?

It's required by law:

- **South Carolina law requires** DHEC to establish and review the positions of the setback lines and baselines **every 7 to 10 years**.
- The last review was conducted in 2008-2010.
- The law also requires DHEC to review the **average long-term shoreline change rate** (aka the "long-term erosion rate") for all oceanfront land that is or potentially could be developed during this time.

Why update the lines now?

There is a legislative deadline:

- In June 2016 legislation went into effect that prohibits the seaward movement of the jurisdictional baseline from its position on December 31, 2017.
  - In order to allow any seaward movement of the lines in this revision, **DHEC must complete the process prior to this December 31 legislative deadline**.

- DHEC planning to meet the target deadline.
  - **If the revision process were to be delayed, all existing lines would have to stay in place, including in those areas** where the state's beachfront jurisdiction is **proposed to move seaward.**

Summary

Key facts:

- **There is a legislative deadline** to complete the process by December 31, 2017, in order to allow any seaward movement of the lines in this revision.
- The **proposed setback areas DO NOT create a "no-build" zone**.
- It is DHEC's position that **property owners have up to one year to request a review** of the lines by DHEC's governing board; the property owner may appeal that board decision to the S.C. Administrative Law Court.

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EXHIBIT
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PUBLIC NOTICE

PROPOSED BEACHFRONT JURISDICTIONAL LINES
EXTENSION OF PUBLIC COMMENT PERIOD
UNTIL APRIL 6, 2018

Based on comments received from landowners, community leaders, the conservation community, and others during the 30-day public comment period, the Department of Health and Environmental Control (Department) is extending the public comment period for the Proposed Beachfront Jurisdictional Lines (the "current proposal"), until **April 6, 2018**. As a result of this extension, the Department will begin to adopt final revised beachfront jurisdictional lines in May 2018 with all final revised lines published by December 31, 2018. A tentative adoption schedule for each beach will be available on the DHEC website on November 13, 2017.

The Department is extending the comment period to allow interested persons time to meet with Department staff, understand the Department's methodology in setting the jurisdictional lines and bring any additional information to the Department's attention for consideration. Comments may be submitted online or in writing. Please visit www.scdhec.gov/beachfrontlines for more information.

In 2016, S.C. Code Laws §48-39-280 was amended to prohibit the baseline from moving seaward from its position on December 31, 2017. **The Department's decision to adopt revised lines after December 31 affects landowners who own property where the baseline was proposed to move seaward of the existing baseline under the Department's current proposal**. To view the proposed lines for your property, please visit https://gis.dhec.sc.gov/shoreline/

If you are a landowner who **owns property where the baseline was proposed to move seaward of the existing baseline**, under the Department's current proposal, or if you are a landowner who contends other information may prove the baseline on your property should move seaward of the existing baseline, please contact the Department with the information requested below **prior to December 4, 2017** to receive information and guidance on board review under S.C. Code Laws §44-1-60. Note that the Department will attempt to proactively reach out to these property owners. S.C. Code Laws §44-1-60(J) states "[a]ny statutory deadlines applicable to permitting and licensing programs administered by the department must be extended to all (sic) for this final review process." It is the Department's position that the December 31 date would be extended for landowners who file a timely request for review under S.C. Code Laws §44-1-60.

To receive information and guidance on board review, please provide the following information via electronic mail [ocrm-comments@dhec.sc.gov] or phone (843-953-0200) prior to December 4, 2017:

- Property Address
- Name of Owner(s)
- Mailing Address of Owner(s)
- Contact Name
- Contact Telephone Number
- Contact Email Address

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EXHIBIT
3

RECEIVED
DEC 13 2017
By

NOTIFICATION LETTER
PURSUANT TO S.C. Code 44-1-60

December 8, 2017

KIAWAH RESORT ASSOCIATES LP
1 KIAWAH ISLAND PKWY
KIAWAH ISLAND, SC 29455

This letter is to notify you that on November 3, 2017, the SC Department of Health and Environmental Control (Department) extended the public comment period for Proposed Beachfront Jurisdictional Lines until April 6, 2018. After consideration of comments, the Department will begin to adopt final revised beachfront jurisdictional lines in May 2018.

You are receiving this Notification Letter because you may own property where the jurisdictional baseline was proposed to move seaward of the existing baseline in the Department's proposed line revisions issued on October 6, 2017, or you contend other information demonstrates that the baseline on your property should move seaward of the existing baseline.

Background

- In 1988, the South Carolina Legislature established a forty-year policy of retreat from the shoreline. This policy is described in S.C. Code Ann. 48-39-280(A).
- The Department is required to implement this policy and utilize the best available scientific and historical data in the implementation. In so doing, the Department must establish a baseline that parallels the shoreline for each standard erosion zone and each inlet erosion zone.
- The baseline and setback line must be revised not less than every seven years but not more than every ten years after each preceding revision to the lines.
- On October 6, 2017, the Department published proposed state beachfront jurisdictional line revisions.
- Under the proposed revisions, some baselines would have moved seaward of the existing baselines, some baselines would move landward, and some baselines would remain the same.
- By statute, until the Department establishes new baselines and setback lines, the existing baselines and setback lines must be used.
- By statute, the baseline must not move seaward from its position on December 31, 2017.

Therefore, landowners who may have benefited from a proposed seaward movement of the baseline on their property under the Department's October 6, 2017 proposal or who contend other information demonstrates the baseline on their property should move seaward of the existing baseline may be impacted by the extension of the public comment period and the Department's decision to adopt revisions to the beachfront jurisdictional lines after December 31, 2017.

You are encouraged to review the proposed baseline position for your property to determine if the Department's decision to adopt revised beachfront jurisdictional lines after December 31, 2017, affects you. To view the proposed lines for your property, visit https://gis.dhec.sc.gov/shoreline/

S.C. Department of Health and Environmental Control
2600 Bull Street, Columbia, SC 29201 (803) 898-3432 www.scdhec.gov

The Department's decision to adopt revised beachfront jurisdictional lines after December 31, 2017, becomes the final agency decision fifteen (15) calendar days after the mailing date of this Notification Letter unless a written Request for Final Review (RFR) regarding your property is filed. See S.C. Code §44-1-60. It is the Department's position that the December 31, 2017, statutory deadline would be extended to allow for the final review process to be completed. See S.C. Code §44-1-60(J).

To initiate a final review process for your property, an RFR and the required filing fee in the amount of $100 must be received by the Department's Clerk of the Board within fifteen (15) calendar days after the mailing date of this Notification Letter. RFRs should be filed in person or by mail at the following address: South Carolina Board of Health and Environmental Control, Attention: Clerk of the Board, 2600 Bull Street, Columbia, South Carolina 29201. Alternatively, RFR's may be submitted by facsimile (803-898-3393) or by electronic mail (boardclerk@dhec.sc.gov), however the required filing fee must be received for an RFR to be filed.

A Guide to Board Review is enclosed to provide additional information on this process.

South Carolina Board of Health and Environmental Control

Guide to Board Review

Pursuant to S.C. Code Ann. § 44-1-60

The decision of the South Carolina Department of Health and Environmental Control (Department) becomes the final agency decision fifteen (15) calendar days after notice of the decision has been mailed to the applicant, permittee, licensee and affected persons who have requested in writing to be notified, unless a written request for final review accompanied by a filing fee in the amount of $100 is filed with Department by the applicant, permittee, licensee or affected person.

Applicants, permittees, licensees, and affected parties are encouraged to engage in mediation or settlement discussions during the final review process.

If the Board declines in writing to schedule a final review conference, the Department's decision becomes the final agency decision and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court within thirty (30) calendar days after notice is mailed that the Board declined to hold a final review conference. In matters pertaining to decisions under the South Carolina Mining Act, appeals should be made to the South Carolina Mining Council.

I. Filing of Request for Final Review

1. A written Request for Final Review (RFR) and the required filing fee of one hundred dollars ($100) must be received by Clerk of the Board within fifteen (15) calendar days after notice of the staff decision has been mailed to the applicant, permittee, licensee, or affected persons. If the 15th day occurs on a weekend or State holiday, the RFR must be received by the Clerk on the next working day. RFRs will not be accepted after 5:00 p.m.
2. RFRs shall be in writing and should include, at a minimum, the following information:
   - The grounds for amending, modifying, or rescinding the staff decision;
   - a statement of any significant issues or factors the Board should consider in deciding how to handle the matter;
   - the relief requested;
   - a copy of the decision for which review is requested; and
   - mailing address, email address, if applicable, and phone number(s) at which the requestor can be contacted.
3. RFRs should be filed in person or by mail at the following address:

   South Carolina Board of Health and Environmental Control
   Attention: Clerk of the Board
   2600 Bull Street
   Columbia, South Carolina 29201

   Alternatively, RFR's may be filed with the Clerk by facsimile (803-898-3393) or by electronic mail (boardclerk@dhec.sc.gov).
4. The filing fee may be paid by cash, check or credit card and must be received by the 15th day.
5. If there is any perceived discrepancy in compliance with this RFR filing procedure, the Clerk should consult with the Chairman or, if the Chairman is unavailable, the Vice-Chairman. The Chairman or the Vice-Chairman will determine whether the RFR is timely and properly filed and direct the Clerk to (1) process the RFR for consideration by the Board or (2) return the RFR and filing fee to the requestor with a cover letter explaining why the RFR was not timely or properly filed. Processing an RFR for consideration by the Board shall not be interpreted as a waiver of any claim or defense by the agency in subsequent proceedings concerning the RFR.
6. If the RFR will be processed for Board consideration, the Clerk will send an Acknowledgement of RFR to the Requestor and the applicant, permittee, or licensee, if other than the Requestor. All personal and financial identifying information will be redacted from the RFR and accompanying documentation before the RFR is released to the Board, Department staff or the public.
7. If an RFR pertains to an emergency order, the Clerk will, upon receipt, immediately provide a copy of the RFR to all Board members. The Chairman, or in his or her absence, the Vice-Chairman shall based on the circumstances, decide whether to refer the RFR to the RFR Committee for expedited review or to decline in writing to schedule a Final Review Conference. If the Chairman or Vice-Chairman determines review by the RFR Committee is appropriate, the Clerk will forward a copy of the RFR to Department staff and Office of General Counsel. A Department response and RFR Committee review will be provided on an expedited schedule defined by the Chairman or Vice-Chairman.
8. The Clerk will email the RFR to staff and Office of General Counsel and request a Department Response within eight (8) working days. Upon receipt of the Department Response, the Clerk will forward the RFR and Department Response to all Board members for review, and all Board members will confirm receipt of the RFR to the Clerk by email. If a Board member does not confirm receipt of the RFR within a twenty-four (24) hour period, the Clerk will contact the Board member and confirm receipt. If a Board member believes the RFR should be considered by the RFR Committee, he or she will

respond to the Clerk's email within forty-eight (48) hours and will request further review. If no Board member requests further review of the RFR within the forty-eight (48) hour period, the Clerk will send a letter by certified mail to the Requestor, with copy by regular mail to the applicant, permittee, or licensee, if not the Requestor, stating the Board will not hold a Final Review Conference. Contested case guidance will be included within the letter.
NOTE: If the time periods described above end on a weekend or State holiday, the time is automatically extended to 5:00 p.m. on the next business day.

9. If the RFR is to be considered by the RFR Committee, the Clerk will notify the Presiding Member of the RFR Committee and the Chairman that further review is requested by the Board. RFR Committee meetings are open to the public and will be public noticed at least 24 hours in advance.
10. Following RFR Committee or Board consideration of the RFR, if it is determined no Conference will be held, the Clerk will send a letter by certified mail to the Requestor, with copy by regular mail to the applicant, permittee, or licensee, if not the Requestor, stating the Board will not hold a Conference. Contested case guidance will be included within the letter.

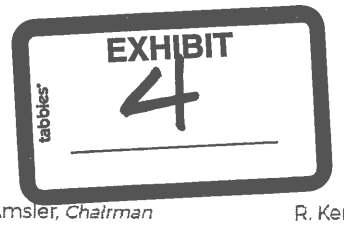
II. Final Review Conference Scheduling

1. If a Conference will be held, the Clerk will send a letter by certified mail to the Requestor, with copy by regular mail to the applicant, permittee, or licensee, if not the Requestor, informing the Requestor of the determination.
2. The Clerk will request Department staff provide the Administrative Record.
3. The Clerk will send Notice of Final Review Conference to the parties at least ten (10) days before the Conference. The Conference will be publically noticed and should:
    - include the place, date and time of the Conference;
    - state the presentation times allowed in the Conference;
    - state evidence may be presented at the Conference;
    - if the conference will be held by committee, include a copy of the Chairman's order appointing the committee; and
    - inform the Requestor of his or her right to request a transcript of the proceedings of the Conference prepared at Requestor's expense.
4. If a party requests a transcript of the proceedings of the Conference and agrees to pay all related costs in writing, including costs for the transcript, the Clerk will schedule a court reporter for the Conference.

III. Final Review Conference and Decision

1. The order of presentation in the Conference will, subject to the presiding officer's discretion, be as follows:
    - Department staff will provide an overview of the staff decision and the applicable law to include [10 minutes]:
        - Type of decision (permit, enforcement, etc.) and description of the program.
        - Parties
        - Description of facility/site
        - Applicable statutes and regulations
        - Decision and materials relied upon in the administrative record to support the staff decision.
    - Requestor(s) will state the reasons for protesting the staff decision and may provide evidence to support amending, modifying, or rescinding the staff decision. [15 minutes] *NOTE: The burden of proof is on the Requestor(s)*
    - Rebuttal by Department staff [15 minutes]
    - Rebuttal by Requestor(s) [10 minutes]
      Note: Times noted in brackets are for information only and are superseded by times stated in the Notice of Final Review Conference or by the presiding officer.
2. Parties may present evidence during the conference; however, the rules of evidence do not apply.
3. At any time during the conference, the officers conducting the Conference may request additional information and may question the Requestor, the staff, and anyone else providing information at the Conference.
4. The presiding officer, in his or her sole discretion, may allow additional time for presentations and may impose time limits on the Conference.
5. All Conferences are open to the public.
6. The officers may deliberate in closed session.
7. The officers may announce the decision at the conclusion of the Conference or it may be reserved for consideration.
8. The Clerk will mail the written final agency decision (FAD) to parties within 30 days after the Conference. The written decision must explain the basis for the decision and inform the parties of their right to request a contested case hearing before the Administrative Law Court or in matters pertaining to decisions under the South Carolina Mining Act, to request a hearing before the South Carolina Mining Council.. The FAD will be sent by certified mail, return receipt requested.
9. Communications may also be sent by electronic mail, in addition to the forms stated herein, when electronic mail addresses are provided to the Clerk.

The above information is provided as a courtesy; parties are responsible for complying with all applicable legal requirements.



Board:
Allen Amsler, *Chairman*
Ann B. Kirol, DDS, *Vice Chair*
L. Clarence Batts, Jr., *Secretary*
R. Kenyon Wells
Charles M. Joye II, P.E.
David W. Gillespie, MD

January 5, 2018

Electronic Mail Delivery and US Mail Certified 9214 8969 0099 9790 1410 5711 87
G. Trenholm Walker (walker@WGFLLAW.com)
Walker Gressette Freeman Linton, LLC
Post Office Box 22167
Charleston, SC 29413

Electronic Mail Delivery
Sara P. Bazemore (bazemosp@dhec.sc.gov)
SCDHEC – Office of General Counsel
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

RE: **17-RFR-42 Kiawah Island Inn**
17-RFR-43 The Ocean Course Golf Club
17-RFR-44 Captain Sam's Spit
17-RFR-45 Kiawah Resort Associates – Beachfront Jurisdictional Lines

Dear Counsel of Record:

The South Carolina Board of Health and Environmental Control will not conduct a Final Review Conference on the above-referenced matters.

CONTESTED CASE GUIDANCE

S.C. Code Section 44-1-60 provides that if the Board declines in writing to schedule a final review conference, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court (ALC) within thirty calendar days after notice is mailed to the applicant, permittee, licensee, and affected person that the Board declined to hold a final review conference.

A request for a contested case hearing before the Administrative Law Court must be filed within the time allowed and in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

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

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: http://www.scalc.net. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,

Lisa Lucas Longshore
Clerk
S.C. Board of Health and Environmental Control

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

dhec
Healthy People

Board:
Allen Amsler, *Chairman*
Ann B Kirol DDS *Vice Chair*
L. Clarence Batts Jr., *Secretary*
R Kenyon Wells
Charles M Joye II, P E
David W Gillespie MD

January 26, 2018

Electronic Mail Delivery and US Mail Certified 9214896900999790153016909 7
G. Trenholm Walker, Esquire (walker@WGFLLAW.com)
Walker Gressette Freeman Litton, LLC
Post Office Box 22167
Charleston, SC 29413

Electronic Mail Delivery
Sara P. Bazemore (bazemosp@dhec.sc.gov)
SCDHEC – Office of General Counsel
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

RE: **17-RFR-128, 14 Eugenia Avenue, Kiawah Island** – Beachfront Jurisdictional Lines

Dear Counsel of Record:

The South Carolina Board of Health and Environmental Control will not conduct a Final Review Conference on the above-referenced matters.

CONTESTED CASE GUIDANCE

S.C. Code Section 44-1-60 provides that if the Board declines in writing to schedule a final review conference, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court (ALC) within thirty calendar days after notice is mailed to the applicant, permittee, licensee, and affected person that the Board declined to hold a final review conference.

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If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,

Lisa Lucas Longshore

Lisa Lucas Longshore
Clerk
S.C. Board of Health and Environmental Control

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

Healthy People. Healthy Communities.

December 6, 2019

KDP II, LLC
c/o Walker Gressette Freeman & Linton, LLC
P.O. Box 22167
Charleston, SC 29401

RE: Docket No. 18-ALJ-07-0047-CC, "Captain Sams Spit", TMS Nos. 207-05-00-001 and 207-05-00-0011, Kiawah Island, SC

Dear Mr. Walker and Mr. Gressette:

The above-referenced case has been remanded to the S.C. Department of Health & Environmental Control (the Department) for a determination of new beachfront jurisdictional lines under S.C. Code Ann. § 48-39-280. The determination is to be made following receipt of supplemental information provided by the Petitioner. This supplemental information was received by the Department on June 5, 2019 and September 26, 2019 and is summarized below. The Department's responses are also provided below, following each point raised by the Petitioner. This Petitioner has preserved an appeal pursuant to S.C. Code Ann. § 48-39-285(b) of the baseline only and therefore, the Department does not have authority to change the legislature's mandatory establishment of the setback line pursuant to the Beachfront Management Reform Act.

Petitioner's Assertion #1: The demarcation between the Standard Zone and the Unstabilized Inlet Zone should be adjusted to a point west of Monument 2615 thereby including most of the Property within the Standard Zone. To support this assertion, the Petitioner provided beach profile elevation data and a digital terrain model, both from a July 2016 inlet relocation monitoring report produced by Coastal Science & Engineering, and an aerial photo of Captain Sams Spit from March 2018.

Department's Response #1: The area adjacent to Captain Sams Inlet beginning at Monument 2625 and extending to the inlet is classified as an unstabilized inlet zone. "An inlet erosion zone is a segment of shoreline along or adjacent to tidal inlets which is influenced directly by the inlet and its associated shoals." S.C. Code Ann. § 48-39-270(7). The unstabilized inlet zone designation in this area has been in place since the S.C. Beachfront Management Act became law in 1988. These zone designations are established in S.C. Code Ann. Regs. 30-21 (Figure 1). The Department is not charged with reassessing the shoreline zone classifications when it is reviewing the baseline and setback lines pursuant to S.C. Code Ann. § 48-39-280. In the late 1980s, when the Department was establishing zone classifications, it reviewed two documents provided by Coastal Science & Engineering, Inc. (1988[1] and 1989[2]), which

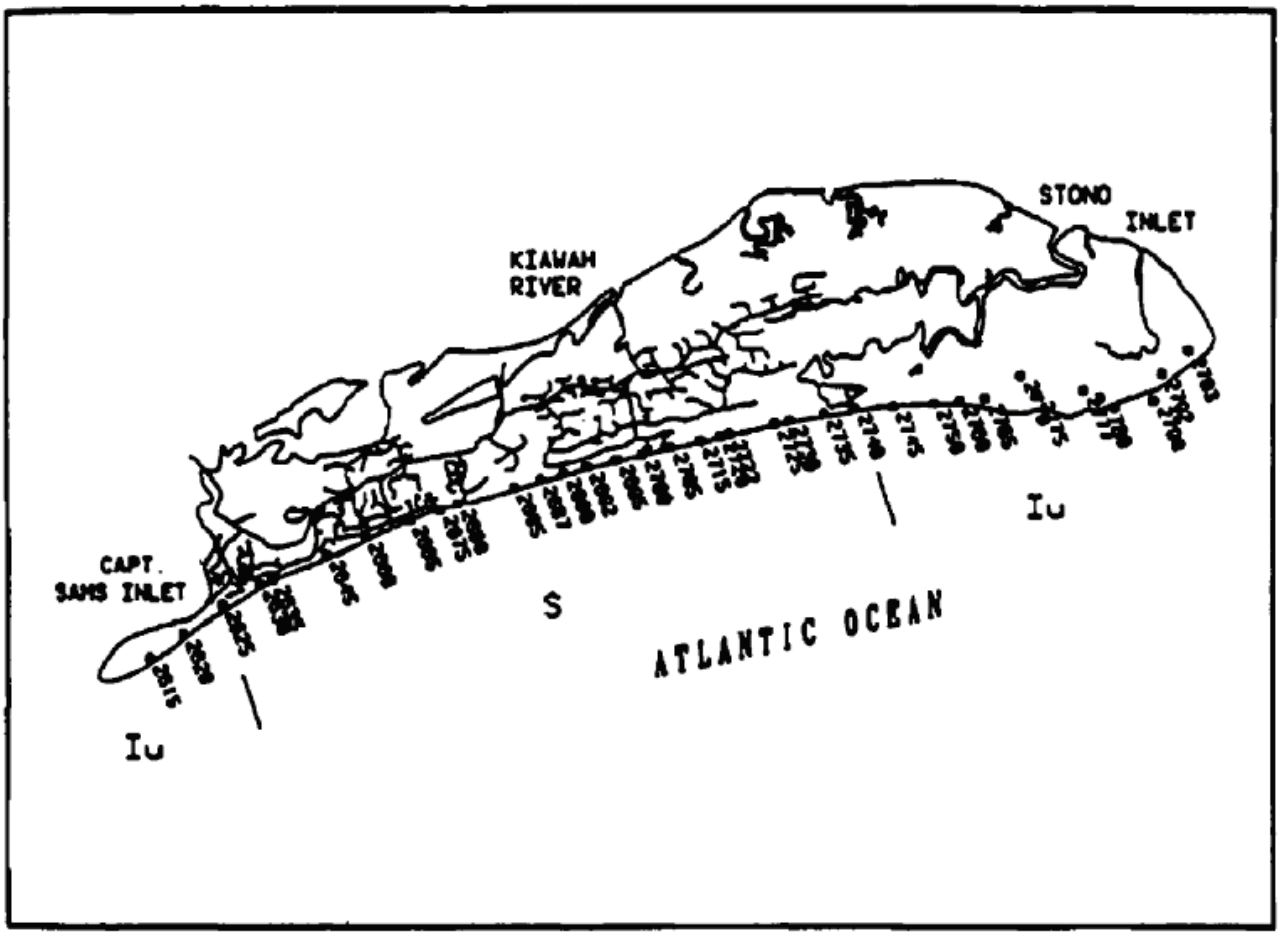
[1] Jones, Christopher P., David M. Scaturo, Timothy W. Kana, and William C. Eiser. June 1988. "Calculation of Interim Baselines and 40-Year Setback Lines." [CSE '87-88 R-16]. Coastal Science & Engineering, Inc., Columbia, SC.

[2] Jones, Christopher P. January 1989. "Summary of Proposed Revisions to Interim Baseline and Setback Line at Kiawah Island." [CSE '88-89 R-05]. Coastal Science & Engineering, Inc., Columbia, SC.

contained information related to the baseline and setback line on Kiawah Island. This information assisted the Department in the establishment of interim and final shoreline zone classifications and jurisdictional lines. Although, the Department does not reclassify beach zones during the line review process, for the purposes of this remand, the Department reviewed the underlying parameters associated with zone designation, and determined that the zones were still valid as described below.

Kiawah Island
Charleston County

Figure 17



South Carolina beachfront jurisdictional lines approved - 7/21/89, 1/19/89
reference orthophotographs: #309 through 333
monument numbers refer to the SCCC beachfront monument network
notes:

Figure 1. Beach zone designations for Kiawah Island from S.C. Code Ann. Regs. 30-21. 'Iu' designates unstabilized inlet zones, and 'S' designates standard zones.

The Department's position is that the shoreline adjacent to Captain Sams Inlet on Kiawah Island, from the mouth of the inlet to Monument 2625, continues to be influenced by Captain Sams Inlet. The zone designations were originally established based on historical shoreline positions and offshore bathymetry contours. Specifically, inlet erosion zones were designated where historic shorelines are not parallel to one another and where offshore contours are not parallel to the present shoreline.[3] Analysis of historical shoreline positions and offshore bathymetry contours in 1988 led Coastal Science & Engineering to conclude that the unstabilized inlet zone adjacent to Captain Sams Inlet should extend from the mouth of the inlet to Monument 2625 (Figure 2).

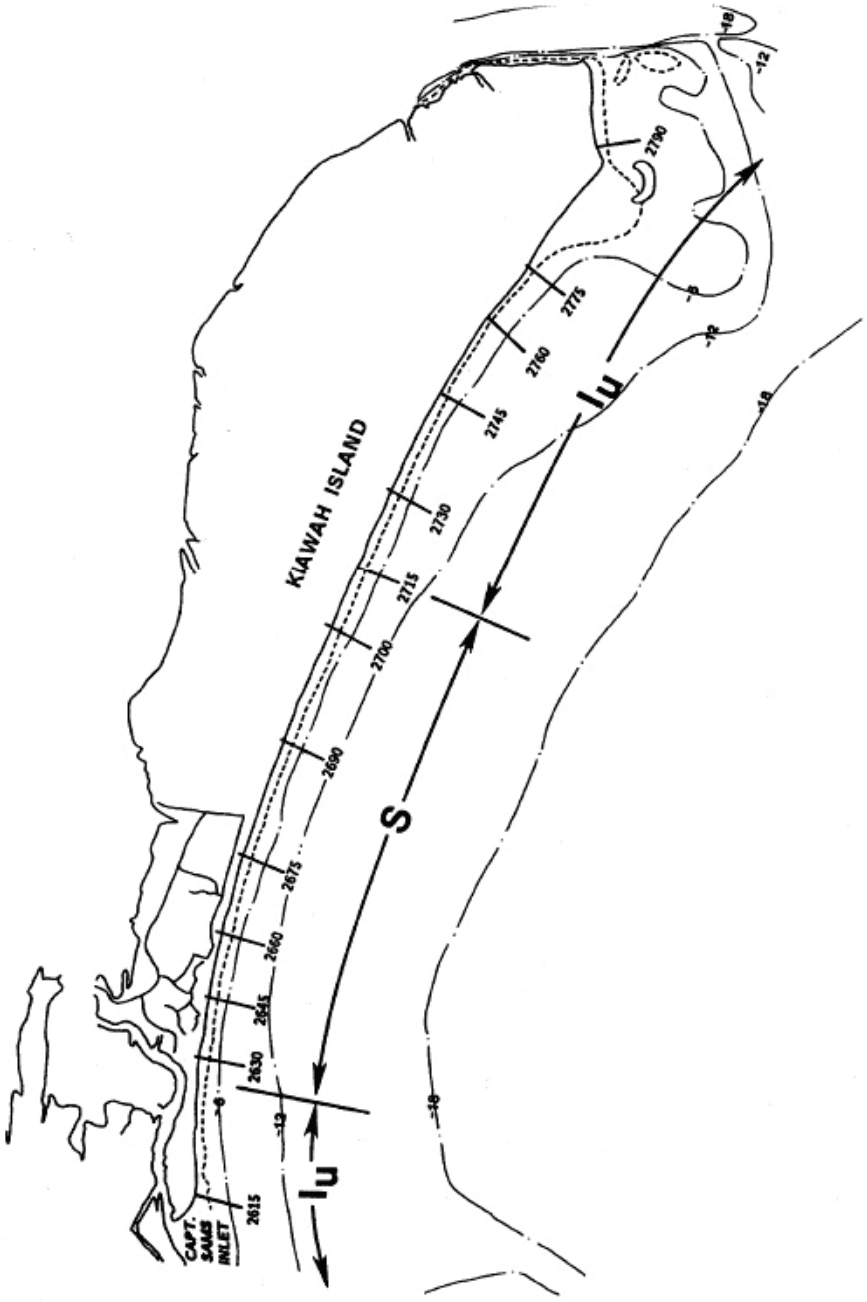


Figure 2. Map of erosion zone designations on Kiawah Island from Jones et al., June 1988. 'Iu' designates unstabilized inlet zones, and 'S' designates standard zones.

[3] Jones et al. June 1988.

The -6 foot, -12 foot, and -18 foot depth contours shown in Figure 2 demonstrate the presence of the ebb shoal complex associated with Stono Inlet to the north of Kiawah Island and the ebb shoal complex associated with Captain Sams Inlet and the North Edisto River Inlet to the south of Kiawah Island. Updated shoreline data and offshore bathymetry contours continue to show that the shoreline southwest of Monument 2625 to the mouth of the inlet is an unstabilized inlet zone. The shoreline positions along the standard erosion zone of Kiawah Island are spaced tightly together with a consistent orientation. Around Monument 2625, the historical shoreline positions diverge and become spaced more widely apart, indicating that the shoreline in this zone is more dynamic (Figure 3).

Figure 3. Updated shoreline positions along Kiawah Island showing closely spaced shorelines in the standard erosion zone and divergence in the shoreline positions in the unstabilized inlet zone, beginning around Monument 2625.

Current nautical charts from the National Oceanic and Atmospheric Administration (NOAA) also show that the offshore bathymetry contours are not parallel with the current shoreline from the mouth of the inlet to Monument 2625 (Figure 4). The orientations of the contours shift at Monument 2625, which is consistent with the original erosion zone designations established in 1988 (see Figure 2).

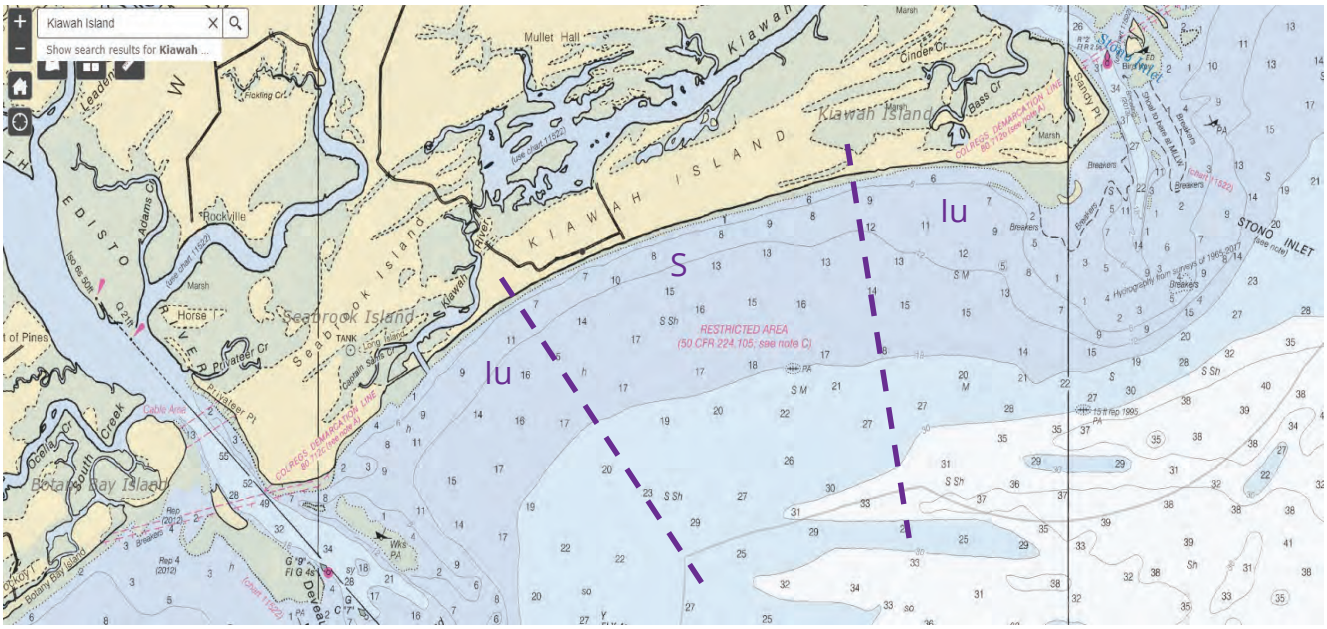


Figure 4. NOAA nautical chart of Kiawah Island, showing the -6 foot, -12 foot, and -18 foot depth contours. The dashed purple lines indicate where the orientations of the offshore bathymetry contours shift and the corresponding points along the shoreline where the erosion zones transition from unstabilized inlet zones (Iu) to a standard erosion zone (S). Chart obtained from https://nauticalcharts.noaa.gov/rnconline/rnconline.html.

The Department also reviewed the supplemental information submitted by the Petitioner. Beach profile elevation data are not the sole data source used by the Department to designate erosion zones. As summarized above, the zones were originally designated based on historical shoreline positions and offshore bathymetry contours. These data sources continue to show that the unstabilized inlet zone adjacent to Captain Sams Inlet is designated correctly. The Petitioner also submitted a digital terrain model showing LiDAR data of Captain Sams Spit from a July 2016 inlet relocation monitoring report. The Petitioner asserts that this digital terrain model provides sufficient information to justify a re-designation of the shoreline from an unstabilized inlet zone to a standard zone. The Department disagrees with this assertion. The digital terrain model shows LiDAR data covering the upland and a very limited swath of the nearshore coastal ocean (approximately 1,000 feet offshore). The -18 foot offshore bathymetry contour shown in Figure 4 is located approximately 2 miles offshore. Bathymetric data covering larger distances offshore is needed to evaluate the extent of ebb shoal complexes and shifts in the orientation of bathymetry contours.

The mouth of Captain Sams Inlet naturally migrates in a southwesterly direction towards Seabrook Island. However, inlet relocation projects in 1983, 1996, and 2015 have moved the inlet mouth back towards Kiawah Island. These inlet relocation projects have resulted in Captain Sams Inlet and the adjacent shorelines being maintained in approximately the same position over time. When the inlet mouth migrates too close to Seabrook Island, it is moved back towards Kiawah Island so it does not threaten structures or infrastructure on either island (Figure 5). The Petitioner has not provided sufficient evidence to demonstrate that the effects of Captain Sams Inlet on adjacent shorelines have been reduced. Rather, the periodic inlet relocation projects have resulted in similar shoreline dynamics as there were in 1988, when the zone designations were first established. The ebb shoal complex offshore and its interactions with waves and currents result in dynamic shorelines in unstabilized inlet zones.

Figure 5. Aerial photo of Captain Sams Inlet, immediately following the 2015 inlet relocation project. A new inlet mouth was cut through Kiawah Island to the north (top of photo), and a sand berm was constructed across the former inlet mouth to the south (bottom of photo).

The Department's permit for the last Captain Sams Inlet Relocation Project in 2015 (P/N 2008-1870-2IG) allowed the Seabrook Island Property Owners Association to "relocate Captain Sams Inlet from its existing position to its 1963/1983/1996 position through Kiawah spit between Kiawah Island and Seabrook Island" and to provide "erosion control and maintenance of a sediment supply to Seabrook Island." This approach to inlet management will likely continue in the future as Seabrook Island property owners seek to keep the inlet mouth sufficiently far away from structures and infrastructure on Seabrook Island. Because of the location of Petitioner's property, it is subject to inlet dynamics and would not be considered a "standard erosion zone"[4] as defined by S.C. Code § 48-39-270(b). Figures 6 and 7 show the results of the inlet relocation projects in 1996 and 2015, which returned the inlet complex to its 1988 configuration. Therefore, the shoreline adjacent to Captain Sams Inlet on Kiawah Island, from the mouth of the inlet to Monument 2625, continues to be influenced by Captain Sams Inlet.

[4] "(6) A standard erosion zone is a segment of shoreline which is subject to essentially the same set of coastal processes, has a fairly constant range of profiles and sediment characteristics, and is not influenced directly by tidal inlets or associated inlet shoals.

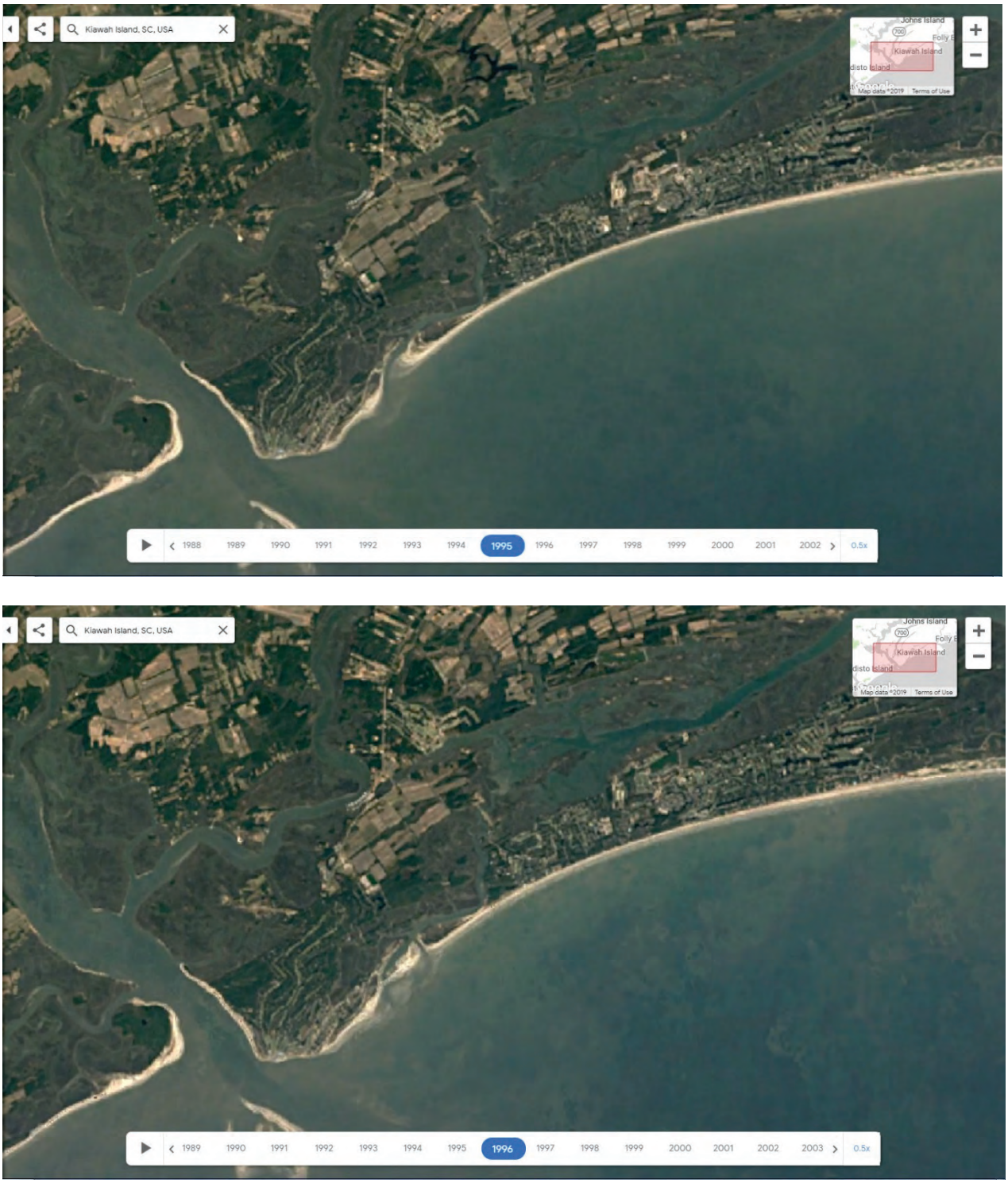


Figure 6. Aerial photos showing the Captain Sams Spit shoreline position before (top) and after (bottom) the 1996 inlet relocation project. These images were obtained from Google Earth's Timelapse: https://earthengine.google.com/timelapse/

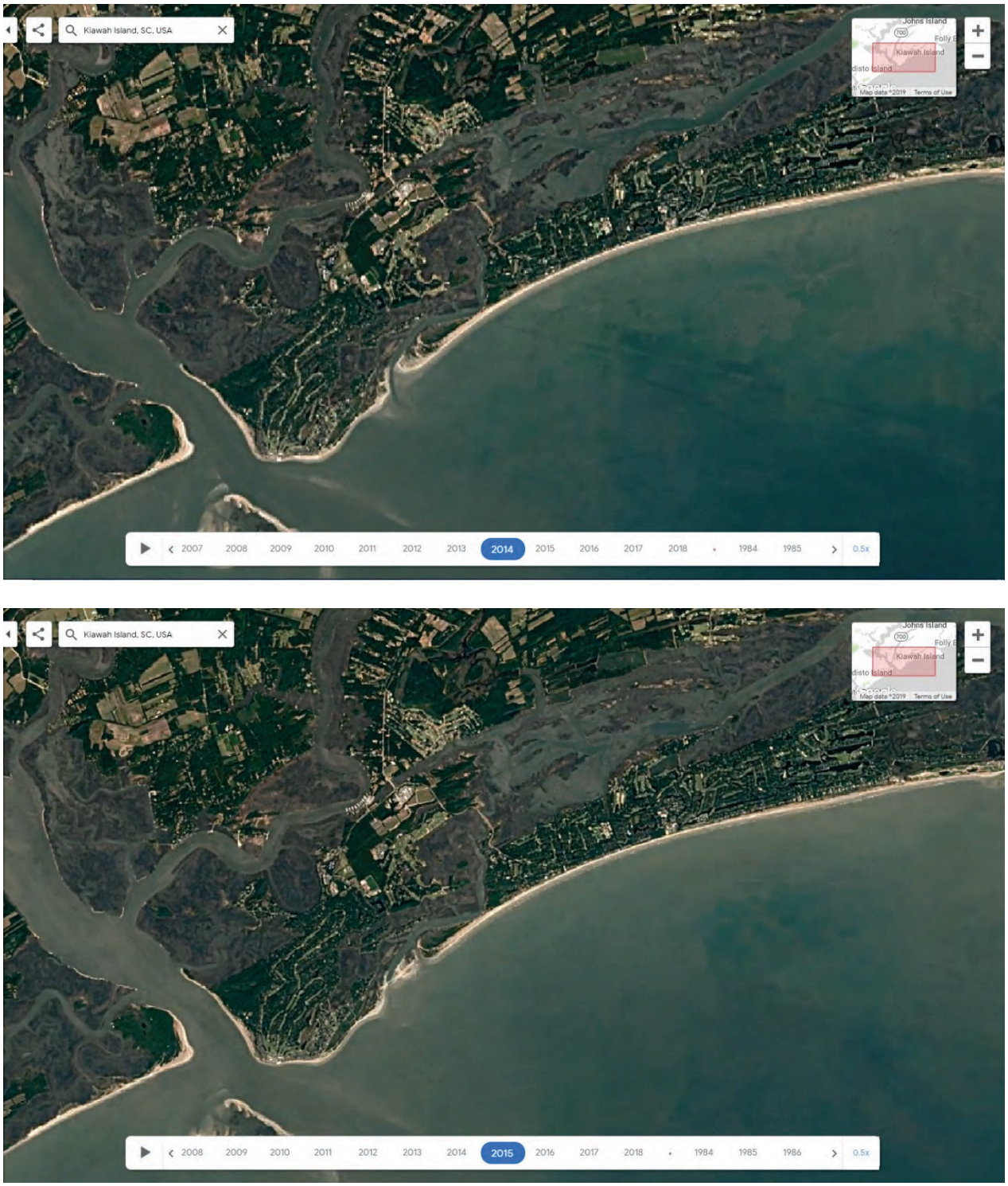


Figure 7. Aerial photos showing the Captain Sams Spit shoreline position before (top) and after (bottom) the 2015 inlet relocation project. These images were obtained from Google Earth's Timelapse: https://earthengine.google.com/timelapse/

Petitioner's Assertion #2: For all portions of the Property within the Standard Zone, the baseline should be set at what the Petitioner alleges is the crest of a primary oceanfront sand dune along the shoreline as depicted in Exhibits D and E. To support this assertion, the Petitioner provided a map titled '2015 Dune Crest Points', showing points at Monuments 2620, 2625, and 2630 and dune topographical survey data from SW+A Surveying, LLC in 2016.

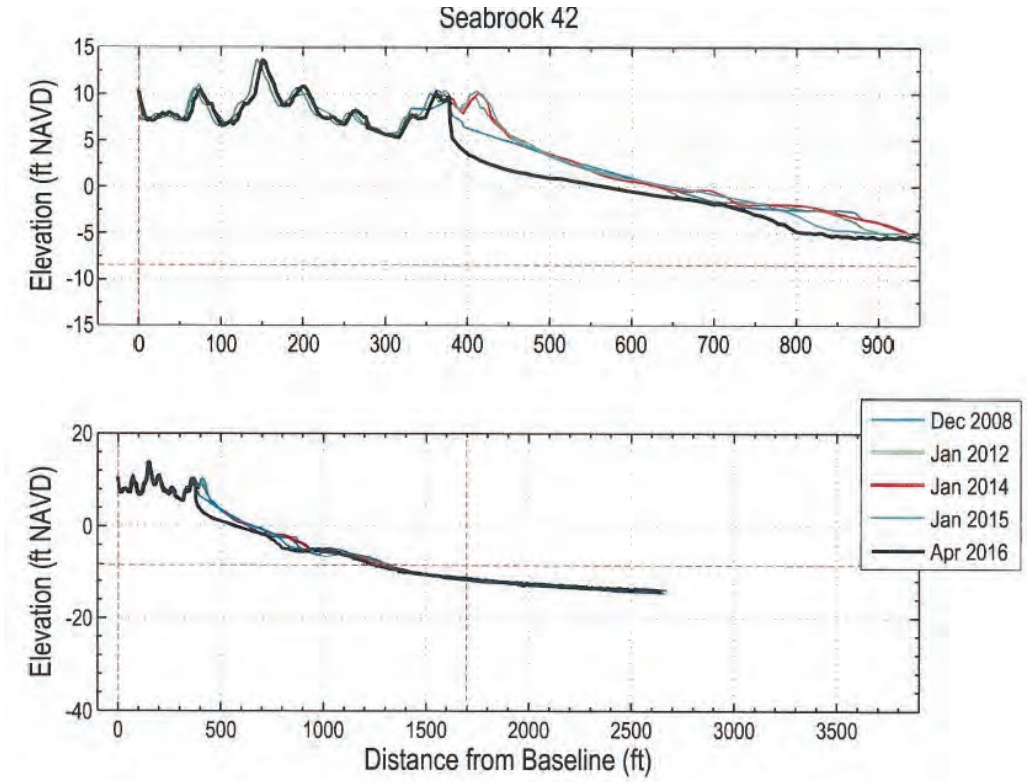
Department's Response #2: As described above in Department's Response #1, the Department maintains its position that the section of ocean shoreline from Monument 2625 and extending to the mouth of Captain Sams Inlet is correctly classified as an unstabilized inlet zone. In unstabilized inlet zones, S.C. Code Ann. § 48-39-280(A)(2) directs the Department to establish the baseline at "the most landward point of erosion at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position." The Department used shoreline data within the mandated 40 year window to establish the baseline southwest of Monument 2625. Additionally, the best available scientific and historical data of Captain Sams Inlet and adjacent beaches does not indicate that the shoreline is unlikely to return to its former position. Periodic inlet relocation projects keep this stretch of shoreline subject to inlet processes, which in turn, can result in dynamic shoreline positions adjacent to the inlet.[5]

Petitioner's Assertion #3: For the portions of the Property that remain designated within the Unstabilized Inlet Zone, the baseline should be set at the most landward point of erosion over the last 40 years. Here, the Petitioner alleges that there has been no such trend of erosion; instead, the Property continues within an unbroken trend of accretion so the baseline should be set using the data and aerial imagery resulting in a baseline along the escarpment after Hurricane Matthew. To support this assertion, the Petitioner provided average shoreline change rates between 1988 and 2017 and a photo-interpreted post-Hurricane Matthew escarpment from a NOAA aerial photo taken on October 13, 2016.

Department's Response #3: In unstabilized inlet zones, S.C. Code Ann. § 48-39-280(A)(2) directs the Department to establish the baseline at "the most landward point of erosion at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position."

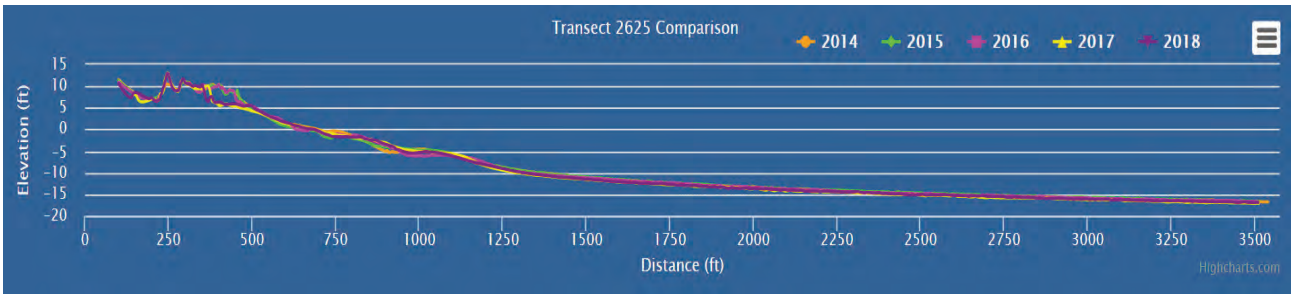
The Department disagrees with the assertion that Captain Sams Spit has experienced an unbroken trend of accretion. Exhibit A, submitted by the Petitioner, shows beach profile elevation data from a July 2016 inlet relocation monitoring report produced by Coastal Science & Engineering. Many of the profiles show erosion that has occurred between December 2008 and April 2016 (pre-Hurricane Matthew) (Figure 8). Figure 9 also shows sand volume loss in the 2017 and 2018 profiles for Transects 2625 and 2620.

[5] Even if the Department assumes for the sake of argument that the zone should be changed to a standard zone, the Petitioner has failed to show that there was a primary oceanfront sand dune where it is claiming one existed. Petitioner's data is insufficient to demonstrate that there was a dune at least 36 inches from toe to crest, and 500 feet long to qualify as a Primary Oceanfront Sand Dune per S.C. Code Ann. Regs. 30-1(D)(43). Moreover, from BERM data collected in 2018, it is evident that the sand dune Petitioner has identified is no longer present.



Date	Unit Vol (cy/ft)
Jan 2006	424.7
Nov 2006	458.5
Dec 2007	460.7
Dec 2008	441.3
Nov 2010	467.9
Jan 2012	448.4
Jan 2014	449.4
Jan 2015	439.8
Apr 2016	403.3

Figure 8. Beach profile "Seabrook 42" from Coastal Science & Engineering's July 2016 inlet relocation monitoring report, provided by the Petitioner as Exhibit A. The beach cross-sections at the top of the figure show erosion that occurred between January 2012 and April 2016. The table at the bottom of the figure shows that the unit volume of sand at this profile decreased from 448.4 cy/ft to 403.3 cy/ft over the same timeframe.



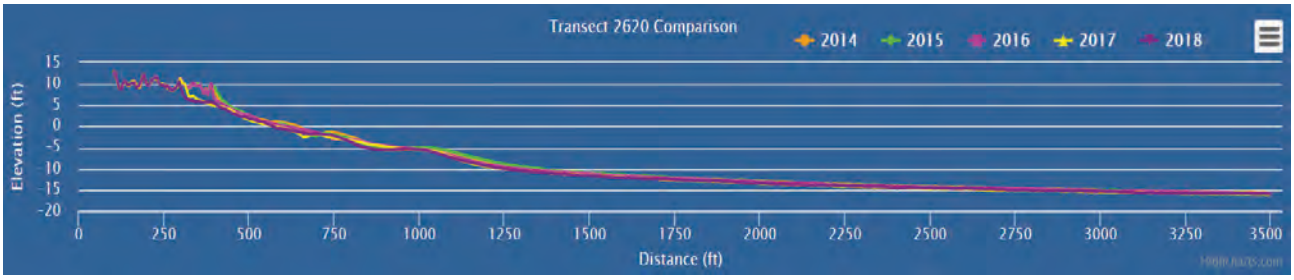


Figure 9. Beach profiles from DHEC OCRM's BERM Explorer web application showing Transects 2625 and 2620. The beach cross-sections show additional loss of sand from 2016 to 2017 and 2018.

Regardless of any recent accretion or erosion, in unstabilized inlet zones, S.C. Code Ann. § 48-39-280(A)(2) directs the Department to establish the baseline at "the most landward point of erosion at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position." The Department used shoreline data within the mandated 40 year window to establish the baseline southwest of Monument 2625. Additionally, the best available scientific and historical data of Captain Sams Inlet and adjacent beaches do not indicate that the shoreline is unlikely to return to its former position. Periodic inlet relocation projects keep this stretch of shoreline subject to inlet processes, which in turn, can result in dynamic shoreline positions adjacent to the inlet.

Petitioner's Assertion #4: Petitioner asserts that the 1988 vegetation line, utilized by the Department for the baseline, is inaccurate, and has proposed an alternative interpretation of the 1988 vegetation line. In support of this alternative interpretation, the Petitioner has provided beach profiles from the Town of Kiawah Island's 1991 local beachfront management plan. For the portions of the Property that remain designated within the unstabilized inlet zone, the Petitioner asserts that the baseline should be placed at the alternative interpretation of the 1988 vegetation line (Figure 10).

Department's Response #4: During this remand, the Department reviewed the digitization of the 1988 vegetation line for the portion of Kiawah Island west of monument 2625, and made minor modifications to fine tune the line of continuous vegetation. This reviewed vegetation line can be seen in Figure 10, and has also been provided to the Petitioner in shapefile format.

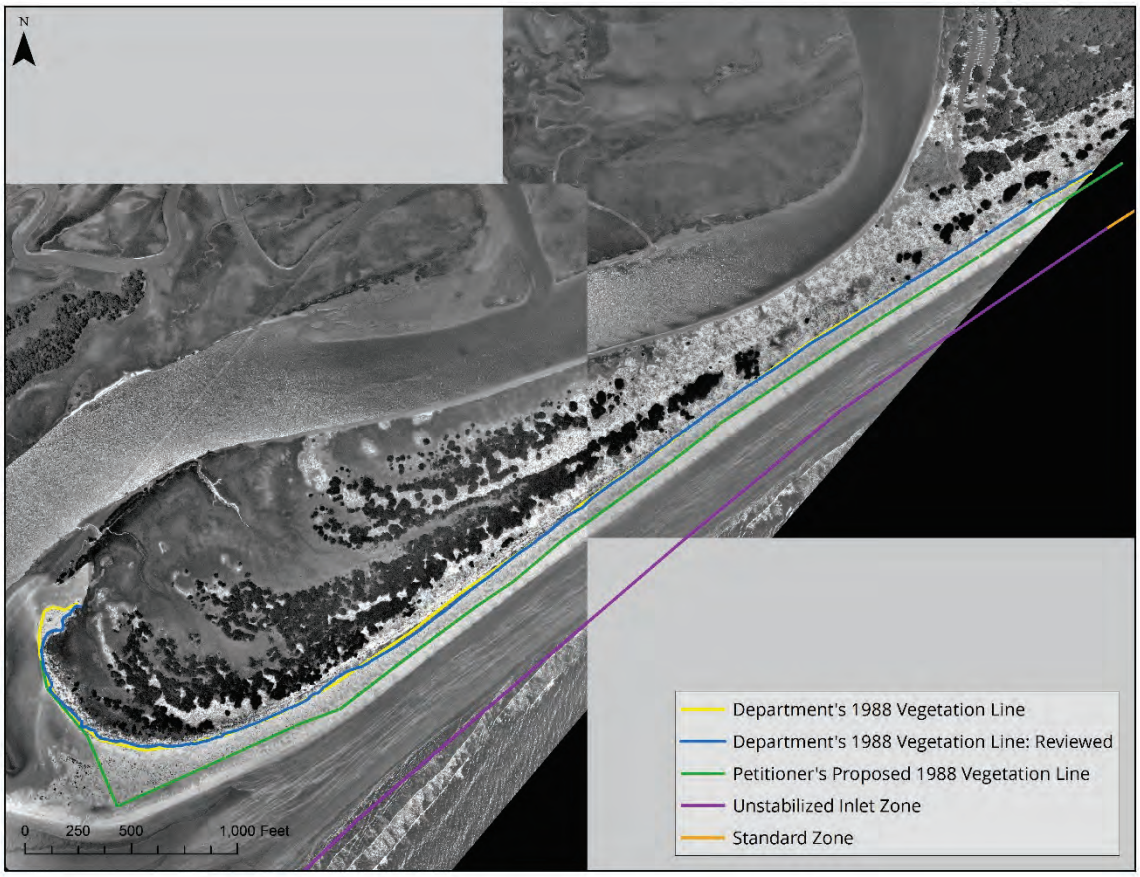


Figure 10. This map shows the 1988 aerial imagery with beach zones, the Department's original 1988 vegetation line, the Department's reviewed 1988 vegetation line, and the Petitioner's proposed 1988 vegetation line.

The beach profile charts provided by the Petitioner do not support the Petitioner's proposed vegetation line. The profile seen in Figure 11 shows a sharp increase in elevation approximately 150 feet seaward from monument 2625. As seen in Figure 12, the distance from Monument 2625 to the Department's 1988 vegetation line is approximately 150 feet.

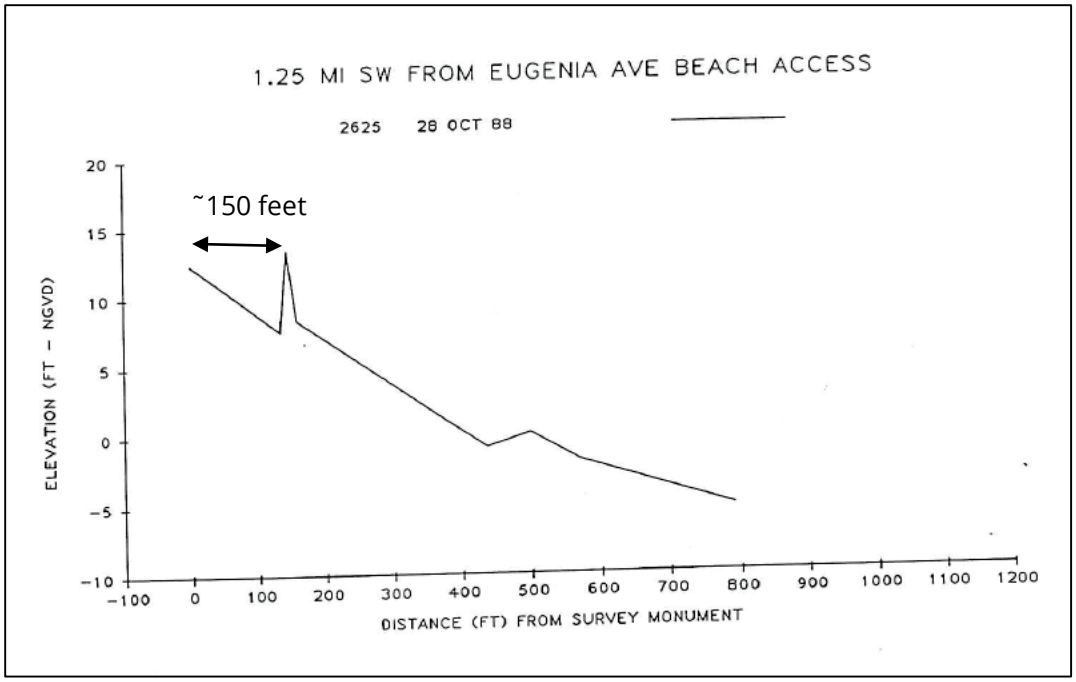


Figure 11. A chart supplied by the Petitioners from the Town of Kiawah's 1991 Beachfront Management Plan.

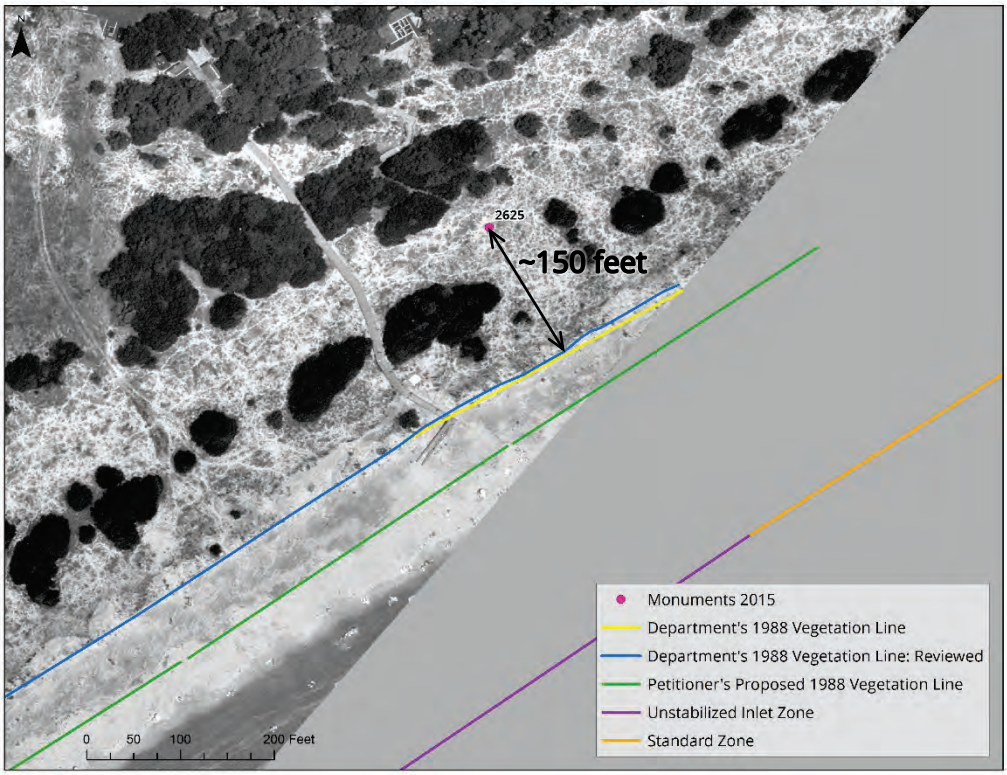


Figure 12. This map shows the 1988 aerial imagery, monument 2625, the Department's original 1988 vegetation line, the Department's reviewed 1988 vegetation line, and the Petitioner's proposed 1988 vegetation line. The distance from the monument to the Department's line is approximately 150 ft.

Finally, while the Department recognizes that there may be patches of sparse vegetation seaward of the Department's reviewed 1988 vegetation line, when digitizing a line of continuous vegetation (Figure 13), these sporadic clumps do not constitute a continuous line.

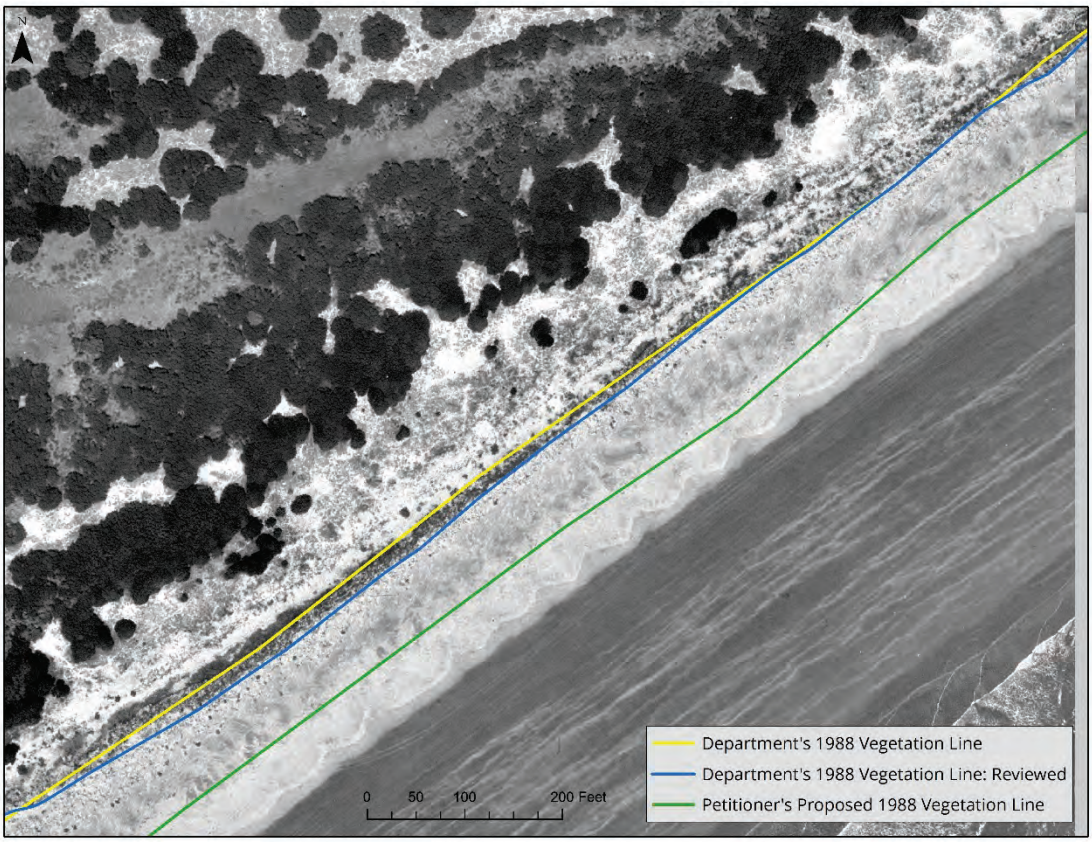


Figure 13. This map shows the 1988 aerial imagery, the Department's original 1988 vegetation line, the Department's reviewed 1988 vegetation line, and the Petitioner's proposed 1988 vegetation line. The purpose of the map is to visually show the line of continuous vegetation, as demarcated by the Department's reviewed vegetation line.

The Department maintains its position that the baseline is accurately established in this unstabilized inlet zone using 40 years of historical shoreline data. The Department considers the reviewed 1988 vegetation line to be the most landward point of erosion in the last 40 years. This is the Department's final decision on remand.

Please let us know if you have any questions.

Sincerely,

Elizabeth B. von Kolnitz
Chief
Office of Ocean and Coastal Resource Management

cc: Matthew J. Slagel, Beachfront Permitting Project Manager, DHEC-OCRM
Jessica B. Boynton, Shoreline Specialist, DHEC-OCRM
Sallie P. Phelan, Attorney, DHEC

STATE OF SOUTH CAROLINA

BEFORE THE BOARD OF

THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

KDP, II, LLC, Petitioner, vs. SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, Respondent,	)	**REQUEST FOR FINAL REVIEW CONFERENCE** This Request Relates To: Final Decision on Remand (December 6, 2019) TMS Nos. 207-05-00-001 and 207-05-00-0011 OCRM Survey Profile Stations: 2615, 2620, 2625

This Request for Final Review Conference ("RFRC") involves the final staff determination of the jurisdictional lines on Petitioner's oceanfront property. In accordance with S.C. Code § 44-1-60(E), Petitioner seeks a conference before the Board to review the final decision of the Department staff on remand by the Administrative Law Court ("ALC") in Docket No. 18-ALJ-07-0047-CC. The purpose of the ALC's remand was to allow Department staff to further consider Petitioner's positions and information to determine whether to adjust the beachfront jurisdictional lines. Department staff issued its Final Decision on Remand on December 6, 2019, copy attached as Exhibit 1, rejecting Petitioner's positions and, instead, making only minor adjustments to the baseline.

Petitioner, KDP II, LLC, ("Petitioner" or "KDP"), is the owner of oceanfront property on the southwestern end of Kiawah Island called Captain Sams Spit, comprised of the land southwest of Beachwalker Park (i.e., generally from Department monument station 2625

extending southwest to Captain Sams Inlet). The parcels included are identified by Charleston County TMS numbers 207-05-00-001 and 207-05-00-0011) ("the Property").

The Department first established the baseline and setback line on the Property in 1999. Because of the 70-year long-term trend of accretion of the beach on the Property, the Department placed the setback line 20 feet behind the baseline, the minimum separation allowed by statute.

In 2009 the Department re-delineated the jurisdictional lines on the Property, slightly moving the baseline seaward and again setting the setback line the minimum 20 feet behind the baseline.

During the next delineation cycle, the Department released its preliminary delineation of the jurisdictional lines for the entire South Carolina coast on October 6, 2017. This preliminary determination showed very little change to the baseline on the Property and again placed the setback line the minimum distance of 20 feet behind the proposed baseline.

After releasing its preliminary determinations on the location of the jurisdictional lines on October 6, 2017, the Department extended the deadline for comments until April 6, 2018. At that time, S.C. Code § 48-39-280 specified that the baseline could not be moved seaward after December 31, 2017. The Department's decision to extend the comment period into 2018 had the immediate effect of establishing the baseline at its existing location and preventing any adjustment seaward at any future time no matter the extent of the beach's accretion. The Department informed oceanfront property owners that if they believed their baseline should be moved seaward from its current location, they should protect their rights and pursue review. KDP did just that.

THE PRIOR RFRC AND APPEAL TO THE ALC

KDP filed its first RFRC on November 20, 2017, asserting that the baseline should be

moved seaward from its 2009 location based on the provisions of the controlling statutes and regulations as applied to the accretional history of the Property over the last 40 years and other compelling information. The Board designated KDP's Request as Case No. 17-RFR-44.

By letter dated January 5, 2018, the Board declined to conduct a final review conference in Case No. 17-RFR-44.

On February 5, 2018 KDP filed its Appeal and Request for Contested Case Hearing with the ALC.

THE BASELINE REFORM ACT

Because of the public outcry over the preliminary determinations of the jurisdictional lines only one year after Hurricane Matthew and other concerns, the General Assembly passed sweeping amendments to the statutes governing the determination of the jurisdictional lines in its 2018 session in what became known as the Baseline Reform Act, 2018 Act No. 173 (H.4683). These were signed into law by Governor McMaster on May 3, 2018. The amendments included two savings clauses that preserved the rights of property owners who filed timely appeals before January 1, 2018. S.C. Code § 48-39-280(A)(4) and § 48-39-285(B). The amendments specified, among other things, that the final baseline of affected property owners would be the most seaward of: (1) the lines established during the 2008 through 2012 establishment cycle, or (2) the lines proposed by the department on October 6, 2017, or (3) the lines established pursuant to a review by the Department or an appeal initiated before January 1, 2018.

THE ALC CASE AND THE REMAND

In compliance with S.C. Code Ann. § 44-1-60(G) and S.C. Code Ann. § 48-39-280(E), KDP filed its Request for Contested Case Hearing with the ALC on February 5, 2018. KDP sought to have the ALC conduct a de novo evidentiary hearing on the Department's denial of

KDP's request to move the baseline and, necessarily, the setback line seaward of both the 2009 delineation and the preliminary delineation of the Property rendered by the Department on October 6, 2017.

The Department filed a Motion to Dismiss KDP's appeal to the ALC on multiple grounds including asserting that the Baseline Reform Act mooted KDP's appeal and prevented the Department from moving the baseline seaward. By Order dated March 29, 2019, Administrative Court Judge Shirley C. Robinson denied the Department's Motion to Dismiss ("the Order").

On April 8, 2019, KDP moved the Court to reconsider and delete Footnote l2 in the Order wherein the Court stated:

> [T]he relief this Court can give Petitioner, at this juncture, is limited to preserving Petitioner's right to a review that contemplates seaward movement of the jurisdictional lines. Because the Department has not issued a final decision on the merits contemplating seaward movement [of the jurisdictional lines at Petitioner's property], this Court cannot make any determinations as to the actual placement of the jurisdictional lines on Petitioner's property. In this respect, Petitioner has not yet exhausted its administrative remedies.

Order, at p.16.

After the filing of KDP's Motion to Reconsider, the parties conferred and proposed a Consent Order of Stay and Remand that was entered by the ALC on June 6, 2019 ("Consent Order"). Pursuant to the Consent Order the ALC proceeding was stayed and the matter was remanded to the Department to allow staff to make a final decision on the merits of KDP's assertions. By consent of the parties and the ALC, the deadline for the final Department decision on remand was ultimately extended until December 6, 2019.

Pursuant to the Consent Order and without waiver of the positions asserted in its prior filings, KDP provided further information and data to the Department staff after remand for their consideration in the review required in the Consent Order. KDP also met two times with staff to

discuss the pertinent consideration and issues.

On December 6, 2019, the Department issued its Final Decision on Remand, Exhibit 1. In its Final Decision on Remand, the Department Staff rejected the KDP's assessment of where the baseline should be located under the regulatory standards, refused to move the jurisdictional lines seaward, and simply tweaked the existing, previous location of the baseline.

GROUNDS FOR REQUEST FOR FINAL REVIEW CONFERENCE

KDP now requests the Board grant a Final Review Conference of the Final Decision on Remand for reasons that include, but are not limited to, those previously set forth in KDP's Request for Final Review Conference dated November 20, 2017, KDP's Request for Contested Case Hearing dated February 5, 2018, and the supplemental information provided by KDP to the Department staff during the remand.

Among other reasons for granting the Final Review Conference, KDP would show:

1. For the portion of the Property in the unstablized inlet zone, the Department staff refused to apply the statutory standard that the baseline be established at "the most landward point of erosion at any time during the past forty years." S.C. Code § 48-39-280 (A)(2). Instead, the Department staff set the baseline where it believed was a continuous line of established vegetation on the basis of staff's interpretation of aerial photographs. Setting the baseline in the location of a continuous line of established vegetation is completely contrary to the express wording of the statutory criterion.

2. The best available scientific and historical data demonstrate that the beachfront of the Property is accreting over the long term rather than eroding, placing the most landward point of erosion far seaward of the location determined by the Department staff on remand.

3. Because the best available scientific and historical data demonstrate that the beachfront of the Property is accreting over the long term rather than eroding, the post-Hurricane Matthew shoreline is the most landward point of erosion over the last 40 years.

4. For the portion of the Property in the unstablized inlet zone, the Department staff mistakenly found that the best available scientific and historical data indicate that the shoreline is unlikely to return to its former position. Instead, the best available scientific

and historical data from the last 40 years indicate that the shoreline is not likely to return to its position 40 years ago but instead to continue to move seaward over the long term as it has over the last 70 years. For this additional reason, the baseline should be established at the post-hurricane shoreline.

5. The Department staff relied on aerial photographs in establishing the jurisdictional lines on Property rather primarily depending on the monument survey data as required by the controlling statute: "In order to locate the baselines and the setback lines, the department must establish monumented and controlled survey points in each county fronting the Atlantic Ocean. The department must acquire sufficient surveyed topographical information on which to locate the baselines." S.C. Code § 48-39-280 (E)(1)

6. The demarcation between the standard zone and the unstabilized inlet zone should be adjusted to a point west of Monument 2615 thereby including much of the Property within the standard zone and the baseline should be set the crest of the primary oceanfront sand dune along the shoreline in the revised standard zone.

7. The Department staff's position that it has no authority to adjust the setback line even if it adjusts the baseline is legally incorrect. S.C. Code § 48-38-280 (B) mandates that the location of the setback line is tied to the location of the baseline. Moving the baseline moves the setback line as a matter of law: "To implement the beach preservation policy provided for in subsection (A), a setback line ***must be established landward of the baseline*** a distance which is forty times the average annual erosion rate or not less than twenty feet ***from the baseline*** for each erosion zone based upon the best historical and scientific data adopted by the department as a part of the State Comprehensive Beach Management Plan." S.C. Code § 48-38-280 (B) (double emphasis added).

8. The Baseline Reform Act further provides that the Department has the authority to move the setback line if it moves the baseline: "(B) Notwithstanding the provisions of subsection (A) and Section 48-39-280, *if the department, pursuant to a review or an appeal initiated before January 1, 2018, revises the baseline proposed on October 6, 2017, to a location seaward of both the baseline established during the 2008 through 2012 establishment cycle and the baseline proposed on October 6, 2017,* ***then both the revised proposed baseline and revised proposed setback line will be in effect for the landowner until the department establishes a new baseline and setback line***." S.C. Code § 48-38-285 (B) (emphasis and double emphasis added).

9. The Department staff incorrectly stated that because KDP did not specifically appeal the setback line in its first RFRC, the Department cannot adjust the setback line on the Property if it were to adjust the baseline. The Department staff disregards the previously

mentioned statutory provisions tying the location of the setback line to the location of the baseline. The Department staff further disregards the following statement in KDP's previous RFRC: "Because of the fully substantiated history of accretion of the Property over the last 70 years, KDP does not take issue with the Department's preliminary determination that the setback line on the Property should be situated at the minimum distance of 20 feet behind the baseline and does not seek at this time a final review conference of that preliminary determination of Department as to the Property." KDP's Request for Final Review Conference dated November 20, 2018, p. 2.

In addition to these specifically enumerated grounds, KDP incorporates by reference all grounds set forth in its previous submissions to this Board and the Department Staff.

The Department staff's Final Decision on Remand is contrary to the controlling statutes and regulations, is arbitrary and capricious, is not based on the best historic and scientific data over the last 40 years and deprives KDP of its valuable property rights.

For these reasons KDP requests the Board:

a. grant a final review conference to allow KDP to present its positions based on the administrative record in this matter;

b. reverse the Department staff's final decision on remand and delineate the baseline at the shoreline after Hurricane Matthew in the unstablized inlet zone;

c. adjust the demarcation between the unstabilized inlet zone and the standard zone, and delineate the baseline at the crest of the oceanfront dune; and,

d. establish the setback line 20 feet behind the adjusted baseline as required by statute.

Respectfully Submitted

Thomas P. Gressette, Jr. (SC Bar #14065)
Direct: (843) 727-2249
Email: Gressette@WGFLLAW.com

G. Trenholm Walker (SC Bar #5777)
Direct: (843) 727-2208
Email: Walker@WGFLLAW.com

WALKER GRESSETTE FREEMAN & LINTON, LLC
Mail: P.O. Drawer 22167, Charleston, SC 29413
Office: 66 Hasell Street, Charleston, SC 29401
Phone: (843) 727-2200

ATTORNEYS FOR PETITIONER, KDP, II, LLC

December 23, 2019

Charleston, SC

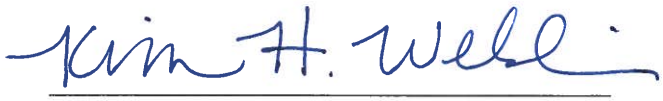
CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2019, in Charleston, South Carolina, I served a copy of the foregoing REQUEST FOR FINAL REVIEW CONFERENCE (Final Decision on Remand issued December 6, 2019) on all other parties and the Administrative Law Court by depositing the same in the United States Mail, First Class, postage paid, to the following:

Sallie P. Phelan
Bradley Churdar, Esq
South Carolina Department of Health and Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, South Carolina 29405

Honorable Shirley C. Robinson
S.C. Administrative Law Court
Edgar Brown Building
1205 Pendleton Street
Columbia, SC 29201

Denise Crawford, Clerk of the Board
South Carolina Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201



Healthy People. Healthy Communities.

December 6, 2019

Via U.S. Mail & Electronic Mail

G. Trenholm Walker, Esquire (Walker@WGFFLAW.com)
Thomas P. Gressette, Jr. (Gressette@WGFFLAW.com)
Walker, Gressette, Freeman, and Linton
Post Office Box 22167
Charleston, SC 29413

Re: *KDP II, LLC v. SCDHEC*
Docket No. 18-ALJ-07-0047-CC

Dear Trenholm and Tom:

Please find enclosed for service upon you the Department's Final Decision on Remand in the above-referenced case.

Please address all correspondence in this matter to my attention at 1362 McMillan Avenue, Suite 400, Charleston, South Carolina 29405.

If you have any questions or concerns, please give me a call at 843-953-0229.

Sincerely,

Sallie P. Phelan

Sallie P. Phelan
Assistant General Counsel

SPP

Enclosure

2018-OCR-OC04-0042 (23215)

December 6, 2019

KDP II, LLC
c/o Walker Gressette Freeman & Linton, LLC
P.O. Box 22167
Charleston, SC 29401

RE: Docket No. 18-ALJ-07-0047-CC, "Captain Sams Spit", TMS Nos. 207-05-00-001 and 207-05-00-0011, Kiawah Island, SC

Dear Mr. Walker and Mr. Gressette:

The above-referenced case has been remanded to the S.C. Department of Health & Environmental Control (the Department) for a determination of new beachfront jurisdictional lines under S.C. Code Ann. § 48-39-280. The determination is to be made following receipt of supplemental information provided by the Petitioner. This supplemental information was received by the Department on June 5, 2019 and September 26, 2019 and is summarized below. The Department's responses are also provided below, following each point raised by the Petitioner. This Petitioner has preserved an appeal pursuant to S.C. Code Ann. § 48-39-285(b) of the baseline only and therefore, the Department does not have authority to change the legislature's mandatory establishment of the setback line pursuant to the Beachfront Management Reform Act.

Petitioner's Assertion #1: The demarcation between the Standard Zone and the Unstabilized Inlet Zone should be adjusted to a point west of Monument 2615 thereby including most of the Property within the Standard Zone. To support this assertion, the Petitioner provided beach profile elevation data and a digital terrain model, both from a July 2016 inlet relocation monitoring report produced by Coastal Science & Engineering, and an aerial photo of Captain Sams Spit from March 2018.

Department's Response #1: The area adjacent to Captain Sams Inlet beginning at Monument 2625 and extending to the inlet is classified as an unstabilized inlet zone. "An inlet erosion zone is a segment of shoreline along or adjacent to tidal inlets which is influenced directly by the inlet and its associated shoals." S.C. Code Ann. § 48-39-270(7). The unstabilized inlet zone designation in this area has been in place since the S.C. Beachfront Management Act became law in 1988. These zone designations are established in S.C. Code Ann. Regs. 30-21 (Figure 1). The Department is not charged with reassessing the shoreline zone classifications when it is reviewing the baseline and setback lines pursuant to S.C. Code Ann. § 48-39-280. In the late 1980s, when the Department was establishing zone classifications, it reviewed two documents provided by Coastal Science & Engineering, Inc. (1988[1] and 1989[2]), which

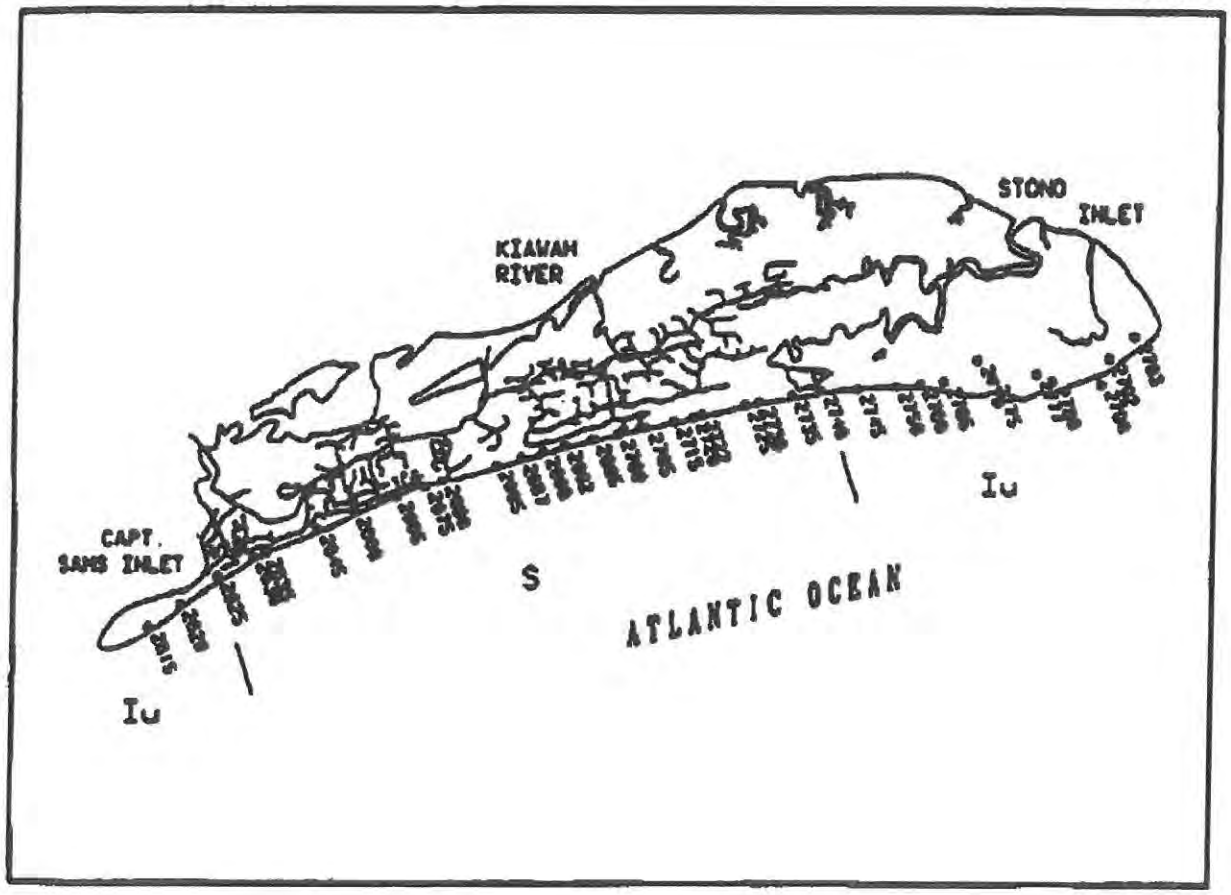
[1] Jones, Christopher P., David M. Scaturo, Timothy W. Kana, and William C. Eiser. June 1988. "Calculation of Interim Baselines and 40-Year Setback Lines." [CSE '87-88 R-16]. Coastal Science & Engineering, Inc., Columbia, SC.

[2] Jones, Christopher P. January 1989. "Summary of Proposed Revisions to Interim Baseline and Setback Line at Kiawah Island." [CSE '88-89 R-05]. Coastal Science & Engineering, Inc., Columbia, SC.

contained information related to the baseline and setback line on Kiawah Island. This information assisted the Department in the establishment of interim and final shoreline zone classifications and jurisdictional lines. Although, the Department does not reclassify beach zones during the line review process, for the purposes of this remand, the Department reviewed the underlying parameters associated with zone designation, and determined that the zones were still valid as described below.

Kiawah Island
Charleston County

Figure 17



South Carolina beachfront jurisdictional lines approved - 7/21/89, 1/19/89
reference orthophotographs: #309 through 333
monument numbers refer to the SCCC beachfront monument network
notes:

Figure 1. Beach zone designations for Kiawah Island from S.C. Code Ann. Regs. 30-21. 'Iu' designates unstabilized inlet zones, and 'S' designates standard zones.

The Department's position is that the shoreline adjacent to Captain Sams Inlet on Kiawah Island, from the mouth of the inlet to Monument 2625, continues to be influenced by Captain Sams Inlet. The zone designations were originally established based on historical shoreline positions and offshore bathymetry contours. Specifically, inlet erosion zones were designated where historic shorelines are not parallel to one another and where offshore contours are not parallel to the present shoreline.[3] Analysis of historical shoreline positions and offshore bathymetry contours in 1988 led Coastal Science & Engineering to conclude that the unstabilized inlet zone adjacent to Captain Sams Inlet should extend from the mouth of the inlet to Monument 2625 (Figure 2).

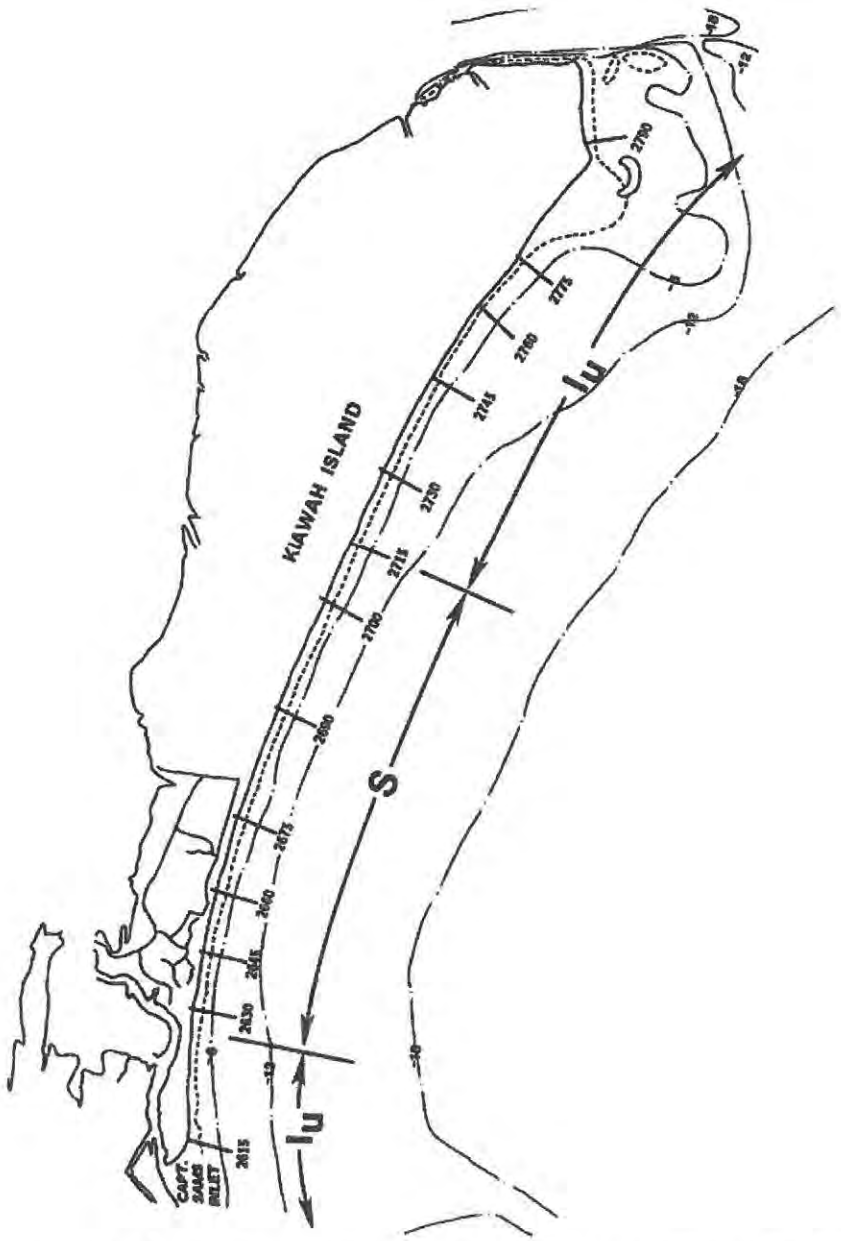


Figure 2. Map of erosion zone designations on Kiawah Island from Jones et al., June 1988. 'lu' designates unstabilized inlet zones, and 'S' designates standard zones.

[3] Jones et al. June 1988.

The -6 foot, -12 foot, and -18 foot depth contours shown in Figure 2 demonstrate the presence of the ebb shoal complex associated with Stono Inlet to the north of Kiawah Island and the ebb shoal complex associated with Captain Sams Inlet and the North Edisto River Inlet to the south of Kiawah Island. Updated shoreline data and offshore bathymetry contours continue to show that the shoreline southwest of Monument 2625 to the mouth of the inlet is an unstabilized inlet zone. The shoreline positions along the standard erosion zone of Kiawah Island are spaced tightly together with a consistent orientation. Around Monument 2625, the historical shoreline positions diverge and become spaced more widely apart, indicating that the shoreline in this zone is more dynamic (Figure 3).

Figure 3. Updated shoreline positions along Kiawah Island showing closely spaced shorelines in the standard erosion zone and divergence in the shoreline positions in the unstabilized inlet zone, beginning around Monument 2625.

Current nautical charts from the National Oceanic and Atmospheric Administration (NOAA) also show that the offshore bathymetry contours are not parallel with the current shoreline from the mouth of the inlet to Monument 2625 (Figure 4). The orientations of the contours shift at Monument 2625, which is consistent with the original erosion zone designations established in 1988 (see Figure 2).

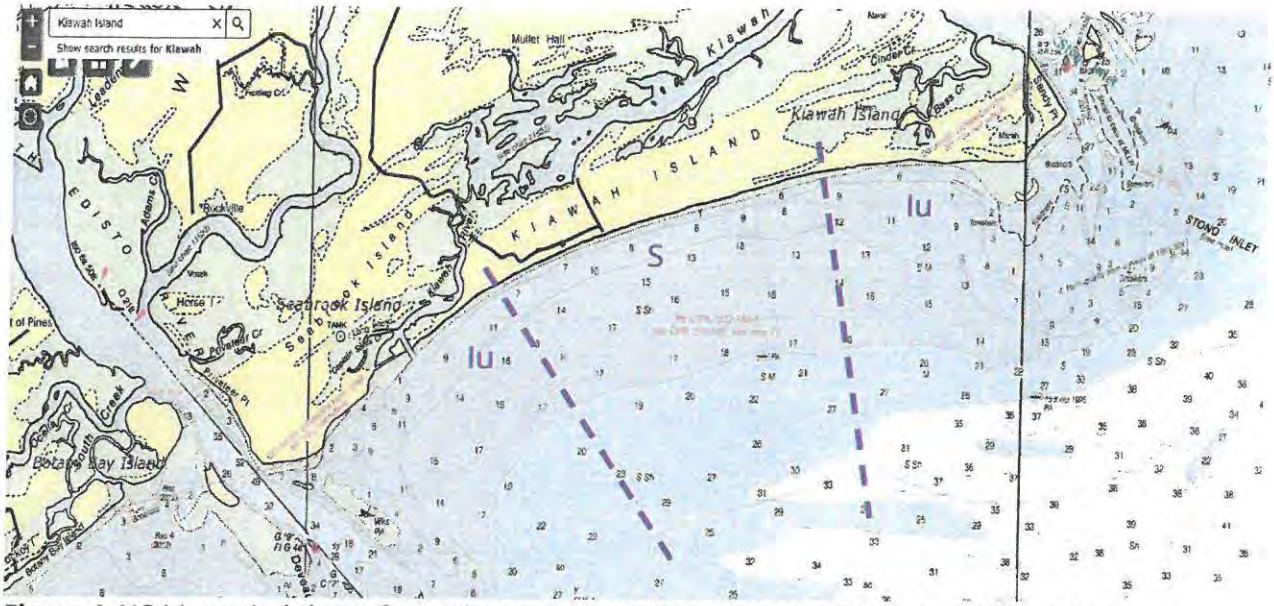


Figure 4. NOAA nautical chart of Kiawah Island, showing the -6 foot, -12 foot, and -18 foot depth contours. The dashed purple lines indicate where the orientations of the offshore bathymetry contours shift and the corresponding points along the shoreline where the erosion zones transition from unstabilized inlet zones (lu) to a standard erosion zone (S). Chart obtained from https://nauticalcharts.noaa.gov/rnconline/rnconline.html.

The Department also reviewed the supplemental information submitted by the Petitioner. Beach profile elevation data are not the sole data source used by the Department to designate erosion zones. As summarized above, the zones were originally designated based on historical shoreline positions and offshore bathymetry contours. These data sources continue to show that the unstabilized inlet zone adjacent to Captain Sams Inlet is designated correctly. The Petitioner also submitted a digital terrain model showing LiDAR data of Captain Sams Spit from a July 2016 inlet relocation monitoring report. The Petitioner asserts that this digital terrain model provides sufficient information to justify a re-designation of the shoreline from an unstabilized inlet zone to a standard zone. The Department disagrees with this assertion. The digital terrain model shows LiDAR data covering the upland and a very limited swath of the nearshore coastal ocean (approximately 1,000 feet offshore). The -18 foot offshore bathymetry contour shown in Figure 4 is located approximately 2 miles offshore. Bathymetric data covering larger distances offshore is needed to evaluate the extent of ebb shoal complexes and shifts in the orientation of bathymetry contours.

The mouth of Captain Sams Inlet naturally migrates in a southwesterly direction towards Seabrook Island. However, inlet relocation projects in 1983, 1996, and 2015 have moved the inlet mouth back towards Kiawah Island. These inlet relocation projects have resulted in Captain Sams Inlet and the adjacent shorelines being maintained in approximately the same position over time. When the inlet mouth migrates too close to Seabrook Island, it is moved back towards Kiawah Island so it does not threaten structures or infrastructure on either island (Figure 5). The Petitioner has not provided sufficient evidence to demonstrate that the effects of Captain Sams Inlet on adjacent shorelines have been reduced. Rather, the periodic inlet relocation projects have resulted in similar shoreline dynamics as there were in 1988, when the zone designations were first established. The ebb shoal complex offshore and its interactions with waves and currents result in dynamic shorelines in unstabilized inlet zones.

Figure 5. Aerial photo of Captain Sams Inlet, immediately following the 2015 inlet relocation project. A new inlet mouth was cut through Kiawah Island to the north (top of photo), and a sand berm was constructed across the former inlet mouth to the south (bottom of photo).

The Department's permit for the last Captain Sams Inlet Relocation Project in 2015 (P/N 2008-1870-2IG) allowed the Seabrook Island Property Owners Association to "relocate Captain Sams Inlet from its existing position to its 1963/1983/1996 position through Kiawah spit between Kiawah Island and Seabrook Island" and to provide "erosion control and maintenance of a sediment supply to Seabrook Island." This approach to inlet management will likely continue in the future as Seabrook Island property owners seek to keep the inlet mouth sufficiently far away from structures and infrastructure on Seabrook Island. Because of the location of Petitioner's property, it is subject to inlet dynamics and would not be considered a "standard erosion zone"[4] as defined by S.C. Code § 48-39-270(b). Figures 6 and 7 show the results of the inlet relocation projects in 1996 and 2015, which returned the inlet complex to its 1988 configuration. Therefore, the shoreline adjacent to Captain Sams Inlet on Kiawah Island, from the mouth of the inlet to Monument 2625, continues to be influenced by Captain Sams Inlet.

[4] "(6) A standard erosion zone is a segment of shoreline which is subject to essentially the same set of coastal processes, has a fairly constant range of profiles and sediment characteristics, and is not influenced directly by tidal inlets or associated inlet shoals.

Figure 6. Aerial photos showing the Captain Sams Spit shoreline position before (top) and after (bottom) the 1996 inlet relocation project. These images were obtained from Google Earth's Timelapse: https://earthengine.google.com/timelapse/

Figure 7. Aerial photos showing the Captain Sams Spit shoreline position before (top) and after (bottom) the 2015 inlet relocation project. These images were obtained from Google Earth's Timelapse: https://earthengine.google.com/timelapse/

Petitioner's Assertion #2: For all portions of the Property within the Standard Zone, the baseline should be set at what the Petitioner alleges is the crest of a primary oceanfront sand dune along the shoreline as depicted in Exhibits D and E. To support this assertion, the Petitioner provided a map titled '2015 Dune Crest Points', showing points at Monuments 2620, 2625, and 2630 and dune topographical survey data from SW+A Surveying, LLC in 2016.

Department's Response #2: As described above in Department's Response #1, the Department maintains its position that the section of ocean shoreline from Monument 2625 and extending to the mouth of Captain Sams Inlet is correctly classified as an unstabilized inlet zone. In unstabilized inlet zones, S.C. Code Ann. § 48-39-280(A)(2) directs the Department to establish the baseline at "the most landward point of erosion at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position." The Department used shoreline data within the mandated 40 year window to establish the baseline southwest of Monument 2625. Additionally, the best available scientific and historical data of Captain Sams Inlet and adjacent beaches does not indicate that the shoreline is unlikely to return to its former position. Periodic inlet relocation projects keep this stretch of shoreline subject to inlet processes, which in turn, can result in dynamic shoreline positions adjacent to the inlet.[5]

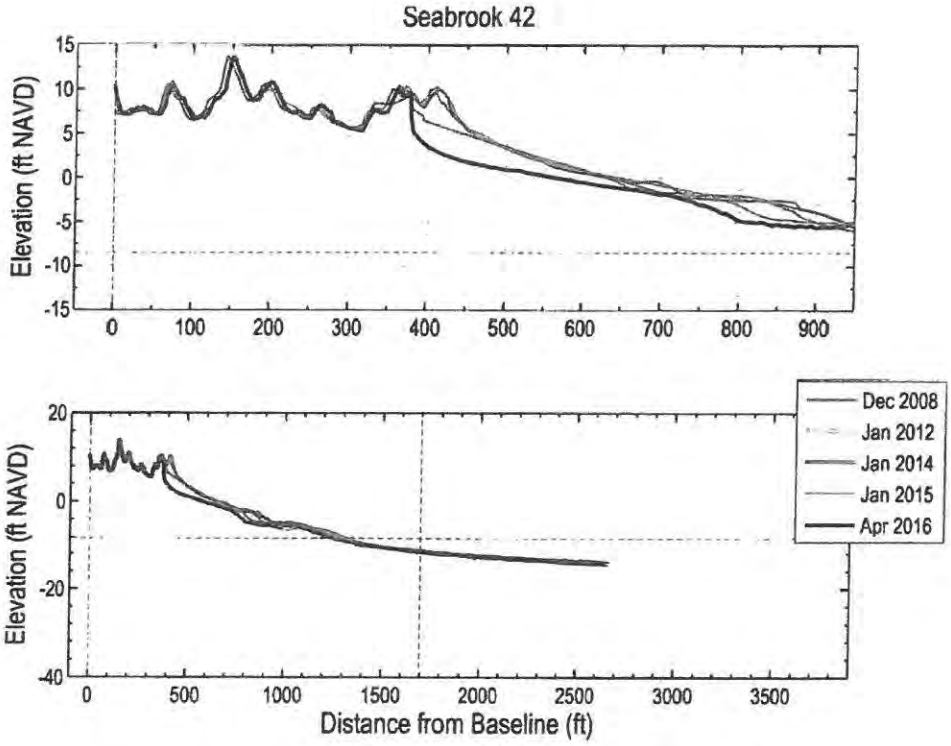
Petitioner's Assertion #3: For the portions of the Property that remain designated within the Unstabilized Inlet Zone, the baseline should be set at the most landward point of erosion over the last 40 years. Here, the Petitioner alleges that there has been no such trend of erosion; instead, the Property continues within an unbroken trend of accretion so the baseline should be set using the data and aerial imagery resulting in a baseline along the escarpment after Hurricane Matthew. To support this assertion, the Petitioner provided average shoreline change rates between 1988 and 2017 and a photo-interpreted post-Hurricane Matthew escarpment from a NOAA aerial photo taken on October 13, 2016.

Department's Response #3: In unstabilized inlet zones, S.C. Code Ann. § 48-39-280(A)(2) directs the Department to establish the baseline at "the most landward point of erosion at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position."

The Department disagrees with the assertion that Captain Sams Spit has experienced an unbroken trend of accretion. Exhibit A, submitted by the Petitioner, shows beach profile elevation data from a July 2016 inlet relocation monitoring report produced by Coastal Science & Engineering. Many of the profiles show erosion that has occurred between December 2008 and April 2016 (pre-Hurricane Matthew) (Figure 8). Figure 9 also shows sand volume loss in the 2017 and 2018 profiles for Transects 2625 and 2620.

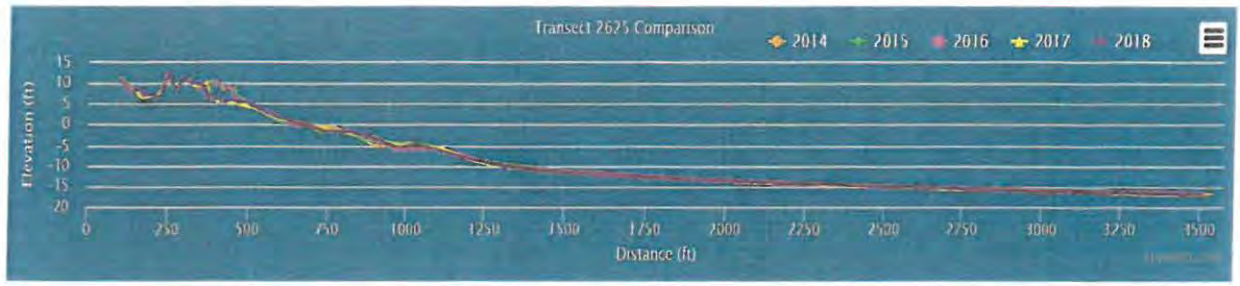
---

[5] Even if the Department assumes for the sake of argument that the zone should be changed to a standard zone, the Petitioner has failed to show that there was a primary oceanfront sand dune where it is claiming one existed. Petitioner's data is insufficient to demonstrate that there was a dune at least 36 inches from toe to crest, and 500 feet long to qualify as a Primary Oceanfront Sand Dune per S.C. Code Ann. Regs. 30-1(D)(43). Moreover, from BERM data collected in 2018, it is evident that the sand dune Petitioner has identified is no longer present.



Date	Unit Vol (cy/ft)
Jan 2006	424.7
Nov 2006	458.5
Dec 2007	460.7
Dec 2008	441.3
Nov 2010	467.9
Jan 2012	448.4
Jan 2014	449.4
Jan 2015	439.8
Apr 2016	403.3

Figure 8. Beach profile "Seabrook 42" from Coastal Science & Engineering's July 2016 inlet relocation monitoring report, provided by the Petitioner as Exhibit A. The beach cross-sections at the top of the figure show erosion that occurred between January 2012 and April 2016. The table at the bottom of the figure shows that the unit volume of sand at this profile decreased from 448.4 cy/ft to 403.3 cy/ft over the same timeframe.



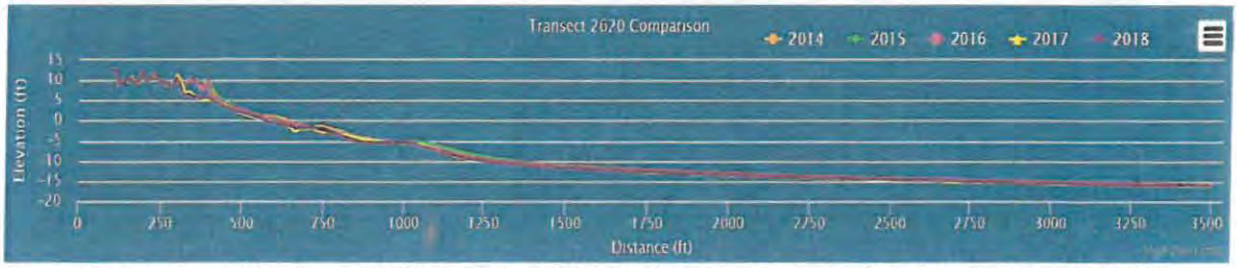


Figure 9. Beach profiles from DHEC OCRM's BERM Explorer web application showing Transects 2625 and 2620. The beach cross-sections show additional loss of sand from 2016 to 2017 and 2018.

Regardless of any recent accretion or erosion, in unstabilized inlet zones, S.C. Code Ann. § 48-39-280(A)(2) directs the Department to establish the baseline at "the most landward point of erosion at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position." The Department used shoreline data within the mandated 40 year window to establish the baseline southwest of Monument 2625. Additionally, the best available scientific and historical data of Captain Sams Inlet and adjacent beaches do not indicate that the shoreline is unlikely to return to its former position. Periodic inlet relocation projects keep this stretch of shoreline subject to inlet processes, which in turn, can result in dynamic shoreline positions adjacent to the inlet.

Petitioner's Assertion #4: Petitioner asserts that the 1988 vegetation line, utilized by the Department for the baseline, is inaccurate, and has proposed an alternative interpretation of the 1988 vegetation line. In support of this alternative interpretation, the Petitioner has provided beach profiles from the Town of Kiawah Island's 1991 local beachfront management plan. For the portions of the Property that remain designated within the unstabilized inlet zone, the Petitioner asserts that the baseline should be placed at the alternative interpretation of the 1988 vegetation line (Figure 10).

Department's Response #4: During this remand, the Department reviewed the digitization of the 1988 vegetation line for the portion of Kiawah Island west of monument 2625, and made minor modifications to fine tune the line of continuous vegetation. This reviewed vegetation line can be seen in Figure 10, and has also been provided to the Petitioner in shapefile format.

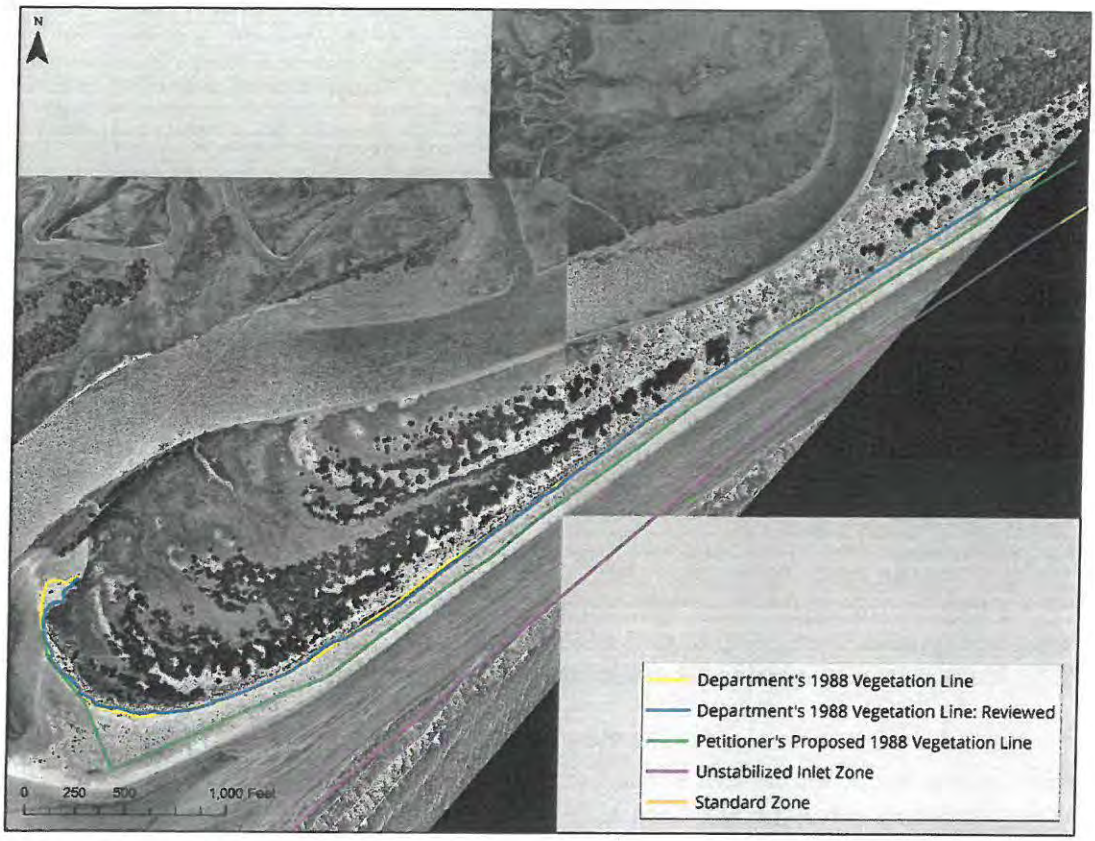


Figure 10. This map shows the 1988 aerial imagery with beach zones, the Department's original 1988 vegetation line, the Department's reviewed 1988 vegetation line, and the Petitioner's proposed 1988 vegetation line.

The beach profile charts provided by the Petitioner do not support the Petitioner's proposed vegetation line. The profile seen in Figure 11 shows a sharp increase in elevation approximately 150 feet seaward from monument 2625. As seen in Figure 12, the distance from Monument 2625 to the Department's 1988 vegetation line is approximately 150 feet.

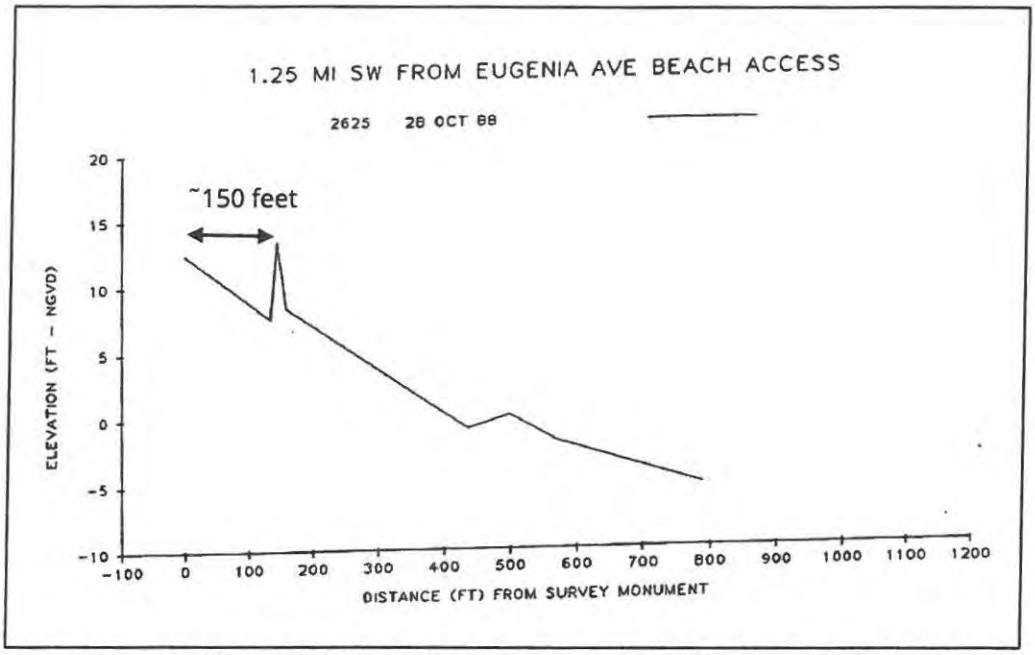


Figure 11. A chart supplied by the Petitioners from the Town of Kiawah's 1991 Beachfront Management Plan.

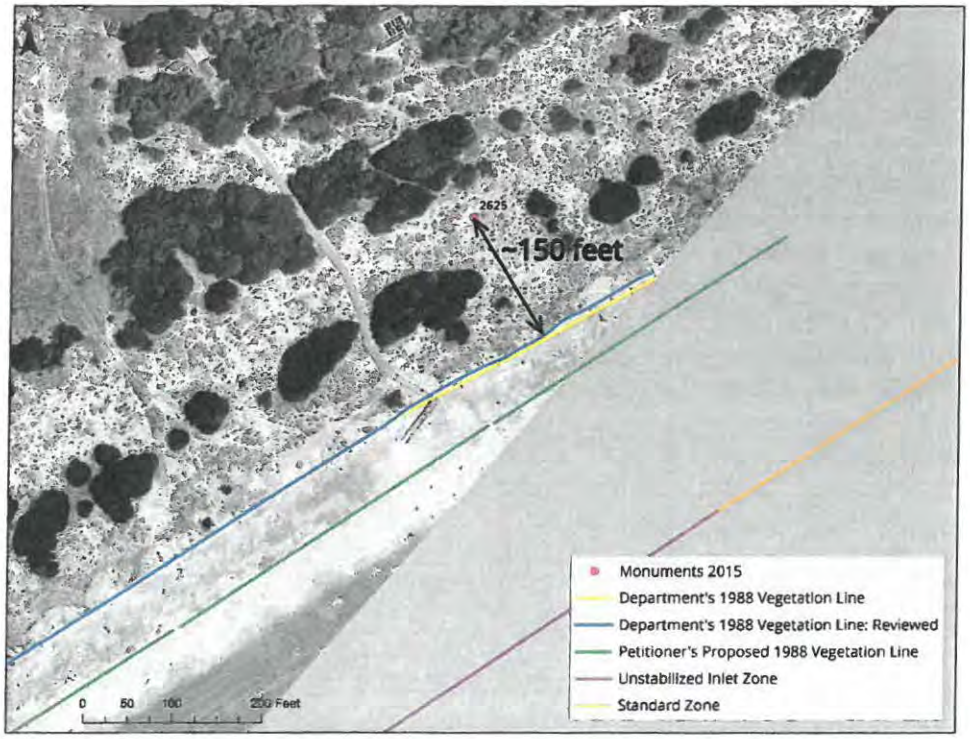


Figure 12. This map shows the 1988 aerial imagery, monument 2625, the Department's original 1988 vegetation line, the Department's reviewed 1988 vegetation line, and the Petitioner's proposed 1988 vegetation line. The distance from the monument to the Department's line is approximately 150 ft.

Finally, while the Department recognizes that there may be patches of sparse vegetation seaward of the Department's reviewed 1988 vegetation line, when digitizing a line of continuous vegetation (Figure 13), these sporadic clumps do not constitute a continuous line.

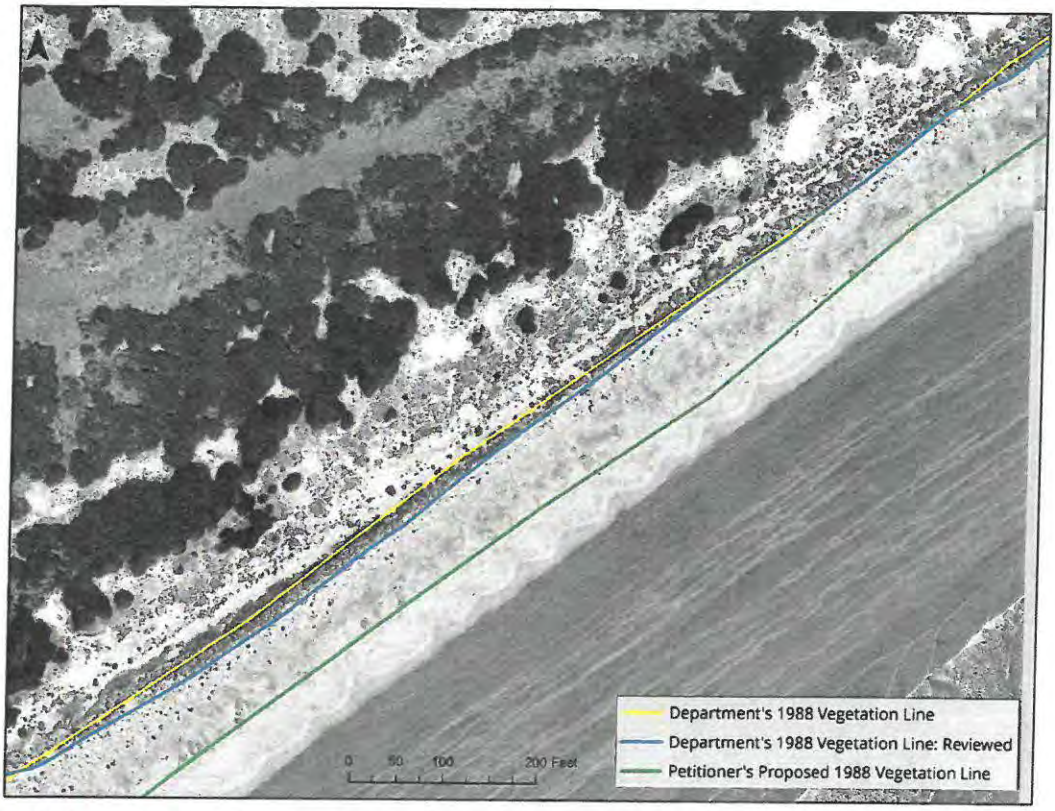


Figure 13. This map shows the 1988 aerial imagery, the Department's original 1988 vegetation line, the Department's reviewed 1988 vegetation line, and the Petitioner's proposed 1988 vegetation line. The purpose of the map is to visually show the line of continuous vegetation, as demarcated by the Department's reviewed vegetation line.

The Department maintains its position that the baseline is accurately established in this unstabilized inlet zone using 40 years of historical shoreline data. The Department considers the reviewed 1988 vegetation line to be the most landward point of erosion in the last 40 years. This is the Department's final decision on remand.

Please let us know if you have any questions.

Sincerely,

Elizabeth B. von Kolnitz
Chief
Office of Ocean and Coastal Resource Management

cc: Matthew J. Slagel, Beachfront Permitting Project Manager, DHEC-OCRM
Jessica B. Boynton, Shoreline Specialist, DHEC-OCRM
Sallie P. Phelan, Attorney, DHEC

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP II, LLC, Petitioner, vs. South Carolina Department of Health and Environmental Control, Respondent.	)	DOCKET NO. 18-ALJ-07-0047-CC **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this day she has served all parties in the above-captioned action with a copy of ***Department's Final Decision on Remand*** on the Petitioner through counsel by U.S. Mail and electronic mail to the following addresses:

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Sallie P. Phelan

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December 6, 2019
Charleston, South Carolina

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BEFORE THE BOARD OF HEALTH AND ENVIRONMENTAL CONTROL
INITIAL STAFF RESPONSE TO REQUEST FOR CONSIDERATION BY THE BOARD PURSUANT TO CONSENT ORDER OF STAY AND REMAND
ALC DOCKET NO. 18-ALJ-07-0047-CC

Requestor: **KDP, II, LLC**

Permitee: **N/A**

Docket No.: **19-RFR-53, KDP, II, LLC – Issuance of Department's Final Decision on Remand for Beachfront Jurisdictional Lines**

Previous Department Docket No.: 17-RFR-44

ALC Docket No.: 18-ALJ-07-0047-CC

OGC No.: **23215**

I. Summary

a. Type of Decision.
Department's Final Decision on Remand for beachfront jurisdictional lines. The above-referenced case was remanded by the S.C. Administrative Law Court to the Department to allow it to make a considered determination in accordance with the applicable statutes and regulations.

b. Location.
Captain Sams Spit, Kiawah Island, Charleston County, South Carolina. TMS Nos. 207-05-00-001 and 207-05-00-0011.

c. Decision.
On December 6, 2019, the South Carolina Department of Health and Environmental Control's Office of Ocean and Coastal Resource Management ("Department" or "DHEC") mailed its Final Decision on Remand to counsel representing KDP, II, LLC to notify them that the Department had concluded its review of additional information received during the remand. The final determination was made following receipt of supplemental information provided by the Requestor. The Department maintains its position that the baseline is accurately established in the unstabilized inlet zone of Captain Sams Spit on Kiawah Island using 40 years of historical shoreline data. The Department considers the reviewed 1988 vegetation line to be the most landward point of erosion in the last 40 years. The Department's Final Decision on Remand, which summarizes points raised by the Requestor and the Department's responses, is attached as **Exhibit 1**. Staff responses to grounds for review in the Request for Final Review Conference (RFR) are also provided below in Section III.

d. Relevant Chronology.

The chronology shows the Department conducted a thorough review and was responsive to specific inquiries.

October 6, 2017 – The Department released preliminary determinations of revised baseline and setback line locations statewide and initiated a 30-day public comment period.

November 3, 2017 – The Department extended the deadline for public comments until April 6, 2018.

November 20, 2017 – KDP, II, LLC filed a Request for Final Review Conference (RFR) before the DHEC Board and asserted that the baseline should be moved seaward from its 2009 location. The Board designated the RFR as Docket No. 17-RFR-44.

January 5, 2018 – The Board notified KDP, II, LLC that it had declined to conduct a final review conference in Docket No. 17-RFR-44.

February 5, 2018 – KDP, II, LLC filed an Appeal and Request for Contested Case Hearing with the ALC.

May 3, 2018 – Governor McMaster signed the Beachfront Management Reform Act into law (2018 Act No. 173; H.4683). The Reform Act specified that the final baseline of affected property owners would be the most seaward of: (1) the lines established during the 2008 through 2012 establishment cycle, or (2) the lines proposed by the Department on October 6, 2017, or (3) the lines established pursuant to a review by the Department or an appeal initiated before January 1, 2018.

October 24, 2018 – The Department filed a Motion to Dismiss KDP, II, LLC's appeal to the ALC, asserting that the Beachfront Management Reform Act mooted Petitioner's appeal and prevented the Department from moving the baseline seaward.

March 29, 2019 – ALC Judge Shirley C. Robinson denied the Department's Motion to Dismiss. Footnote 12 of the Order noted that "[T]he relief this Court can give Petitioner, at this juncture, is limited to preserving Petitioner's right to a review that contemplates seaward movement of the jurisdictional lines. Because the Department has not issued a final decision on the merits contemplating seaward movement [of the jurisdictional lines at Petitioner's property], this Court cannot make any determinations as to the actual placement of the jurisdictional lines on Petitioner's property. In this respect, Petitioner has not yet exhausted its administrative remedies."

April 8, 2019 – KDP, II, LLC moved the Court to reconsider and delete Footnote 12 in the Order.

June 6, 2019 – A Consent Order of Stay and Remand was entered by the ALC, which stayed the ALC proceeding and remanded the matter to the Department to allow staff to make a final decision on the merits of KDP, II, LLC's assertions. By consent of the parties and the ALC, the deadline for the final Department decision on remand was extended until December 6, 2019.

August 21, 2019 – Department staff and representatives of KDP, II, LLC met to discuss pertinent issues.

August 29, 2019 – KDP, II, LLC and the Department requested an extension of the stay and remand from the ALC to allow time for KDP, II, LLC to submit additional information for consideration and to allow time for the Department to review the additional information.

September 26, 2019 – Department staff and representatives of KDP, II, LLC met a second time to discuss pertinent issues and additional data and information submitted for consideration by KDP, II, LLC.

December 6, 2019 – The Department mailed its Final Decision on Remand to counsel representing KDP, II, LLC to notify them that the Department had concluded its review of additional information received during the remand. The Final Decision on Remand is attached as **Exhibit 1**.

December 23, 2019 – The Department received the Request for Final Review from counsel representing KDP, II, LLC challenging the location of the baseline and setback line along Captain Sams Spit on Kiawah Island.

II. Relevant Law

a. Statutes.

§48-39-10(H). "Beaches means those lands subject to periodic inundation by tidal and wave action so that no nonlittoral vegetation is established."

§48-39-10(I). "Primary oceanfront sand dune means the dune or dunes that constitute the front row of dunes adjacent to the Atlantic Ocean."

§48-39-270(5). "The beach/dune system includes all land from the mean high water mark of the Atlantic Ocean landward to the setback line described in Section 48-39-280."

§48-39-270(6). "A standard erosion zone is a segment of shoreline which is subject to essentially the same set of coastal processes, has a fairly constant range of profiles and sediment characteristics, and is not influenced directly by tidal inlets or associated inlet shoals."

§48-39-270(7). "An inlet erosion zone is a segment of shoreline along or adjacent to tidal inlets which is influenced directly by the inlet and its associated shoals."

§48-39-270(13). "Active beach is that area seaward of the escarpment or the first line of stable natural vegetation, whichever first occurs, measured from the ocean."

§48-39-280(A). "A policy of beach preservation is established. The department must implement this policy and utilize the best available scientific and historical data in the implementation. The department must establish a baseline that parallels the shoreline for each standard erosion zone and each inlet erosion zone."

§48-39-280. "Beach preservation policy established; notice requirements; appeals procedures.
A) A policy of beach preservation is established. The department must implement this policy and utilize the best available scientific and historical data in the implementation. The department must establish a baseline that parallels the shoreline for each standard erosion zone and each inlet erosion zone.
(1) The baseline for each standard erosion zone is established at the location of the crest of the primary oceanfront sand dune in that zone. In standard erosion zones in which the shoreline has been altered naturally or artificially by the construction of erosion control devices, the baseline must be established by the department using the best scientific and historical data, as where the crest of the primary oceanfront sand dune for that zone would be located if the shoreline had not been altered.
(2) The baseline for inlet erosion zones that are not stabilized by jetties, terminal groins, or other structures must be determined by the department as the most landward point of erosion at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position. In collecting and utilizing the best scientific and historical data available for the implementation of the beach preservation policy, the department, as part of the State Comprehensive Beach Management Plan provided for in this chapter, among other factors, must consider historical inlet migration, inlet stability, channel and ebb tidal delta changes, the effects of sediment bypassing on shorelines adjacent to the inlets, and the effects of nearby beach restoration projects on inlet sediment budgets.
(3) The baseline within inlet erosion zones that are stabilized by jetties, terminal groins, or other structures must be determined in the same manner as provided for in item (1). However, the actual location of the crest of the primary oceanfront sand dune of that erosion zone is the baseline of that zone, not the location if the inlet had remained unstabilized.
(4) A baseline established pursuant to this section must not move seaward from the most seaward location of the following:
(a) the location of the baseline as established during the 2008 through 2012 establishment cycle;
(b) the location of the baseline as proposed by the department on October 6, 2017; and
(c) the location of the proposed October 6, 2017, baseline as revised by the department pursuant to a review or an appeal initiated before January 1, 2018.
(B) To implement the beach preservation policy provided for in subsection (A), a

setback line must be established landward of the baseline a distance which is forty times the average annual erosion rate or not less than twenty feet from the baseline for each erosion zone based upon the best historical and scientific data adopted by the department as a part of the State Comprehensive Beach Management Plan.
(C) The department must establish baselines and setback lines for all geographic areas where baselines and setback lines were established on or before January 31, 2012. The baselines and setback lines must be established anew during establishment cycles that are not less than every seven years, but not more than every ten years following a previous establishment cycle and must be based upon the best available data. Until the department establishes new baselines and setback lines for a geographic area, the existing baselines and setback lines for the geographic area must be used.
(D)(1) In each new establishment cycle of the baselines and setback lines, the department must:
(a) stagger the establishment of the baselines and setback lines by geographic area and provide a tentative schedule of establishment for each geographic area on the department's website at least one hundred twenty days prior to beginning a new establishment cycle;
(b) publish proposed locations of baselines and setback lines for a geographic area on the department's website for public input at least one hundred twenty days prior to establishing the baselines and setback lines for the geographic area;
(c) on the date of the publication of the proposed locations of baselines and setback lines for a geographic area:
(i) provide notice of the publication in a newspaper of general statewide circulation and a newspaper of local circulation in the geographic area; and
(ii) make readily available to the public, including on the department's website, the information and raw data that the department used to determine the locations of the proposed baselines and setback lines and explanations for these determinations;
(d) hold at least one public hearing in the county or municipality of a geographic area at least ninety days prior to establishing the baselines and setback lines for the geographic area; and
(e) accept and review data up to thirty days prior to establishing baselines and setback lines for a geographic area to determine if a proposed baseline or setback line for the geographic area should be revised.
(2) Baselines and setback lines for a geographic area are in effect upon the date of establishment and are subject to review pursuant to the provisions of subsection (F).
(E)(1) In order to locate the baselines and the setback lines, the department must establish monumented and controlled survey points in each county fronting the Atlantic Ocean. The department must acquire sufficient surveyed topographical information on which to locate the baselines.
(2) Surveyed topographical data typically must be gathered at two thousand foot intervals. However, in areas subject to significant near-term development and in areas currently developed, the interval, at the discretion of the department, may be more frequent. The resulting surveys must locate the crest of the primary oceanfront sand dune to be used as the baseline for computing the forty-year erosion rate. In cases where no primary oceanfront sand dune exists, a study conducted by the department is required to determine where the upland location of the crest of the primary oceanfront sand dune

would be located if the shoreline had not been altered.
(3) The department, by regulation, may exempt specifically described portions of the coastline from the survey requirements of this section when, in its judgment, the portions of coastline are not subject to erosion or are not likely to be developed by virtue of local, state, or federal programs in effect on the coastline which would preclude significant development, or both.
(4) If an erosion zone incurs extraordinary erosion due to the impact of a storm system or event named by the National Weather Service after June 1, 2018, then data collected from the erosion zone within eighteen months of the date of impact of the storm system or event must not be used to locate the crests of primary oceanfront sand dunes or to establish baselines pursuant to subsection (A)(1) and (A)(3).
(F)(1) A landowner claiming ownership of property adversely affected by the establishment of a baseline or setback line, upon submittal of substantiating evidence, must be granted a review of the baseline or setback line. Alternatively, the municipality or county in which the property is situated, acting on behalf of the landowner with his written authorization, or an organization acting on behalf of the landowner with his written authorization, upon submittal of substantiating evidence, must be granted a review of the baseline and setback line. A review is initiated by filing a request for a review conference with the department board via certified mail within one year of the establishment of the baseline or setback line and must include a one hundred-dollar-review fee per property.
(2) The initial decision to establish a baseline or setback line must be a department staff decision.
(3) No later than sixty calendar days after the receipt of a request for review, the board must:
(a) decline to schedule a review conference in writing; or
(b) conduct a review conference in accordance with the provisions of item (4).
(4) A review conference may be conducted by the board, its designee, or a committee of three members of the board appointed by the chair. The board shall set the place, date, and time for the conference; give twenty calendar days' written notice of the conference; and advise the landowner or the county, municipality, or organization acting on behalf of the landowner that evidence may be presented at the conference. The review conference must be held as follows:
(a) Review conferences are open to the public; however, the officers conducting the conference may meet in closed session to deliberate on the evidence presented at the conference. The burden of proof in a conference is upon the landowner or the county, municipality, or organization acting on behalf of the landowner. During the course of the review conference, the staff must explain the staff decision and the materials relied upon to support its decision. The landowner or the county, municipality, or organization acting on behalf of the landowner shall state the reasons for contesting the staff decision and may provide evidence to support amending the staff decision. The staff may rebut information and arguments presented by the landowner or the county, municipality, or organization acting on behalf of the landowner, and the landowner or the county, municipality, or organization acting on behalf of the landowner may rebut information and arguments presented by the staff. Any review conference officer may request additional information and may question the landowner or the county, municipality, or

organization acting on behalf of the landowner and the staff.
(b) After the review conference, the board, its designee, or a committee of three members of the board appointed by the chair shall issue, based upon the evidence presented, a written decision to the landowner or the county, municipality, or organization acting on behalf of the landowner via certified mail no later than thirty calendar days after the date of the review conference. The written decision must explain the basis for the decision and inform the landowner or the county, municipality, or organization acting on behalf of the landowner of the right to request a contested case hearing before the Administrative Law Court.
(5) The landowner or the county, municipality, or organization acting on behalf of the landowner may file a request with the Administrative Law Court, in accordance with Chapter 23, Title 1, for a contested case hearing within thirty calendar days after:
(a) written notice is received by the landowner or the county, municipality, or organization acting on behalf of the landowner that the board declines to hold a review conference;
(b) the sixty-calendar-day deadline to hold the review conference has lapsed and no conference has been held; or
(c) the final agency decision resulting from the review conference is received by the landowner or the county, municipality, or organization acting on behalf of the landowner."

§48-39-285. "Mandatory establishment cycle baseline and setback in effect until new lines established.
A) Notwithstanding the provisions of Section 48-39-280, the department must initiate a new baseline cycle by no sooner than January 1, 2024. Until the department establishes a new baseline and setback line affecting a landowner as part of that establishment cycle, the baseline and setback line in effect for the landowner are the most seaward of the following, respectively:
(1)(a) the baseline established during the 2008 through 2012 establishment cycle; or
(b) the baseline proposed by the department on October 6, 2017; and
(2)(a) the setback line established during the 2008 through 2012 establishment cycle; or
(b) the setback line proposed by the department on October 6, 2017.
(B) Notwithstanding the provisions of subsection (A) and Section 48-39-280, if the department, pursuant to a review or an appeal initiated before January 1, 2018, revises the baseline proposed on October 6, 2017, to a location seaward of both the baseline established during the 2008 through 2012 establishment cycle and the baseline proposed on October 6, 2017, then both the revised proposed baseline and revised proposed setback line will be in effect for the landowner until the department establishes a new baseline and setback line."

b. Regulations.

R.30-1(D)(4). "Baselines:
(a) Within a standard erosion zone the baseline is established at the location of the crest of the primary oceanfront sand dune in that zone. In a standard erosion zone in which the shoreline has been altered naturally or artificially by the construction of erosion

control devices, groins, or other man-made alterations, the baselines must be established by the Department using the best scientific and historical data, as where the crest of the primary ocean front sand dune for that zone would be located if the shoreline had not been altered.
(b) Within an unstabilized inlet zone the baseline must be determined by the Department as the most landward point of erosion at anytime during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position. In collecting and utilizing the best scientific and historical data available for the implementation of the retreat policy, the Department as part of the State Comprehensive Beach Management Plan provided for in this chapter, among other factors, must consider: historical inlet migration, inlet stability, channel and ebb tidal delta changes, the effects of sediment bypassing on shorelines adjacent to the inlets, and the effects of nearby beach restoration project on inlet sediment budgets."

R.30-1(D)(5). "Beach/Dune System – all land from the mean high-water mark of the Atlantic Ocean landward to the 40 year setback line described in §48-39-280."

R.30-1(D)(28). "Inlet Erosion Zone – a segment of shoreline along or adjacent to tidal inlets which is directly influenced by the inlet and its associated shoals.
(a) Unstabilized Inlets – inlets that have not been stabilized by jetties, terminal groins, or other structures.
(b) Stabilized Inlets – inlets which are stabilized by jetties, terminal groins, or other structures."

R.30-1(D)(43). "Primary Oceanfront Sand Dunes - those dunes which constitute the front row of dunes adjacent to the Atlantic Ocean, are partially or wholly seaward of the setback line, are not landward of an existing functional erosional control device, and have a minimum height of thirty-six (36) inches, as measured vertically from the crest to the toe of the dune. For purposes of establishing the baseline, this dune must also form a continuous line for 500 shore parallel feet."

R.30-1(D)(45). "Setback Area – the area located between the setback line and the baseline."

R.30-1(D)(46). "Setback Line - the line landward of the baseline that is established at a distance which is forty times the average annual erosion rate as determined by historical and other scientific means and adopted by the Department in the State Comprehensive Beach Management Plan. However, all setback lines shall be established no less than twenty feet landward of the baseline, even in cases where the shoreline has been stable or has experienced net accretion over the past forty years."

R.30-1(D)(49). "Standard Erosion Zone - a segment of shoreline which is subject to essentially the same set of coastal processes, has a fairly constant range of profiles and sediment characteristics, and is not directly influenced by tidal inlets or associated inlet shoals."

R.30-14(E). "Procedures for Adopting Baselines and Erosion Rates (Section 48-39-280).
(1) Following the establishment of the interim baselines, erosion rates, and setback lines pursuant to Section 48–39–280(C) and any amendments or revisions thereto, the Department will adopt final baselines, erosion rates, and setback lines as part of the state comprehensive beach management plan pursuant to Section 48–39–320. The following procedure will be used for the establishment of final baselines, erosion rates, and setback lines:
(a) The proposed baseline, erosion rate, and setback line for a region, island or part thereof, or other geographic area of South Carolina's ocean shoreline shall be made available to the public for inspection at each of the Department's offices;
(b) the Department shall afford the public a thirty-day comment period;
(c) the Department shall afford the opportunity for a public hearing.
(2) The Department shall, following the consideration of all public comments, adopt in final form the baselines, erosion rates, and setback lines and shall include such information in the state plan."

R.30-14(F). "Procedures for Appealing Baselines and Erosion Rates [Section 48-39-280(E)].
(1) Any landowner claiming ownership of affected property who feels that the final or revised setback line, baseline, or erosion rate as adopted is in error, upon submittal of substantiating evidence, within one year of the revision date, must be granted a review of the setback line, baseline, or erosion rate, or a review of all three. The Department shall hear all requests for review. The process is as follows:
(a) Upon receipt of a property owner's request for review of the setback, baseline, or erosion rate, a request will be made of the property owner to provide the Department with substantiating evidence, as required in Section 48–39–280(E). If the property owner does not respond or if there is no evidence at all to support the request, a letter will be sent to the property owner denying the request.
(b) If the Department agrees with the property owner that the lines are in error, the lines will be moved.
(c) If the Department disagrees with the property owner, and believes that the location of the lines is correct, the property owner will be notified in writing. Any appeal of the Department's decision under this section shall be made to the Administrative Law Judge Division.
(2) Appeals are governed by R.30–6."

III. Staff Response to Grounds Stated in Request for Review.

a. Regarding the methodology for establishing the baseline in unstabilized inlet zones:

Requestor states: "1. For the portion of the Property in the unstabilized inlet zone, the Department staff refused to apply the statutory standard that the baseline be established at 'the most landward point of erosion at any time during the past forty years.' S.C. Code § 48-39-280 (A)(2). Instead, the Department staff set the baseline

where it believed was a continuous line of established vegetation on the basis of staff's interpretation of aerial photographs. Setting the baseline in the location of a continuous line of established vegetation is completely contrary to the express wording of the statutory criterion."

Requestor states: "2. The best available scientific and historical data demonstrate that the beachfront of the Property is accreting over the long term rather than eroding, placing the most landward point of erosion far seaward of the location determined by the Department staff on remand."

Requestor states: "3. Because the best available scientific and historical data demonstrate that the beachfront of the Property is accreting over the long term rather than eroding, the post-Hurricane Matthew shoreline is the most landward point of erosion over the last 40 years."

Requestor states: "4. For the portion of the Property in the unstabilized inlet zone, the Department staff mistakenly found that the best available scientific and historical data indicate that the shoreline is unlikely to return to its former position. Instead, the best available scientific and historical data from the last 40 years indicate that the shoreline is not likely to return to its position 40 years ago but instead to continue to move seaward over the long term as it has over the last 70 years. For this additional reason, the baseline should be established at the post-hurricane shoreline."

Staff response: Since the enactment of the S.C. Beachfront Management Act in 1988, OCRM staff have used historical vegetation lines from aerial photographs as indicators of "the most landward point of erosion at any time during the past forty years." S.C. Code § 48-39-270(13) defines "active beach" as "that area seaward of the escarpment or the first line of stable natural vegetation, whichever first occurs, measured from the ocean." Since the term "first line of stable natural vegetation" is included in the definition of "active beach," OCRM has statutory authority to use this feature to evaluate the Department's beachfront jurisdictional lines. OCRM analyzes historical aerial photographs to determine where the line of stable natural vegetation existed at different points in time. In the case of Captain Sams Spit on Kiawah Island, OCRM digitized the first line of stable natural vegetation from a 1988 aerial, which is currently 32 years old and within the allowable forty-year window. The baseline that is the subject of this appeal is located at the line of stable natural vegetation from the 1988 aerial photograph. In other words, the baseline is set at the landward edge of the "active beach" as it existed in 1988, which the Department considers "the most landward point of erosion at any time during the past forty years."

Please note in Ground #4 above, Requestor states that "the Department staff mistakenly found that the best available scientific and historical data indicate that the shoreline is unlikely to return to its former position." Department staff presumes this is a typographical error; on the contrary, staff found that the best available scientific and historical data ***did not indicate*** that the shoreline is unlikely to return to its former position. Unstabilized inlet zones like Captain Sams Spit are inherently dynamic, and the shoreline has the potential to

return to its 1988 conditions. In addition, at this location, the Kiawah River is eroding the back side of the barrier island at a greater rate than the ocean shoreline is accreting.

The Department also disputes Requestor's assertion that the ocean shoreline of Captain Sams Spit has experienced an unbroken trend of accretion over the last 70 years. A detailed staff response to this assertion is provided in **Exhibit 1** on pages 9 to 11.

b. Regarding the use of aerial photographs to establish the baseline:

Requestor states: "5. The Department staff relied on aerial photographs in establishing the jurisdictional lines on Property rather primarily depending on the monument survey data as required by the controlling statute: 'In order to locate the baselines and the setback lines, the department must establish monumented and controlled survey points in each county fronting the Atlantic Ocean. The department must acquire sufficient surveyed topographical information on which to locate the baselines.' S.C. Code § 48-39-280(E)(1)."

Staff response: As noted above, OCRM staff have used historical vegetation lines from aerial photographs as indicators of "the most landward point of erosion at any time during the past forty years" since the enactment of the S.C. Beachfront Management Act in 1988. This is not a new approach or process that was begun during the last jurisdictional line revision cycle. Rather, OCRM has used aerial photograph interpretation to set the baseline in unstabilized inlet zones during the initial establishment of the baseline in 1989-1990 and subsequent updates in 1999, 2008-2012, and 2016-2018.

Topographical (elevation) data referenced in S.C. Code § 48-39-280(E)(1) is helpful for identifying a primary dune in standard zones and stabilized inlet zones, but it is less helpful for identifying "the most landward point of erosion at any time during the past forty years" in unstabilized inlet zones. In unstabilized inlet zones, the baseline is set at "the most landward point of erosion at any time during the past forty years." The best available scientific and historical data that demonstrates the location of this historical erosion is historical aerial photographs from the time period in question. S.C. Code § 48-39-280(E)(2) goes on to state that "The resulting surveys must locate the crest of the primary oceanfront sand dune to be used as the baseline for computing the forty-year erosion rate." Clearly, the monument survey data is intended to be used for establishing the baseline in standard zones and stabilized inlet zones, where the baseline is set at the crest of the primary oceanfront sand dune. In unstabilized inlet zones like Captain Sams Spit on Kiawah Island, the baseline is set at "the most landward point of erosion at any time during the past forty years" so monument survey data provides less information compared to historical aerial photographs.

c. Regarding the demarcation between the standard zone and unstabilized inlet zone along and adjacent to Captain Sams Spit:

Requestor states: "6. The demarcation between the standard zone and the unstabilized inlet zone should be adjusted to a point west of Monument 2615 thereby including

much of the Property within the standard zone and the baseline should be set the crest of the primary oceanfront sand dune along the shoreline in the revised standard zone."

Staff response: The Department disagrees with this assertion, and a detailed staff response is provided in **Exhibit 1** on pages 1 to 9.

d. Regarding the Requestor's desire to adjust the setback line in addition to the baseline:

Requestor states: "7. The Department staff's position that it has no authority to adjust the setback line even if it adjusts the baseline is legally incorrect. S.C. Code § 48-39-280 (B) mandates that the location of the setback line is tied to the location of the baseline. Moving the baseline moves the setback line as a matter of law: 'To implement the beach preservation policy provided for in subsection (A), a setback line *must be established landward of the baseline* a distance which is forty times the average annual erosion rate or not less than twenty feet *from the baseline* for each erosion zone based upon the best historical and scientific data adopted by the department as a part of the State Comprehensive Beach Management Plan.' S.C. Code § 48-39-280 (B)."

Requestor states: "8. The Baseline Reform Act further provides that the Department has the authority to move the setback line if it moves the baseline: '(B) Notwithstanding the provisions of subsection (A) and Section 48-39-280, if the department, pursuant to a review or an appeal initiated before January 1, 2018, revises the baseline proposed on October 6, 2017, to a location seaward of both the baseline established during the 2008 through 2012 establishment cycle and the baseline proposed on October 6, 2017, *then both the revised proposed baseline and revised proposed setback line will be in effect for the landowner until the department establishes a new baseline and setback line.'* S.C. Code § 48-38-285 (B)."

Requestor states: "9. The Department staff incorrectly stated that because KDP did not specifically appeal the setback line in its first RFRC, the Department cannot adjust the setback line on the Property if it were to adjust the baseline. The Department staff disregards the previously mentioned statutory provisions tying the location of the setback line to the location of the baseline. The Department staff further disregards the following statement in KDP's previous RFRC: 'Because of the fully substantiated history of accretion of the Property over the last 70 years, KDP does not take issue with the Department's preliminary determination that the setback line on the Property should be situated at the minimum distance of 20 feet behind the baseline and does not seek at this time a final review conference of that preliminary determination of Department as to the Property.' KDP's Request for Final Review Conference dated November 20, 2018, p. 2."

Staff response: Although KDP, II, LLC raises several points about the location of the setback line in its Request for Contested Case, this issue has not been properly preserved on appeal. In KDP, II, LLC's initial Request for Contested Case Hearing, KDP, II, LLC writes "The Petitioner seeks a ruling by the Administrative Law Court, based on the facts and law,

setting the baseline applicable to Petitioner's property seaward of its location as of December 31, 2017, and reversing the final decision of DHEC refusing to adjust the location of the baseline seaward." Request For Contested Case dated 2/5/2018 at page 2, **Exhibit 2**. Similarly, KDP, II, LLC's Request for Final Review Conference to the DHEC Board dated November 20, 2017 only requests review of the baseline and not that of the setback line. The Request for Final Review Conference provides:

> … the new baseline should be seaward of the existing (2009) location for the reasons set forth below. Because of the fully substantiated history of accretion of the Property over the last 70 years, KDP does not take issue with the Department's preliminary determination that the setback line on the Property should be situated at the minimum distance of 20 feet behind the baseline and does not seek at this time a final review conference of the preliminary determination of Department as to the Property.

Exhibit B of Exhibit 2 at 2. KDP, II, LLC expressly states that it does not seek a final review conference relating to the setback line. Given that KDP, II, LLC did not raise issues relating to the placement of the setback line before January 1, 2018 as required by S.C. Code Ann. Section 48-39-285, the Department has not addressed the setback line and has focused on the location of the baseline which was properly preserved for appeal.

KDP, II, LLC also argues that Section 48-39-285 gives the Department the authority to move the setback line if it is moving the baseline. By its plain language, this section addresses the situation where there is a "revised proposed setback line":

> … if the department, pursuant to a review or an appeal initiated before January 1, 2018, revises the baseline proposed on October 6, 2017, to a location seaward of both the baseline established during the 2008 through 2012 establishment cycle and the baseline proposed on October 6, 2017, then both the revised proposed baseline and revised proposed setback line will be in effect for the landowner until the department establishes a new baseline and setback line.

S.C. Code § 48-38-285(B). In this case, there is not a revised proposed setback line. Since KDP, II, LLC did not request review of the setback line prior to January 1, 2018, then the legislature through the Beachfront Management Reform Act set the setback line as the most seaward line established during the 2008 through 2012 cycle or the Department's proposed 2017 setback line.

IV. Requested Action

Based on the foregoing and the Final Decision on Remand document (attached as **Exhibit 1**), the Department requests that the Board decline to hold a final review conference in the above-referenced matter and uphold the staff decision as issued.

[SIGNATURES ON FOLLOWING PAGE]

BEFORE THE BOARD OF HEALTH AND ENVIRONMENTAL CONTROL
INITIAL STAFF RESPONSE TO REQUEST FOR REVIEW

Docket No.: **19-RFR-53, KDP, II, LLC – Issuance of Department's Final Decision on Remand for Beachfront Jurisdictional Lines**

Respectfully Submitted,

Elizabeth B. von Kolnitz
Chief
Office of Ocean & Coastal Resource Management

Sallie P. Phelan
Assistant General Counsel
Office of Ocean & Coastal Resource Management

Date: January 16, 2020

EXHIBIT 1

Healthy People. Healthy Communities.

December 6, 2019

KDP II, LLC
c/o Walker Gressette Freeman & Linton, LLC
P.O. Box 22167
Charleston, SC 29401

RE: Docket No. 18-ALJ-07-0047-CC, "Captain Sams Spit", TMS Nos. 207-05-00-001 and 207-05-00-0011, Kiawah Island, SC

Dear Mr. Walker and Mr. Gressette:

The above-referenced case has been remanded to the S.C. Department of Health & Environmental Control (the Department) for a determination of new beachfront jurisdictional lines under S.C. Code Ann. § 48-39-280. The determination is to be made following receipt of supplemental information provided by the Petitioner. This supplemental information was received by the Department on June 5, 2019 and September 26, 2019 and is summarized below. The Department's responses are also provided below, following each point raised by the Petitioner. This Petitioner has preserved an appeal pursuant to S.C. Code Ann. § 48-39-285(b) of the baseline only and therefore, the Department does not have authority to change the legislature's mandatory establishment of the setback line pursuant to the Beachfront Management Reform Act.

Petitioner's Assertion #1: The demarcation between the Standard Zone and the Unstabilized Inlet Zone should be adjusted to a point west of Monument 2615 thereby including most of the Property within the Standard Zone. To support this assertion, the Petitioner provided beach profile elevation data and a digital terrain model, both from a July 2016 inlet relocation monitoring report produced by Coastal Science & Engineering, and an aerial photo of Captain Sams Spit from March 2018.

Department's Response #1: The area adjacent to Captain Sams Inlet beginning at Monument 2625 and extending to the inlet is classified as an unstabilized inlet zone. "An inlet erosion zone is a segment of shoreline along or adjacent to tidal inlets which is influenced directly by the inlet and its associated shoals." S.C. Code Ann. § 48-39-270(7). The unstabilized inlet zone designation in this area has been in place since the S.C. Beachfront Management Act became law in 1988. These zone designations are established in S.C. Code Ann. Regs. 30-21 (Figure 1). The Department is not charged with reassessing the shoreline zone classifications when it is reviewing the baseline and setback lines pursuant to S.C. Code Ann. § 48-39-280. In the late 1980s, when the Department was establishing zone classifications, it reviewed two documents provided by Coastal Science & Engineering, Inc. (1988[1] and 1989[2]), which

[1] Jones, Christopher P., David M. Scaturo, Timothy W. Kana, and William C. Eiser. June 1988. "Calculation of Interim Baselines and 40-Year Setback Lines." [CSE '87-88 R-16]. Coastal Science & Engineering, Inc., Columbia, SC.

[2] Jones, Christopher P. January 1989. "Summary of Proposed Revisions to Interim Baseline and Setback Line at Kiawah Island." [CSE '88-89 R-05]. Coastal Science & Engineering, Inc., Columbia, SC.

contained information related to the baseline and setback line on Kiawah Island. This information assisted the Department in the establishment of interim and final shoreline zone classifications and jurisdictional lines. Although, the Department does not reclassify beach zones during the line review process, for the purposes of this remand, the Department reviewed the underlying parameters associated with zone designation, and determined that the zones were still valid as described below.

Kiawah Island
Charleston County

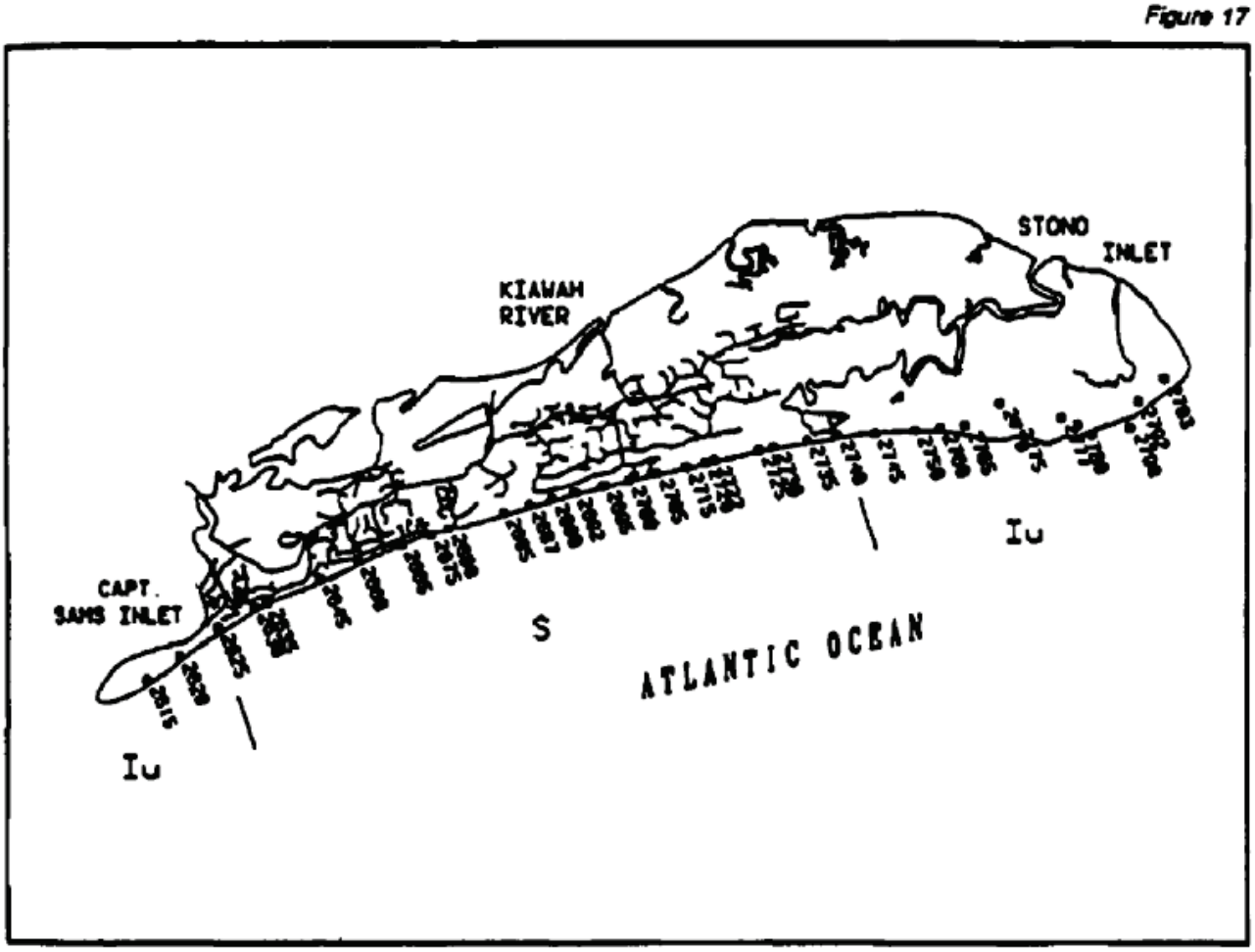

Figure 1. Beach zone designations for Kiawah Island from S.C. Code Ann. Regs. 30-21. 'Iu' designates unstabilized inlet zones, and 'S' designates standard zones.

The Department's position is that the shoreline adjacent to Captain Sams Inlet on Kiawah Island, from the mouth of the inlet to Monument 2625, continues to be influenced by Captain Sams Inlet. The zone designations were originally established based on historical shoreline positions and offshore bathymetry contours. Specifically, inlet erosion zones were designated where historic shorelines are not parallel to one another and where offshore contours are not parallel to the present shoreline.[3] Analysis of historical shoreline positions and offshore bathymetry contours in 1988 led Coastal Science & Engineering to conclude that the unstabilized inlet zone adjacent to Captain Sams Inlet should extend from the mouth of the inlet to Monument 2625 (Figure 2).

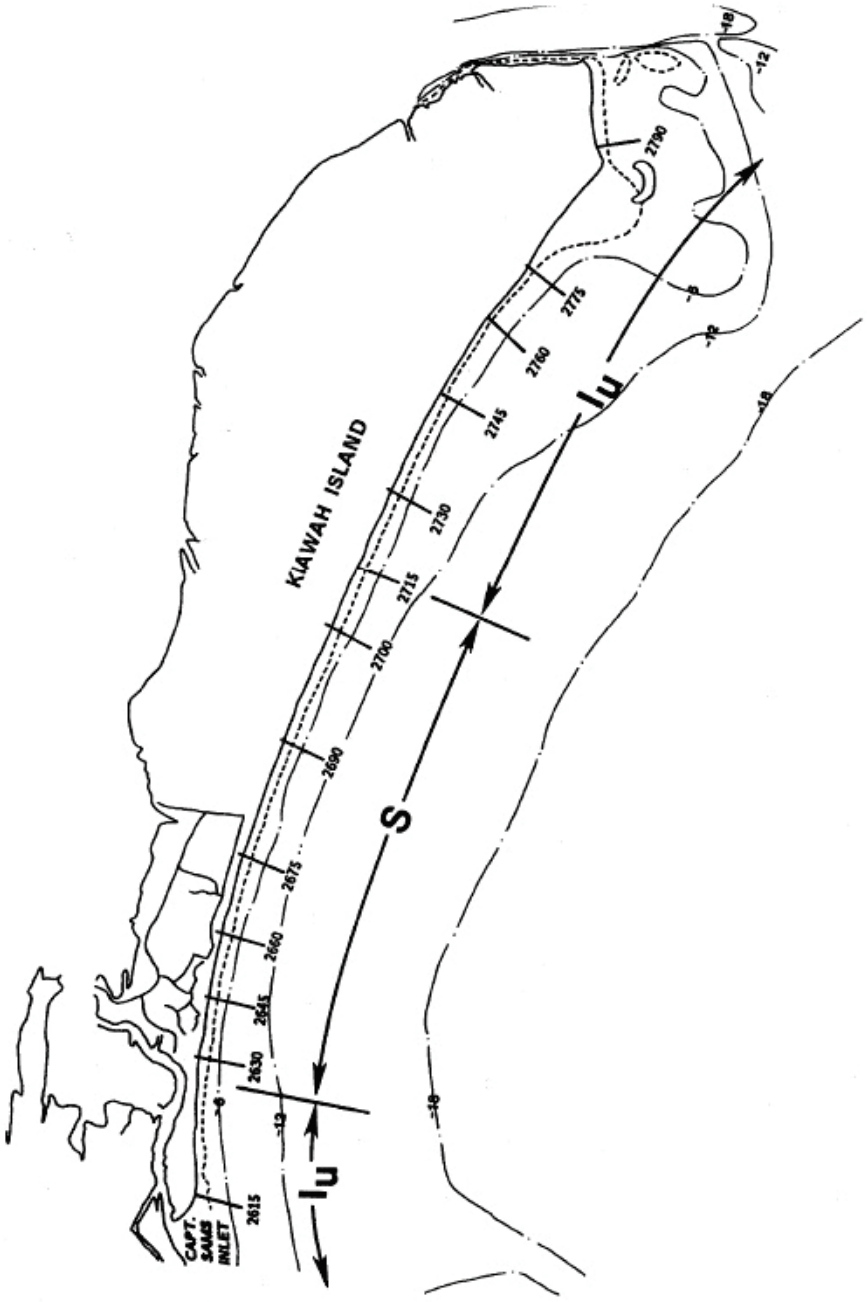

Figure 2. Map of erosion zone designations on Kiawah Island from Jones et al., June 1988. 'Iu' designates unstabilized inlet zones, and 'S' designates standard zones.

[3] Jones et al. June 1988.

The -6 foot, -12 foot, and -18 foot depth contours shown in Figure 2 demonstrate the presence of the ebb shoal complex associated with Stono Inlet to the north of Kiawah Island and the ebb shoal complex associated with Captain Sams Inlet and the North Edisto River Inlet to the south of Kiawah Island. Updated shoreline data and offshore bathymetry contours continue to show that the shoreline southwest of Monument 2625 to the mouth of the inlet is an unstabilized inlet zone. The shoreline positions along the standard erosion zone of Kiawah Island are spaced tightly together with a consistent orientation. Around Monument 2625, the historical shoreline positions diverge and become spaced more widely apart, indicating that the shoreline in this zone is more dynamic (Figure 3).

Figure 3. Updated shoreline positions along Kiawah Island showing closely spaced shorelines in the standard erosion zone and divergence in the shoreline positions in the unstabilized inlet zone, beginning around Monument 2625.

Current nautical charts from the National Oceanic and Atmospheric Administration (NOAA) also show that the offshore bathymetry contours are not parallel with the current shoreline from the mouth of the inlet to Monument 2625 (Figure 4). The orientations of the contours shift at Monument 2625, which is consistent with the original erosion zone designations established in 1988 (see Figure 2).

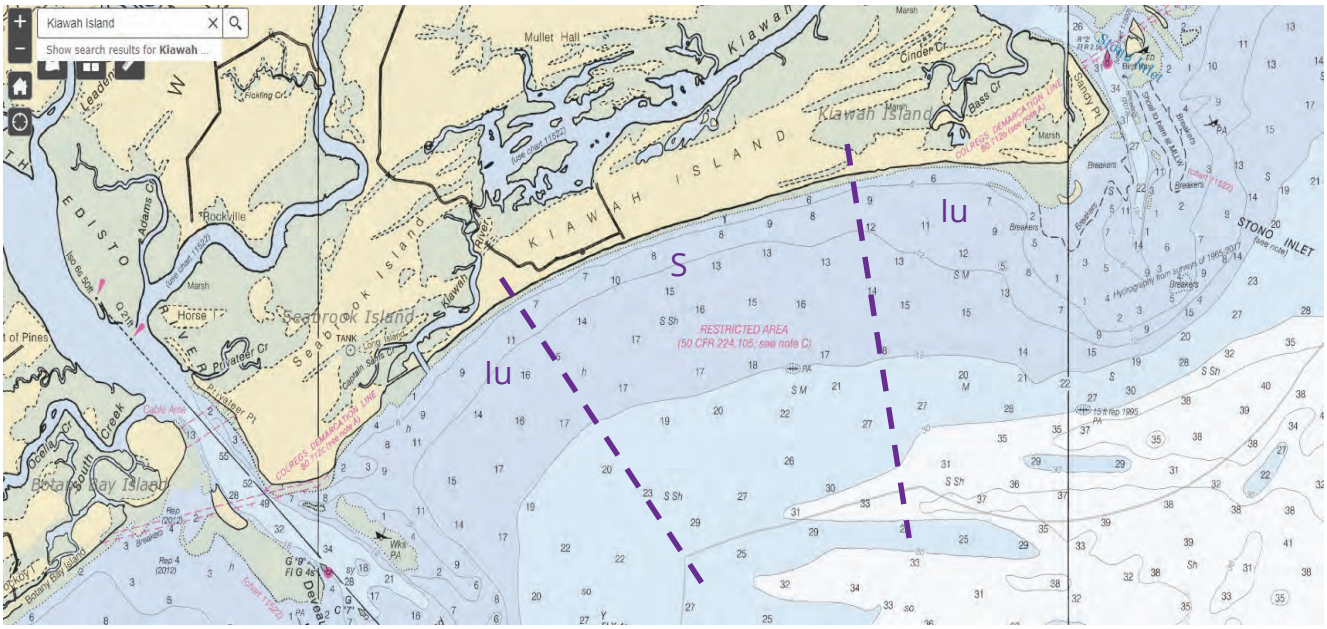
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Figure 5. Aerial photo of Captain Sams Inlet, immediately following the 2015 inlet relocation project. A new inlet mouth was cut through Kiawah Island to the north (top of photo), and a sand berm was constructed across the former inlet mouth to the south (bottom of photo).

The Department's permit for the last Captain Sams Inlet Relocation Project in 2015 (P/N 2008-1870-2IG) allowed the Seabrook Island Property Owners Association to "relocate Captain Sams Inlet from its existing position to its 1963/1983/1996 position through Kiawah spit between Kiawah Island and Seabrook Island" and to provide "erosion control and maintenance of a sediment supply to Seabrook Island." This approach to inlet management will likely continue in the future as Seabrook Island property owners seek to keep the inlet mouth sufficiently far away from structures and infrastructure on Seabrook Island. Because of the location of Petitioner's property, it is subject to inlet dynamics and would not be considered a "standard erosion zone"[4] as defined by S.C. Code § 48-39-270(b). Figures 6 and 7 show the results of the inlet relocation projects in 1996 and 2015, which returned the inlet complex to its 1988 configuration. Therefore, the shoreline adjacent to Captain Sams Inlet on Kiawah Island, from the mouth of the inlet to Monument 2625, continues to be influenced by Captain Sams Inlet.

[4] "(6) A standard erosion zone is a segment of shoreline which is subject to essentially the same set of coastal processes, has a fairly constant range of profiles and sediment characteristics, and is not influenced directly by tidal inlets or associated inlet shoals.

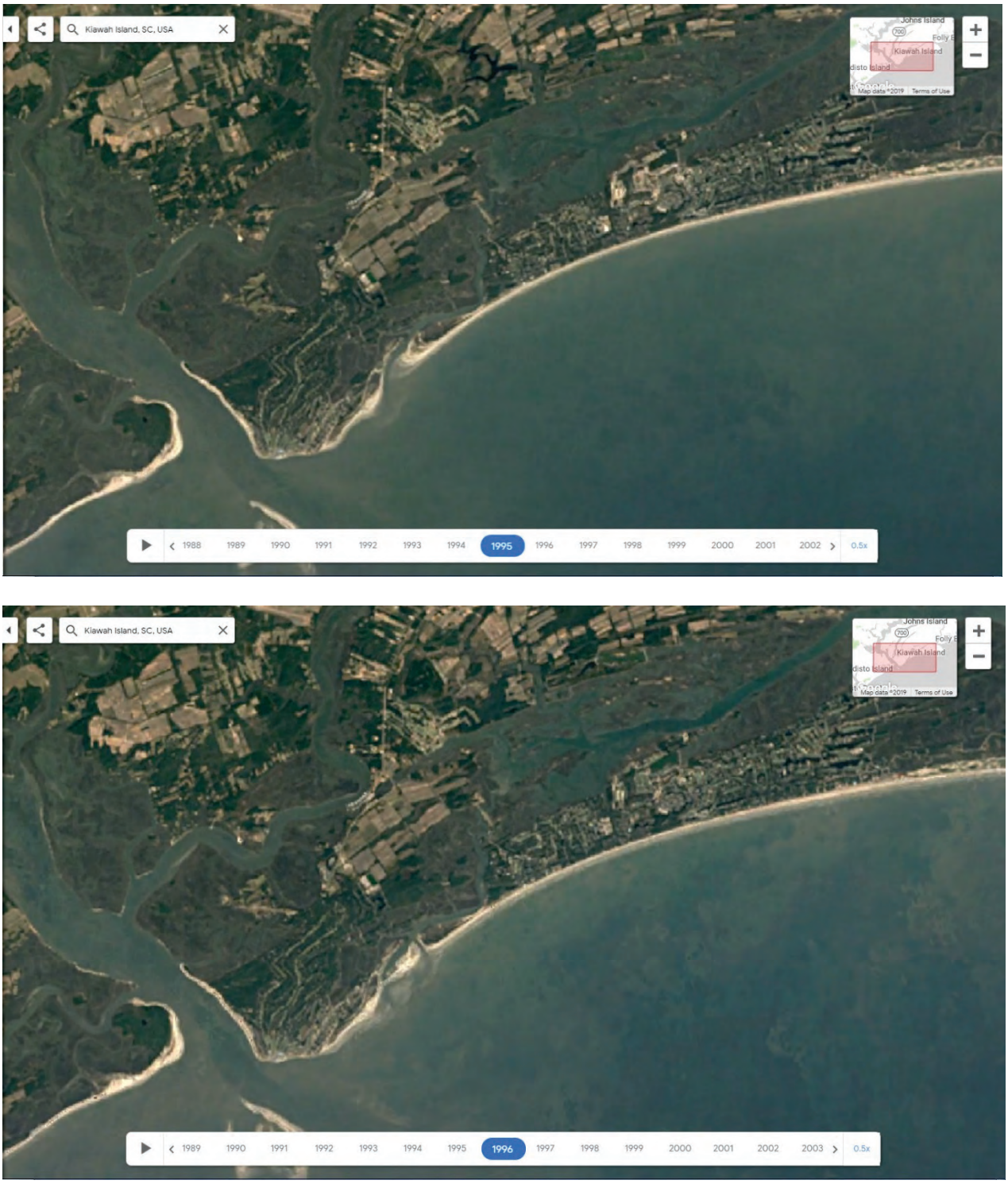


Figure 6. Aerial photos showing the Captain Sams Spit shoreline position before (top) and after (bottom) the 1996 inlet relocation project. These images were obtained from Google Earth's Timelapse: https://earthengine.google.com/timelapse/

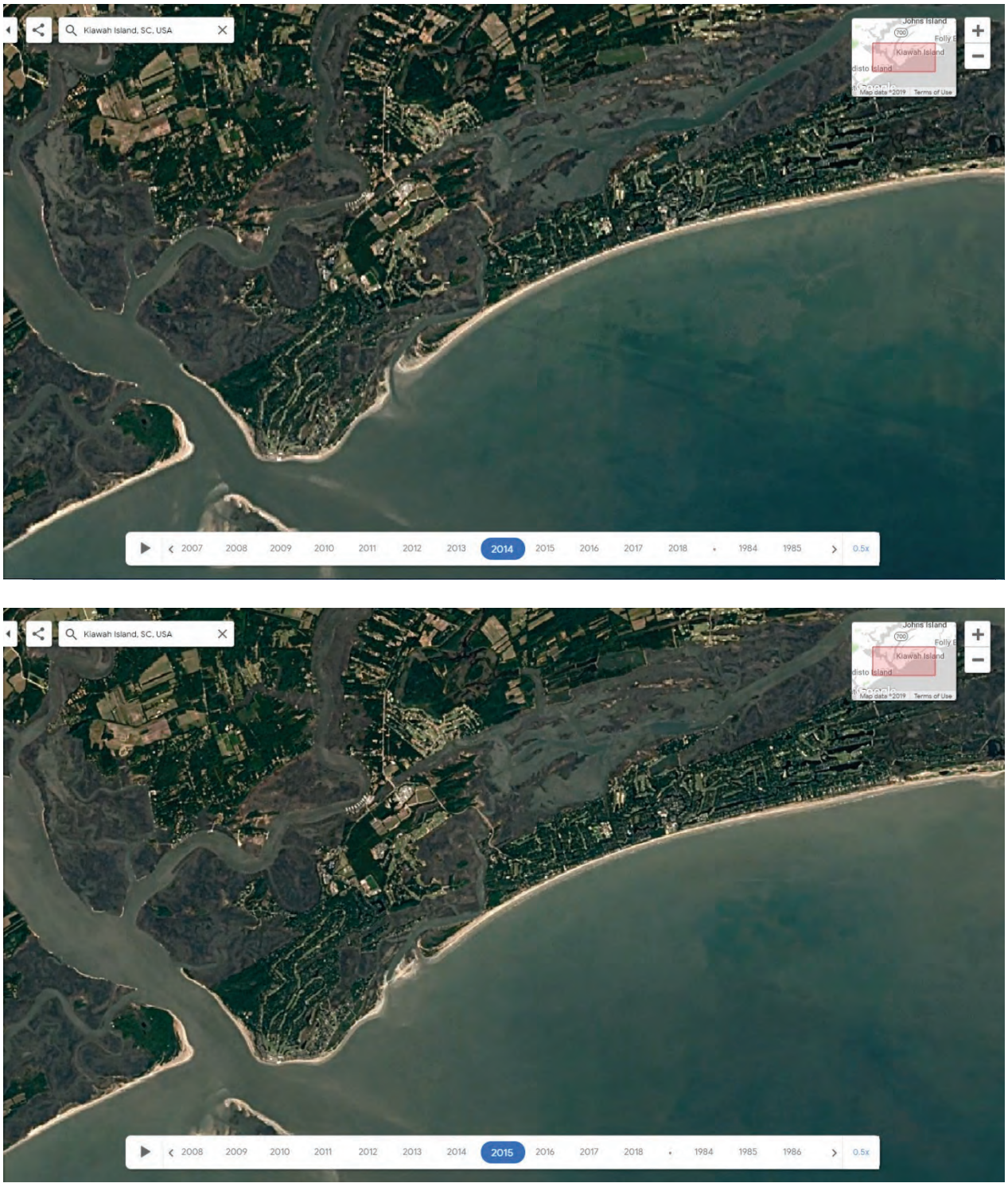


Figure 7. Aerial photos showing the Captain Sams Spit shoreline position before (top) and after (bottom) the 2015 inlet relocation project. These images were obtained from Google Earth's Timelapse: https://earthengine.google.com/timelapse/

Petitioner's Assertion #2: For all portions of the Property within the Standard Zone, the baseline should be set at what the Petitioner alleges is the crest of a primary oceanfront sand dune along the shoreline as depicted in Exhibits D and E. To support this assertion, the Petitioner provided a map titled '2015 Dune Crest Points', showing points at Monuments 2620, 2625, and 2630 and dune topographical survey data from SW+A Surveying, LLC in 2016.

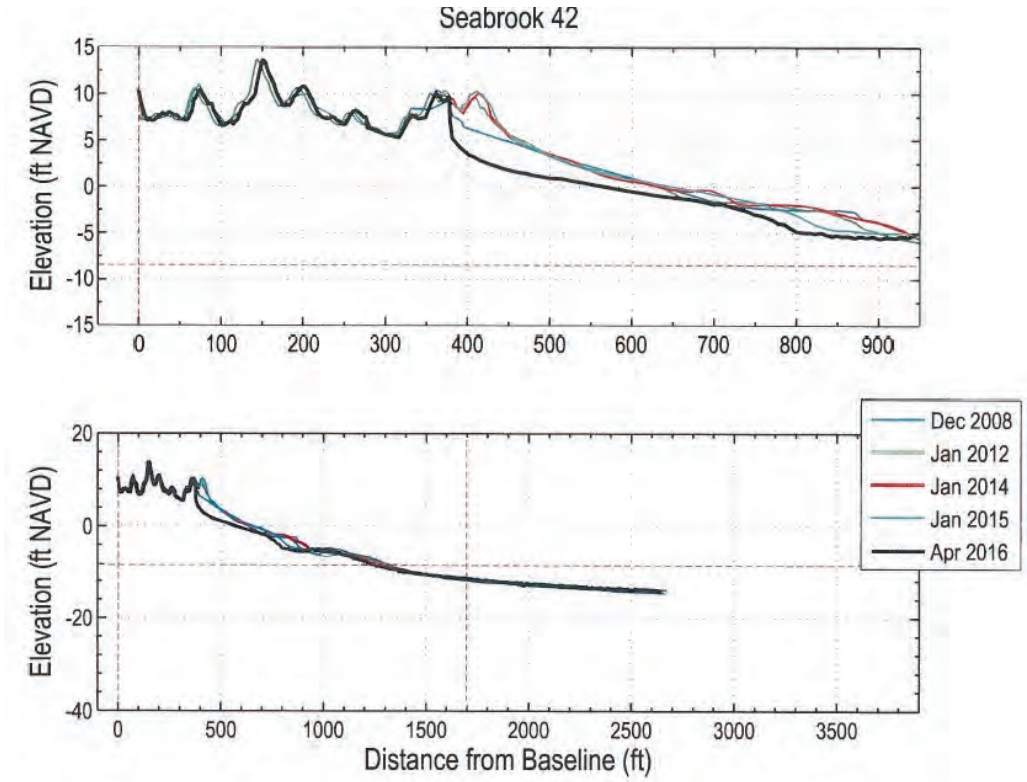
Department's Response #2: As described above in Department's Response #1, the Department maintains its position that the section of ocean shoreline from Monument 2625 and extending to the mouth of Captain Sams Inlet is correctly classified as an unstabilized inlet zone. In unstabilized inlet zones, S.C. Code Ann. § 48-39-280(A)(2) directs the Department to establish the baseline at "the most landward point of erosion at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position." The Department used shoreline data within the mandated 40 year window to establish the baseline southwest of Monument 2625. Additionally, the best available scientific and historical data of Captain Sams Inlet and adjacent beaches does not indicate that the shoreline is unlikely to return to its former position. Periodic inlet relocation projects keep this stretch of shoreline subject to inlet processes, which in turn, can result in dynamic shoreline positions adjacent to the inlet.[5]

Petitioner's Assertion #3: For the portions of the Property that remain designated within the Unstabilized Inlet Zone, the baseline should be set at the most landward point of erosion over the last 40 years. Here, the Petitioner alleges that there has been no such trend of erosion; instead, the Property continues within an unbroken trend of accretion so the baseline should be set using the data and aerial imagery resulting in a baseline along the escarpment after Hurricane Matthew. To support this assertion, the Petitioner provided average shoreline change rates between 1988 and 2017 and a photo-interpreted post-Hurricane Matthew escarpment from a NOAA aerial photo taken on October 13, 2016.

Department's Response #3: In unstabilized inlet zones, S.C. Code Ann. § 48-39-280(A)(2) directs the Department to establish the baseline at "the most landward point of erosion at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position."

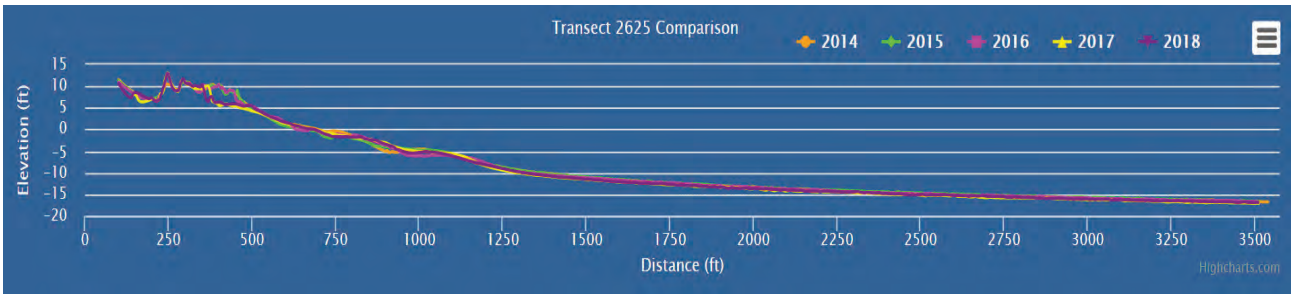
The Department disagrees with the assertion that Captain Sams Spit has experienced an unbroken trend of accretion. Exhibit A, submitted by the Petitioner, shows beach profile elevation data from a July 2016 inlet relocation monitoring report produced by Coastal Science & Engineering. Many of the profiles show erosion that has occurred between December 2008 and April 2016 (pre-Hurricane Matthew) (Figure 8). Figure 9 also shows sand volume loss in the 2017 and 2018 profiles for Transects 2625 and 2620.

[5] Even if the Department assumes for the sake of argument that the zone should be changed to a standard zone, the Petitioner has failed to show that there was a primary oceanfront sand dune where it is claiming one existed. Petitioner's data is insufficient to demonstrate that there was a dune at least 36 inches from toe to crest, and 500 feet long to qualify as a Primary Oceanfront Sand Dune per S.C. Code Ann. Regs. 30-1(D)(43). Moreover, from BERM data collected in 2018, it is evident that the sand dune Petitioner has identified is no longer present.



Date	Unit Vol (cy/ft)
Jan 2006	424.7
Nov 2006	458.5
Dec 2007	460.7
Dec 2008	441.3
Nov 2010	467.9
Jan 2012	448.4
Jan 2014	449.4
Jan 2015	439.8
Apr 2016	403.3

Figure 8. Beach profile "Seabrook 42" from Coastal Science & Engineering's July 2016 inlet relocation monitoring report, provided by the Petitioner as Exhibit A. The beach cross-sections at the top of the figure show erosion that occurred between January 2012 and April 2016. The table at the bottom of the figure shows that the unit volume of sand at this profile decreased from 448.4 cy/ft to 403.3 cy/ft over the same timeframe.



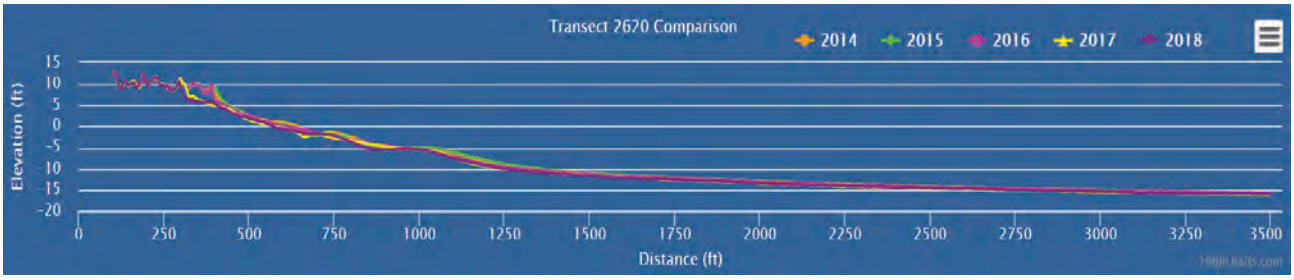


Figure 9. Beach profiles from DHEC OCRM's BERM Explorer web application showing Transects 2625 and 2620. The beach cross-sections show additional loss of sand from 2016 to 2017 and 2018.

Regardless of any recent accretion or erosion, in unstabilized inlet zones, S.C. Code Ann. § 48-39-280(A)(2) directs the Department to establish the baseline at "the most landward point of erosion at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position." The Department used shoreline data within the mandated 40 year window to establish the baseline southwest of Monument 2625. Additionally, the best available scientific and historical data of Captain Sams Inlet and adjacent beaches do not indicate that the shoreline is unlikely to return to its former position. Periodic inlet relocation projects keep this stretch of shoreline subject to inlet processes, which in turn, can result in dynamic shoreline positions adjacent to the inlet.

Petitioner's Assertion #4: Petitioner asserts that the 1988 vegetation line, utilized by the Department for the baseline, is inaccurate, and has proposed an alternative interpretation of the 1988 vegetation line. In support of this alternative interpretation, the Petitioner has provided beach profiles from the Town of Kiawah Island's 1991 local beachfront management plan. For the portions of the Property that remain designated within the unstabilized inlet zone, the Petitioner asserts that the baseline should be placed at the alternative interpretation of the 1988 vegetation line (Figure 10).

Department's Response #4: During this remand, the Department reviewed the digitization of the 1988 vegetation line for the portion of Kiawah Island west of monument 2625, and made minor modifications to fine tune the line of continuous vegetation. This reviewed vegetation line can be seen in Figure 10, and has also been provided to the Petitioner in shapefile format.

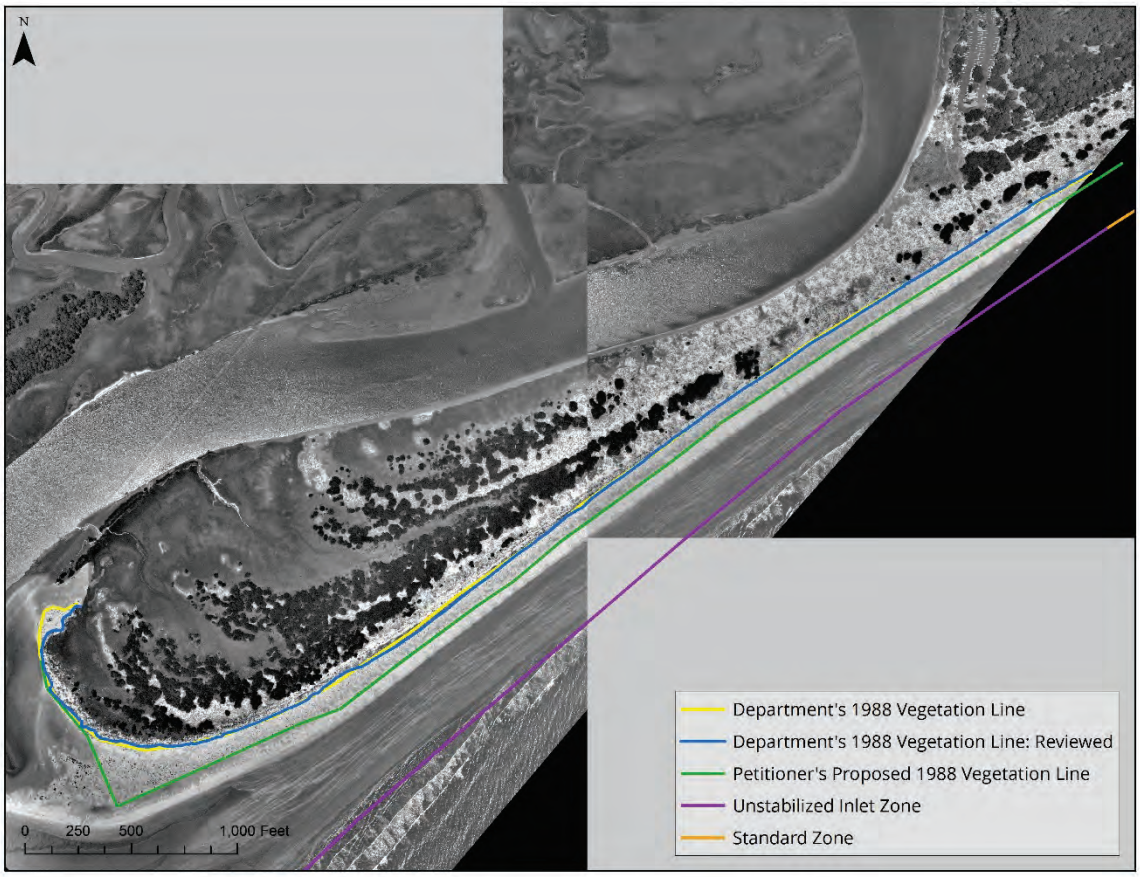


Figure 10. This map shows the 1988 aerial imagery with beach zones, the Department's original 1988 vegetation line, the Department's reviewed 1988 vegetation line, and the Petitioner's proposed 1988 vegetation line.

The beach profile charts provided by the Petitioner do not support the Petitioner's proposed vegetation line. The profile seen in Figure 11 shows a sharp increase in elevation approximately 150 feet seaward from monument 2625. As seen in Figure 12, the distance from Monument 2625 to the Department's 1988 vegetation line is approximately 150 feet.

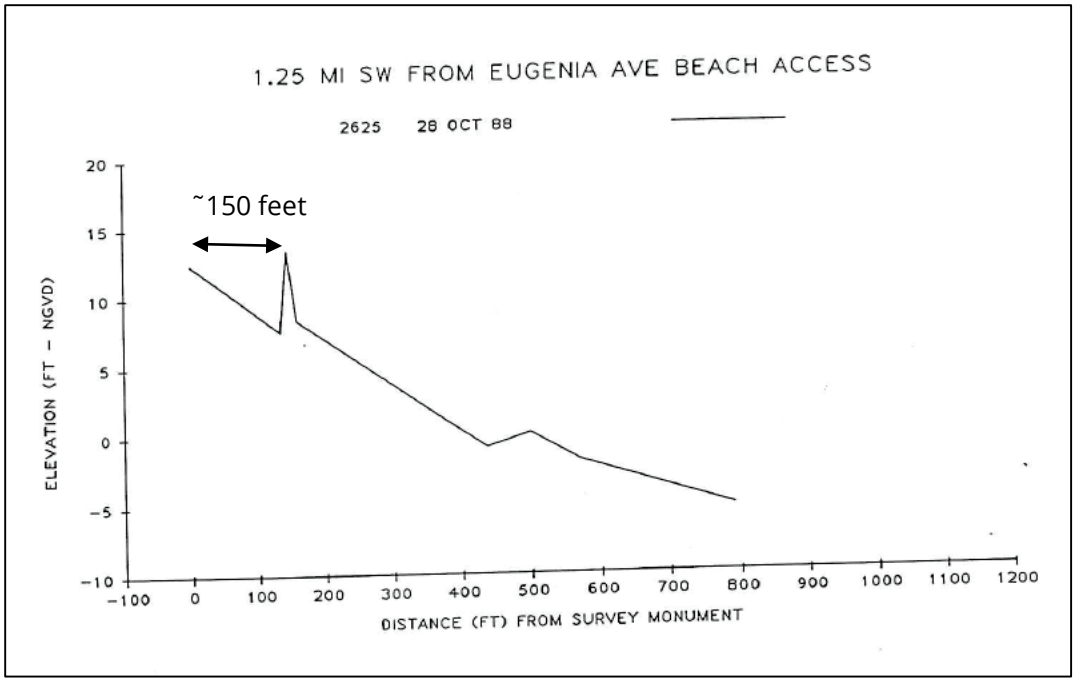


Figure 11. A chart supplied by the Petitioners from the Town of Kiawah's 1991 Beachfront Management Plan.

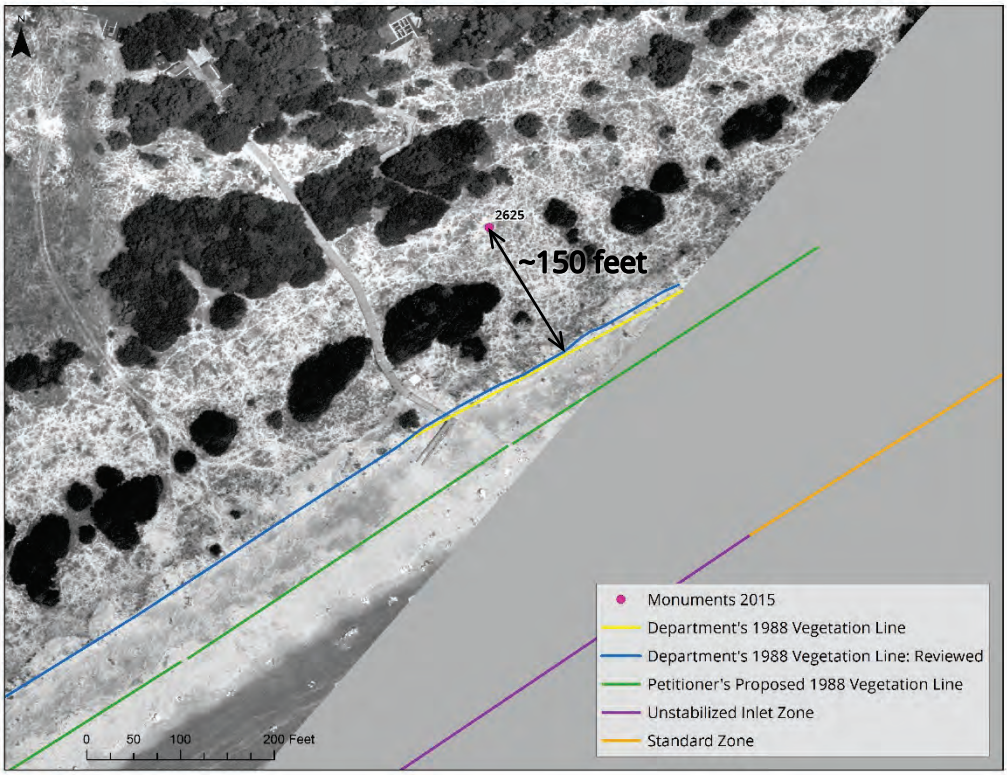


Figure 12. This map shows the 1988 aerial imagery, monument 2625, the Department's original 1988 vegetation line, the Department's reviewed 1988 vegetation line, and the Petitioner's proposed 1988 vegetation line. The distance from the monument to the Department's line is approximately 150 ft.

Finally, while the Department recognizes that there may be patches of sparse vegetation seaward of the Department's reviewed 1988 vegetation line, when digitizing a line of continuous vegetation (Figure 13), these sporadic clumps do not constitute a continuous line.

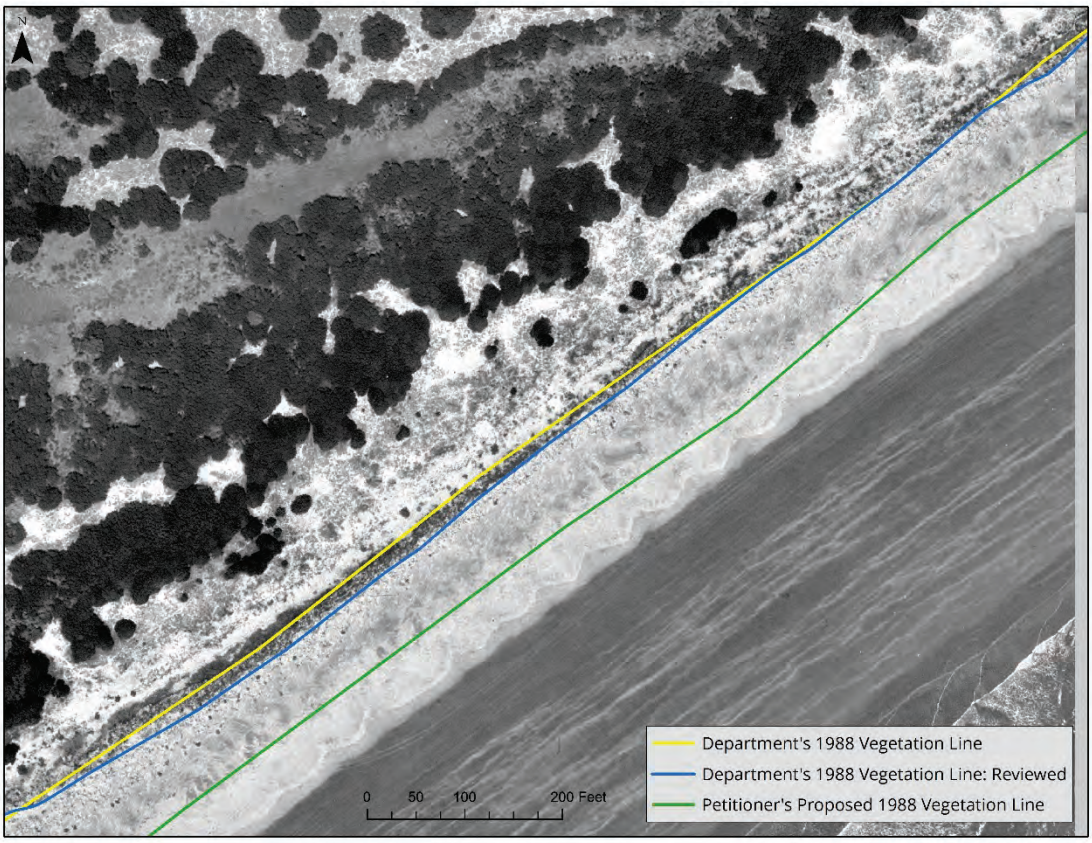


Figure 13. This map shows the 1988 aerial imagery, the Department's original 1988 vegetation line, the Department's reviewed 1988 vegetation line, and the Petitioner's proposed 1988 vegetation line. The purpose of the map is to visually show the line of continuous vegetation, as demarcated by the Department's reviewed vegetation line.

The Department maintains its position that the baseline is accurately established in this unstabilized inlet zone using 40 years of historical shoreline data. The Department considers the reviewed 1988 vegetation line to be the most landward point of erosion in the last 40 years. This is the Department's final decision on remand.

Please let us know if you have any questions.

Sincerely,

Elizabeth B. von Kolnitz
Chief
Office of Ocean and Coastal Resource Management

cc: Matthew J. Slagel, Beachfront Permitting Project Manager, DHEC-OCRM
Jessica B. Boynton, Shoreline Specialist, DHEC-OCRM
Sallie P. Phelan, Attorney, DHEC

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP II, LLC, Petitioner, vs. SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, Respondent, In Re: DHEC Case No. 17-RFR-44	)	**REQUEST FOR CONTESTED CASE HEARING** DATE: February 5, 2018 DOCKET NO. 2018- ALJ -

Under S.C. Code Ann. §44-1-60(G) and S.C. Code Ann. §48-39-280(E), notice is hereby given that the Petitioner, KDP II, LLC, does hereby appeal and request a contested case hearing concerning the final decision of the South Carolina Department of Health and Environmental Control ("DHEC") in DHEC Case No. 17-RFR-44 extending the public comment period for DHEC's proposed new locations of the baseline and setback line and the time for the final establishment of those lines until after December 31, 2017. This decision constituted a de facto final denial of the Petitioner's request to move the baseline seaward of its existing location as of December 31, 2017, as part of the re-delineation of the baseline under S.C. Code Ann. § 48-39-280 despite the factual and legal basis for adjustment of the baseline seaward of its current location.

DHEC published its proposed new beachfront jurisdictional lines on October 6, 2017, also providing notice at that time of a 30-day public comment period with a final determination of the new jurisdictional lines before December 31, 2017. On November 3, 2017, DHEC issued a second notice extending the public comment period and final determination of those

jurisdictional lines until well after December 31, 2017 (copy attached as Exhibit A). Petitioner timely filed a written Request for Final Review Conference with the DHEC Board on November 20, 2017 (copy attached as Exhibit B). The DHEC Board declined Petitioner's request for review, by letter dated January 5, 2018 (copy attached as Exhibit C).

The grounds for Petitioner's appeal and request for contested case hearing are set forth in Exhibit B.

The Petitioner seeks a ruling by the Administrative Law Court, based on the facts and law, setting the baseline applicable to Petitioner's property seaward of its location as of December 31, 2017, and reversing the final decision of DHEC refusing to adjust the location of the baseline seaward.

Respectfully Submitted

WALKER GRESSETTE FREEMAN & LINTON, LLC

BY: /s/ Trenholm Walker

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Post Office Box 22167
Charleston, SC 29413
Telephone: 843-727-2200
Fax: 843-727-2238
walker@wgfllaw.com

ATTORNEYS FOR PETITIONER

February 5, 2018

Charleston, S.C.

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2018, in Charleston, South Carolina, I served a copy of the foregoing Request for Contested Case Hearing on all other parties by depositing the same in the United States mail, first class, postage paid, to the following:

Sara P. Bazemore (bazemosp@dhec.sc.gov)
SCDHEC - Office of General Counsel
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

Lisa Lucas Longshore
Clerk
South Carolina Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

EXHIBIT A

Healthy People

PUBLIC NOTICE

PROPOSED BEACHFRONT JURISDICTIONAL LINES
EXTENSION OF PUBLIC COMMENT PERIOD
UNTIL APRIL 6, 2018

Based on comments received from landowners, community leaders, the conservation community, and others during the 30-day public comment period, the Department of Health and Environmental Control (Department) is extending the public comment period for the Proposed Beachfront Jurisdictional Lines (the "current proposal"), until **April 6, 2018**. As a result of this extension, the Department will begin to adopt final revised beachfront jurisdictional lines in May 2018 with all final revised lines published by December 31, 2018. A tentative adoption schedule for each beach will be available on the DHEC website on November 13, 2017.

The Department is extending the comment period to allow interested persons time to meet with Department staff, understand the Department's methodology in setting the jurisdictional lines and bring any additional information to the Department's attention for consideration. Comments may be submitted online or in writing. Please visit www.scdhec.gov/beachfrontlines for more information.

In 2016, S.C. Code Laws §48-39-280 was amended to prohibit the baseline from moving seaward from its position on December 31, 2017. **The Department's decision to adopt revised lines after December 31 affects landowners who own property where the baseline was proposed to move seaward of the existing baseline under the Department's current proposal.** To view the proposed lines for your property, please visit https://gis.dhec.sc.gov/shoreline/

If you are a landowner who **owns property where the baseline was proposed to move seaward of the existing baseline**, under the Department's current proposal, or if you are a landowner who contends other information may prove the baseline on your property should move seaward of the existing baseline, please contact the Department with the information requested below **prior to December 4, 2017** to receive information and guidance on board review under S.C. Code Laws §44-1-60. Note that the Department will attempt to proactively reach out to these property owners. S.C. Code Laws §44-1-60(J) states "[a]ny statutory deadlines applicable to permitting and licensing programs administered by the department must be extended to all (sic) for this final review process." It is the Department's position that the December 31 date would be extended for landowners who file a timely request for review under S.C. Code Laws §44-1-60.

EXHIBIT A

To receive information and guidance on board review, please provide the following information via electronic mail [ocrm-comments@dhec.sc.gov] or phone (843-953-0200) prior to December 4, 2017:

- Property Address
- Name of Owner(s)
- Mailing Address of Owner(s)
- Contact Name
- Contact Telephone Number
- Contact Email Address

EXHIBIT B

STATE OF SOUTH CAROLINA

BEFORE THE BOARD OF

THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

KDP, II, LLC

Affected Property Owner-Requestor,

vs.

The South Carolina Department of Health and Environmental Control

Respondent.

Re: 2017 Beachfront Jurisdictional Line Determinations (S.C. Code § 48-39-280)

Charleston County: TMS Nos. 207-05-00-001 and 207-05-00-0011

OCRM Survey Profile Stations: 2615, 2620, 2625

INTRODUCTION

Pursuant to S.C. Code Ann. §44-1-60, KDP, II, LLC ("KDP") hereby requests that the Board of the Department of Health and Environmental Control (the "Department") conduct a Final Review Conference of the final determination made by the Department in its notice issued on November 3, 2017, (the "Notice"), concerning the new beachfront jurisdictional lines under S.C. Code Ann. § 48-39-280 that were proposed on October 6, 2017. The Notice extended the comment period for the proposed new lines until April 6, 2018. The Department has since issued a separate communication with a tentative adoption date of August 24, 2018, for Kiawah Island.

Under the provisions of S.C. Code Ann. Section 48-39-280, as amended in 2016, the *de facto* legal effect of this Notice is the Department's final determination to adopt the location of the existing baseline, established in 2009, as the location of the new baseline

for properties in those instances where the owner believes the final location of the new baseline should be seaward of the existing baseline, because the statute prohibits the baseline moving seaward after December 31, 2017.[1]

KDP is the owner of land on western end of Kiawah Island called Captain Sams Spit, comprised of the land south of Beachwalker Park (i.e., generally from Department monument station 2625 extending West to Captain Sams Inlet, also identified by TMS parcel numbers 207-05-00-001 and 207-05-00-0011)(hereinafter the "Property").

Based on the criteria set forth in S.C. Code Ann. § 48-39-280 as well as related statutes and regulations, the new baseline should be seaward of the existing (2009) location for the reasons set forth below. Because of the fully substantiated history of accretion of the Property over the last 70 years, KDP does not take issue with the Department's preliminary determination that the setback line on the Property should be situated at the minimum distance of 20 feet behind the baseline and does not seek at this time a final review conference of that preliminary determination of Department as to the Property.

---

[1] The Notice recognizes this final consequence and states, in part, the following: "In 2016, S.C. Code Laws §48-39-280 was amended to prohibit the baseline from moving seaward from its position on December 31, 2017. The Department's decision to adopt revised lines after December 31 affects landowners who own property where the baseline was proposed to move seaward of the existing baseline under the Department's current proposal. ... If you are a landowner who owns property where the baseline was proposed to move seaward of the existing baseline, under the Department's current proposal, or if you are a landowner who contends other information may prove the baseline on your property should move seaward of the existing baseline, please contact the Department with the information requested below prior to December 4, 2017 to receive information and guidance on board review under S.C. Code Laws §44-1-60."

BASIS FOR REQUEST FOR FINAL REVIEW CONFERENCE

Failure to Follow Statutorily Prescribed Methods

The statute and regulations governing the location of the baseline and setback line emphasize that the primary factor for consideration is the beach survey monument data gathered by the Department every six months. Based on the limited information the Department has provided KDP, it appears that the Department deviated from this mandate and relied on other information and methodology not referenced by the statute and regulations.

The following statutory and regulatory provisions give priority to the survey monument information in the adjustment of the lines:

> (D) ***In order to locate the baseline and the setback line***, the department must establish monumented and controlled survey points in each county fronting the Atlantic Ocean. ***The department must acquire sufficient surveyed topographical information on which to locate the baseline.*** Surveyed topographical data typically must be gathered at two thousand foot intervals. However, in areas subject to significant near-term development and in areas currently developed, the interval, at the discretion of the department, may be more frequent. ***The resulting surveys must locate the crest of the primary oceanfront sand dunes to be used as the baseline for computing the forty-year erosion rate***. In cases where no primary oceanfront sand dunes exist, a study conducted by the department is required to determine where the upland location of the crest of the primary oceanfront sand dune would be located if the shoreline had not been altered.

SC Code Section 48-39-280 (D).

> (a) The changing nature of the shoreline or long-term stability of beachfronts can now be documented by use of the monitoring and archival system now in place. Twice a year beachfront profile stations, established to third order survey accuracy, will be surveyed and the results recorded and stored. Comparing these surveys seasonally and over the years will provide a long-term view of what is happening at a particular point along the coast. ***This information will be the cornerstone for the development of a scientific method for locating baselines and establishing erosion rates.***

SC Code of Regs Ann. Section 30-21(C)(1)(a).

> (f) Goal: Improve Coastal Data Base
>
> These policies will be implemented by Council staff who will conduct the beach surveys and enter the results of each survey into a computerized data base. This will be an ongoing activity that the staff of the Council will continually upgrade. ***The monitoring plan will provide the Council with a means to establish historic trends and to establish setback lines and better regulate development along the coastline. Data obtained from the monitoring program will be used to adjust the lines*** and evaluate the success of renourishment projects as required under Section 30-14 of the Administrative Procedures Section.

SC Code of Regs Ann. Section 30-21(C)(2)(f).

The Department's four-page "Line Report: Proposed Baseline and Setback Line Kiawah Island, October 6, 2017" (the "Report") indicates that the Department did not use the beach survey monument data for the Property as the primary basis for its determinations.

In describing how it set the proposed baseline in the unstabilized inlet zone, the Department states that it relied on vegetation line positions from aerial imagery, a process that has no basis in the controlling statute. The statute governing the location of the baseline in the unstabilized inlet zone makes no reference to fixing the baseline at a line of vegetation:

> The baseline for inlet erosion zones that are not stabilized by jetties, terminal groins, or other structures must be determined by the department as ***the most landward point of erosion*** at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position.

S.C. Code Ann. §48-39-280 (A)(2)(double emphasis added).

Vegetation lines do not equate to the most landward point of erosion, or even the most landward shoreline.[2] There also has been no information provided to verify the accuracy of these aerial images supposedly showing these lines of vegetation including their resolution and whether they were orthorectified. KDP would also note that it made FOIA requests for all documents the Department was relying upon in setting the new jurisdictional lines and the agency did not disclose the use of a 1983 wet/dry shoreline referenced by the Report as the partial basis for the location of the baseline on the Property. While KDP received such digital files that depict these lines, KDP has no information on their derivation nor their inherent position error.

Most important of all, the Report incorrectly states that "in unstabilized inlet zones, the baseline is established at the most landward shoreline position." Section 48-39-280 (A)(2) clearly and unambiguously states the baseline in unstabilized inlet zones "***must*** be determined by the department as the most ***landward point of erosion*** at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position." The most landward point of erosion is NOT the same as the most landward shoreline.

It is undisputed that the Property is consistently accretional. Thus, using the most landward shoreline instead of the most landward point of erosion in a 40-year period leads to a result that is not in conformity with the mandate of this statute. The Department should first have determined if the Property suffered a trend of erosion under normal conditions during the prior 40 years. If the Department had done so, it would have determined that

[2] Vegetation lines have customarily been used by the Department in setting the Baseline, and KDP agrees that vegetation lines may be used under some circumstances as a proxy for relative shoreline movement, but vegetation lines are not the shoreline nor do they equate to the most landward point of erosion.

there has been no such trend of erosion, recognized the unbroken trend of accretion, and set the baseline in conformity with that finding based upon surveyed profile data and aerial imagery.

Turning to the determination of the baseline in the standard zone, the Report refers to the use of the beach survey data "OR LIDAR" in determining the crest of the primary dune in the standard zone. There is no provision in the statutes or regulations authorizing the use of LIDAR as a substitute for the beach survey data accumulated by the agency. LIDAR is a secondary source and may provide pertinent information, but LIDAR readings are not the approved determinant for establishing the baseline in the standard zone. LIDAR topographic data may well overlook seaward primary dunes that field surveys disclose. The method used for the stabilized zone is important, given the justified adjustment to the boundary of the unstabilized zone and standard zone on the Property described below.

Unstabilized Inlet Zone vs Standard Zone

The Report fails to state whether the Department made a current determination of the locations of the standard zone and the unstabilized inlet zone along the shoreline of the Property. To date KDP has not received any information that shows that the Department considered any near-shore bathymetry as would be necessary for such a determination. The Report merely states without explanation that "[t]he central portion of Kiawah Island between OCRM Monument 2625 and OCRM Monument 2740 is classified as a standard zone." The Department's designation of the location of these two zones appears not to have changed since the original jurisdictional lines were adopted in 1989.

SC Code Section 48-39-270 gives the following definitions of standard zone and inlet zone:

> (6) A standard erosion zone is a segment of shoreline which is subject to essentially the same set of coastal processes, has a fairly constant range of profiles and sediment characteristics, and is not influenced directly by tidal inlets or associated inlet shoals.
>
> (7) An inlet erosion zone is a segment of shoreline along or adjacent to tidal inlets which is influenced directly by the inlet and its associated shoals.

The July 2016 Inlet Relocation Monitoring Report of CSE documenting shoreline conditions a year after the re-location of Captain Sams Inlet in the summer of 2015 included extensive bathymetric data. The bathymetric transects along Property and digital terrain model for the Property, both from July 2016 Inlet Relocation Monitoring Report of CSE are attached as Exhibit 1. These studies have the benefit of providing the bathymetry for a considerable distance offshore. The studies show a common beach profile for the standard zone. As expressed in the CSE report, the shoreline to a location that is west of Monument 2615, "is subject to essentially the same set of coastal processes, has a fairly constant range of profiles and sediment characteristics, and is not influenced directly by" Captain Sams Inlet or its shoals.

Additionally, the attached Exhibit 2 shows the bathymetry along the Property in 2017. The geomorphology does not suggest influence of the tidal inlet east of Profile 2620. The bathymetry is slightly curved and arcuate which reflects the general curvature of the shoreline. There can be no question that the shoreline east of Profile 2620 is in the standard zone. Whether the standard zone is deemed to start East of Profile 2615 or East of Profile 2620 is less important than the Department's failure to undertake this threshold analysis required by the controlling statutes and regulations to determine if a

particular location on the beachfront is in the standard zone or unstabilized inlet zone and, accordingly, whether the baseline is the most landward point of erosion or the primary dune.

KDP knows of no information that refutes the bathymetric profile data contained in the enclosures. In fact, the Department's "DHEC - OCRM Beach Erosion Research & Monitoring Profile Viewer" (B.E.R.M. Explorer) demonstrates that is a constant range of profiles for Stations 2620 and 2625 for the years 2014 thru 2016. The profile drawing displayed from the B.E.R.M. Explorer shows bathymetry readings taken extend to a point approximately 3,000 feet offshore. If the Department has bathymetric readings that counter those of CSE, KDP asks that they be provided.

The Department's Location of the Baseline is Incorrect

Within the unstablized inlet zone, the Department used vegetation lines to guess at the most landward shoreline over the last forty years. The Department did not attempt to determine the most landward point of erosion over the last 40 years as the statute dictates.

It has been documented in geologic studies of the area that at Kiawah, there is an abundant sediment supply in the form of the shoals and ebb tidal delta associated with the Stono River. In addition, it is believed that much of Kiawah's sand supply has been incorporated from the erosion of Morris Island and Folly Beach. As the predominant longshore sediment transport is from east to west, this supply of sand has provided general stability to the beach at Kiawah. A study of sand budgets on Kiawah noted that the volume of sand in these updrift shoals on Kiawah is approximately ten (10X) times the volume of sand contained on the beach at Kiawah Island.

It is without dispute that the Property has been accreting along with the rest of Kiawah Island. Year after year, the Department has described Kiawah Island as one of the healthiest beaches in South Carolina. the Department has singled out in particular the western end that includes the Property. All of the Department's publicly available State of the Beaches Reports from 2001 through 2009 contain in their introductory paragraph for Kiawah Island the following: "Kiawah is one of the most stable barrier islands in the state, although the eastern and western ends of the island are more dynamic due to their proximity to inlets."

Attached as Exhibit 3 is the beach profile survey data of the Department from 1988 to 2017 that shows the average annual rate of accretion at the stations on the Property along with an aerial that shows the exact location of the monitoring stations. The annual average rate of accretion ranges from a low of around five feet per year at Profile 2625 to a high of around ten to twelve feet per year at Station K-21. These monument survey beach profiles fully substantiate this unbroken trend of accretion. KDP further notes that, on its Beach App, the Department indicates that Profiles 2625 and 2620 have had annual accretion rates of 5.22 ft/yr and 8.50 ft/yr, respectively.

The only erosional events that have been documented on the Property's shoreline over the last 40 years are: (1) some modest erosion on the far western end next to the inlet resulting from the relocation of the inlet to the east in the summer of 2015, (2) the storm surge of Hurricane Matthew in October of 2016, and (3) the storm surge of Hurricane Irma in September 2017. These are one-time events and are not reflective of whether the trend of this particular beachfront is accretional or erosional over the last forty years. Since KDP understands the Department is not considering Hurricane Irma, the

most landward point of erosion over the last 40 years is the escarpment after Hurricane Matthew as shown on the aerial image that is Exhibit 4.

It also must be noted that the Department's determination that the baseline should remain in the virtually same location as 2009 is arbitrary and capricious and without factual foundation. The Department's monument survey data, confirmed by aerial imagery, demonstrates the beach is accreting. Even if a low average annual accretion rate of 6 feet per year was used, the baseline should have moved at least 54 feet seaward (9 years X 6ft/yr) using the Department's incorrect benchmark of the most landward shoreline. The Department's analysis completely ignores the best scientific and historical information, fully corroborated by its beach monument survey data, that the reach of the beach along this shoreline is accreting on an annual basis, which is also confirmed by the Department's setting the setback line the minimum distance of 20 feet landward of its preliminary baseline.

Finally, as just discussed, the primary zone should be extended to the southwest of Profile 2625 to at least to Profile 2620 and possibly to Profile 2615. Along this shoreline the crest of the primary dune is the baseline. Instead of using the statutory criterion of setting the baseline in the standard zone at the crest of the primary dune, the Department incorrectly set it at the most landward shoreline over the last 40 years according to data sources other than those prescribed by the controlling statutes and regulation.

CONCLUSION

For these reasons, KDP requests that the Board grant a final review conference of the final determination of the location of the new baseline on the Property effectively implemented by the Notice, reverse this final determination, and set the baseline at the location shown of Exhibit 4 or, in the alternative, at the crest of the primary dune along the shoreline within the revised location of the standard zone.

WALKER GRESSETTE FREEMAN &
LINTON, LLC

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ATTORNEYS FOR REQUESTOR
KDP. II, LLC

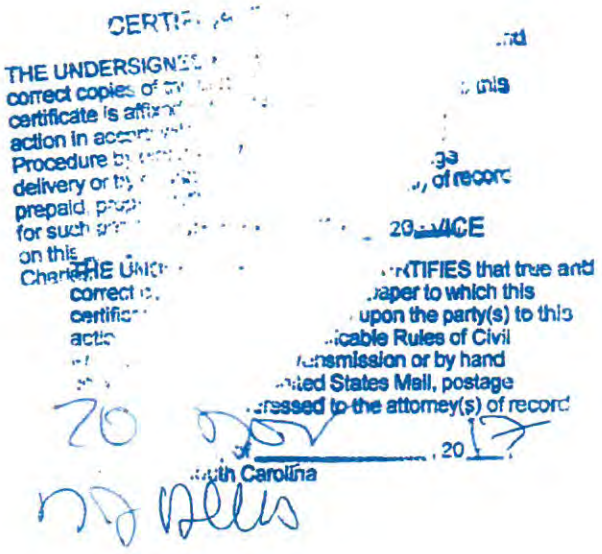
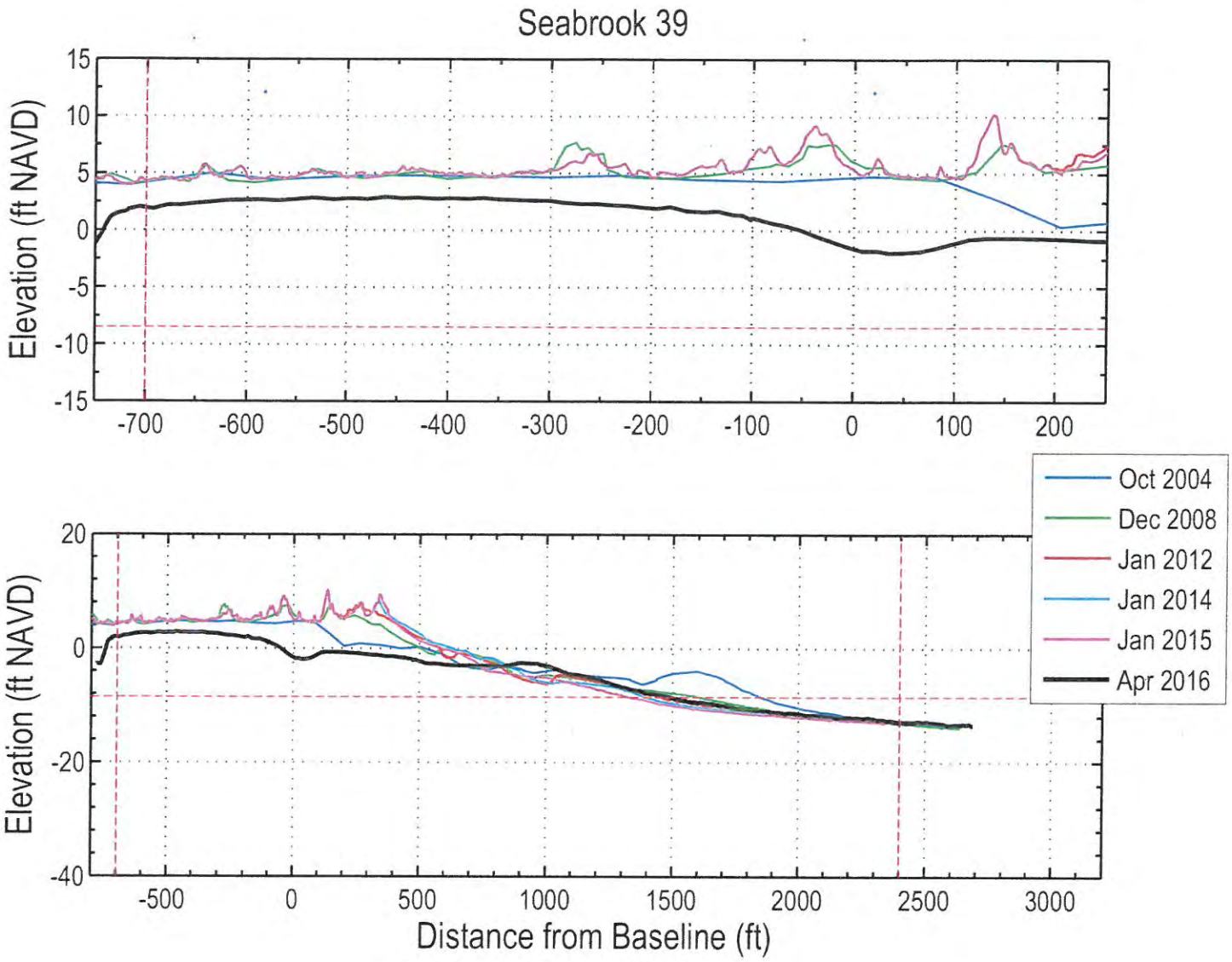


TABLE OF EXHIBITS

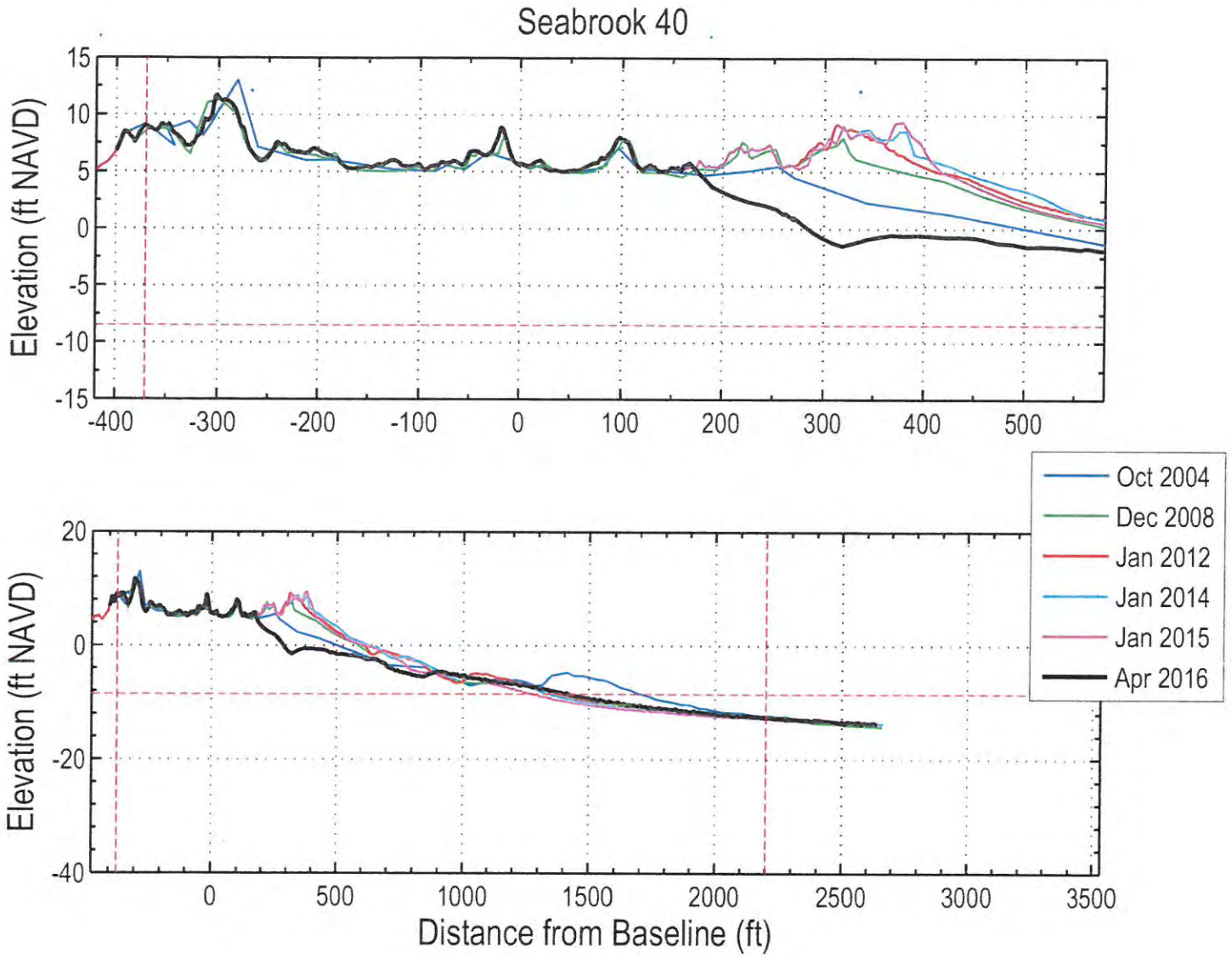
Exhibit 1	Bathymetric Transects along Property and Digital Terrain Model for the Property, both from July 2016 Inlet Relocation Monitoring Report of CSE
Exhibit 2	2017 Bathymetry for Property
Exhibit 3	The Department beach profile data for the average annual rate of accretion at the stations on the Property from 1988 to 2017 with aerial showing location of stations
Exhibit 4	Aerial showing most landward point of erosion

EXHIBIT B
Exhibit 1



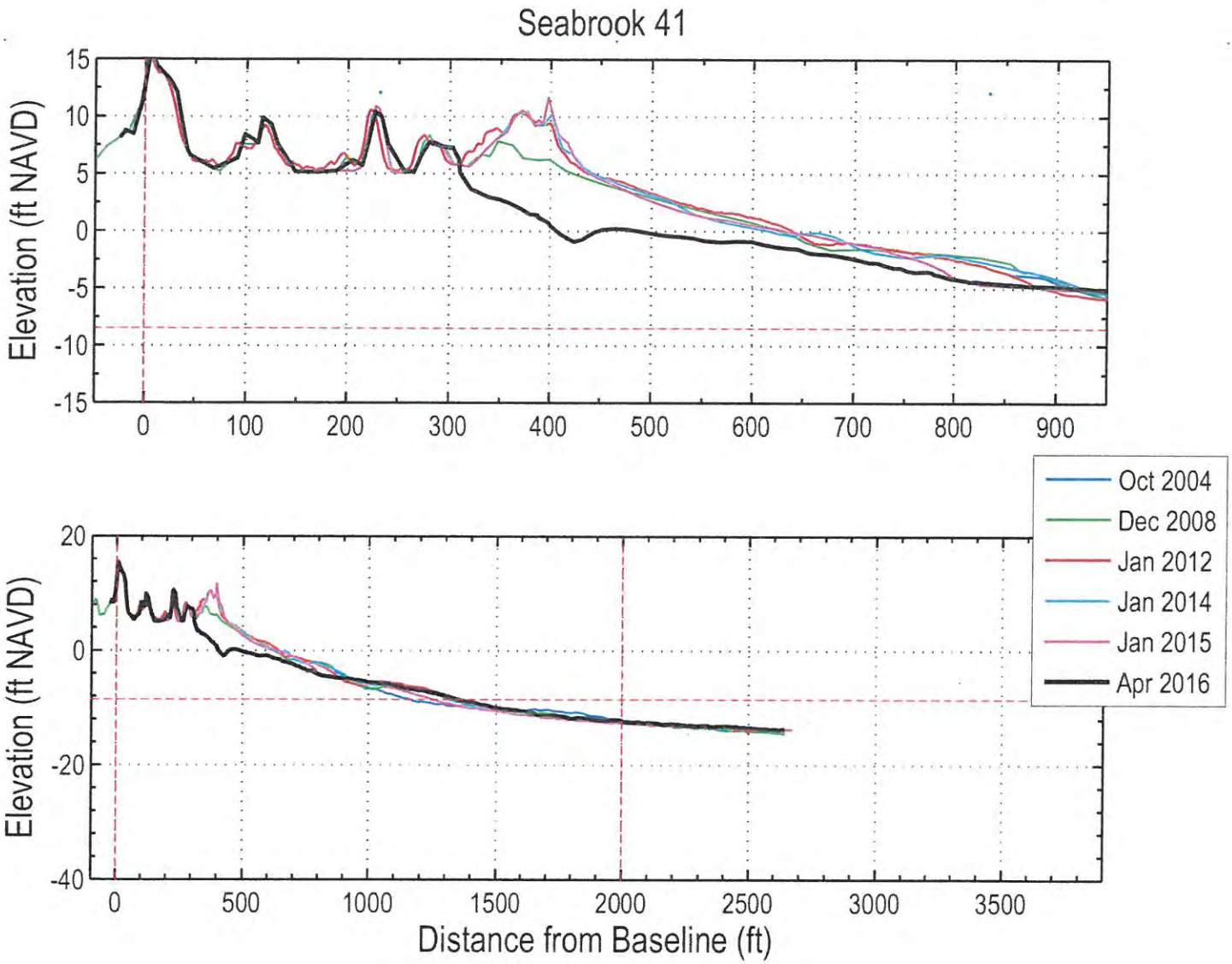
Date	Unit Vol (cy/ft)
Jan 2006	779.4
Nov 2006	810.0
Dec 2007	742.8
Dec 2008	744.8
Nov 2010	786.2
Jan 2012	765.2
Jan 2014	773.1
Jan 2015	749.8
Apr 2016	556.4

EXHIBIT B
Exhibit 1



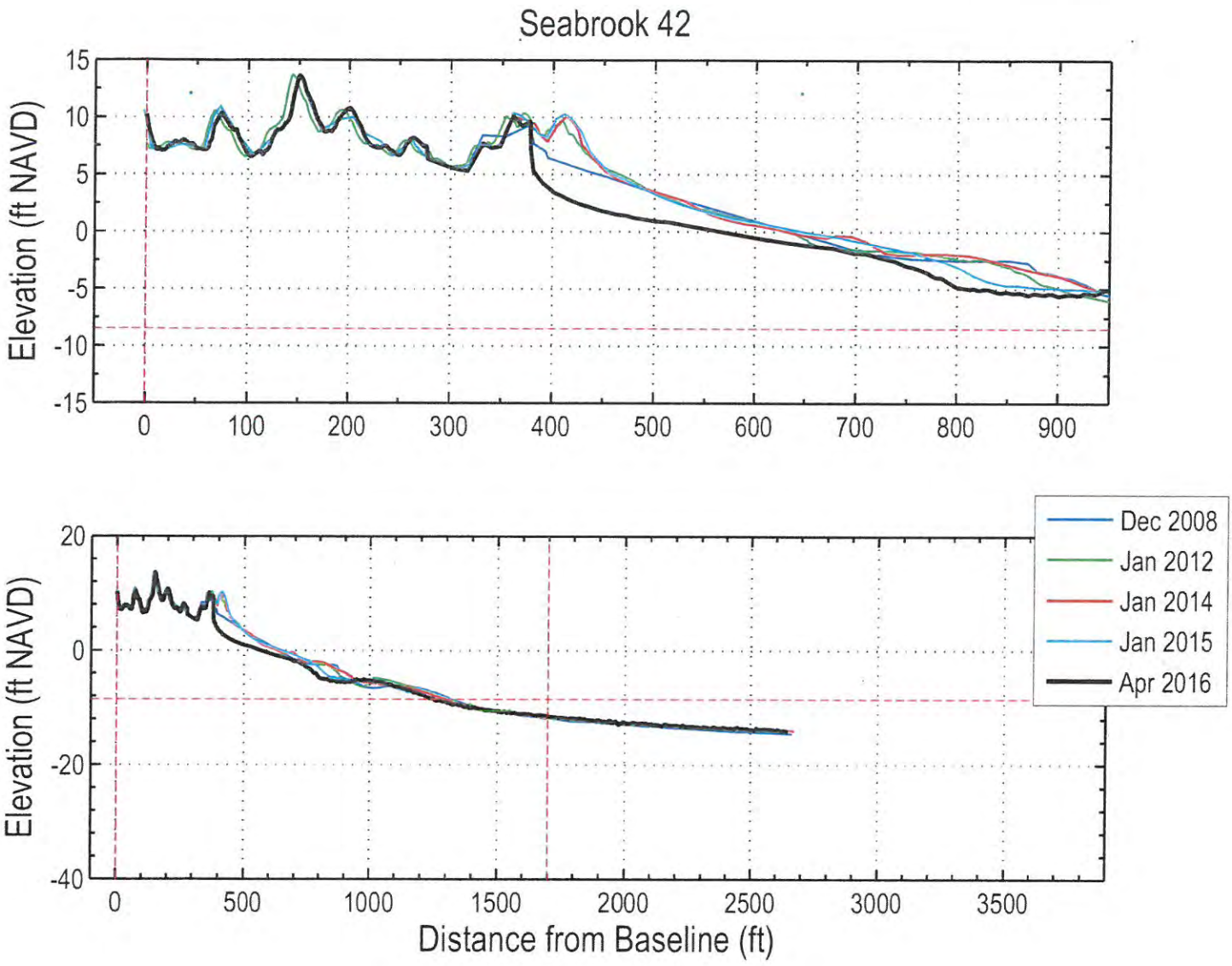
Date	Unit Vol (cy/ft)
Jan 2006	644.4
Nov 2006	668.8
Dec 2007	630.5
Dec 2008	596.7
Nov 2010	646.5
Jan 2012	624.1
Jan 2014	627.4
Jan 2015	608.3
Apr 2016	521.6

EXHIBIT B
Exhibit 1



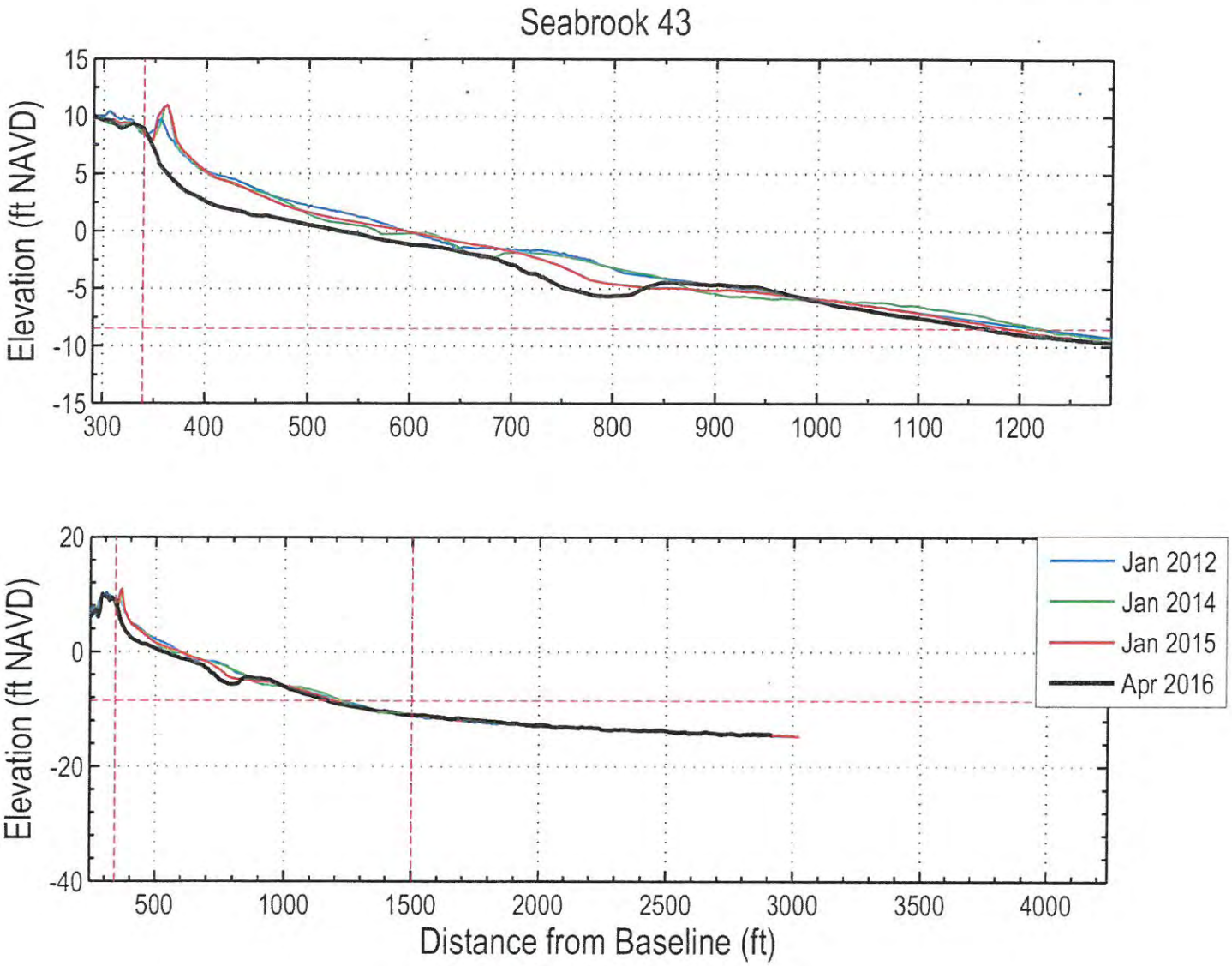
Date	Unit Vol (cy/ft)
Jan 2006	432.6
Nov 2006	467.5
Dec 2007	449.2
Dec 2008	424.4
Nov 2010	445.2
Jan 2012	438.0
Jan 2014	431.8
Jan 2015	420.2
Apr 2016	373.5

EXHIBIT B
Exhibit 1



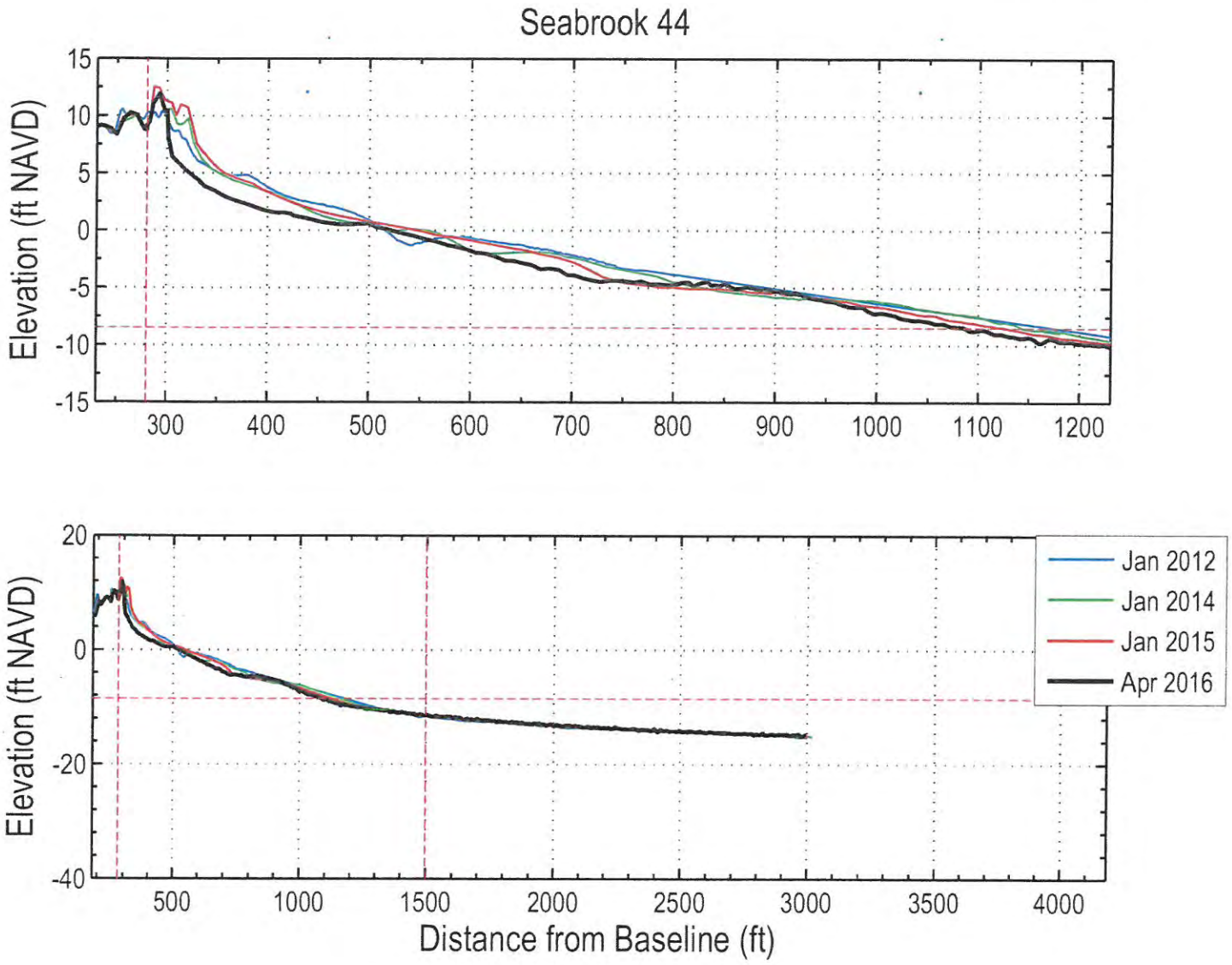
Date	Unit Vol (cy/ft)
Jan 2006	424.7
Nov 2006	458.5
Dec 2007	460.7
Dec 2008	441.3
Nov 2010	467.9
Jan 2012	448.4
Jan 2014	449.4
Jan 2015	439.8
Apr 2016	403.3

EXHIBIT B
Exhibit 1



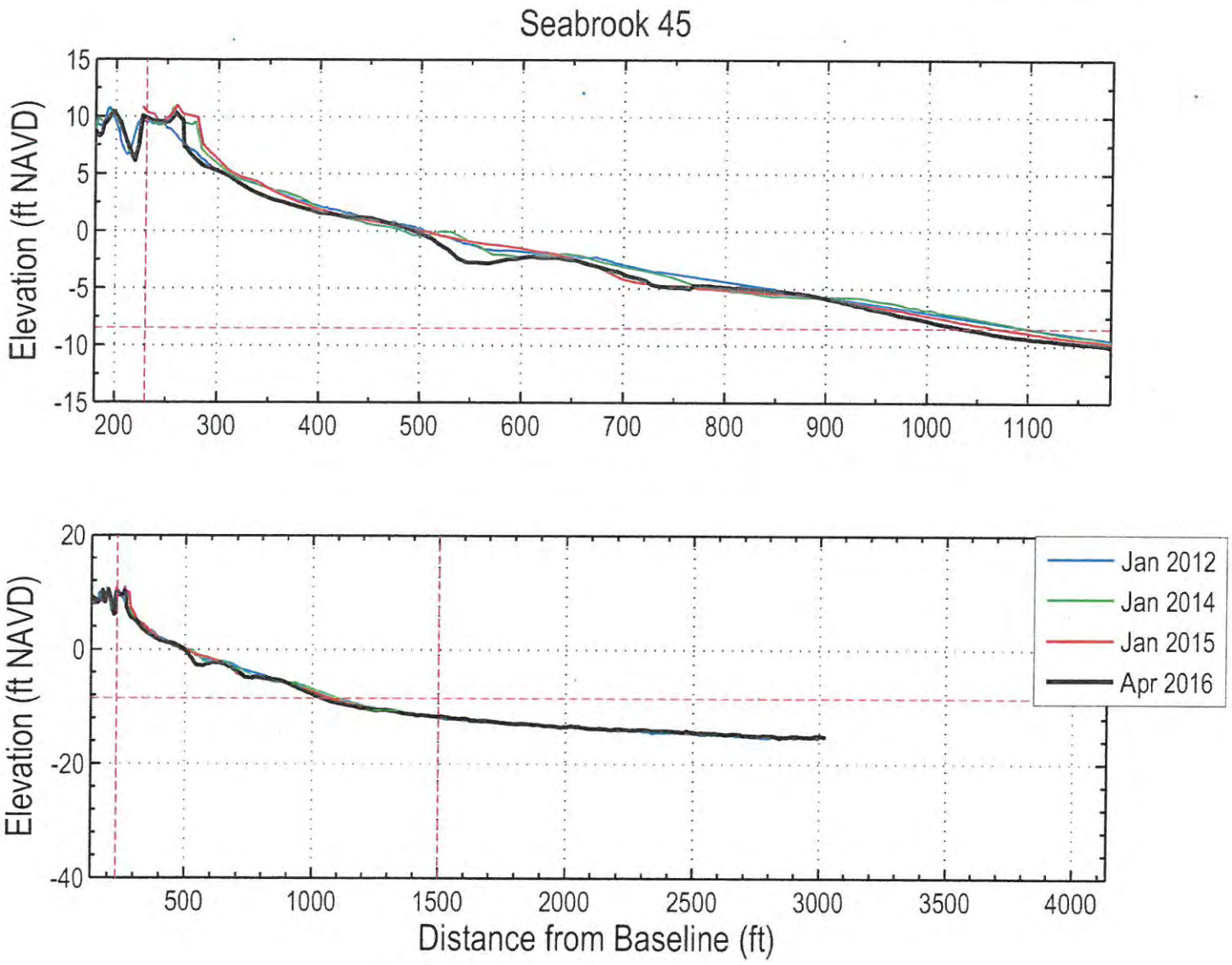
Date	Unit Vol (cy/ft)
Nov 2010	219.4
Jan 2012	205.6
Jan 2014	200.5
Jan 2015	196.3
Apr 2016	168.4

EXHIBIT B
Exhibit 1



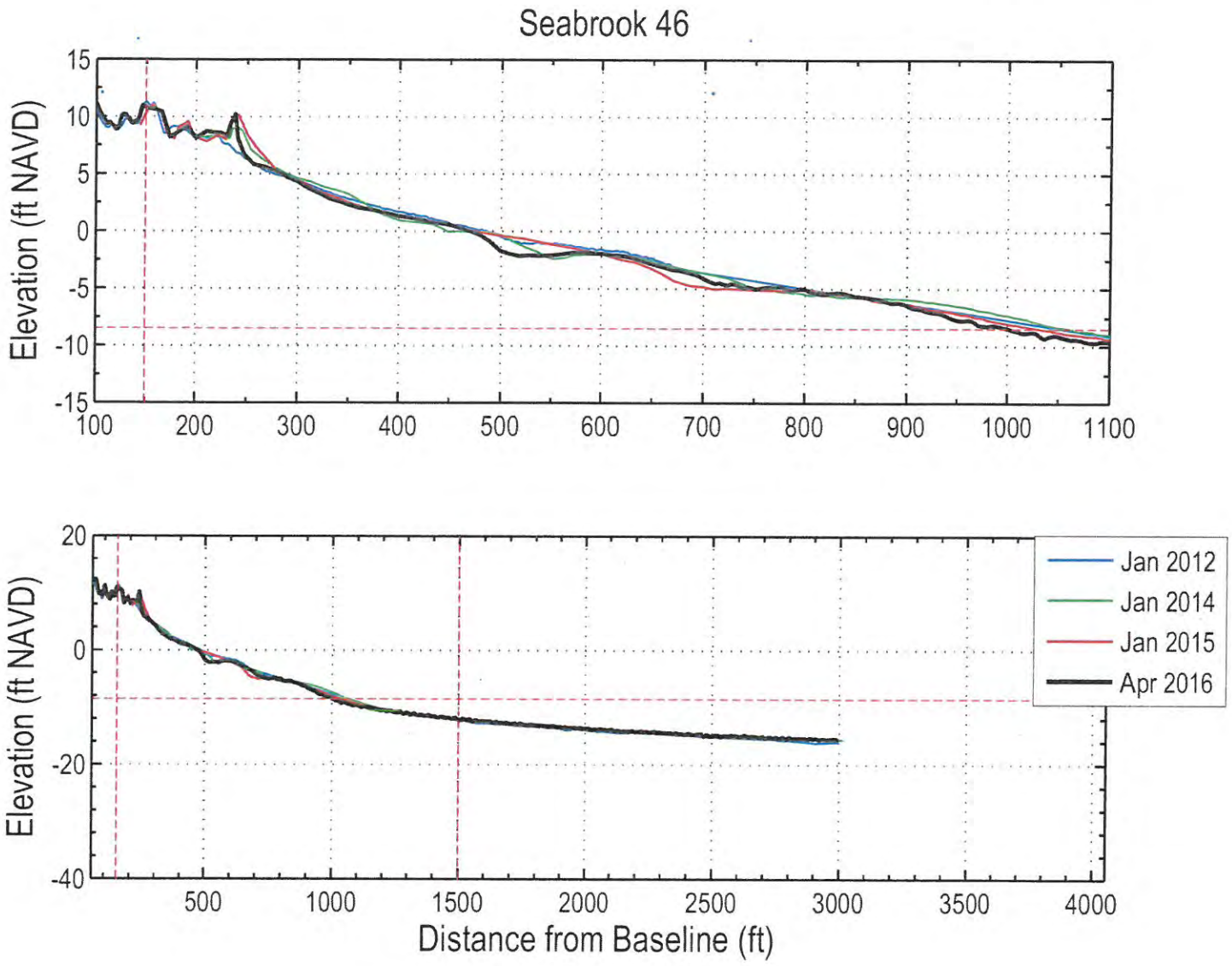
Date	Unit Vol (cy/ft)
Nov 2010	222.6
Jan 2012	214.0
Jan 2014	206.6
Jan 2015	206.2
Apr 2016	183.6

EXHIBIT B
Exhibit 1

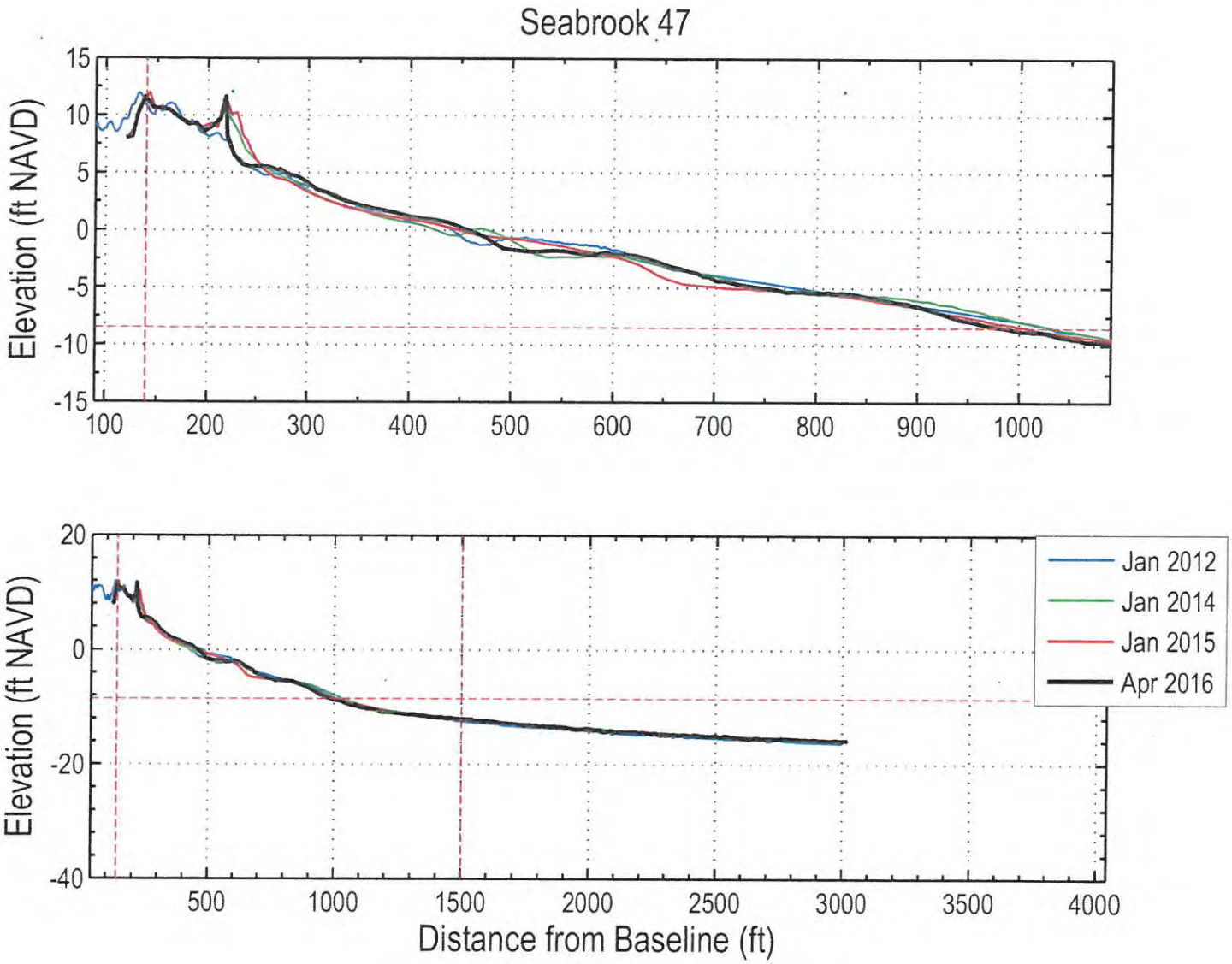


Date	Unit Vol (cy/ft)
Nov 2010	216.6
Jan 2012	213.8
Jan 2014	212.8
Jan 2015	210.3
Apr 2016	198.4

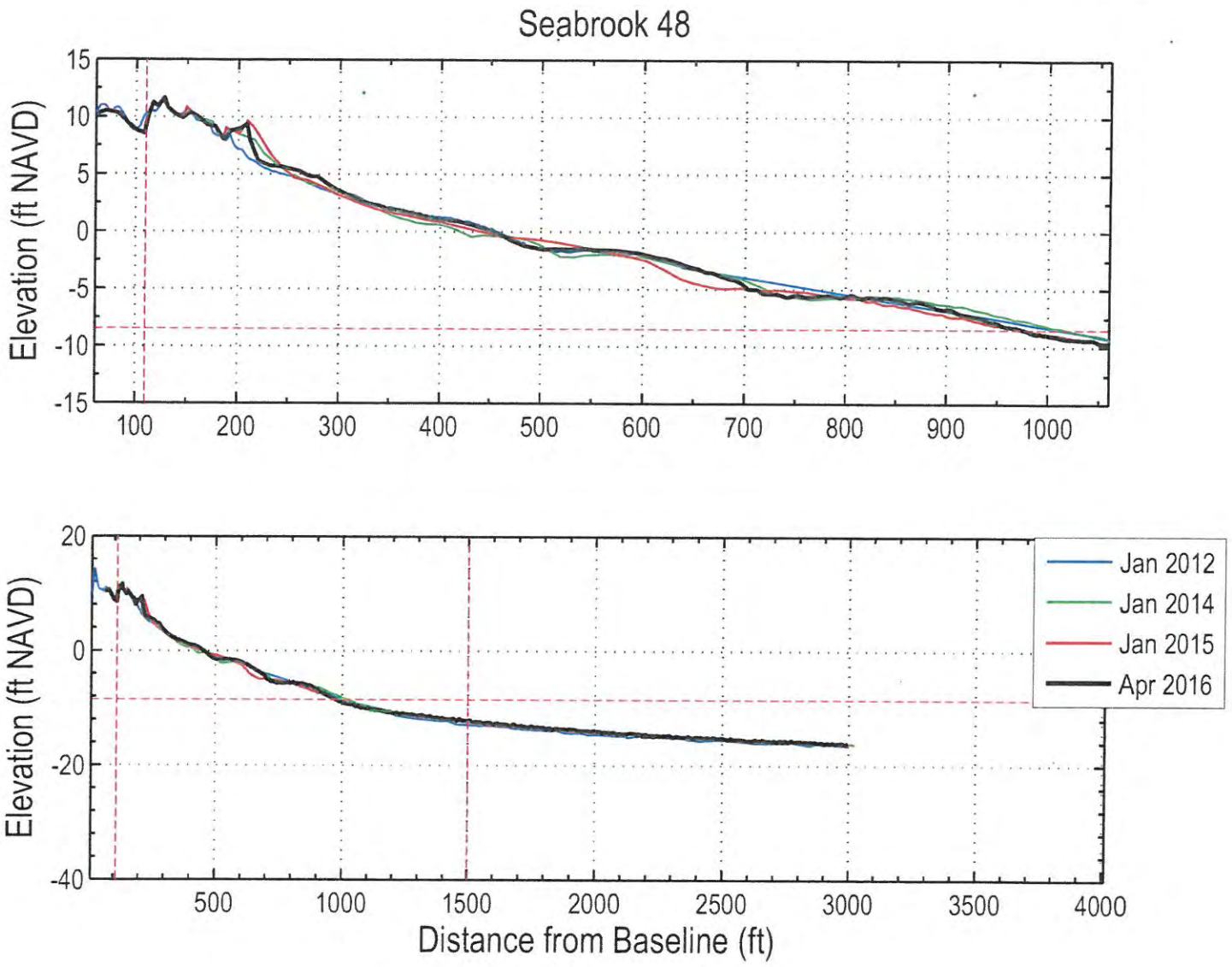
EXHIBIT B
Exhibit 1



Date	Unit Vol (cy/ft)
Nov 2010	239.9
Jan 2012	245.4
Jan 2014	244.4
Jan 2015	239.8
Apr 2016	235.6

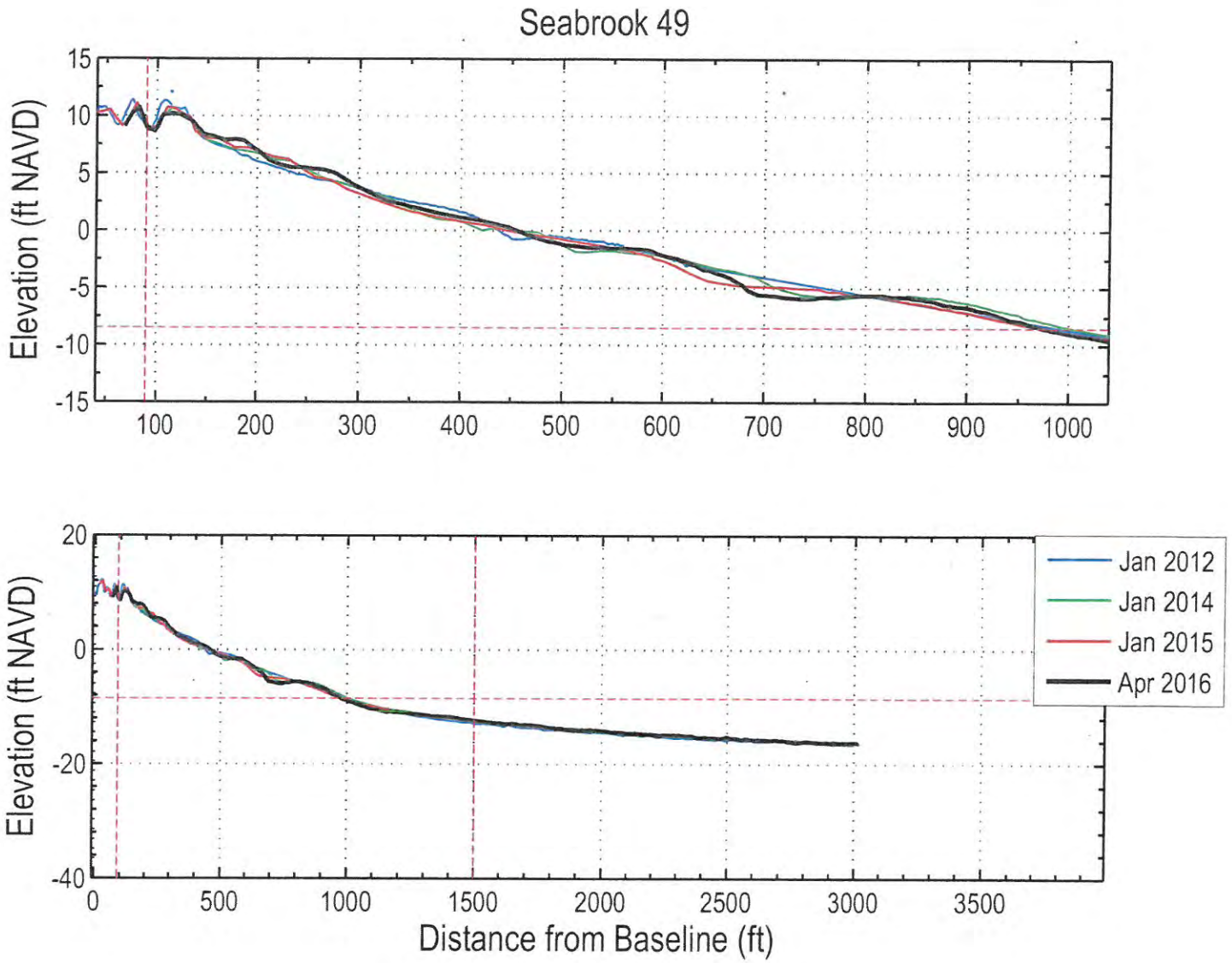


Date	Unit Vol (cy/ft)
Nov 2010	233.5
Jan 2012	239.2
Jan 2014	240.5
Jan 2015	235.8
Apr 2016	237.8

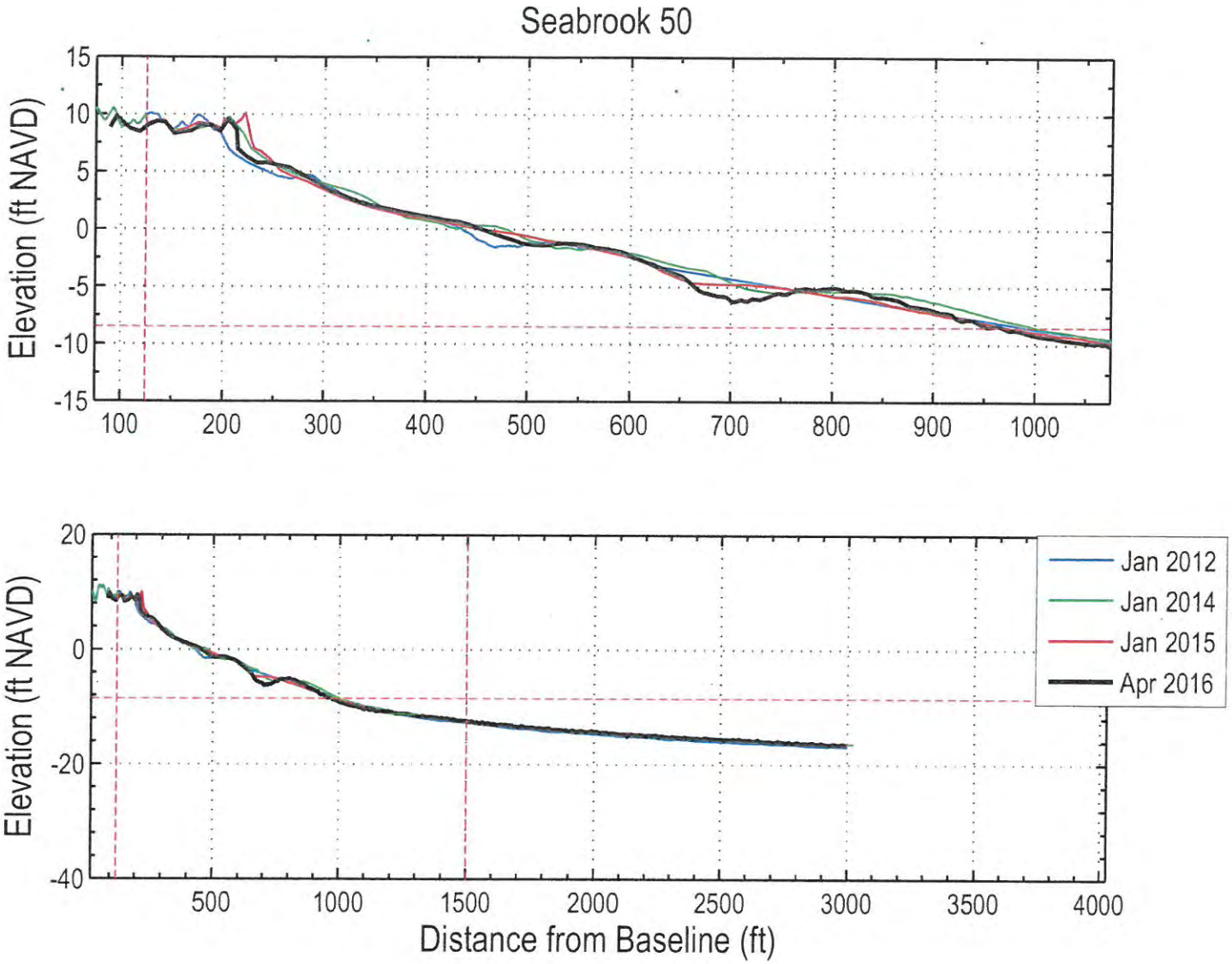


Date	Unit Vol (cy/ft)
Nov 2010	241.1
Jan 2012	251.4
Jan 2014	250.8
Jan 2015	246.8
Apr 2016	252.3

EXHIBIT B
Exhibit 1



Date	Unit Vol (cy/ft)
Nov 2010	247.1
Jan 2012	260.2
Jan 2014	258.9
Jan 2015	253.6
Apr 2016	257.7



Date	Unit Vol (cy/ft)
Nov 2010	228.9
Jan 2012	235.1
Jan 2014	245.4
Jan 2015	238.0
Apr 2016	235.4

EXHIBIT B
Exhibit 1

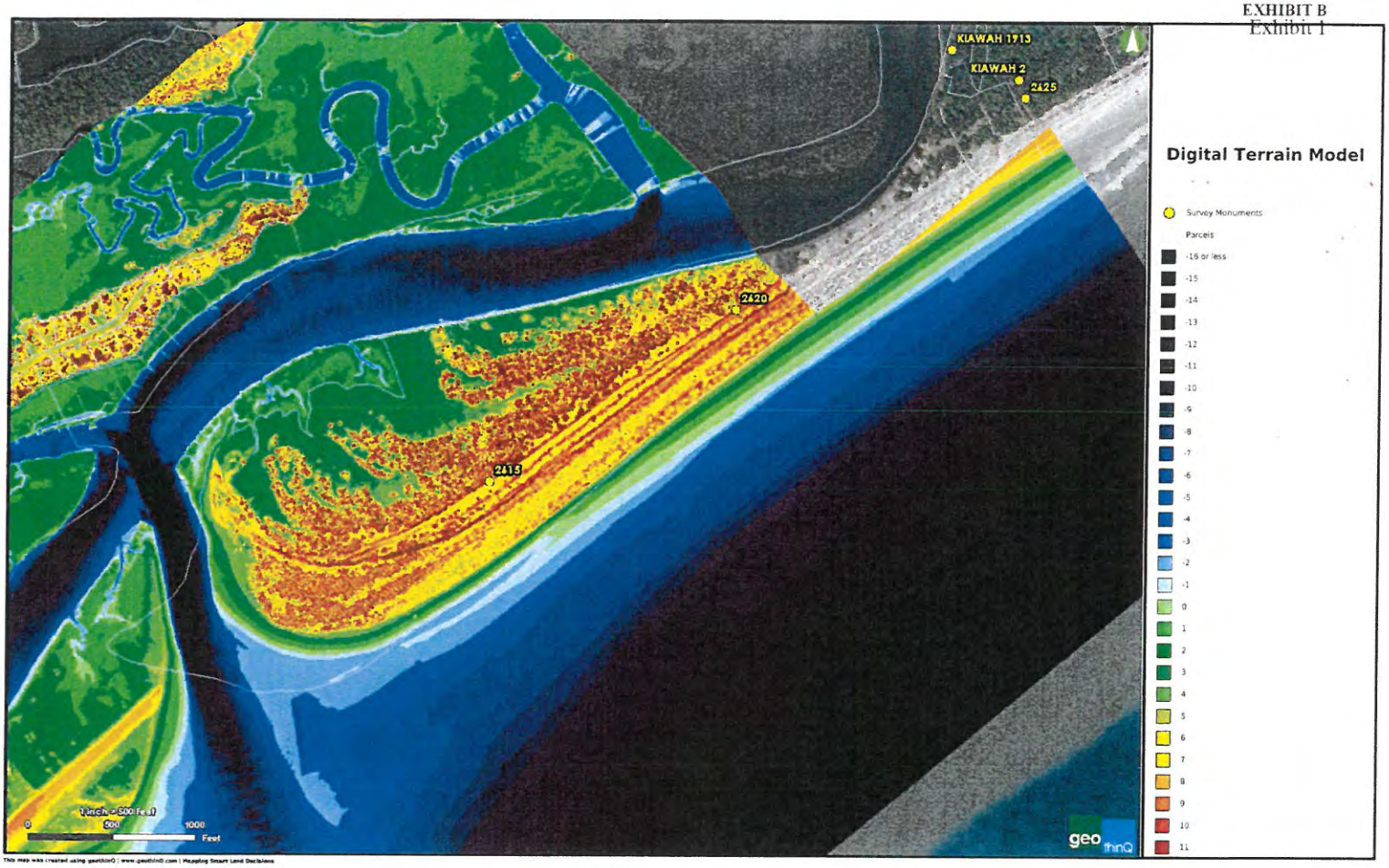
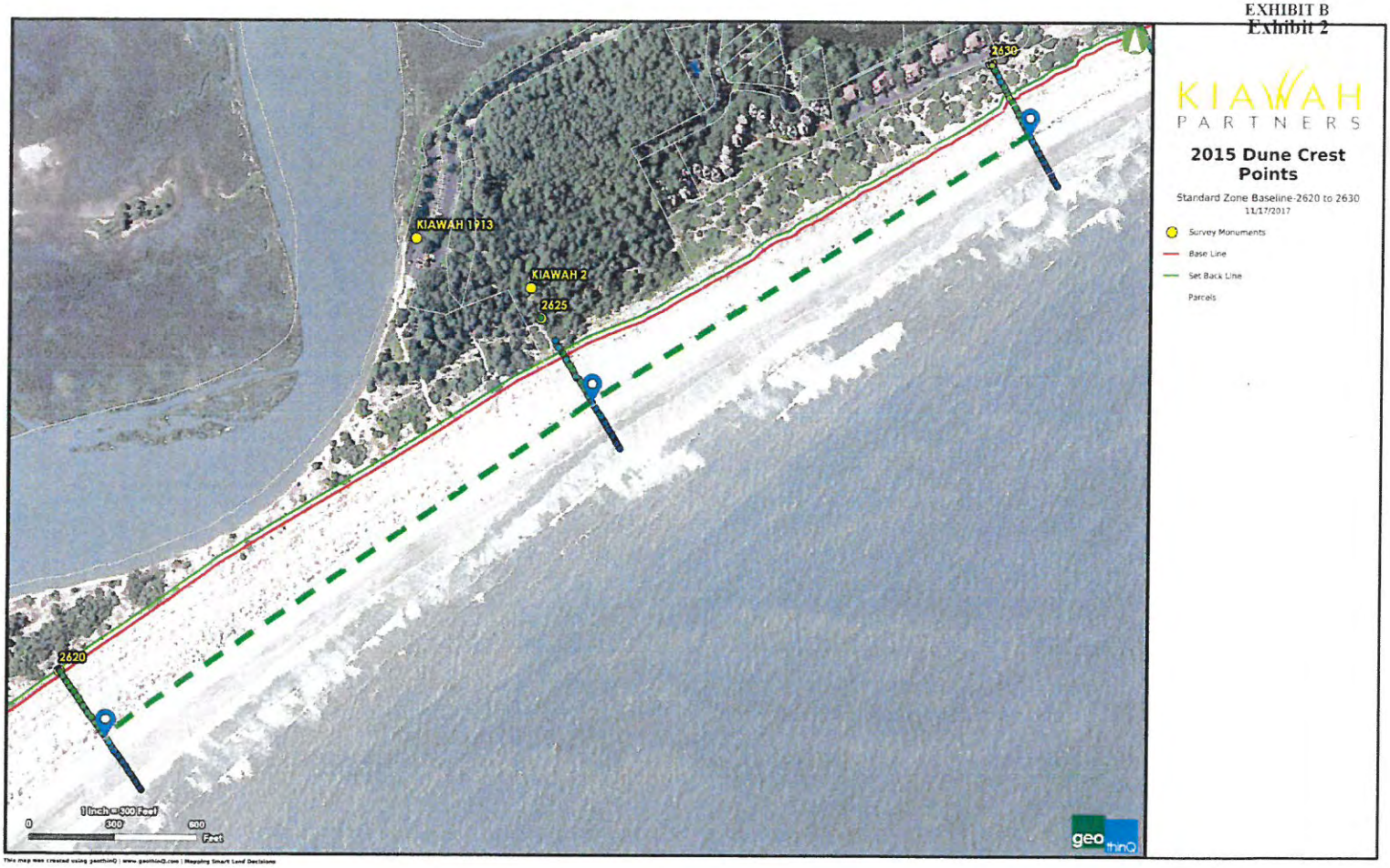
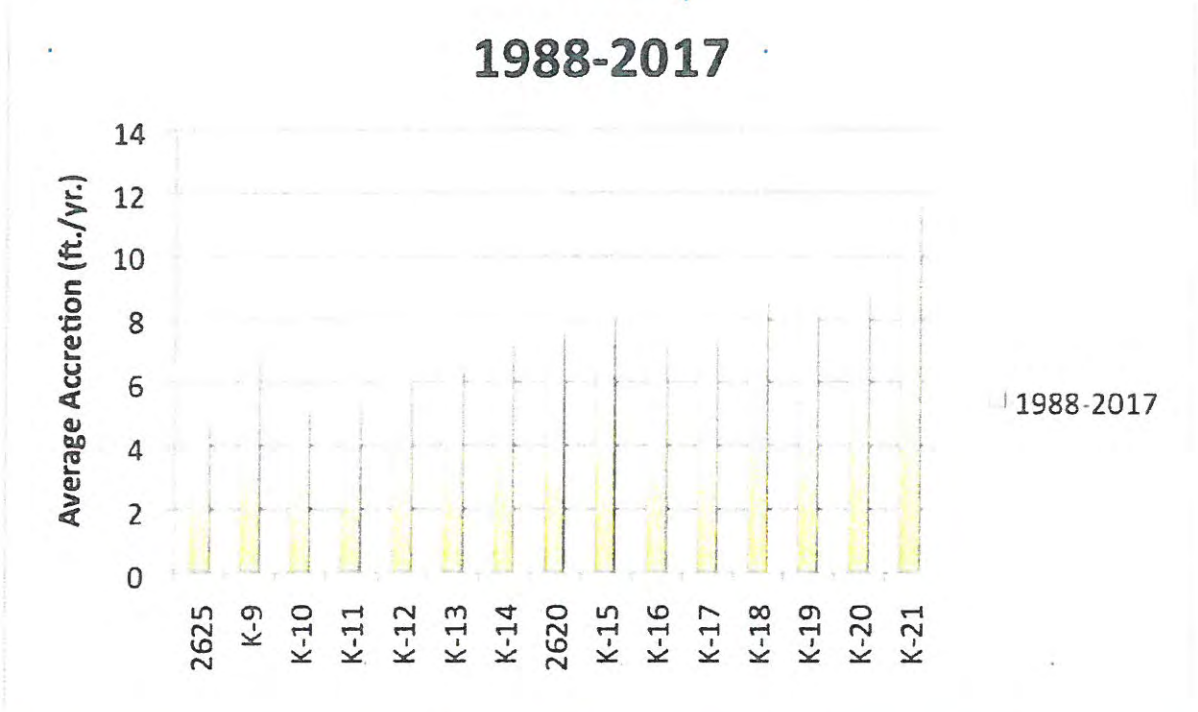


EXHIBIT B
~~Exhibit 2~~



EXH 3


1988-2017
Average Accretion (ft./yr.)
14
12
10
8
6
4
2
0
2625
K-9
K-10
K-11
K-12
K-13
K-14
2620
K-15
K-16
K-17
K-18
K-19
K-20
K-21
1988-2017

Profile Locations
ADDRESS
KIAWAH 1913
KIAWAH 2
2617
K-10
K-11
K-13
K-14
2620
K-16
K-17
K-18
K-19
2615
K-20
K-21
Hybrid

EXHIBIT B

EXH 4

EXHIBIT C

Board:
Allen Amsler, *Chairman*
Ann B. Kirol, DDS, *Vice Chair*
L. Clarence Batts, Jr., *Secretary*
R. Kenyon Wells
Charles M. Joye II, P.E.
David W. Gillespie, MD

January 5, 2018

Electronic Mail Delivery and US Mail Certified 9214 8969 0099 9790 1410 5711 87
G. Trenholm Walker (walker@WGFLLAW.com)
Walker Gressette Freeman Linton, LLC
Post Office Box 22167
Charleston, SC 29413

Electronic Mail Delivery
Sara P. Bazemore (bazemosp@dhec.sc.gov)
SCDHEC – Office of General Counsel
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

RE: **17-RFR-42 Kiawah Island Inn**
17-RFR-43 The Ocean Course Golf Club
17-RFR-44 Captain Sam's Spit
17-RFR-45 Kiawah Resort Associates – Beachfront Jurisdictional Lines

Dear Counsel of Record:

The South Carolina Board of Health and Environmental Control will not conduct a Final Review Conference on the above-referenced matters.

CONTESTED CASE GUIDANCE

S.C. Code Section 44-1-60 provides that if the Board declines in writing to schedule a final review conference, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court (ALC) within thirty calendar days after notice is mailed to the applicant, permittee, licensee, and affected person that the Board declined to hold a final review conference.

A request for a contested case hearing before the Administrative Law Court must be filed within the time allowed and in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

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

EXHIBIT C

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: http://www.scalc.net. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,

Lisa Lucas Longshore

Lisa Lucas Longshore
Clerk
S.C. Board of Health and Environmental Control

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

Healthy People. Healthy Communities

Mark R. Elam, Chairman
Jim P. Creel, Jr., Vice-Chairman
Charles M. Joye, II, P.E., Secretary
J.B. (Sonny) Kinney

Board:
Seema Shrivastava-Patel
Richard V. Lee, Jr.
Alex A. Singleton

February 10, 2020

Via Electronic Mail and US Mail Certified 9214 8969 0099 9790 1416 9170 95
Thomas P. Gressette, Jr., Esquire
Email: Gressette@WGFLLAW.com
G. Trenholm Walker, Esquire
Email: walker@WGFLLAW.com
Walker Gressette Freeman Linton
Post Office Box 22167
Charleston, SC 29401

Via Electronic Mail
Sallie P. Phelan, Esquire
Email: phelansp@dhec.sc.gov
SCHEC – Office of General Counsel
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

RE: Docket No. 19-RFR-53, KDP, II, LLC
Issuance of Department's Final Determination on Remand for beachfront jurisdictional lines. TMS Nos. 207-05-00-001 and 207-05-00-0011

Dear Counsel of Record:

The South Carolina Board of Health and Environmental Control will not conduct a Final Review Conference on the above-referenced matter.

CONTESTED CASE GUIDANCE

S.C. Code Section 44-1-60 provides that if the Board declines in writing to schedule a final review conference, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court (ALC) within thirty calendar days after notice is mailed to the applicant, permittee, licensee, and affected person that the Board declined to hold a final review conference.

A request for a contested case hearing before the Administrative Law Court must be filed within the time allowed and in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

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If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,

M. Denise Crawford
Clerk
S.C. Board of Health and Environmental Control

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

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP, II, LLC, Petitioner, vs. SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, Respondent.	Docket No. 18-ALJ-07-0047-CC **RENEWED REQUEST FOR CONTESTED CASE HEARING AFTER REMAND AND REQUEST TO LIFT STAY** TMS Nos. 207-05-00-001 and 207-05-00-0011 OCRM Survey Profile Stations: 2615, 2620, 2625

The Petitioner, KDP II, LLC ("Petitioner" or "KDP"), hereby appeals the final decision on remand of South Carolina Department of Health and Environmental Control (the "Department") and renews its Request for a Contested Case hearing. KDP also asks that this Court lift the stay that was entered in this proceeding while the matter was remanded to the staff of the Department for a final determination on whether to adjust the jurisdictional lines on KDP's oceanfront property.

KDP filed its first Request for Contested Case Hearing in this matter on February 5, 2018. By Order dated March 29, 2019, this Court denied the Department's Motion to Dismiss. In so ruling, this Court commented that KDP had not exhausted its administrative remedies because the Department had not yet issued a final decision *on the merits* of KDP's reasons for requesting the seaward adjustment of the jurisdictional lines. Order of March 29, 2019, n. 12. After issuance of the Order, KDP filed its Motion to Reconsider, for Clarification and Status Conference, contending it had in fact exhausted its administrative remedies and the Department had effectively ruled on the merits. With the Court's concurrence, the parties resolved that

motion by agreeing to stay these proceedings and remanding the case to the Department staff to consider the merits of KDP's request. On June 6, 2019, the Court entered its Consent Order of Stay and Remand.

On December 6, 2019, the Department staff issued its Final Decision on Remand. On December 23, 2019, KDP filed its Request for Final Conference Review with the Board of the Department. On January 16, 2020, DHEC filed its Staff Response to the Request for Final Review Conference. On February 10, 2020, the Department Board notified KDP that it would not conduct a final review conference.

The Consent Order of Stay and Remand dated June 6, 2019, provides, in pertinent part, that "[u]pon notice that Petitioner has filed a Request for Contested Case Hearing, the stay in this contested case proceeding shall be lifted in this proceeding and this contested case proceeding shall resume."

KDP incorporates by reference its first Request for Contested Case Hearing and further shows in support of its request that the jurisdictional lines be moved seaward on its oceanfront property on the western end of Kiawah Island called Captain Sams Spit ("the Property") the specific grounds stated below:

1. For the portion of the Property in the unstablized inlet zone, the Department staff refused to apply the statutory standard that the baseline be established at "the most landward point of erosion at any time during the past forty years." S.C. Code § 48-39-280 (A)(2). Instead, the Department staff set the baseline where it believed was a continuous line of established vegetation on the basis of staff's interpretation of aerial photographs. Setting the baseline in the location of a continuous line of established vegetation is completely contrary to the express wording of the statutory criterion. A line of continuous vegetation is neither the shoreline nor the most landward point of erosion at that point in time.

2. The best available scientific and historical data demonstrate that the beachfront of the Property is accreting over the long term rather than eroding, placing the most landward point of erosion far seaward of the location determined by the Department staff on

remand.

3. Because the best available scientific and historical data demonstrate that the beachfront of the Property is accreting over the long term rather than eroding, the post-Hurricane Matthew shoreline or one reasonably approximate to it or the shoreline at the effective date of the determination is the most landward point of erosion over the last 40 years.

4. For the portion of the Property in the unstablized inlet zone, the Department staff mistakenly found that the best available scientific and historical data indicate that the shoreline is likely to return to its former position. Instead, the best available scientific and historical data from the last 40 years indicate that the shoreline is not likely to return to its position 40 years ago but instead to continue to move seaward over the long term as it has over the last 70 years. For this additional reason, the baseline should be established at the post-hurricane shoreline, one approximate to it, or the shoreline at the effective date of the determination.

5. The Department staff relied on aerial photographs in establishing the jurisdictional lines on Property rather than primarily depending on the monument survey data as required by the controlling statute: "In order to locate the baselines and the setback lines, the department must establish monumented and controlled survey points in each county fronting the Atlantic Ocean. The department must acquire sufficient surveyed topographical information on which to locate the baselines." S.C. Code § 48-39-280 (E)(1).

6. To the extent the Department relied on the most seaward line of vegetation as depicted on aerial photographs to establish the jurisdictional lines, which KDP will show is not the legally correct benchmark or standard, the Department did not use the most seaward vegetation line.

7. The demarcation between the standard zone and the unstabilized inlet zone should be adjusted to a point west of Monument 2615 thereby including much of the Property within the standard zone and the baseline should be set at the crest of the primary oceanfront sand dune along the shoreline in the revised standard zone.

8. The Department staff's position that it has no authority to adjust the setback line even if it adjusts the baseline is legally incorrect. S.C. Code § 48-38-280 (B) mandates that the location of the setback line is tied to the location of the baseline. Moving the baseline moves the setback line as a matter of law: "To implement the beach preservation policy provided for in subsection (A), a setback line ***must be established landward of the baseline*** a distance which is forty times the average annual erosion rate or not less than

twenty feet ***from the baseline*** for each erosion zone based upon the best historical and scientific data adopted by the department as a part of the State Comprehensive Beach Management Plan." S.C. Code § 48-38-280 (B) (double emphasis added).

9. The Baseline Reform Act further provides that the Department has the authority to move the setback line if it moves the baseline: "(B) Notwithstanding the provisions of subsection (A) and Section 48-39-280, *if the department, pursuant to a review or an appeal initiated before January 1, 2018, revises the baseline proposed on October 6, 2017, to a location seaward of both the baseline established during the 2008 through 2012 establishment cycle and the baseline proposed on October 6, 2017*, ***then both the revised proposed baseline and revised proposed setback line will be in effect for the landowner until the department establishes a new baseline and setback line***." S.C. Code § 48-38-285 (B) (emphasis and double emphasis added).

10. The Department staff incorrectly stated that because KDP did not specifically appeal the setback line in its first Request for Final Review Conference ("RFRC"), the Department cannot adjust the setback line on the Property if it were to adjust the baseline. The Department staff disregards the previously mentioned statutory provisions tying the location of the setback line to the location of the baseline. The Department staff further disregards the following statement in KDP's previous RFRC: "Because of the fully substantiated history of accretion of the Property over the last 70 years, KDP does not take issue with the Department's preliminary determination that the setback line on the Property should be situated at the minimum distance of 20 feet behind the baseline and does not seek at this time a final review conference of that preliminary determination of Department as to the Property." KDP's Request for Final Review Conference dated November 20, 2018, p. 2.

WHEREFORE, the Petitioner, KDP:

1. Asks this Court to lift the stay in accordance with its Order dated June 6, 2019;
2. Requests the Court enter a Scheduling Order setting a date for the Contested Case Hearing after allowing an appropriate time for pre-hearing discovery; and
3. Make a determination after the Contested Case Hearing setting the baseline on KDP's Property seaward of its location as of December 31, 2017, and setting the setback line 20 feet landward of the final location of the adjusted baseline in accordance with the evidenced to be presented at trial and applicable law.

Respectfully Submitted

Thomas P. Gressette, Jr. (SC Bar #14065)
Direct: (843) 727-2249
Email: Gressette@WGFLLAW.com

G. Trenholm Walker (SC Bar #5777)
Direct: (843) 727-2208
Email: Walker@WGFLLAW.com

WALKER GRESSETTE FREEMAN & LINTON, LLC
Mail: P.O. Drawer 22167, Charleston, SC 29413
Office: 66 Hasell Street, Charleston, SC 29401
Phone: (843) 727-2200

ATTORNEYS FOR PETITIONER, KDP, II, LLC

March 6, 2020

Charleston, SC

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2020, in Charleston, South Carolina, I served a copy of the foregoing **RENEWED REQUEST FOR CONTESTED CASE HEARING AND REQUEST TO LIFT STAY** on all other parties by depositing the same in the United States Mail, First Class, postage paid, to the following:

Sallie P. Phelan, Esq.
Assistant General Counsel
South Carolina Department of Health
and Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, South Carolina 29405

M. Denise Crawford
Clerk
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, SC 29201

Nancy Jane Dennis
Paralegal

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP, II, LLC, Petitioner, v. SOUTH CAROLNA DEPT. OF HEALTH & ENVIRONMENTAL CONTROL, Respondent.	)	Docket No. 18-ALJ-07-0047-CC **MOTION TO INTERVENE ON BEHALF OF COASTAL CONSERVATION LEAGUE**

TO: THE ADMINISTRATIVE LAW COURT AND COUNSEL OF RECORD:

YOU WILL PLEASE TAKE NOTICE that Coastal Conservation League (the League) hereby moves this Court, pursuant to SCALC Rule 20 for an Order permitting them to intervene in this proceeding. The basis for this motion is as follows:

1. Petitioner KDP, II, LLC is a real estate developer that does its main business on Kiawah Island, South Carolina.
2. Respondent South Carolina Department of Health and Environmental Control (DHEC or the Department) is the agency charged with administering the provisions of the S.C. Beachfront Management Act, S.C. Code Ann. §48-39-250 *et seq.*
3. The League is a non-profit membership corporation organized and existing under the laws of the State of South Carolina. The members of the League regularly use and enjoy the public trust beaches and other natural resources of the South Carolina coastal zone which are impacted by the decisions of the South Carolina Department of Health and Environmental Control (DHEC) and its Office of Ocean and Coastal Resource Management (OCRM).

4. Petitioner is the owner of certain property located on Captain Sam's spit (the Spit) on Kiawah Island. Members of the League live on Kiawah Island and use and enjoy the waters, wetlands, and other natural resources of Kiawah, and Captain Sam's Spit in particular. Members of the League boat and otherwise recreate in the waters, wetlands and beaches surrounding Kiawah Island, including the spit on which Petitioner seeks to develop a 26-lot subdivision known as Cape Charles Phase I.

5. Petitioner has, for many years, pursued development of the Spit and has sought permits from DHEC, including a critical area permit to construct a vertical bulkhead and sloping revetment and an NPDES stormwater permit and coastal zone consistency certification. The League has challenged each and every permit approval authorizing impacts in furtherance of development of the Spit. *See Kiawah Development Partners, II v. South Carolina Department of Health & Env. Control*, 813 S.E.2d 691 (2018); *South Carolina Coastal Conservation League v. DHEC, KDP II, LLC & KRA Dev., LP*, Docket No. 15-ALJ-07-0369-CC.

6. On February 5, 2018, Petitioner submitted a Notice of Request for Contested Case Hearing with this Court. Petitioner seeks to have this Court order that the beachfront jurisdictional lines on Captain Sam's Spit be moved seaward of the location proposed by DHEC in 2017.

7. On June 6, 2019, this Court remanded the contested case to DHEC for the purpose of exploring a resolution to the appeal. After no agreement was reached, Petitioner filed a Renewed Request for Contested Case Hearing After Remand and Request to Lift Stay on March 6, 2020.

8. The League seeks intervention in this case because an order moving the beachfront jurisdictional lines seaward on the Spit will create the opportunity for Petitioner to construct a road to access the proposed lots to be developed and thereby will injure the members of the League who use and enjoy the Spit.
9. The League's interests are not adequately represented by the existing parties, in particular DHEC. As a regulatory agency, DHEC cannot represent the environmental interests of the League and its members. *See, e.g., In Re Sierra Club*, 945 F.2d 776 (4th Cir. 1991).
10. The League has timely moved to intervene in these proceedings. The League became aware of this appeal only recently since the Petitioner requested to have the stay lifted and has taken this step as expediently as possible.
11. Intervention by the League will not unduly delay or prejudice the adjudication of the rights of the original parties. The League understands that prior to the remand, discovery had only been initiated and that there is still substantial discovery to be conducted. A hearing has not yet been set by the Court.
12. In addition, the proposed intervenor will not seek to prolong the adjudication of any issue.
13. The League has consulted with Petitioner as to their position on this motion and they have indicated they do not consent.

WHEREFORE, Coastal Conservation League respectfully requests that this Court issue an order permitting its intervention in this contested case.

[SIGNATURE BLOCK FOLLOWS]

Leslie Lenhardt by: Amy Armstrong with permission

Leslie S. Lenhardt, S.C. Bar. No. 15858
Attorney for Coastal Conservation League

SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Mailing address: Post Office Box 1380
Pawleys Island, SC 29585
Office address: 430 Highmarket Street
Georgetown, SC 29440
Telephone: (843) 527-0078
Email: leslie@scelp.org

May 26, 2020

STATE OF SOUTH CAROLINA
BOARD OF HEALTH & ENVIRONMENTAL CONTROL

KDP II, LLC, Petitioner, v. South Carolina Department of Health and Environmental Control, Respondent.	)	Docket No. 18-ALJ-07-0047-CC **CERTIFICATE OF SERVICE**

I hereby certify that on this date I have served the Motion for Intervention on Petitioner, KDP II, LLC and Respondent South Carolina Department of Health and Environmental Control by depositing same in the U.S. Mail, postage paid, to the parties addressed to:

Sallie Phelan, Esq.
SCDHEC-OCRM
1362 McMillan Avenue Suite 400
Charleston, SC 29405

Thomas Gressette, Esq.
Walker Gressette Freeman Linton LLC
66 Hasell Street
Charleston, SC 29401

~~Leslie S. Lenhardt~~
Amy E Armstrong

May 26, 2020

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP, II, LLC, Petitioner, vs. SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, Respondent,	)	Docket No. 18-ALJ-07-0047-CC **PETITIONER KDP'S OPPOSITION TO MOTION TO INTERVENE BY COASTAL CONSERVATION LEAGUE** TMS Nos. 207-05-00-001 and 207-05-00-0011 OCRM Survey Profile Stations: 2615, 2620, 2625

The Petitioner, KDP, II, LLC ("KDP"), respectfully submits that the Motion to Intervene of the South Carolina Coastal Conservation League (the "League") should be denied for three reasons:

1. The statutory provisions governing appeals over the location of the jurisdictional lines do not allow participation by a third party, non-property owner such as the League;
2. The League fails to show that it meets the criteria for intervention; and
3. The joinder of the League will unduly prolong this proceeding that was initiated more than two years ago.

SUMMARY

On February 5, 2018, KDP initiated this Appeal and Request for Contested Case Hearing pursuant to S.C. Code § 48-39-280, seeking review of the delineation of the oceanfront jurisdictional lines made by the Respondent, South Carolina Department of Health and Environmental Control ("the Department" or "DHEC") in October 2017. The lines at issue are

on KDP's beachfront property on the western end of Kiawah Island generally referred to as Captain Sams Spit ("the Property"). KDP is authorized to develop the Property under the terms of its development agreement with the Town of Kiawah Island.

Nearly two years later, after limited proceedings in this Court that resulted in a remand to the Department for further consideration of the information provided by KDP concerning the location of the lines, the Department staff issued its Final Decision on Remand on December 6, 2019. KDP maintains that the Department's Final Decision on Remand refused to apply the statutory standard for establishing the baseline and that the Department ignored the best available scientific and historical data. *See* KDP's Renewed Request for Contested Case Hearing, March 6, 2020. This Appeal seeks a Contested Case Hearing and an Order of the Court setting the baseline on KDP's Property seaward of its location as of December 31, 2017, and setting the setback line 20 feet landward of the final location of the adjusted baseline.

PROCEDURAL HISTORY

S.C. Code Ann. § 48-39-280 establishes the standards and procedures the Department must use to delineate jurisdictional lines. In October of 2017, the Department released its preliminary delineations of the jurisdictional lines for the Property. KDP disagreed with the Department's proposed baseline and setback line ("the delineation").

The plain language of S.C. Code Ann. § 48-39-280 in effect in October 2017 prescribed a specific avenue for a landowner like KDP to present concerns to the Department about its preliminary delineation of a property's jurisdictional lines. The Statute provides:

> A landowner claiming ownership of property affected who feels that the final or revised setback line, baseline, or erosion rate as adopted is in error, upon submittal of substantiating evidence, must be granted a review of the setback line, baseline, or erosion rate, or a review of all three.

S.C. Code Ann. § 48-39-280(E) (effective June 3, 2016, to May 2, 2018).[1]

On November 20, 2017, pursuant to the procedure set forth in S.C. Code Ann. § 48-39-280(E) for landowners seeking a review of the Department's proposed "setback line, baseline, or erosion rate, or a review of all three," KDP filed a Request for Final Review Conference. The Department denied the Request for Review via letter dated January 5, 2018. On February 5, 2018, KDP initiated this matter by filing of a Request for Contested Case Hearing.

On October 24, 2018, the Department filed a Motion to Dismiss KDP's Request for Contested Case Hearing. The Department asserted that the Request was barred by a failure to exhaust administrative remedies.

By Order dated March 29, 2019, this Court denied the Motion to Dismiss. and issued a written Order detailing the Court's findings ("the Order"). In the following weeks KDP and the Department conferred and then proposed a Consent Order of Stay and Remand, which this Court entered on June 6, 2019 ("Consent Order"). Pursuant to the Consent Order this case was stayed and remanded to the Department to allow KDP and the Department to confer and to allow the Department to make a considered determination in accordance with the applicable statutes and regulations. On December 6, 2019, the Department issued its Final Decision on Remand which left unchanged the Department's delineation that is under appeal.

KDP timely filed a written Request for Final Review Conference with the DHEC Board on December 23, 2019. On January 16, 2020, the Department filed its Staff Response to the Request for Final Review Conference. On February 11, 2020, the Department notified Petitioner

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[1] Pursuant to amendment effective May 2018, the statute now reads:

> A landowner [or his appointee] claiming ownership of property adversely affected by the establishment of a baseline or setback line, upon submittal of substantiating evidence, must be granted a review of the baseline or setback line.

S.C. Code § 48-39-280(F)(1). As indicated, the right to review remains limited to the landowner.

that it would not conduct a final conference review. On March 6, 2020, KDP filed Petitioner's Renewed Request for Contested Case Hearing After Remand and Request to Lift Stay, which this Court granted by Order dated June 10, 2020.

Pursuant to the Court's June 10, 2020, Order, the Department and KDP must file updated prehearing statements and a consent scheduling order on or before June 30, 2020.

THE LEAGUE'S MOTION TO INTERVENE

On May 26, 2020, the South Carolina Coast Conservation League filed its request to intervene in this case that has been pending since February 5, 2018.[2]

As indicated above, the Motion should be denied because the League is not authorized to appeal pursuant to S.C. Code § 48-39-280(E)[3] and the Motion fails to establish sufficient grounds for intervention under the applicable statute and Rules of this Court.

A. THE ALC DOES NOT HAVE JURISDICTION TO PERMIT INTERVENTION BY THE LEAGUE.

This matter is a landowner's appeal of the Department's establishment of the oceanfront jurisdictional lines on its land in accordance with specific provisions of S.C. Code Ann. § 48-39-280. "A ***landowner*** claiming ownership of property affected who feels that the final or revised setback line, baseline, or erosion rate as adopted is in error, must be granted a review of the setback line, baseline, or erosion rate, or a review of all three." S.C. Code Ann. § 48-39-280(E) (double emphasis added). Per the plain language of the statute, the General Assembly granted this right of appeal solely to the landowner. The General Assembly did not extend that right to any other person who might claim to be potentially aggrieved by the delineation.

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[2] The preliminary delineations were issued over 2 ½ years ago and this case has been pending almost as long.

[3] The League is likewise not authorized by the post-May 2018 language of S.C. Code § 48-39-280(F)(1). *See*, *supra*, page 3 (discussing amendment and continued limitation to landowner or landowner's appointee).

In its Motion the League admits that KDP is the landowner and, therefore, the only party entitled to participate in this case. *See* Motion at p. 2 (conceding KDP "is the owner"). Because the League is a mere stranger and not an affected landowner, it has no right to partake in the appeal of the landowner, nor is the ALC authorized to permit the League to participate in KDP's claim filed pursuant to this specific and limited statutory remedy. *See A.O. Smith Corp. v. S.C. Dep't of Health & Envtl. Control*, 428 S.C. 189, 201, 833 S.E.2d 451, 458 (Ct. App. 2019) ("The General Assembly has the authority to limit the subject matter jurisdiction of a court it has created; therefore, it can prescribe the parameters of the ALC's powers." (quoting *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 403 S.C. 576, 585, 743 S.E.2d 786, 791 (2013)).

The plain language of S.C. Code § 48-39-280 creates a pathway to the ALC for a "landowner claiming ownership of property affected who feels that the final or revised setback line, baseline, or erosion rate as adopted is in error." S.C. Code Ann. § 48-39-280(E). There is no provision in the statute for persons who are not property owners to become involved in the proceedings. The General Assembly has prescribed the parameters for review. Where the terms of the statute are clear, the court must apply those terms according to their literal meaning. *See Paschal v. State Election Comm'n,* 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995).

The contorted reading of S.C. Code Ann. § 48-39-280 that the League suggests would not only impermissibly expand the statute by establishing a path for appeal of jurisdictional delineations by non-landowners, it would also force the ALC to hear appeals without the authority of the General Assembly. South Carolina law is clear -- a court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute. *Brown v. S.C. Dep't of Health & Envtl. Control*,

348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (citing *Berkebile v. Outen,* 311 S.C. 50, 426 S.E.2d 760 (1993)). Also, as this Court has specifically held, South Carolina's Administrative Law Court is "an administrative body with limited jurisdiction" and, as such the Court cannot extend its geographic or subject matter reach without authorization. *See S.C. Dep't of Revenue, Petitioner*, No. Docket No.: 19-ALJ-17-0110-IJ, 2019 WL 2576507, at *2 (June 11, 2019) (Hon. Shirley C. Robinson, S. C. Administrative Law Judge).

Allowing intervention in this proceeding would allow the League to utilize a procedure the General Assembly only authorized for landowners and it would impermissibly expand the General Assembly's specifically limited jurisdiction for access to the ALC in delineation disputes.

B. THE LEAGUE HAS NOT SUBSTANTIATED ITS MOTION, MUCH LESS ESTABLISHED THE REQUIRED SHOWING NECESSARY TO JUSTIFY INTERVENTION.

The League's Motion should be denied on separate, independent grounds that its Motion is without evidentiary support and that it has failed to put forward a showing that it meets the three criteria that must be demonstrated before intervention.

The League has moved this Court, "pursuant to SCALC Rule 20 for an Order permitting them to intervene in this proceeding." Motion at p.1. SCALC Rule 20(B) is clear -- intervention may be granted only "upon a showing" of certain facts. A movant is not entitled to an order of this Court permitting intervention unless a sufficient "showing" is made to establish all three of the elements set forth in the Rule.

The League's Motion is barely 4 pages long without any supporting affidavits or exhibits. The Motion merely parrots the language of SCALC Rule 20 and then makes conclusory assertions without factual support, which is fatal to the request for intervention.

Nothing in the League's Motion is sufficiently supported so as to be classified as "proof" or the required "showing" mandated by SCALC Rule 20.

C. THE LEAGUE CANNOT MEET AND HAS NOT ESTABLISHED THE REQUIREMENTS OF SCALC RULE 20(B) OR (C).

SCALC Rule 20(B), only permits intervention by a party upon a successful showing that:

(1) the movant will be aggrieved or adversely affected by the final order;

(2) the interests of the movant are not being adequately represented by existing parties, or that it is otherwise entitled to intervene;

(3) that intervention will not unduly prolong the proceedings or otherwise prejudice the rights of existing parties.

Moreover, SCALC Rule 20(C) also requires that all motions to intervene "***shall*** be filed as early in the proceedings as possible to avoid adverse impact on the existing parties or the disposition of the proceedings." (double emphasis added). The League has failed to make an adequate showing of Rule 20(B)'s mandatory requirements, and it clearly failed to promptly seek intervention as required by SCALC Rule 20(C).

(1) THE LEAGUE WILL NOT BE AGGRIEVED OR ADVERSELY AFFECTED BY THE FINAL ORDER IN THIS CASE.

The League will not be aggrieved or adversely affected by the final order of this case, because it has no rights at issue in this case. Additionally, the Motion makes clear that the purported interest of the League in this proceeding is the subject of other administrative litigation that has been pending for five years and is now on appeal to the State Supreme Court. The League's claims are already pending in an entirely different action. As the Motion explains, "The League seeks intervention in this case because an order moving the beachfront jurisdictional lines seaward on the Spit will create the opportunity for Petitioner to construct a road...." Motion at p. 3. The access road the League seeks to prevent was allowed under the

permits at issue in *South Carolina Coastal Conservation League v. DHEC, KDP II, LLC & KRA Dev., LP,* Docket No. 15- ALJ-07-0369-CC. The League vigorously contested those permits. Chief Administrative Law Judge Anderson upheld the permits and the League has appealed them to the South Caroline Supreme Court.[4] This other pending proceeding is the appropriate one for litigation of the right to build a road, not this one. The League can protect its claimed interest fully in that case. Intervening in this case is just the League's attempt to hijack this case.

Whether a road can or cannot be built has nothing to do with the application of the statutory criteria to the facts that govern the setting of the jurisdictional lines. In its Motion, the League does not put forward any facts that it intends to prove that affect the location of the jurisdictional lines, much less make any showing that of facts or arguments that have not already been ably presented by the Department.

The League does not have a proper or sufficient interest in this limited administrative proceeding to justify intervention nor has it shown how its interests will be adversely affected.

(2) THE LEAGUE HAS NOT ESTABLISHED ITS INTERESTS ARE NOT ADEQUATELY REPRESENTED BY EXISTING PARTIES.

The League cites *In Re Sierra Club,* 945 F.2d 776 (4th Cir. 1991), attempting to establish Rule 20(B)(2)'s requirement that the League's interests are not being adequately represented by existing parties (the Department) in this case. This reported decision, instead, supports denial of the Motion.

In Re Sierra Club addressed the situation where an environmental group did not agree with the position of DHEC and the Court found that because of that conflict DHEC could not represent the environmental interests of the League and its members. The Fourth Circuit Court

[4] *See* Appellate Case No. 2019-000074 (currently at a standstill while the Court considers the League's Motion to Strike Materials from KDP's Designation of Matter).

of Appeals explained, "South Carolina DHEC, in theory, should represent all of the citizens of the state, including the interests of those citizens who also may be … proponents of new hazardous waste facilities." *In re Sierra Club*, 945 F.2d 776, 780 (4th Cir. 1991). The Court reasoned that "Sierra Club, on the other hand, appears to represent only a subset of citizens concerned with hazardous waste—those who would prefer that few or no new hazardous waste facilities receive permits." *Id.* Also, the Court pointed out that "Sierra Club and DHEC had taken opposing positions in relevant permitting actions." *Id.*

Here, the League admits the Department is asserting the positions that the League wants advanced. There is no conflict between the positions of the League and the Department. The League wants the lines to be where the Department set them. According to the website for the League's attorneys, the Motion to Intervene seeks an order "upholding DHEC's 2017 jurisdictional line determination and preventing it from moving seaward." *Advocates Propose to Intervene in Effort to Revise Jurisdictional Lines on Captain Sams Spit*, SCELP Press Release, posted May 26, 2020, available online at: https://scelp.org/posts/view/184 (Copy attached as Exhibit A, emphasis added).

The League has not shown how its interests are not being adequately represented by the Department. A quick review of the Final Decision in Remand shows that the Department is fully engaged and employing all its resources in defense of its delineation. The League's Motion did not claim that the Department's defense of the appeal was insufficient legally or factually. The League did not show what it would do that the Department has not done or will not be doing. The League has not put forward any reports of experts or any other witnesses, much less those that advance facts or opinions or positions that are not being advocated by the Department. In short, the League has done nothing to show inadequate representation by the Department nor that

it brings some expertise or position to the table to compensate for that inadequate representation.

Clearly, the League does not claim adversity between it and the Department that was the basis for allowing intervention in *In Re Sierra Club* and the League has failed to establish inadequate representation by the Department. The League's patent inability to meet the showing required by SCALC Rule 20(B)(2) dictates the Motion be denied.

(3) INTERVENTION BY THE LEAGUE WILL ABSOLUTELY UNDULY PROLONG THESE PROCEEDINGS AND OTHERWISE PREJUDICE THE RIGHTS OF KDP.

The fact that the KDP and the Department have already been dealing with the issues in this case for over the past 30 months also undercuts the League's claim that "Intervention by the League will not unduly delay or prejudice the adjudication of the rights of the original parties" and "the proposed intervenor will not seek to prolong the adjudication of any issue." Motion at p.3. However, the League has no credibility to support this conclusory assertion.

In its Motion the League asserts its primary purpose for requesting intervention is "because an order moving the beachfront jurisdictional lines seaward on the Spit will create the opportunity for [KDP] to construct a road to access the proposed lots to be developed...." *Id.*

However, on the previous page the Motion boasts of the League's years of successfully delaying KDP's use and/or development of the Property:

> [KDP] has, for many years, pursued development of the Spit and has sought permits from DHEC, including a critical area permit to construct a vertical bulkhead and sloping revetment and an NPDES stormwater permit and coastal zone consistency certification. **The League has challenged each and every permit approval authorizing impacts in furtherance of development of the Spit.** *See Kiawah Development Partners, II v. South Carolina Department of Health & Env. Control,* 813 S.E.2d 691 (2018); *South Carolina Coastal Conservation League v. DHEC, KDP II, LLC & KRA Dev., LP,* Docket No. 15-ALJ-07-0369-CC.

Motion at p.2 (emphasis added). Since at least 2008, the League has worked to stop any use of the Property by KDP. The League has created repeated delays, pursued multiple appeals, and

prolonged adjudication of the ultimate issues in the matters litigated. Furthermore, the League has not once in any of the past 12-plus years foregone an opportunity to move to stay authorized actions by KDP and the League has consistently sought reconsideration and pursued appeals in its efforts to prevent KDP's activity on the Property. The dockets speak for themselves:

- ALC Docket No. 09-ALJ-07-0029-CC
- ALC Docket No. 09-ALJ-07-0039-CC
- South Carolina Supreme Court Appellate Case No. 2016-000707
- ALC Docket No. 15-ALJ-07-0369-CC.
- South Carolina Supreme Court Appellate Case 2019-000074

These facts and its Motion's multiple contradictions illustrate why there is no credible reason to think that this matter would not be unduly prolonged by the intervention of the League. The League's whole purpose is to extend ***all*** administrative proceedings involving Captain Sams by contesting and appealing every approval or permit. *See also* https://www.coastalconservation.org/captain-sams-litigation/ (League website detailing its ongoing litigation over the Property that has since 2008 included three arguments before the South Carolina Supreme Court and multiple requests for stay(s) and/or injunction(s)) (Copy attached as Exhibit B).

Joining the League as a party would add another set of witnesses and another set of lawyers and mean more sets of written discovery and more depositions. It will take the case on needless side trips promised by the League, such as whether moving jurisdictional lines would allow the road that it has fought for five years in a separate case. As shown by the discussion in the next section, the League will use the case to foster publicity to gain attention and donations and generally stir a frenzy about the case. The League has worked hard to prolong proceedings against KDP and to hinder its rights. Allowing intervention into this case at this time would unduly prolong these already delayed proceedings and prejudice KDP.

(4) THE LEAGUE CHOSE NOT TO INTERVENE AS EARLY IN THE PROCEEDINGS AS POSSIBLE. ALLOWING INTERVENTION WOULD BE CONTRARY TO RULE 20(C)'S MANDATORY TIMING REQUIREMENT BECAUSE THE LEAGUE'S ADMITTED GOAL IS TO ADVERSELY IMPACT KDP AND THE DISPOSITION OF THE PROCEEDINGS.

The League's Motion also fails to establish that it sought to intervene "as early in the proceedings as possible to avoid adverse impact on the existing parties or the disposition of the proceedings." *See* ALC Rule 20(C). According to the Motion, "The League became aware of this appeal only recently since the Petitioner requested to have the stay lifted and has taken this step as expediently as possible." Motion at p.3. However, as the Motion points out, the League's primary concern is stopping the development of the Property, a goal it has been pursuing for over a decade. *See* Exhibit B. The Motion also admits that the League has challenged "each and every permit approval authorizing impacts in furtherance of development of the Spit." Motion at p.2. It is hardly plausible, much less established, that the League moved to intervene "as early in the proceedings as possible to avoid adverse impact on the existing parties or the disposition of the proceedings." *See* Rule 20(C).

The Motion also attempts to justify the League's reasons for intervening by stating, "Members of the League live on Kiawah Island and use and enjoy the waters, wetlands, and other natural resources of Kiawah, and Captain Sam's Spit in particular." Motion at p. 2.[5] Again, as with the previous point, it is not plausible that the League's members who "live on Kiawah and use and enjoy … Captain Sam's Spit" were unaware of this matter so as to excuse the League's last-minute attempt to intervene. The League cannot claim its members are so

[5] It is important to note that the assertion that the League's members engage in recreational pursuits around Captain Sams Spit has nothing to do with the issues in this appeal. The jurisdictional lines are on KDP's private property well landward of the public beach. If the League's members were engaging in activities in the location of these lines, they would be trespassing.

deeply involved with the area around the Property such that intervention is proper and simultaneously assert those members were absolutely unaware of the delineations at the Property or this case. Clearly, the League did not seek to intervene "as early in the proceedings as possible to avoid adverse impact on the existing parties or the disposition of the proceedings." *See* ALC Rule 20(C).

Other facts also indicate the League was fully aware of baseline redelineations at the Property. According to one report, at least as of November 8, 2016, the League's executive director Dana Beach was confident that "'Setting it [the baseline on Captain Sams] next year will put the setback line in the river and the baseline 100 feet back in the former dunes." *Hurricane confirms instability of Capt. Sam's Spit,* Post and Courier, October 16, 2016, available online at https://www.postandcourier.com/opinion/editorials/hurricane-confirms-instability-of-capt-sams-spit/article_1cba2d94-9643-11e6-8d44-974a15f79888.html (Copy attached as Exhibit C); and *A Wedge in the Sand: Nature Intervenes in Construction Line Controversy: Hurricane Matthew moved the battle lines on Kiawah Island's controversial Captain Sam's Spit*, The Journal of Light Construction, November 8, 2016, available online at: https://www.jlconline.com/coastal-contractor-news/nature-intervenes-in-construction-line-controversy_o (Copy attached as Exhibit D).

Multiple additional documents prepared by the League itself demonstrate that the League has been aware of the baseline redelineation at Captain Sams for a very long time. In November of 2015, the League's Program Director of Air, Water and Public Health, Katie Zimmerman, published the following:

> For eight years, the Coastal Conservation League … has challenged numerous permits issued to Kiawah Development Partners (KDP) and its affiliates.
>
> ***

> KDP has shown that it is not only willing to sacrifice the Spit itself, but also the protections of our entire coastline. To that end, the developers have sought to amend a beachfront management bill in our state legislature this session, and actually managed to convince a senator from Berkeley County to defend its proposal (the "Kiawah Amendment"). The bill in question would set a permanent baseline along our entire coast, defending taxpayers, homeowners and natural resources from development too close to the ocean. The "Kiawah Amendment" would delay setting that baseline, allowing road and other construction to occur even closer to the ocean on Captain Sams Spit.
>
> We plan to fight the "Kiawah Amendment" to the beachfront management bill as the legislative session continues....

Captain Sams Spit Back in Development Headlines, by Katie Zimmerman, S.C. Coastal Conservation League, November 23, 2015, available online at: https://charlestoncurrents.com/2015/11/nov23-issue/ (Copy attached as Exhibit E); *see also Captain Sams in the Legislature* (discussing legislation dating back to 2008 and the League's efforts to fight the same regarding the baseline at Captain Sam's), available online at https://www.coastalconservationleague.org/captain-sams-legislature/ (Copy attached as Exhibit F).

The facts establish that contrary to the League's Motion, the League has specifically been aware of and, in fact, actually involved in pursuing issues related to the baseline at the Property at issue in this case. *See* Exhibit A, Exhibit B, Exhibit C, Exhibit D, Exhibit E, and Exhibit F. Even if the League was somehow unaware of this specific proceeding, that does not justify allowing intervention at this late point given that the League has clearly not acted to become involved "early in the proceedings...to avoid adverse impact on the existing parties or the disposition of the proceedings." In fact, all evidence would actually support the opposite conclusion – that this attempt to intervene is intended to stall this matter and to delay and perhaps prevent any development whatsoever at Captain Sams, all to the detriment of KDP.

CONCLUSION

For these many independent reasons, the League's Motion to Intervene should be denied.

Respectfully Submitted

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June 15, 2020

Charleston, SC

Advocates Propose To Intervene In Effort To Revise Jurisdictional Lines On Captain Sams Spit

Posted: May 26, 2020

For immediate release

CHARLESTON, SC — The **Coastal Conservation League** is seeking to block an attempt by **KDP, II, LLC** (formerly Kiawah Development Partners II, Inc.) to move the beachfront jurisdictional baseline seaward of the location proposed by South Carolina Department of Health and Environmental Control (DHEC) in 2017. The effort would eliminate regulatory hurdles that limit the types and location of construction that can occur on Captain Sams Spit, an environmentally fragile inlet at the southern end of Kiawah Island.

On Tuesday, **South Carolina Environmental Law Project (SCELP)** filed the motion to intervene on behalf of the Conservation League in the South Carolina Administrative Law Court aimed at upholding DHEC's 2017 jurisdictional line determination and preventing it from moving seaward. DHEC uses the jurisdictional lines to determine whether and what type of permit might be needed for construction activities.

A seaward jurisdictional line movement at Captain Sams Spit would give the developer more space to construct an access road and utilities at the imperiled narrow neck of the Spit, potentially dispensing with the need for any additional permits. SCELP has long-represented the Conservation League in challenging various permits associated with KDP's proposal to build a 50-house residential development known as Cape Charles Phase I on the Spit.

Members of the Conservation League use and enjoy recreating on and around the Spit and easing restrictions on where the developer can build a road and infrastructure would harm them, according to the petition filed today.

"KDP is, yet again, seeking a work-around to implement its unwise development plans. Their hope is this challenge to DHEC's beachfront jurisdictional lines will facilitate access to its proposed residential development and the Conservation League cannot stand by and fail to protect the interests of its members," said SCELP Staff

EXHIBIT A

Attorney **Leslie Lenhardt.**

"Captain Sams Spit is a valuable public resource that would be irreparably harmed by the proposed development," said Coastal Conservation League Executive Director **Laura Cantral.** "In addition to the public's recreational use, numerous species such as endangered piping plovers, diamondback terrapins, and bottlenose dolphins rely on the Spit for foraging, resting and breeding. Damaging the Spit's natural beauty and wildlife to build a housing development on a dynamic and constantly shifting piece of land is beyond senseless."

To date, SCELP and the Conservation League have secured **multiple favorable rulings (https://scelp.org/projects/view/74)** from the South Carolina Supreme Court over various challenges to permits associated with proposed development on the Spit. In the most recent ruling from April 2018, the state's highest court concluded that the public benefits to preserving the spit outweighed any private benefits to developing it.

Yet a ruling in late 2018 from the Administrative Law Court again opened the door for the development, and the groups are back before the Supreme Court yet again challenging the most recent round of permits.

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South Carolina Environmental Law Project is a nonprofit public interest law firm. Its mission is to protect the natural environment of South Carolina by providing legal services and advice to environmental organizations and concerned citizens and by improving the state's system of environmental regulation.

The **Coastal Conservation League** is a nonprofit advocacy organization dedicated to protecting the coastal resources of South Carolina. Its mission is to protect the state's natural landscapes, abundant wildlife, clean water, and quality of life. Since 1989, the Conservation League has carried out this mission by working with citizens, local government and the state legislature. Get involved at www.coastalconservationleague.org.

Download available KDP Line Appeal - Motion to Intervene (/files/downloads/kdpiillcvsdheccccclmotiontointervene.pdf)

EXHIBIT A

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CELEBRATING 30 YEARS ESTABLISHED 1987

EXHIBIT A

THE FOUR PERMITS IN LITIGATION

Special thanks to the stellar attorneys at the South Carolina Environmental Law Project (SCELP) who are representing us on all of these cases.

Kiawah Development Partners (KP) has five outstanding DHEC permit applications — four of which we have legally challenged. The first one is a request for a permit to build a 2,783-foot bulkhead/revetment. After this initial request, they also applied for a permit to build a 340-foot steel sheet pile wall, a community dock, and a 2,380-foot steel wall.

The 2,783-foot Bulkhead/Revetment

In 2008, KP applied for a permit to construct a 2,783-foot long, 40-foot wide concrete block revetment and bulkhead system on the river side of the Spit. Bulkhead is just a fancy way of saying seawall. The revetment is the structural component of the bulkhead that absorbs the impacts from waves. DHEC denied most of the permit request, but allowed for the construction of a 270-foot bulkhead in front of Beachwalker Park.

That decision left both sides unhappy. In 2009, the Conservation League appealed the issuance of the 270 feet of revetment/bulkhead system, and KP also filed an appeal, seeking the permit for the full 2,783-foot bulkhead/revetment. Both cases were heard in the ALC.

Things didn't go so well in 2010. Judge Anderson reversed DHEC's decision and granted KP permission to construct the full 2,783-foot bulkhead/revetment. We immediately filed an appeal to the Court of Appeals and requested an injunction to prevent any construction activity, and that our case be transferred to the South Carolina Supreme Court.

The Supreme Court granted our motion for injunction, temporarily preventing KP from constructing the bulkhead/revetment until the case was heard.

In November 2011, the Supreme Court issued its first decision in the case – VICTORY! The Supreme Court ruled in our favor, preventing the construction of the bulkhead/revetment.

But KP immediately filed a motion asking the Supreme Court to reconsider its decision. Oral arguments were heard a second time in April of 2012. Almost a year later, the Supreme Court completely reversed course and permitted the construction of the bulkhead/revetment.

We filed a petition for rehearing, asking the Court to reconsider its reversal. In May of 2014, the Supreme Court granted the motion for rehearing.

On December 10, 2014, the Supreme Court issued its third ruling in the case. The Court ruled that there is no public benefit to constructing an erosional structure on the Spit and that the only benefit is economic, for the developer. The Supreme Court also ruled that DHEC may

consider upland impacts when assessing permit applications. The case was remanded to Judge Anderson (the ALC) for further consideration in light of its ruling. Judge Anderson conducted numerous hearings and requested briefings on several issues.

Judge Anderson then issued two orders: (1) an Order Granting the Motions for Clarification and Denying the Motions for Reconsideration; and (2) an Amended Final Order and Decision, in which he explicitly authorized the entire 2,783-foot length of the bulkhead and the 40-foot wide revetment for the 270-foot length of Beachwalker Park.

On March 23, 2016, we filed a motion asking Judge Anderson to stay his Amended Final Order and Decision authorizing the structure. On March 30, 2016, we simultaneously filed a Notice of Appeal and Motion to Transfer the matter from the Court of Appeals to the Supreme Court.

On April 15, 2016, after CCL and KP submitted written arguments, Judge Anderson issued an order preventing the construction of the vertical bulkhead he approved.

And on May 20, 2016, the Supreme Court agreed to hear our challenge to Judge Anderson's order on remand. We presented oral arguments in the Supreme Court on September 27, 2017, and on April 18, 2018, the Supreme Court affirmed only the 270-foot bulkhead/revetment system next to Beachwalker Park, denying 2500 + feet that would run along the neck of the Spit. In their unanimous opinion, the Justices cited the importance of protecting the Kiawah River shoreline along the neck of the Spit because it's considered a public resource under the law. This ruling represents a tremendous victory in our ongoing litigation.

The 340-foot Steel Wall

In 2009, KP requested a DHEC permit for the construction of another wall of sorts — a 340-foot long steel sheet pile wall (a wall that is meant to retain sand) along the neck of Captain Sams Spit — an important area because it is where a road and utilities would have to go to serve future development.

Many affected parties expressed concern over the permit application. The US Fish and Wildlife Service and the SC Department of Natural Resources requested denial of this permit because of threatened and endangered species on Captain Sams Spit. The Coastal Conservation League was concerned about the wall's impacts to natural inlet migration and wildlife.

On October 27, 2009, DHEC staff issued the permit for the 340-foot structure.

We requested a final review conference before the DHEC Board, which was granted, to reevaluate the staff decision granting KP permission to build the wall. On January 7, 2010, the DHEC Board overturned the staff's decision, concluding that building a wall in the dunes, as is

the case on the neck of the Spit, violates the Coastal Management Program.

KP was not happy with the DHEC Board's decision. They filed a request for a contested case hearing in the Administrative Law Court (ALC), which has been stayed pending the final outcome of the other cases involving Captain Sams Spit.

This means that, for now, the 340-foot wall cannot be constructed as the case lingers in the ALC.

The Community Dock

There's more. In 2011, KP applied for a DHEC permit to build a 2,200 square foot community dock on the "neck" of the Spit that connects the 150-acre spit to the main body of Kiawah Island.

In 2012, we appealed the DHEC permit to the ALC, but all parties agreed to hold the challenge in abeyance pending resolution of the challenges to KP's erosion control structures.

The 2,380-foot Steel Wall

In May 2015, KP requested and received permits and certifications from DHEC authorizing the construction of this steel sheet pile wall — along with a roadway, stormwater management system, water lines and utility lines. The 2,380-foot wall runs adjacent to the Kiawah River, from Beachwalker Park to the other side of the Spit's neck.

In 2015, the Conservation League appealed the permit decisions to the ALC, staying the project until the administrative decision is heard (this is so that no irreparable harm occurs before we know whether the project is legal or not). KP filed a motion in the ALC to lift the stay so that they could proceed with the wall's construction. Judge Anderson ruled in their favor and lifted the stay.

But we were not deterred. The day after Judge Anderson's decision, we filed a Petition for Extraordinary Relief with the South Carolina Supreme Court, requesting an injunction to prevent irreparable harm to this critical public trust resource. The Supreme Court ruled in our favor and reinstated the stay until the case is heard in the ALC.

Our trial lasted for seven days in the ALC between August 21 – August 29, 2017. You can read SCELP's recap of the trial here. On September 24, 2018, Judge Anderson issued a 50-page Order upholding permits to authorize construction of a road, steel wall, and other infrastructure, concluding that the "economic benefits of developing the upland" outweigh preservation of the riverbank and Spit. We submitted a motion to stay the effect of this decision and it was subsequently granted by Judge Anderson in December 2018. Judge

Anderson also issued an Amended Order and a Reconsideration Order. We have filed an appeal of the rulings and heard in August 2019 that the state Supreme Court will hear our case! Stay tuned for a date.

OTHER PERMITS

8,000 Cubic Yards of Sand

In early 2017, KP applied for a general permit to add 8,000 cubic yards of sand to the Spit to nourish a portion that experienced over a 100 foot loss of beach and dunes during Hurricane Matthew (you also can see impacts from Irma here!). At a public hearing, hundreds of citizens showed up to voice their opposition to the permit with almost 50 folks giving public comment, all requesting that DHEC deny the permit request. On October 13, DHEC authorized the permit, despite the huge opposition. However, due to language included in KP's recent and controversial land swap transaction with the Kiawah Island Community Association, the terms of agreement state that they cannot act on this permit. We and our Kiawah members will continue to monitor this to ensure that this remains true.

Emily Cedzo · emilyc@scccl.org · 843.723.8035

Hurricane confirms instability of Capt. Sam's Spit

OCT 19, 2016

Mother Nature has a way of stripping away man's myths.

Hurricane Matthew, for example, revealed problems that people had wanted to ignore: a broken gutter, a roof in need of patching, a dead tree limb, a drainage system that can't keep up.

It also revealed that rosy predictions for developing Captain Sam's Spit at the tip of Kiawah Island were more than optimistic. They were unrealistic.

The 150-acre teardrop of exposed dunes is continually reshaped by waves and wind. But Kiawah Partners has insisted it is stable enough to provide a firm foundation for 50 homes and a road along a narrow neck of land connecting Kiawah "mainland" to the spit.

The company and environmentalists have been fighting it out in court. Environmentalists would like to stop the development, insisting that it poses a threat to wildlife and marine life and would increase the likelihood that the spit will erode further.

But the issue goes beyond just the development. Kiawah Partners fought to adjust the timing of the state's shoreline management rules. The expectation that setting a new baseline next year would give developers more leeway is another perception that Hurricane Matthew should have disproved.

The line is set on the beach to restrict construction too close to the ocean, and hence too close to being lost to the ocean. The old law called for it to be moved according to erosion or accretion. The more erosion, the closer to the dunes the line was set. Conversely, the more the beach accreted, the farther from the dunes the line was moved.

That proved to be problematic because accreted land is not necessarily stable enough for building. So a blue ribbon committee proposed this change: When the land erodes, the beachfront line moves inland. When it accretes, it stays put.

Kiawah Partners has banked on the spit accreting and pushed to set the line later than initially planned.

But according to a report from the town of Kiawah Island, the opposite has occurred: The stretch of beach from Captain Sam's Inlet to Beachwalker County Park (where the development is planned) lost 70-120 feet from Oct. 5 to Oct. 9.

Coastal Conservation League Executive Director Dana Beach declared the project dead. "Setting it [the baseline] next year will put the setback line in the river and the baseline 100 feet back in the former dunes," he said.

But Bill Hindman, spokesman for Kiawah Partners, said the line should be set based on erosion patterns over the last 40 years, not one catastrophic event.

Doing that would seem most impractical, given the 100-foot loss of beach this month.

At the least the damage dispels notions that the spit is a stable piece of land suitable for a housing development.

It isn't.

EXHIBIT C

It is, however, a great spot for nesting turtles, porpoises strand feeding (hurling themselves onto the shore), rare birds and treasured marine life.

Hurricane Matthew wasn't the monster that had been predicted for the South Carolina coast.

But it should disabuse builders of the would-be merits of constructing 50 high-end houses on this vulnerable spit in the path of a powerful sea and future storms.

EXHIBIT C

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HOW TO PROJECTS TOOLS PRODUCTS BUSINESS FORUMS

Posted on November 08, 2016 0

A Wedge in the Sand: Nature Intervenes in Construction Line Controversy

Hurricane Matthew moved the battle lines on Kiawah Island's controversial Captain Sam's Spit.

By Ted Cushman

The Post and Courier

Conservationists and developers have been tussling for years over the future of Captain Sam's Spit, a small, sandy peninsula in the gated coastal community of Kiawah Island, S.C. JLC's Coastal Connection last reported on the spit's situation in June (see: "Spit Take: Amid Controversy, South Carolina Revises Shoreline Development Law," Coastal Connection 6/14/16). At that writing, developers had won permission to develop the spit in a court battle, but had lost a bid to delay the implementation of

PART 6
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See All Previous Episodes

a freeze in the baseline defining the construction setback from the shore—a line in the sand that limits construction near the water along the whole state's coastline.

Kiawah developers had wanted to delay the freeze in the coastal baseline until 2025, hoping to benefit from accretion of sand on the Atlantic side of the spit's narrow neck. But October's Hurricane Matthew flipped the script, eroding the beach by some 70 to 100 feet. The Charleston Post and Courier weighed in with an editorial on October 19 (see: "Hurricane confirms instability of Capt. Sam's Spit"). "Kiawah Partners has banked on the spit accreting and pushed to set the line later than initially planned," the paper explained. "But according to a report from the town of Kiawah Island, the opposite has occurred: The stretch of beach from Captain Sam's Inlet to Beachwalker County Park (where the development is planned) lost 70-120 feet from Oct. 5 to Oct. 9. Coastal Conservation League Executive Director Dana Beach declared the project dead. 'Setting it [the baseline] next year will put the setback line in the river and the baseline 100 feet back in the former dunes,' he said. But Bill Hindman, spokesman for Kiawah Partners, said the line should be set based on erosion patterns over the last 40 years, not one catastrophic event."

"Hurricane Matthew wasn't the monster that had been predicted for the South Carolina coast," the paper commented. "But it should disabuse builders of the would-be merits of constructing 50 high-end houses on this vulnerable spit in the path of a powerful sea and future storms."

Still, there's more than one way to view Matthew's effect on Kiawah. The town's report is posted here (see: "Kiawah Island Post Storm Beach Report," prepared by Jim Jordan, Wildlife Biologist). Town managers seem willing to view the beach's movement as part of a long-term oscillation, not a one-way creep, and they expect sand to build up again on the shore's edge. "Kiawah's extensive dune system performed its role exactly as it should have," the report reads. "The role of dunes is to sacrifice themselves to protect inland areas. This is exactly what occurred. Beaches are extremely resilient and eroded sand will slowly make its way back up onto our beaches and dunes will begin to rebuild naturally."

Along most of the beach, photos in the report show, the line's movement was minimal compared to the depth of the developed land near the shore. But on Captain Sam's spit, the issue is more debatable: the hundred-foot movement of the dune line diminished the spit's narrow neck by about a fifth.

The area near the gated community's golf course took the biggest hit: "The outer beach dune ridge directly in front of the Ocean Course Driving Range was completely destroyed," the town reported. But again, the report puts an optimistic spin on the news: "This will have a positive long-term benefit since it will allow waves to push additional sand directly onto the beach adjacent to the driving range and clubhouse."

About the Author

Ted Cushman

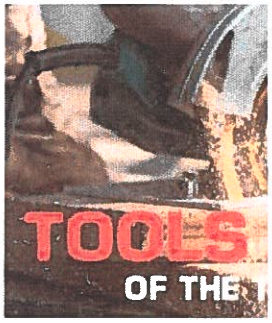
Ted Cushman is a Senior Editor at JLC.

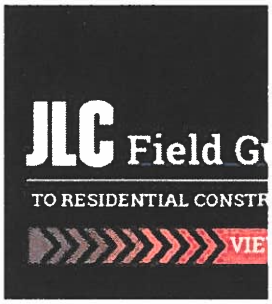
Advertisement

Keywords:

Subject:

Hurricanes Erosion Control Environmental Controls





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BYKO REALTY

Charleston Currents
a journal of good news for the Lowcountry

Monday, June 15, 2020

Full issue

11/23, full issue: Capt. Sams Spit; new mayor-to-be; more

Charleston Currents· 11/23/2015 9:21 am·Comments Off

Charleston Currents | Nov. 23, 2015 | Number 8.04

(c) 2015, Agnes Pomata

THE BIG TOMATO: This Wadmalaw Island farm stand crumbled recently after all of the rains and flooding that hit South Carolina. What's kind of amazing is that it toppled not too long after it was filmed to be part of Anthony Bourdain's "Parts Unknown" show about Charleston food, which aired last week. Island resident Agnes Pomata (almost rhymes with "tomato"), who snapped the photo, told us the tomato icon on the stand had faded, but was touched up apparently for the show. "Its roof has been slowly sinking, as though its appearance on TV was its last glorious breath," she wrote. Thanks, Agnes.

EXHIBIT E

IN THIS ISSUE

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TODAY'S FOCUS

Captain Sams Spit back in development headlines

By Katie Zimmerman, S.C. Coastal Conservation League

NOV. 23, 2015 | Captain Sams Spit is in the crosshairs of development again.

Zimmerman

The Spit is a 150-acre pristine sandy land mass at the southern end of Kiawah Island, relied upon by the piping plover, diamondback terrapin, bottlenose dolphin, and other rare and threatened species for nesting and feeding.

For eight years, the Coastal Conservation League, represented by the South Carolina Environmental Law Project (SCELP), has challenged numerous permits issued to Kiawah Development Partners (KDP) and its affiliates. The first round of permits would have allowed construction of a half-mile long concrete wall in connection with KDP's proposal to build a high-end residential development on the undeveloped, highly dynamic Spit. Just as the public felt relief with the state Supreme Court's December 2014 ruling on this permit to be the final word — with the recognition that a pristine, active island and critically important public trust resource providing habitat to a variety of rare, threatened, and endangered species is not something to be sacrificed for the sole benefit of a private developer — KDP applied for a new round of permits.

Photo by J. Henry Fair, courtesy of S.C. Coastal Conservation League.

This most recent attempt of KDP, which is based out of North Carolina and backed by the same New York hedge fund that manages some of the New York State retirement fund, refuses to accept that a spit of eroding sand cannot make them a quick buck. KDP sought permits for a new steel sheet pile wall, road and sewer and water lines in connection with the proposed development. While this new wall is in the dunes, as opposed to below the mean high water mark, the same legal standards of the Coastal Management Program apply, making it a distinction without a difference. In addition, according to experts, the wall will be exposed on the sandy shoreline in short order due to the erosion rates. Yet the state Department of Health and Environmental Control (DHEC) gave KDP a free pass by issuing the permits, despite the Supreme Court's ruling.

On behalf of the Coastal Conservation League, SCELP appealed the permits in the Administrative Law Court. KDP asked Judge Ralph King Anderson III, to "lift the automatic stay" to allow construction of the steel wall along the banks of the Kiawah River. The "automatic stay" works to protect public resources and prevent degradation until an Administrative Law judge determines whether the permits were properly issued. Two weeks ago, Judge Anderson granted KDP's request to lift the "automatic stay" and authorize construction of the steel sheet pile wall. There has been no hearing to determine whether the most recent permits were issued in compliance with the law, and as SCELP chief counsel Amy Armstrong has pointed out, "These new DHEC authorizations are contrary to the ruling of our state's highest court and would result in imminent harm to Captain Sams Spit and the wildlife dependent upon it." On behalf of the League, SCELP has requested the state Supreme Court to grant "extraordinary relief" and prevent construction on the Spit. We are waiting to hear the court's decision.

Capt. Sams Spit after the October 2015 flooding.

KDP has shown that it is not only willing to sacrifice the Spit itself, but also the protections of our entire coastline. To that end, the developers have sought to amend a beachfront management bill in our state legislature this session, and actually managed to convince a senator from Berkeley County to defend its proposal (the "Kiawah Amendment"). The bill in question would set a permanent baseline along our entire coast, defending taxpayers, homeowners and natural resources from development too close to the ocean. The "Kiawah Amendment" would delay setting that baseline, allowing road and other construction to occur even closer to the ocean on Captain Sams Spit.

We plan to fight the "Kiawah Amendment" to the beachfront management bill as the legislative session continues, but we also plan to fight a bill being promoted by Myrtle Beach area developers and road boosters that would eliminate the automatic stay (referenced above) in its entirety. Their bill would have harmful implications for the environment, as in the case with Captain Sams Spit. The automatic stay is a legal mechanism that prevents irreversible damage to South Carolina's special places when a permit that could cause harm is being appealed.

Development proposals like the one for Captain Sams Spit are completely inappropriate. Developers like KDP have demonstrated no deference to wild places that deserve protection. Make sure you stay involved with this issue and the legislative ones affecting it by signing up at this link.

Katie Zimmerman is program director of air, water and public health for the S.C. Coastal Conservation League.

COMMENTARY

Meet Charleston's next mayor

By Andy Brack, editor and publisher

EDITOR'S NOTE: This is an updated version of a special commentary published last week after Charleston businessman John Tecklenburg got a 16-point runoff win over state Rep. Leon Stavrinakis in the race for Charleston mayor. To see the original, click here.

NOV. 23, 2015 | Just as Charleston plays a leading role in South Carolina's history, economy and civic life, so does its leader.

ANDY BRACK

For the last 40 years, that's been Mayor Joseph P. Riley Jr., a passionate, future-oriented progressive who has molded the Holy City from a somewhat sleepy footnote of history into a nationally-recognized municipal dynamo powered by its port, knowledge economy and world-ranked tourism.

So it is understandable that many across the state have an interest in the man who will replace Riley at the helm, businessman John Tecklenburg, who was elected Tuesday to take over in January.

Many South Carolinians outside of Charleston may not know of Tecklenburg, a commercial real estate agent with a long record of civic involvement. For years, he ran the family business, an oil distribution company. He also built and operated a store on Daniel Island. And he served as Charleston's director of economic development for Riley in the 1990s, a stint that helped spur the revitalization of upper King Street, once the home of empty stores now filled with nationally-recognized restaurants, shops and businesses.

As a veteran staffer under Riley, he brings a well-rounded understanding of how the city works — and should work. For almost two years, he's campaigned for Charleston's top job by saying he would work to involve people in the city and to improve its livability.

"Charleston is not a theme park," Tecklenburg said in a television ad that set his campaign apart. In those six words, he succinctly captured what distinguished his candidacy from the five people he faced at the polls on the first Tuesday of this month. His motivation: to serve the people of Charleston by working collaboratively with them to achieve a unified community vision.

Tecklenburg

Tecklenburg placed first in the general election with 36 percent of the vote, edging long-time state Rep. Leon Stavrinakis, D-Charleston, by just one point. Ginny Deerin, a former Riley campaign manager and nonprofit founder, placed third with 17 percent of the vote.

Deerin played a key role in Tecklenburg's ultimate victory. During the long general election campaign marked by more than 30 public forums, Deerin ran a tough ad that linked Stavrinakis to developers. Stavrinakis balked, claiming the ad was negative and that such campaigning didn't have a place in Charleston politics. As the spat intensified, Tecklenburg pushed his positive theme of unity and quality of life.

When Deerin didn't make the Nov. 17 runoff election, she endorsed Tecklenburg. Many times, endorsements may not carry a lot of punch. But when Stavrinakis — the guy who complained about a negative ad — then ran a negative ad calling Tecklenburg, a real estate agent, a developer, the duplicity was too much for many. It energized Deerin's supporters to return to the polls and punch the button for Tecklenburg.

"This was a good win done the right way," one former city council member observed Tuesday, noting how Tecklenburg refused to take the bait of negative attacks and nasty campaigning.

Maybe leaders across South Carolina can learn something from Tecklenburg about running a campaign based on decency. In times when terrorists set off bombs in Paris and a lone gunman murders people in a historic Charleston church, it is comforting to know that the man who will now lead the city has a strong a set of core community values, integrity and single-mindedness to do the right thing.

He got that from his parents, former city council member Esther Tecklenburg and the late Henry Tecklenburg Jr., a statewide civic leader who worked for years with former U.S. Sen. Fritz Hollings. Upon Henry Tecklenburg's death in 1993, Hollings said, ""Teck, as we knew him, was the epitome of the Charleston gentleman and the Christian servant. He loved people – people of all walks of life. He took satisfaction in setting them at ease, sharing his wisdom with them, extending a helping hand, making a difference big or small in their lives."

Sound familiar today? That's the kind of guy who will now lead Charleston. His father would be proud, just as his family and friends are.

Andy Brack is editor and publisher of Charleston Currents and Statehouse Report. You can reach him at: editor@charlestoncurrents.com

IN THE SPOTLIGHT

SCIWAY

The public spiritedness of our underwriters allows us to bring *Charleston Currents* to you at no cost. Today we shine our spotlight on **SCIWAY.** Pronounced "sky-way," **SCIWAY** is South Carolina's Information Superhighway — the largest and most comprehensive directory of South Carolina information on the Internet. It includes thousands of links to other South Carolina Web sites, including *Charleston Currents,* as well as an amazing collection of maps, charts, articles, photos and other resources.

- To learn more about this extraordinary information hub that 7 million people visit a year, go to: http://www.SCIWAY.com.
- To meet all of our underwriters, click here.

GOOD NEWS

Stokes-Marshall, Mazyck honored on 2016 calendar

The 27th edition of AT&T's S.C. African American History Calendar unveiled last week in Columbia includes two Lowcountry leaders devoted to make people's lives better: Thomasena Stokes-Marshall of Mount Pleasant and Bernie Mazyck of Summerville. (Download the 2016 calendar.)

Mazyck

Mazyck, featured in June, is president and CEO of the S.C. Association for Community Economic Development, where he has worked for 17 years to improve the quality of life of poor families and communities. His organization and its member groups have developed projects with a $250 million impact in the state's communities. Other accomplishments: More than 1,000 families have been able to buy their first homes and 6,000 people got jobs. More information.

Stokes-Marshall

Stokes-Marshall, a former New York City police officer who returned to her hometown of Mount Pleasant to serve as the first African American on town council, two which she was elected in 1998. Six years later, she founded the Sweetgrass Cultural Arts Festival Association to help preserve the Gulla-Geechee culture. She is featured in the November section of the calendar. More information.

"Our state has been built and molded by many extraordinary people, from all walks of life," said Pamela P. Lackey, president of AT&T South Carolina. "The South Carolina African American History Calendar enables us to gratefully recognize the impact this year's honorees have had on so many lives, while also assuring that their stories are told and preserved to educate and inspire future generations."

The 2016 calendar features a dozen people who the company says have made significant impacts in a range of fields, including education, healthcare, business, politics, public safety, economic development, and foreign diplomatic service. Other honorees include: Columbia native **Durham E. Carter**, an educator and community leader; **Schylver V. Foster** – corporate leader with BMW Manufacturing and Greenville-area community educator; Columbia Dr. **Stuart A. Hamilton**, a healthcare pioneer ; Columbia Fire Chief **Aubrey D. Jenkins**; Ambassador **Howard F. Jeter**, a native of Union; **James P. "JP" Neal, Jr**., a Columbia public administrator, educator, broadcaster and minister; Orangeburg native **James H. Salley**, an institutional development officer for Africa University in Zimbabwe; **Carrie Sinkler-Parker**, a Clarendon County community advocate; Columbia native **Martha Scott Smith**, a business leader with AT&T, philanthropist, volunteer and community leader; and the late **Elizabeth "Lizzie" Evelyn Wright** (1872-1906), founder of Voorhees College.

In other good news:

Talking turkey. While more than 46 million turkeys are expected to be eaten over the Thanksgiving holiday, most Americans don't cook a lot of turkeys (although they seem to know how to talk turkey!) If you have questions about cooking turkeys safely, you can turn to various resources available through the U.S. Department of Agriculture — from smartphone apps to its 30-year-old Meat and Poultry Hotline. Learn more: FAQ Turkey Questions.

Holiday craft fair. Magnolia Plantation and Gardens will hold a holiday craft fair where you can buy unique, hand-crafted gift items from 9 a.m. to 4 pm. on Nov. 28-29. At the same time — and through Dec. 31, the attraction will have a holiday Children's Village, which features Santa's workshop, a candy factory and elf bunkhouse. A Christmas Train will also take up to 35 passengers on a 15-minute ride each weekend until Christmas. All three are free with garden admission. More.

FEEDBACK

Send us your thoughts

Tell us what you really think. If you have an opinion on something we've offered or on a subject related to the Lowcountry, please send your letters of 150 words or less to: editor@charlestoncurrents.com. Our feedback policy.

CALENDAR

Nov. 23+ Getting into the holiday spirit

ON THE CALENDAR

Holiday Festival of Lights: Through **Jan. 3, 2016**, James Island County Park. The annual light festival with millions of lights and lots of family fun opens for a seven-week run. Lots of information is online here.

That Holiday Book Sale: **Dec. 4-6**, Charleston County Main Library, 68 Calhoun St., Charleston. The Friends of the Library will offer a great book sale just in time for the holidays where you can pick up affordable books, CDs and more. For times and other information, click here.

Miracle on 34th Street: Dec. 4-20, Footlight Players Theatre, 20 Queen St., Charleston. The Footlight Players will perform the beloved holiday classic based on the 1947 Oscar-winning film. Shows are at 8 p.m. Dec. 4-5, Dec. 11-12 and Dec. 17-19 and at 3 p.m. Dec. 6, Dec. 13 and Dec. 20. Tickets are $35 for adults; $32 for seniors/military, $25 for students and $15 for children. More: footlightplayers.net.

(NEW) **Homegrown Holiday Bazaar**: 10 a.m. to 4 p.m., **Dec. 5**, Johns Island Farmers Market, 3546 Maybank Highway, Johns Island. The market and Sea Islands Chamber of Commerce will offer its second annual holiday bazaar with silent auction items, a hayride, face painting and visits by Santa and Mrs. Claus. There will be music, crafts for the holidays and lots more.

(NEW) **Gospel Christmas**: 7:30 p.m., **Dec. 5**, Ashley River Baptist Church, 1101 Savannah Highway, Charleston. The Charleston Gospel Choir and Charleston Spiritual Ensemble will present the 15th annual Gospel Christmas, a performance of moving interpretations of sacred holiday music. Tickets are $35 for adults, $30 for seniors and $15 for students. Learn more here.

Path to Secession: 11:15 a.m., **Dec. 8**, John's Island Regional Library, Johns Island. Join Charleston County Public Library historian Nic Butler to follow 50 years of events that led the state to secede from the union in 1860 in this installment of the library's history series. The talk will be also offered 6 p.m., **Dec. 9**, at the main library on Calhoun St.

(NEW) **Stern lecture**: 6 p.m., **Dec. 10**, Charleston Library Society, 164 King St., Charleston. "Remembering of the Remarkable Ted Stern: Charleston's Compass" will be the focus of a lecture by Bob Macdonald, director emeritus of the Museum of the City of New York and vice chair emeritus of the S.C. Aquarium. Introduction by Mayor Joseph P. Riley Jr. Cost is $15 for non-members; $10 for members. Tickets.

Bird walks: 8:30 a.m. to noon, **every Wednesday and Saturday**. This is the time of year that a great variety of migrating birds fly through the Lowcountry so what better time to take part in one of the regular early morning bird walks at Caw Caw Interpretive Center in Ravenel. Pre-registration is suggested. Cost is $5. Walks also are conducted on James Island and Folly Beach. Learn more online.

If you have an event to list on our calendar, please send it to editor@charlestoncurrents.com for consideration. The calendar is updated weekly on Mondays.

REVIEW

The Bees

A novel by Laline Paull

RECOMMENDED READING

Worker bee Flora 717 does not calmly enter into this world; she explodes into it, tearing through the waxy constraints of her womb room. Born into the lowest caste of the hive, Flora should be a mute bee who works her sanitation job diligently and without question, but that's not the case. Flora can speak, produce Flow (royal jelly), understand emotions, and think for herself. Flora challenges the uniformity and strict social hierarchy of the hive in every possible way, including carrying an egg, a treasonous offence against the queen. Flora must decide if her own maternal instinct and happiness is worth going against the hive's internal order. This pivotal point is also where Laline Paull's debut turns from an *Animal Farm*-esque story to a dystopian mix of Margaret Atwood's *The Handmaid's Tale* and Suzanne Collins' *The Hunger Games* calling into question Nature vs. Nurture as wells as questioning the status quo.

Paull transports us into the mind of a bee and illustrates the inner workings of a hive, whether that's through the highly detailed descriptions of the architectural wonder that is a hive or a caste-based system that requires its residents to fall in line and do as they're told — unless you're Flora 717. Paull's language is wonderfully evocative: the flight scene of the male drones places you onto an airstrip where you're practically buzzing along with the bees as they prepare for flight. It's quickly countered by Flora's more peaceful first voyage, less Nikolai Rimsky-Korsakov's "Flight of the Bumblebee" more Debussy's "Clair de Lune." Paull weaves a story that both entertains and forewarns, entertaining with clever word play while also addressing serious issues, including prejudice, sexism, and environmental concerns.

— Melissa Tunstall, Main Library, Charleston, S.C.

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MYSTERY PHOTO

Looks pretty old

You have to travel about 75 miles from downtown Charleston to find this historical treasure. Where — and more importantly — what is it? The third person to identify this photo and its history will win a pair of tickets to Magnolia Plantation and Gardens. Send your guess and town of residence to editor@charlestoncurrents.com. Good luck! *(Photo by Andy Brack)*

Congratulations to all who correctly identified the model train holiday display from the Belmond Charleston Place: **Kristina Wheeler** and **Legare Clement**, both of West Ashley; **Joe Mendelsohn** of Charleston; **Archie Burkel** and **Fred Sales** of James Island; **Deborah Getter** of Johns Island; **Stephen Yetman** of North Charleston; and **Chris Brooks** of Mount Pleasant.

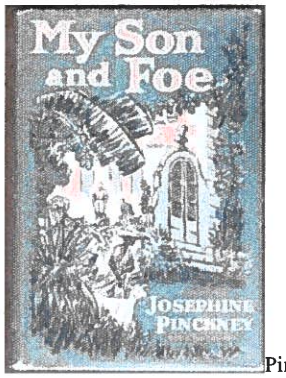
A CONTEST THAT PAYS: This year's train is being installed this week before Thanksgiving. The hotel is having a photo contest via Instagram of the best photo of the train (with or without people). You could win $500 by posting your photo to #BCPHolidayTrain between Nov. 26 and Dec. 19. Winners will be announced Dec. 20.

- If you have a picture with which you'd like to stump our readers, send it along to editor@charlestoncurrents.com.

S.C. ENCYCLOPEDIA

Josephine Lyons Scott Pinckney

S.C. Encyclopedia | Josephine Pinckney was born January 25, 1895, at Charleston into a family long prominent in the state's history. She was a direct descendant of Eliza Lucas Pinckney and Governor Thomas Pinckney. Her parents were Thomas Pinckney, one of South Carolina's last great rice planters, and Camilla Scott of Virginia. In 1912 she graduated from Ashley Hall School, where she helped establish a literary magazine, and later attended the College of Charleston, Radcliffe College, and Columbia University. She received an honorary degree from the College of Charleston in 1935, and was named an honorary member of the William and Mary Chapter of Phi Beta Kappa in 1934. She received numerous honors for her writing including the Southern Authors Award in 1946.



Pinckney played a key role in the literary revival that swept through the South after World War I. She worked closely with Dubose Heyward, Hervey Allen, and John Bennett in founding the Poetry Society of South Carolina in 1920. During the following decade, Pinckney emerged as a poet of national reputation when her work, often evocative eulogies to a vanishing way of southern life, appeared in influential journals such as the Saturday Review of Literature and Poetry, as well as in numerous anthologies. Her only book of poems, *Sea-Drinking Cities* (1927) received praise from Donald Davidson for "a luxuriance of phrase, a quiet humor controlling deep emotion."

Pinckney participated in other aspects of the "Charleston Renaissance" through her dedicated involvement in local cultural institutions, such as the Carolina Art Association, the Charleston Museum, and the Dock Street Theatre. Active in the Society for the Preservation of Spirituals from its inception in 1922, Pinckney helped with the transcriptions and musical annotations for the African American songs included in *The Carolina Lowcountry* (1931). She also worked quietly behind the scenes of the historic preservation movement in Charleston and was posthumously honored by the American Scenic and Historic Preservation Society for the manner in which she "tactfully and persuasively, firmly and wisely" helped to restore the city's neighborhoods and notable buildings.

During the 1930s, Pinckney embraced a modernist sensibility and turned her writing talents to prose. *The Virginia Quarterly Review* published her two short stories, "They Shall Return as Strangers" (1934) and "The Marchant of London and the Treacherous Don" (1936). Her essay, "Bulwarks Against Change," which appeared in W. T. Couch, ed., *Culture in the South* (1934) remains an insightful commentary on the evolving South. In 1941 Pinckney published her first novel, *Hilton Head*, followed by the best-selling social comedy, *Three O'Clock Dinner* (1945), which made her one of America's best known women fiction writers. Her third novel, *Great Mischief*(1948), a Book-of-the-Month Club selection, was followed by *My Son and Foe* (1952), and *Splendid in Ashes* (1958). Her editor at Viking Press remembered Pinckney "more warmly" than any other of his distinguished writers of the day for her "charm and grace of her character, the intelligence of her insights into people, the delights of her Charleston ambiance tempered by her cosmopolitan ways and her irony."

Although Pinckney traveled widely, she always maintained a home in Charleston and her family plantation on the Santee River, "El Dorado." Josephine Pinckney died October 4, 1957, and was buried in Magnolia Cemetery.

– Excerpted from the entry by Barbara L. Bellows. To read more about this or 2,000 other entries about South Carolina, check out The South Carolina Encyclopedia by USC Press. (Information used by permission.)

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In 2008, a piece of legislation was introduced to Congress that would have removed federal protections from this spit of land. Thanks to the immediate response of hundreds of Conservation League members and activists, the bill was withdrawn and the Spit remains in the Coastal Barrier Resources System. This federal law identifies naturally sensitive or erosional coastal areas and discourages their development by prohibiting federal subsidies in the form of federal flood insurance and hurricane relief.

Throughout the ongoing turmoil in court, in 2015, KP began a legislative effort to support their plans for development on the Spit. Working with state Senator Paul Campbell (R-Berkeley) to introduce the "Kiawah Amendment," KP pushed to undermine coastal protections in an otherwise good bill aimed at protecting the shoreline. Without KP's amendment, the bill would set a baseline along our entire coast that would never again move seaward — defending taxpayers, homeowners and natural resources from development too close to the ocean. While the line would never again move towards the ocean, it could still move landward in highly erosional areas. With the Kiawah Amendment, the bill would delay setting the baseline until as late as the year 2021 — a stalling tactic designed to buy time while sand potentially accretes on the Spit. With more sand, the developers could potentially have room to build the road they need.

After a stalemate, the Senate ultimately voted to pass the bill and set the final baseline in December of 2017. Despite immense pressure from the developers, the House passed the same version of the bill. Governor Haley signed the bill into law in June 2016.

Unfortunately, the non-seaward baseline came under attack during the 2018 legislative session. However, we worked hard to protect the provision and ultimately it was upheld with slightly different language. The baseline that will never move more seaward will be set at whichever is the most seaward for a property owner: the 2012 baseline, the 2017 baseline, or the outcome of current appeals.

This law adds a critical safeguard to our state's beach protection policy. It reduces the chance of development in vulnerable areas — development that puts taxpayers on the hook — while preserving the dry sand beach for all South Carolinians to enjoy.

Emily Cedzo · emilyc@scccl.org · 843.723.8035

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2020, in Charleston, South Carolina, I served a copy of the foregoing on all other parties by depositing the same in the United States Mail, First Class, postage paid, to the following:

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Email: leslie@scelp.org

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP, II, LLC, Petitioner, v. SOUTH CAROLNA DEPT. OF HEALTH & ENVIRONMENTAL CONTROL, Respondent.	)	Docket No. 18-ALJ-07-0047-CC **RETURN TO PETITIONER'S OPPOSITION TO MOTION TO INTERVENE**

Proposed Intervenor Coastal Conservation League ("the League") submits the following in support of its Motion to Intervene.

"Hijacking" is how Petitioners characterize the League's efforts to protect its members' interests, which, Petitioners recognize, are consistent with each and every challenge to this proposed development. Clearly Petitioners are frustrated about their inability to obtain a return on their investment and that they do not have carte blanche to alter the critical area and destroy the public's access. This attitude, however, does not deter the League from advocating in every venue to protect the unique interests of its members who have a significant and vested interest in the regulatory decisions DHEC makes regarding this development.

Petitioner argues that allowing intervention in an already-existing contested case proceeding would "establish a path for appeal of jurisdictional delineations." In fact, intervention does not equate to an appeal. The fact that the language of 48-39-280 provides for an appeal to be brought by a landowner does not preclude intervention. Moreover, Reg. 30-14(F) echoes the language set forth in the statute, but also states that "appeals are governed by 30-6." Reg. 30-6 provides for an appeal by any "affected person." Even if it is true that no party other than a

landowner may bring a contested case, the clear language of the statute does not in any fashion preclude intervention. The League has met the requirements of Rule 20 and should be granted intervention.

In response to Petitioner's claim that the League sat on its hands and did not move to intervene timely, the League reiterates that it was unaware of the existence of this particular appeal. While it is absolutely correct that the League has been involved in the legislative efforts to alter the Beachfront Management Act, as evidenced by the exhibits to Petitioner's memo in opposition, it does not automatically follow that the staff was aware of this individual appeal of this specific area. Though this contested case was pending since February of 2018, the filings reveal Respondent DHEC filed a motion to dismiss soon after the request for contested case was filed. Even if the League would have been aware of the appeal or somehow would be charged with knowledge of it, it would not have been appropriate to intervene when a motion to dismiss was pending and had not been decided. It would not have been clear to the League that the case would move forward on the merits. Further, immediately after this Court denied the motion to intervene, the matter was remanded to OCRM for the purposes of seeking a resolution to the matter. It also would have been inappropriate and impossible to get involved in that stage of the proceedings. When the case was restored to the docket, the League promptly filed its motion. Now that the Court will conduct a hearing in this case, it is appropriate for the League to appeal.

As for the charge that the case will be unduly delayed, the League would provide fact witnesses on the particular impacts of this DHEC decision on their constituents, which are distinct from the general population and citizens of the State. However, the majority of the witnesses, we expect, would be identified regardless of the intervention of the League and the depositions that will take place will take place regardless. The League understands that there is still much to be

done for discovery and no hearing date has been set in this case. This is not a situation where Petitioner is ready to begin breaking ground.

In its argument that its interests are adequately represented, Petitioner mischaracterizes the ruling in Sierra Club, which does not hold that intervention should not be granted where a party is not adverse to DHEC. The Court did not hold that DHEC represents the interests of all interests as well as the interests of the Sierra Club. The court stated that in an ideal situation, DHEC should represent the interests of all the citizens:

> Although Sierra Club and South Carolina DHEC may share some objectives, South Carolina DHEC is not an adequate representative for Sierra Club. South Carolina DHEC, ***in theory***, should represent all of the citizens of the state, including the interests of those citizens who also may be HWTC members or proponents of new hazardous waste facilities. DHEC is an agency and should not be adopting a position prior to complete agency review as to the impropriety of hazardous waste facilities. See Trbovich v. United Mine Workers, 404 U.S. 528, 538–39, 92 S.Ct. 630, 636, 30 L.Ed.2d 686 (1972) (concluding that "sufficient doubt about the adequacy of representation [existed] to warrant intervention" by a union member where the Secretary of Labor had two distinct, "related, but not identical" duties—to serve union members and to protect the public interest); United Guar., 819 F.2d at 475.
>
> Sierra Club, on the other hand, appears to represent only a subset of citizens concerned with hazardous waste—those who would prefer that few or no new hazardous waste facilities receive permits.[9] Sierra Club does not need to consider the interests of all South Carolina citizens and it does not have an obligation, though DHEC does, to consider its position vis-a-vis the national union. Although the interests of Sierra Club and South Carolina DHEC may converge at the point of arguing that Regulation 61–99 does not violate the Commerce Clause, the interests may diverge at points involving the appropriate disposition of sections of Regulation 61–99 that may not violate the Commerce Clause, the balance of hardships accruing to the parties if part of Regulation 61–99 is enjoined by preliminary injunction, and the public interest factor to be weighed in a preliminary injunction analysis.

In this case the League's interests are to protect the beachfront from encroachment of a development that *DHEC itself has permitted*. The League's interests are in preventing structures from being built too close to the beach, which is not of much concern to DHEC. DHEC's statutory obligation is to go through the procedures to set the baseline and setback line based on the erosional

state of a particular beach. The policy concerns specific to the League are not considered by DHEC in their analysis.

The showing required for inadequate representation is minimal. Virginia v. Westinghouse Elec. Corp., 542 F.2d 214, 216 (4th Cir. 1976) (citing Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 n.10 (1971)). A movant need only show that its interests are different from the existing parties such that their representation "may be" inadequate. Trbovich, 404 U.S. 538 n.10. To determine whether the existing representation is adequate, the following must be considered: (1) whether the existing parties will undoubtedly make all of the intervenor's arguments; (2) whether the existing parties are capable and willing to make such arguments; and (3) whether the intervenor offers different knowledge, experience, or perspective on the proceedings that would otherwise be absent. Berkeley Elec. Coop. v. Town of Mt. Pleasant, 302 S.C. 186, 191, 394 S.E.2d 712, 715 (1990) (quoting Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 528 (9th Cir. 1983)).

The government's interest is different from that of CCL because the government has a "basic duty of representing the people in matters of public litigation" and serves "in a representative capacity on behalf of its people." Stuart v. Huff, 706 F.3d 345, 352, 351 (4th Cir. 2013). "[T]he government's position is defined by the public interest, as well as the interests of a particular group of citizens." Feller v. Brock, 802 F.2d 722, 730 (4th Cir. 1986). In fact, that public interest should include Plaintiffs' interests, just as it should include the Proposed Intervenor's interests. See In re Sierra Club, 945 F.2d at 780 (4th Cir. 1991) (stating that a government party should represent all citizens including those who may oppose the proposed intervenor's interest).

In the present case, while DHEC represents the members of the public generally, CCL represents a subset of the public who believes the public beach should be actively conserved and beachfront development should be discouraged because of the beaches' natural beauty and

intrinsic value as wildlife habitats. See, e.g., Fund for Animals, Inc. v. Norton, 322 F.3d 728, 736 (D.C. Cir. 2003) (granting intervention where federal defendant and proposed intervenor's interests "might diverge during the course of litigation"); Nat. Res. Def. Council v. Costle, 561 F.2d 904, 912 (D.C. Cir. 1977) (reversing the district court's denial of motions for intervention and finding separate representation justified where the proposed intervenor "may well have honest disagreements with EPA on legal and factual matters").

Even beyond the divergence between DHEC's interest and that of Proposed Intervenor is the legitimate concern that the DHEC might not vigorously defend its decision on the lines. See Teague, 931 F.2d at 262 (finding that the proposed intervenors' interests were not adequately represented where the existing defendants had "financial constraints" that raised a "significant chance that they might be less vigorous than" the proposed intervenor in defending the case); Mausolf v. Babbitt, 85 F.3d 1295, 1303–04 (8th Cir. 1996) (finding that the government inadequately represented the proposed intervenor's interests by waiving and failing to enforce the regulations at issue in the case).

CCL cannot stand by and risk the chance of an unfavorable outcome, such as a settlement that harms the interests of Proposed Intervenor. See Defs. of Wildlife, 281 F.R.D. at 269 (finding that the proposed intervenor "satisfied its minimal burden of showing that representation of its interests, absent intervention, may be inadequate" where the proposed intervenor argued that the defendant "could settle this case in a matter that would harm [proposed intervenor's] interests"). Similarly, DHEC may choose not to pursue an appeal of an adverse ruling, whereas Proposed Intervenor might. Proposed Intervenor's interests therefore are inadequately represented by DHEC. Additionally, it is charged with representing a broader constituency than Plaintiffs' more

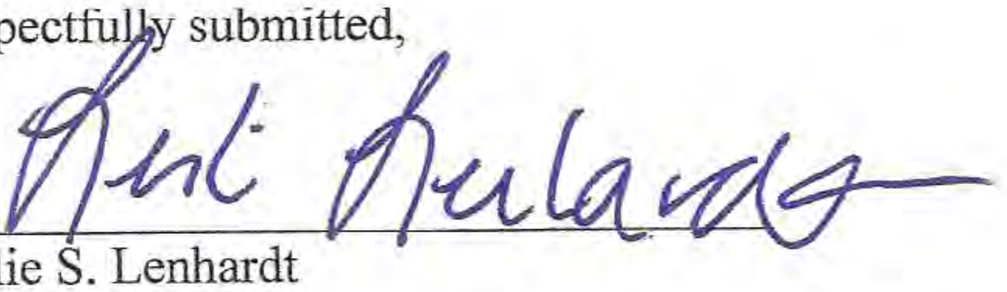
narrow interests. Therefore, the "minimal" burden to show a possibility that the government's representation "may be" inadequate has manifestly been met under *Trbovich.* 404 U.S. at 538 n.10.

Further, the League will be harmed by the decision if the Court reverses DHEC, or if DHEC decides to reverse its decision, which is always a possibility in these appeals. Rich Thomas, who is a property owner in relatively close proximity to the Spit, has executed an affidavit, attached to this Return. Mr. Thomas explains his significant interest in Captain Sams Spit and the significant amount of time he spends enjoying this area. He, as a member of the League, will be harmed by any permitted action that facilitates the construction of this development.

Petitioner again seeks to demean the League's position on this development by alleging they are out to "generally stir a frenzy." If the Petitioners wish to characterize the efforts to stop this injurious and unwise development that is their prerogative but the League stands by its convictions that this must be stopped. The League is merely availing itself of its statutory and constitutional rights to due process and following proper procedure.

THEREFORE, Proposed Intervenor Coastal Conservation League requests the Court grant the motion to intervene.

Respectfully submitted,



Leslie S. Lenhardt
Amy E. Armstrong
Attorneys for Coastal Conservation League

June 24, 2020

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP, II, LLC, Petitioner, v. SOUTH CAROLNA DEPT. OF HEALTH & ENVIRONMENTAL CONTROL, Respondent.	)	Docket No. 18-ALJ-07-0047-CC **AFFIDAVIT OF RICH THOMAS**

Personally appeared before me, the undersigned swears and states as follows:

1. I am over the age of 18 and competent to execute this affidavit.

2. I live at 4360 Betsy Kerrison Parkway on Johns Island, South Carolina.

3. My home is approximately two and a half miles from Kiawah Island and 3.5 miles from Captain Sams Spit. I can launch a kayak in the Kiawah River approximately eight minutes from my house and paddle the Inlet to the Spit in a short time, or ride my bike to Beachwalker Park and the Spit in less than 20 minutes.

4. I visit friends on Kiawah Island frequently. I ride my bike to Beachwalker Park and ride on the beach and enjoy sitting on the beach at Captain Sams to observe the wildlife, including birds, dolphins, turtles, deer, etc., and generally enjoy being in this beautiful natural unmolested area.

5. I also kayak and fish in the vicinity of Captain Sams and in the Inlet.

6. I have recreated and enjoyed this area approximately once a week for ~~eight or nine years~~ twelve years, ever since I moved to Johns Island in 2008.

7. I take friends and visitors to the Spit whenever possible, usually on bikes, and also kayak with them in the Inlet to the Spit. This is always a wonderful experience for them to enjoy this beautiful natural unmolested area.
8. I observe many other people enjoying this area year-round enjoying both the beaches and the inlet as I do, through walking, paddle boarding, cycling, boating and fishing on the beach and in the inlet while observing the wildlife and natural beauty,
9. Over the last few years I have observed an increase in the number of people using Beachwalker Park at the head of the Spit, thence walking or cycling to the end to the Inlet to watch dolphins and birds,
10. Over the last few years the vacation visitors to Kiawah have been increasing and many of these people walk or cycle to the Inlet to watch birds and dolphins and enjoy the natural beauty of the beach. These visitors also kayak in the Inlet and take the boat tours from Mingo Point to observe dolphins.
11. Over the last few years I have observed increasing numbers of nesting turtle tracks on the Spit and the markers for their nests up close to the dune.
12. I have observed that the erosion of the Spit beachfront dunes and tidal surge flooding of the area at the end has occurred with each named hurricane the last 4 years.
13. I testified in the contested case hearing captioned Coastal Conservation League v. DHEC & KDP II, LLC & KRA Development, LLC, Docket No. 15-ALJ-07-0369-CC, which was an appeal of a permit to install a sheet pile wall for the purpose of erosion control
14. I understand that the issues raised in the current contested case appeal, the location of the jurisdictional lines, would provide additional room to allow for the construction of the road.

15. The construction of the access road along with the development of over 50 lots, would diminish my enjoyment of the area tremendously. It would hinder our ability to enjoy the area by prohibiting the natural movement of the beachfront and deter us from visiting the area. It would also most certainly deter the rich wildlife habitat and consequently the numbers of animals that live there.

Further the affiant sayeth not.

Rich Thomas

Sworn to before me this 24 day of June, 2020

Notary Public for the State of South Carolina
My Commission Expires 7-18-2026

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP II, LLC, Petitioner, vs. South Carolina Department of Health and Environmental Control, Respondent.	)	DOCKET NO. 18-ALJ-07-0047-CC **DHEC'S AMENDED PREHEARING STATEMENT**

On behalf of Respondent South Carolina Department of Health and Environmental Control (the "Department"), the following information is submitted:

1. **Nature of the proceeding:**

This contested case initially arose as an appeal of the Department's decision to extend the public comment period for the proposed jurisdictional lines until April 2018 as noticed to the public by the Department on November 3, 2017. The extension of the public notice period beyond December 31, 2017, resulted in no seaward movement of the baseline from its current location, even where originally proposed by the Department on October 6, 2017 or contended by landowners based upon substantial supporting information, due to the prohibition in S.C. Code Ann. §48-39-280 (Supp. 2017). On November 20, 2017, KDP, II, LLC filed a Request for Final Review Conference and asserted that the baseline should move seaward from its 2009 location. On January 5, 2018, the Department notified the Petitioner that the Board declined the Final Review Conference. On February 5, 2018, KDP II filed a Request for Contested Case Hearing arguing that the Department's decision to delay finalizing the proposed lines had the de facto effect of adopting the 2009 location of the baseline and sought a ruling to set the baseline applicable to Petitioner's property seaward of its location as of December 31, 2017. The Petitioner did not challenge the Respondent's determination of the setback line.

On May 3, 2018, The South Carolina General Assembly passed The Beachfront Management Reform Act, which established the baseline and setback line in effect for landowners as (1) the most seaward of the baseline and setback line established during the 2008 through 2012 establishment cycle, (2) the lines as proposed by the Department on October 6, 2017, or (3) lines established pursuant to a review of the Department or on appeal initiated before January 1, 2018. On October 24, 2018, the Department filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure which the Administrative Law Court denied on March 28, 2019. In its Order denying the motion the Court stated:

> However, the relief this Court can give Petitioner, at this juncture, is limited to preserving Petitioner's right to a review that contemplates seaward movement of the jurisdictional lines. Because the Department has not issued a final decision on the merits contemplating seaward movement [of the jurisdictional lines at Petitioner's property], this Court cannot make any determinations as to the actual placement of the jurisdictional lines on Petitioner's property. In this respect, Petitioner has not yet exhausted its administrative remedies.

Order dated March 28, 2019, p.16, FN 12. On June 6, 2019, the Administrative Law Court entered a Consent Order of Stay and Remand which stayed the case and remanded the case back to the Department to make a determination in accordance with the applicable statutes and regulations.

On December 6, 2019, after considering supplemental information provided by the Petitioner during the remand, the Department issued its Final Decision on Remand to the Petitioner. The Department determined that the baseline should be established using 40 years of historical shoreline data as Captain Sams is located in an unstabilized inlet zone. The Department determined that the 1988 vegetation line, reviewed and modified on remand, represented the most landward point of erosion in the last 40 years.

On December 23, 2019, the Department received a Request for Final Review from the Petitioner challenging the Department's determination on remand. On February 10, 2020, the DHEC Board denied the Request for a Final Review Conference. On March 6, 2020, the Petitioner filed a Renewed Request for Contested Case Hearing After Remand and Request to Lift Stay to challenge the Department's Final Decision on Remand. On June 10, 2020, the Court entered an Order which lifted the stay and ordered that this case proceeding should resume.

This renewed contested case now arises as an appeal of the Department's Final Decision on Remand dated December 6, 2019 of the placement of the baseline on Captain Sams Spit.

2. **The statutory provision(s) conferring subject matter jurisdiction and other applicable statutes and regulations, be specific, not general:**

The Court's subject matter jurisdiction arises from S.C. Code Ann. §§ 48-39-10, *et seq.*

Applicable statutory and regulatory provisions include:
S.C. Code Ann. §48-39-10, et seq. (Supp. 2017); specifically, §48-39-10(H), §48-39-10(I), §48-39-20, §48-39-30, §48-39-250, §48-39-260, §48-39-270(5), §48-39-270(6), §48-39-270(7), §48-39-270(13), §48-39-280, §48-39-285; and S.C. Code Ann. §44-1-60 (2018).
S.C. Code Ann. Regs. R.30-1 through R.30-21 (2011 & Supp. 2017); specifically, R.30-1(D)(4), R.30-1(D)(5), R.30-1(D)(28), R.30-1(D)(43), R.30-1(D)(45), R.30-1(46), R.30-1(49), R.30-6, R.30-14(E), R.30-14(F), R.30-21.

3. **Issues to be presented for determination, including any claims or defenses expected to be raised:**

The issue before this Court is whether the Department properly set the baseline jurisdictional line for Captain Sams Spit in accordance with the Coastal Zone Management Act and Critical Area Regulations. The Department anticipates that the following considerations will be presented to the Court:

a. Whether the Department correctly applied S.C. Code Ann. §48-39-280(A)(2) in determining the baseline's location by finding that the "most landward point of erosion at any time in the past forty years" was the revised 1988 vegetation line.
b. Whether the Department correctly applied §48-39-280(A)(2) in determining that the data did not support finding that the property, based upon the best available scientific and historical data, is unlikely to return to its former position.
c. Whether the Department correctly applied §48-39-280(A)(2) with respect to the Petitioner's claim that Captain Sams Spit has experienced an unbroken trend of accretion and should be located on the post-Hurricane Matthew shoreline.
d. Whether the Department correctly applied the statutory and regulatory guidelines for the unstabilized inlet zone pursuant to 48-39-280(A)(2) and not the standard zone pursuant to §48-39-280(A)(1) beginning at Monument 2625 moving to a point west of Monument 2615.

An additional issue to be presented for determination is whether the Petitioner timely preserved for appeal the location of the setback line when it failed to raise issues relating to the setback line in either its Request for Review to the DHEC Board or in its Original Request for Contested Case, or in any other manner prior to January 1, 2018 as required by §48-39-285.

4. **Action of the Court and detailed statement of the law which supports requested action, including statutory and/or case citations:**

The Department respectfully requests that the Court affirm the Department's Final Decision on Remand that the baseline was properly set in accordance with the applicable statutes and regulations at the 1988 reviewed vegetation line as this was the most landward point of erosion based on the last 40 years of historical shoreline data.

Pursuant to S.C. Code Ann. §48-39-280(C), "baselines and setback lines must be established anew during establishment cycles that are not less than every seven years, but not more than every ten years following a previous establishment cycle and must be based upon the best available data." The Petitioner's property lies within an unstabilized inlet zone pursuant to S.C. Code Ann. §48-39-280(A)(2) and S.C. Code Ann. Reg. 30-21. The Petitioner's argument that its property should be mostly in the standard zone is not in

accordance with S.C. Code Ann. §48-39-270(6) which defines a standard zone as " a segment of shoreline which is subject to essentially the same set of coastal processes, has a fairly constant range of profiles and sediment characteristics, and is not influenced indirectly by tidal inlets or associated shoals." Contrary to the Petitioner's assertions, Captain Sams Inlet continues to influence Kiawah Island's shoreline. Since the property lies in an unstabilized inlet zone, the Department correctly utilized S.C. Code Ann. §48-39-280(A)(2) to determine the location of the baseline. S.C. Code Ann. §48-39-280(A)(2) governs unstabilized inlet zones and states that

> The baseline for inlet erosion zones that are not stabilized by jetties, terminal groins, or other structures must be determined by the department as the most landward point of erosion at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position.

During the remand, the Department determined the baseline by reviewing historical shoreline data including vegetation lines from aerial photographs to determine the most landward point of erosion at any time during the past forty years. This analysis is consistent with S.C. Code Ann. §49-39-270(13) which defines "active beach" as "that area seaward of the escarpment or the first line of stable natural vegetation, whichever first occurs, measured from the ocean." The Petitioner did not timely challenge the location of the setback line as required by S.C. Code Ann. §48-39-285, and therefore the setback line was established by the Beachfront Management Reform Act.

The Court should give deference to the Department's interpretation of the applicable regulations. *Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 723 S.E.2d 191 (2012)("...we give deference to the interpretation of a regulation by the agency charged with it [sic] enforcement," citing, *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003).)

5. **A brief summary of the facts to be presented at the hearing:**

On December 6, 2019, the Department issued its Final Decision on Remand and set the baseline at the Petitioner's property, also known as Captain Sams Spit, after reviewing forty years of historical shoreline data. The Department reviewed historical shorelines to determine where the line of stable vegetation existed at different points of time. The Department has used this method to set the baseline in unstabilized inlet zones since the enactment of the S.C. Beachfront Management Act in 1988. The Department determined the location of the 1988 vegetation line which was revised during the remand to be the most landward point of erosion in the past forty years and therefore, the proper location for the baseline pursuant to §48-39-280(A)(2).

The Department evaluated the Petitioner's property as an unstabilized inlet zone in accordance with its statutory definitions and regulations. Monument 2625 is the demarcation between the standard zone to the east of the monument and the unstabilized

inlet zone to the west of the monument where the Petitioner's property is located. Historical shoreline data and bathymetry surveys show that the shoreline from the mouth of the inlet up to Monument 2625 is continually influenced by Captain Sams Inlet and is consistent with the unstabilized inlet zone demarcation. Also, periodic inlet relocation projects contribute to Captain Sams Inlet and adjacent shorelines maintaining similar shoreline dynamics as existed in 1988, when the zone designations were first established. Although Petitioner claims that the Department should have assessed Captain Sams Spit as a standard zone contrary to what is specified in S.C. Code Ann. Regs. §30-21, the Department is not charged with reassessing the zones at the time that it reevaluates the jurisdictional lines and the Petitioner had never before requested the Department to reevaluate the zone designation for its property.

The Department also considered the likelihood of the shoreline returning to its former position but because Captain Sams Spit is in an unstabilized inlet zone, the forces acting on the shorelines are dynamic, and the shoreline has the potential to return to its 1988 conditions.

The Petitioner has argued that the shoreline adjacent to Captain Sams Inlet has been accreting continuously and therefore, the Department should have used the data and aerial imagery after Hurricane Matthew to set the baseline. The data that Petitioner provided however did not support the Petitioner's contention. Regardless, the Department followed the statutory and regulatory mandates and properly found that the most landward point of erosion in the past forty years is the reviewed 1988 vegetation line.

6. **Summary of motions expected to be raised at the hearing and the appropriate authority underlying the motion:**

The Department is not aware of any motions expected to be raised at the hearing of this case but reserves the right to amend this Prehearing Statement to reflect the filing of motions should they become necessary.

7. **A list of proposed witnesses and exhibits is as follows:**

Witnesses:

Jessica Boynton, SCDHEC-OCRM
Matt Slagel, SCDHEC-OCRM
Blair Williams, SCDHEC-OCRM
Elizabeth von Kolnitz, SCDHEC-OCRM
Marian Page, SCDHEC-OCRM
Sean Briggs, SCDHEC-OCRM
Barbara Neale, SCDHEC-OCRM
Ray Pantlik, KDP II Representative
Andy Tolleson, PE, D.GE
John Hodge, PG
Experts named by either party to be determined.
Any witness named by any other party to this litigation.

Exhibits: The exhibits will consist of the Department's file of documents and data evaluated to set the baseline at Captain Sams Spit including beach profile elevation data, photographs, technical reports, offshore bathymetry data, LIDAR (Light Detection and Ranging) data, and shoreline change rates.

The Department reserves the right to supplement this list of witnesses and exhibits as discovery progresses and the issues in this case are more fully developed.

8. **A statement regarding the necessity for discovery if any:**

Both written discovery and depositions are necessary given the issues and complexity of the case.

9. **The estimated time required for the hearing:**

The hearing in this matter should last approximately three to four days, depending on the number of experts involved in the case.

10. **Any dates the parties, counsel or key witnesses are unavailable in the next three months:**

July 3, 2020; July 9-10, 2020; July 13-15, 2020; August 5-7, 2020; August 10-14, 2020; August 17-28, 2020; September 7, 2020; September 16-18, 2020.

11. **An email address where you can be reached:**

phelansp@dhec.sc.gov
debruhjh@dhec.sc.gov

Respectfully Submitted,

Sallie P. Phelan

Sallie Phelan, SC Bar # 14150
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(843) 953-0229
Attorney for Respondent SCDHEC
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June 30, 2020
Charleston, South Carolin

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP II, LLC., Petitioner, vs. South Carolina Department of Health and Environmental Control Respondent.	)	DOCKET NO. 18-ALJ-07-0047-CC **CONSENT SCHEDULING ORDER**

Pursuant to Rules 17 and 27 of the South Carolina Rules of Procedure for the Administrative Law Court and with the attached consent of the parties, the following schedule is established in this case:

1. The Petitioner shall identify its expert witnesses by name, address, telephone number, area of expertise, and expected subject matter of the testimony, no later than **August 15, 2020.**

2. The depositions of the Petitioner's expert witnesses shall take place no later than **September 30, 2020**.

3. The Respondent shall file and serve a document identifying its expert witnesses by name, address, telephone number, area of expertise, and expected subject matter of the testimony, no later than **November 13, 2020.**

4. The depositions of the Respondent's expert witnesses shall take place no later than **January 15, 2021**.

5. The parties shall complete discovery pursuant to the Administrative Law Court Rules of Procedure no later than **February 1, 2021** with all requests served in a timely manner to allow for responses by this date except for any further expert discovery.

6. The parties shall, on or before **February 15, 2021** exchange:

    a. A final list of witnesses the party reasonably expects to testify at the hearing, including name, address, telephone number, and expected subject matter of

the testimony if that information has not otherwise been disclosed in discovery, and

b. A final list of all exhibits expected to be offered at the hearing.

7. Any objections to these disclosures must be filed on or before **February 25, 2021.**

8. This case will be called for trial on or after **March 8, 2021.**

AND IT IS ORDERED.

The Honorable Shirley C. Robinson
South Carolina Administrative Law Judge

Charleston, South Carolina

_____, 2020

We Consent:

By: _____

Thomas P. Gressette, Jr.
G. Trenholm Walker

Attorneys for Petitioner KDP II, LLC.

By: Sallie P. Phelan

Sallie P. Phelan

Attorney for Respondent S.C. Dept. of Health and Environmental Control

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP, II, LLC, Petitioner, vs. SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, Respondent,	)	Docket No. 18-ALJ-07-0047-CC **UPDATED PREHEARING STATEMENT OF KDP II, LLC** TMS Nos. 207-05-00-001 and 207-05-00-0011 OCRM Survey Profile Stations: 2615, 2620, 2625

The Petitioner, KDP, II, LLC ("KDP"), hereby submits this Updated Prehearing Statement in response to the request of the Court in its Order of June 10, 2020. This Updated Prehearing Statement supplements and incorporates by reference KDP's initial Prehearing Statement dated August 21, 2018.

BACKGROUND

On February 5, 2018, KDP filed its appeal and request for contested case hearing. On October 24, 2018, the Respondent, South Carolina Department of Health and Environmental Control (the "Department"), filed a Motion to Dismiss. By Order dated March 29, 2019, this Court denied the Department's Motion to Dismiss. In so ruling, this Court commented that KDP had not exhausted its administrative remedies because the Department had not yet issued a final decision *on the merits* of KDP's reasons for requesting the seaward adjustment of the jurisdictional lines. Order of March 29, 2019, n. 12.

With the Court's concurrence, the parties agreed to stay these proceedings and for the matter to be remanded to the Department staff to consider the full merits of KDP's request.

Accordingly, on June 6, 2019, the Court entered its Consent Order of Stay and Remand.

On December 6, 2019, the Department staff issued its Final Decision on Remand. On December 23, 2019, KDP filed its Request for Final Conference Review with the Board of the Department. On January 16, 2020, DHEC filed its Staff Response to the Request for Final Review Conference. On February 10, 2020, the Department Board notified KDP that it would not conduct a final review conference.

On March 6, 2020, KDP renewed its request for a contested case hearing and to lift the stay. By Order dated June 10, 2020, the Court lifted the stay and requested the parties file updated prehearing statements. Pursuant to the Court's June 10, 2020, Order, KDP submits this Updated Prehearing Statement.

1. THE NATURE OF THIS PROCEEDING.

KDP owns beachfront property of over 150 acres of upland on the southwestern end of Kiawah Island known as Captain Sams Spit ("Captain Sams"). Captain Sams is over a mile long and ends at Captain Sams Inlet, which separates Kiawah Island and Seabrook Island. KDP and the Town of Kiawah Island entered a Development Agreement that entitles KDP to develop up to fifty lots on no more than 20 of the 150 upland acres. Under the terms of the Development Agreement, the remainder of the land outside the lots, roads, utilities, and beach-parking area, will be protected by a conservation easement that will preserve the land in its natural state in perpetuity.

Captain Sams, as well as most of Kiawah Island, is unusual for the coastline of South Carolina. Its beach is accreting. Captain Sams has accreted continuously since 1947. Even the beach along the isthmus of Captain Sams that connects it to the rest of Kiawah Island is accreting at a rate of somewhere around six feet per year.

DHEC's Office of Ocean and Coastal Resource Management ("DHEC-OCRM") last set the beachfront jurisdictional lines on Kiawah Island in 2009 based on a preliminary determination made in 2008. On October 6, 2017, DHEC-OCRM released its preliminary determination of the location of the baseline and setback line on Kiawah Island including Captain Sams for this delineation cycle. At the time the controlling statute required DHEC-OCRM to delineate the jurisdictional lines every seven to ten years. In its preliminary determination on October 6, 2017, DHEC-OCRM placed the baseline and setback line in essentially the same location as 2009, even though the beach had accreted for nine more years (2008 to 2017).

KDP appealed the preliminary determination of the baseline to the DHEC board and requested a final review conference. KDP took this unusual step, along with around fifty other property owners, because of legislation amending the controlling statute that was passed in 2016. S.C. Code Section 48-39-280, as amended in 2016, specified that the baseline could never move seaward from its location on December 31, 2017.

In response to public dissatisfaction about the preliminary lines announced on October 6, 2017, and to address concerns about the process, the General Assembly changed the governing laws in the 2018 legislative session. The legislature adopted, and Governor McMaster signed, Bill H4683. This bill did away with the re-delineation cycle that DHEC-OCRM initiated in 2017 and postponed it until 2024 for most beachfront property owners. The legislation provided, among other things, that the lines would be set at most seaward of the line established during the 2008 through 2012 establishment cycle or the location proposed by DHEC-OCRM on October 6, 2017. In addition, the legislation specifically preserved the appeals of the preliminary baseline determinations such as this one and stated that the outcome of the appeal would be the final determination of the baseline if it were the most seaward:

> (4) A baseline established pursuant to this section must not move seaward from the most seaward location of the following:
> (a) the location of the baseline as established during the 2008 through 2012 establishment cycle;
> (b) the location of the baseline as proposed by the department on October 6, 2017; and
> ***(c) the location of the proposed October 6, 2017, baseline as revised by the department pursuant to a review or an appeal initiated before January 1, 2018.***

H4683 is now codified at S.C. Code Ann. § 48-39-280(A)(4) (double emphasis added).

The ultimate question for determination in this proceeding is the location of the baseline on Captain Sams based on its continual accretion over the last seventy years and the application of the governing statutes. KDP intends to prove that DHEC-OCRM did not adhere to the specific statutory directives for setting the baseline under S.C. Code Ann. § 48-39-280(A), resulting in its locating the baseline significantly landward of where it should be. Despite the statutory instruction that the baseline in the unstabilized inlet zone be set at the most landward point of erosion over the last forty years primarily as determined by the Department's own survey monument data, DHEC-OCRM set the line at what it believes to be a vegetation line based on its interpretation of an aerial photograph. KDP has also raised the question of whether the standard zone should be extended westward of its current location based on beach profile data that shows the area west of its current location is not subject to the influence of the Captain Sams Inlet between Kiawah and Seabrook Islands. Further, even though KDP agrees with DHEC-OCRM that the setback line should be the minimum distance of 20 feet landward of the baseline, this Court will need to also establish the setback line based on its determination of the proper location of the baseline.

2. THE STATUTORY PROVISION(S) CONFERRING SUBJECT MATTER JURISDICTION TO THE COURT AND OTHER APPLICABLE STATUTES AND REGULATIONS.

Statutes conferring jurisdiction:

S.C. Code Ann. § 44-1-60(F); and

S.C. Code Ann. § 48-39-280(F)(5)

Other applicable statutes and regulations:

S.C. Code Ann. § 48-39-270;

S.C. Code Ann. § 48-39-280, as amended in 2016 and 2018;

S.C. Code Regs. Ann. § 30-1; and,

S.C. Code Regs. Ann. § 30-21.

KDP reserves the right to refer to other statutes and regulations that may be pertinent.

3. THE ISSUES TO BE PRESENTED FOR DETERMINATION, INCLUDING ANY CLAIMS OR DEFENSES EXPECTED TO BE RAISED.

1. For the portion of the Property in the unstablized inlet zone, the Department staff refused to apply the statutory standard that the baseline be established at "the most landward point of erosion at any time during the past forty years." S.C. Code § 48-39-280 (A)(2). Instead, the Department staff set the baseline where it believed was a continuous line of established vegetation on the basis of staff's interpretation of aerial photographs. Setting the baseline in the location of a continuous line of established vegetation is completely contrary to the express wording of the statutory criterion. A line of continuous vegetation is neither the shoreline nor the most landward point of erosion at that point in time.

2. The best available scientific and historical data demonstrate that the beachfront of the Property is accreting over the long term rather than eroding, placing the most landward point of erosion far seaward of the location determined by the Department staff on remand.

3. Because the best available scientific and historical data demonstrate that the beachfront of the Property is accreting over the long term rather than eroding, the post-Hurricane Matthew shoreline or one reasonably approximate to it or the shoreline at the effective date of the determination is the most landward point of erosion over the last 40 years.

4. For the portion of the Property in the unstablized inlet zone, the Department staff mistakenly found that the best available scientific and historical data indicate that the shoreline is likely to return to its former position. Instead, the best available scientific and historical data from the last 40 years indicate that the shoreline is not likely to return to its position 40 years ago but instead to continue to move seaward over the long term as it has over the last 70 years. For this additional reason, the baseline should be established at the post-hurricane shoreline, one approximate to it, or the shoreline at the effective date of the determination.

5. The Department staff relied on aerial photographs in establishing the jurisdictional lines on Property rather than primarily depending on the monument survey data as required by the controlling statute: "In order to locate the baselines and the setback lines, the department must establish monumented and controlled survey points in each county fronting the Atlantic Ocean. The department must acquire sufficient surveyed topographical information on which to locate the baselines." S.C. Code § 48-39-280 (E)(1).

6. To the extent the Department relied on the most seaward line of vegetation as depicted on aerial photographs to establish the jurisdictional lines, which KDP will show is not the legally correct benchmark or standard, the Department did not use the most seaward vegetation line.

7. The demarcation between the standard zone and the unstabilized inlet zone should be adjusted to a point west of Monument 2615 thereby including much of the Property within the standard zone and the baseline should be set at the crest of the primary oceanfront sand dune along the shoreline in the revised standard zone.

8. The Department staff's position that it has no authority to adjust the setback line even if it adjusts the baseline is legally incorrect. S.C. Code § 48-38-280 (B) mandates that the location of the setback line is tied to the location of the baseline. Moving the baseline moves the setback line as a matter of law: "To implement the beach preservation policy provided for in subsection (A), a setback line ***must be established landward of the baseline*** a distance which is forty times the average annual erosion rate or not less than twenty feet ***from the baseline*** for each erosion zone based upon the best historical and scientific data adopted by the department as a part of the State Comprehensive Beach Management Plan." S.C. Code § 48-38-280 (B) (double emphasis added).

9. The Baseline Reform Act further provides that the Department has the authority to move the setback line if it moves the baseline: "(B) Notwithstanding the provisions of subsection (A) and Section 48-39-280, *if the department, pursuant to a review or an appeal initiated before January 1, 2018, revises the baseline proposed on October 6, 2017, to a location seaward of both the baseline established during the 2008 through 2012 establishment cycle and the baseline proposed on October 6, 2017,* ***then both the revised proposed baseline and revised proposed setback line will be in effect for the landowner until the department establishes a new baseline and setback line***."

S.C. Code § 48-38-285 (B) (emphasis and double emphasis added).

10. The Department staff incorrectly stated that because KDP did not specifically appeal the setback line in its first Request for Final Review Conference ("RFRC"), the Department cannot adjust the setback line on the Property if it were to adjust the baseline. The Department staff disregards the previously mentioned statutory provisions tying the location of the setback line to the location of the baseline. The Department staff further disregards the following statement in KDP's previous RFRC: "Because of the fully substantiated history of accretion of the Property over the last 70 years, KDP does not take issue with the Department's preliminary determination that the setback line on the Property should be situated at the minimum distance of 20 feet behind the baseline and does not seek at this time a final review conference of that preliminary determination of Department as to the Property." KDP's Request for Final Review Conference dated November 20, 2018, p. 2.

4. THE ACTION REQUESTED OF THE COURT AND A DETAILED STATEMENT OF THE LAW WHICH SUPPORTS THE REQUESTED ACTION, INCLUDING STATUTORY AND/OR CASE CITATIONS.

KDP requests that the Court apply the applicable regulatory criteria for determining the location of the baseline to the facts and find the baseline should be set far seaward of the location where DHEC-OCRM set the lines in its 2009 demarcation and in its preliminary delineation of October 6, 2017. If and to the extent the Court determines that the boundary of the standard erosion zone should be moved west of its current location, KDP requests that the Court set the baseline at the crest of the primary oceanfront dune. Once the Court establishes the baseline, the Court should delineate the setback line twenty feet landward of the baseline, which is the minimum distance prescribed by the controlling statute.

KDP refers to the statutes and regulations previously described as the supporting the requested action.

5. A BRIEF SUMMARY OF THE FACTS TO BE PRESENTED AT THE HEARING.

KDP has provided a brief summary of the facts to be presented at the hearing in the above responses.

6. A SUMMARY OF ANY MOTIONS EXPECTED TO BE RAISED AT THE HEARING AND THE APPROPRIATE AUTHORITY UNDERLYING THE MOTION.

KDP does not know of any motions expected to be raised at the hearing at this time.

7. A LIST OF PROPOSED WITNESSES AND EXHIBITS.

Potential Witnesses:

Representative of Owner
(To be identified)
Kiawah Partners
345 Freshfields Drive, Suite 200
Kiawah Island, SC 29455

Ray C. Pantlik, P.E.
Kiawah Partners
One Kiawah Island Parkway
Kiawah Island, SC 29455

John T. Byrnes, III, RLS
Kevin Kuzio
SeamonWhiteside + Associates Surveying, LLC
1035-B Jenkins Road
Charleston, SC 29407

John Adams Hodge
Hodge & Associates, LLC
Environmental & Aviation Law
Registered Professional Geologist
Box 25553
Columbia, SC 29224
9367 Two Notch Road, Suite C2B (29223)

Andy Tolleson, PE, D.GE
Tolleson Limited Company
305 Stoneridge Drive Suite A
Columbia SC 29210

Various employees of DHEC-OCRM involved in the determination of the preliminary baseline of Captain Sams. Their identities and addresses are known to DHEC-OCRM.

Potential Exhibits:

1. The files of DHEC-OCRM related to its determination of the baseline on Captain Sams for this delineation cycle as well as prior delineation cycles, inclusive of the rate of accretion of the beach calculated by DHEC-OCRM in the 2017 re-delineation cycle;
2. The files of DHEC-OCRM related to its determination of the demarcation between the standard erosion zone and the unstabilized inlet zone generally and on Kiawah Island in particular;
3. Bathymetric surveys and data for Kiawah Island and Captain Sams in particular;
4. Surveys of Captain Sams including topographic surveys;
5. Aerial photos and other photographs of Captain Sams;
6. Possibly videos of the shoreline of Captain Sams;
7. Plats, maps, and diagrams, of the area in question;
8. Documents exchanged by the parties in discovery; and
9. Other documents to be identified that are relevant to the issues in the case.

KDP reserves the right to modify and supplement its list of witnesses and exhibits.

8. A STATEMENT REGARDING THE NECESSITY OF DISCOVERY, IF ANY.

The parties have a head start on written discovery. Before the matter was remanded to the staff of the Department to further consider the information provided by KDP on the proper location of the baseline, KDP served written discovery on DHEC-OCRM and received responses. It is not anticipated that there will be much more written discovery. KDP anticipates taking two or three depositions. KDP has set forth what it believes to be a fair and realistic schedule for completing the remaining discovery in its proposed scheduling order attached as Exhibit 1 hereto.

9. THE ESTIMATED TIME REQUIRED FOR THE HEARING.

Four days.

10. ANY DATES THE PARTIES, COUNSEL OR KEY WITNESSES ARE SPECIFICALLY UNAVAILABLE DURING THE NEXT THREE MONTHS.

The proposed scheduling order negotiated with DHEC proposes a trial date on or after February 1, 2021. The unprecedented delays and scheduling issues created by COVID-19

greatly complicate planning and may further create issues in the future. As of this time, however, no conflicts are known.

11. AN EMAIL ADDRESS WHERE YOU CAN BE REACHED.

G. Trenholm Walker: Walker@WGFLLAW.com
Thomas P. Gressette, Jr.: Gressette@WGFLLAW.com

12. CONSENT SCHEDULING ORDER.

The parties have negotiated a Consent Scheduling Order to be submitted with the Respondent's Updated Prehearing Statement.

Respectfully Submitted,

G. Trenholm Walker
Direct: (843) 727-2208
Email: Walker@WGFLLAW.com
Thomas P. Gressette, Jr.
Direct: (843) 727-2249
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WALKER GRESSETTE FREEMAN & LINTON, LLC
Mail: P.O. Drawer 22167, Charleston, SC 29413
Office: 66 Hasell Street, Charleston, SC 29401
Phone: (843) 727-2200

ATTORNEYS FOR PETITIONER, KDP II, LLC

June 30, 2020

Charleston, South Carolina

CERTIFICATE OF SERVICE

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand, or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 30th day of June, 2020, in Charleston, South Carolina.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP II, LLC, Petitioner, vs. South Carolina Department of Health and Environmental Control, Respondent.	)	Docket No.: 18-ALJ-07-0047-CC **NOTICE OF HEARING**

IT IS HEREBY ORDERED that this action will be heard on the merits before The Honorable Shirley C. Robinson, Administrative Law Judge, **beginning at 10:00 a.m. on Tuesday, March 9, 2021 through Friday, March 12, 2021,** at the South Carolina Administrative Law Court ("ALC" or" Court"), Edgar Brown Building, Second Floor, 1205 Pendleton Street, Columbia, South Carolina.

1. This hearing will be conducted in accordance with the Rules of Procedure of the Administrative Law Court, a copy of which is available from the Clerk of the Court.

2. Unless otherwise determined by the Administrative Law Judge, the hearing will proceed as follows:
   a. Call of the case;
   b. Motions and other preliminary matters such as stipulations, agreements, or consent orders to be entered into the record;
   c. Opening statements, not to exceed ten (10) minutes, with the party requesting the contested hearing proceeding first;
   d. Presentation of evidence;
   e. Final arguments, not to exceed fifteen (15) minutes, with the party requesting the contested hearing opening and closing.

3. All parties are notified to bring all documents, records, and witnesses needed to present the party's case. NOTE: IF SPECIAL EQUIPMENT IS REQUIRED FOR THE PRESENTATION OF EVIDENCE, THE PARTY PRESENTING THE EVIDENCE IS

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ADMIN. LAW COURT

RESPONSIBLE FOR OBTAINING THE EQUIPMENT AND ITS CUSTODY.

4. Subpoenas are available to the parties pursuant to S.C. Code Ann. § 1-23-320(D) (Supp. 2008) and the rules of the Court, to compel the attendance of witnesses or for the production of documents at the hearing. The parties are responsible for the service of the subpoenas.

5. A party may represent himself or may be represented by an attorney at the hearing. An attorney representing a party must file a notice of representation with the Court and with all opposing parties immediately after his or her services have been retained.

6. TAKE NOTICE THAT A FAILURE TO APPEAR AT THE HEARING MAY RESULT IN:

   a. A finding that the party who fails to appear does not object to the relief of which notice has been given;

   b. Dismissal of the case or striking of the pleadings of the party who fails to appear;

   c. Exclusion of evidence proffered by the party who fails to appear; or

   d. Such other rulings as are deemed appropriate by the Administrative Law Judge, including a finding of civil contempt and/or a monetary fine.

7. **Continuances will be granted only when extraordinary circumstances exist**. Parties may request continuances no later than 24 hours prior to the scheduled hearing date. Failure to timely request a continuance may result in imposition of court costs and court reporter fees.

8. In case of settlement or dismissal, failure of the parties to inform the Court before the scheduled hearing that the hearing is not necessary may result in the imposition of court costs and court reporter fees against the parties.

SHIRLEY C. ROBINSON
Administrative Law Judge

July 10th, 2020
Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has served this Order in the above-captioned matter upon all parties by depositing a copy hereof in the United States mail, postage prepaid, or in the inter-agency Mail Service, addressed to the party (or their attorney).

This 10 day of July, 2020

By: _____
Judicial Law Clerk

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge

Docket No. 18-ALJ-07-0047-CC

Coastal Conservation League, ... Appellants,

vs.

KDP, II, LLC & South Carolina Department of Health and Environmental Control, ... Respondents,

---

NOTICE OF APPEAL

The Coastal Conservation League hereby appeals from the Order Denying Motion to Intervene, issued by the Honorable Shirley C. Robinson, Administrative Law Judge, on July 10, 2020.

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Amy E. Armstrong
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July 29, 2020

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Attorneys for SCDHEC

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP II, LLC., Petitioner, vs. South Carolina Department of Health and Environmental Control Respondent.	)	DOCKET NO. 18-ALJ-07-0047-CC **SECOND AMENDED CONSENT SCHEDULING ORDER**

Pursuant to Rules 17 and 27 of the South Carolina Rules of Procedure for the Administrative Law Court and with the attached consent of the parties, the following amended schedule is established in this case:

1. The Petitioner shall update its discovery responses to include information and documents regarding experts and respond to expert subpoenas no later than **December 15, 2021**.

2. The depositions of the Petitioner's expert witnesses shall take place no later than **March 22, 2021**.

3. The Respondent shall file and serve a document identifying its expert witnesses by name, address, telephone number, area of expertise, and expected subject matter of the testimony, no later than **April 23, 2021**.

4. The Respondent shall update its discovery responses to include information and documents regarding experts and respond to expert subpoenas no later than **May 11, 2021**.

5. The depositions of the Respondent's expert witnesses shall take place no later than **June 18, 2021**.

6. The parties shall complete discovery pursuant to the Administrative Law Court Rules of Procedure no later than **June 18, 2021**, with all requests served in a timely manner to allow for responses by this date, except for any further expert discovery.

7. The parties shall, on or before **July 11, 2021**, exchange:

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ADMIN. LAW COURT

EXHIBIT "A"

a. A final list of witnesses the party reasonably expects to testify at the hearing, including name, address, telephone number, and expected subject matter of the testimony if that information has not otherwise been disclosed in discovery, and

b. A final list of all exhibits expected to be offered at the hearing.

8. Any objections to these disclosures must be filed on or before **July 26, 2021**.

9. This case will be called for trial on or after **August 10, 2021**.

10. The parties may amend by mutual agreement any deadlines, except for the trial on or after date of **August 10, 2021**, without having to formally amend the scheduling order with the Court.

AND IT IS ORDERED.

The Honorable Shirley C. Robinson
South Carolina Administrative Law Judge

November 18th, 2020
Columbia, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that I am delivering this date a copy of the foregoing document to the person(s) named below at the address(es) indicated below by depositing a copy of same in the United States mail, postage paid, or in the interagency mail system addressed to the person(s) named below at the address(es) indicated:

This 18 day of November 2020

By: _____
Judicial Law Clerk

EXHIBIT "A"

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP II, LLC, Petitioner, vs. SOUTH CAROLINA DEPARTMENT OF HEALTH & ENVIRONMENTAL CONTROL, Respondent.	Docket No. 18-ALJ-07-0047-CC **KDP II, LLC'S RESPONSE TO DEPARTMENT'S FIRST REQUESTS FOR PRODUCTION TO PETITIONER** TMS Nos. 207-05-00-001 and 207-05-00-0011 (Captain Sams Spit)

Petitioner KDP II, LLC hereby responds, pursuant to SCALC Rule 21 and SCRCP 34, to Respondent Department's First Requests for Production to Petitioner:

1. Produce all documents identified in, referred to, or relied upon in your responses to Department's First Set of Interrogatories.

RESPONSE:

KDP objects on the grounds that the Request is overly broad as to time, scope and subject matter, is unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence. KDP objects to this Request to the extent it seeks information or documents protected from disclosure, including but not limited to attorney-client communications, documents created and shared during attempts to compromise or settle this matter, communications regarding any attempts to compromise or settle this matter, attorneys' work-product, documents and/or materials prepared in anticipation of litigation, including consulting expert materials and communications, all of which are outside the scope of discovery permitted by law and the South Carolina Rules of Civil Procedure. Subject to objection and to the extent the Request can be construed to seek production of documents or things that are described with reasonable specificity, KDP produces herewith two indices of materials available for viewing and copying:

1. Index of Documents and Data
2. Index of Emails and Attachments

These indices are the result of extensive collection, organization, and review of materials. To assist Respondent, all duplicates have been removed and all items are identified by at least File Name, Document Extension or Source Application, beginning Bates Number. Emails are further identified by Sender and Date.

Due to the volume of data gathered and then organized in the indices (approximately 150 gigabytes), Respondent will provide a hard drive containing the production, as agreed by counsel.

Please note that KDP does not make any representation that the documents/items identified or made available are actually responsive or relevant or that KDP relies upon the same to support its position(s).

KDP reserves the right to supplement this Response.

2. Produce any and all statements by any witnesses related to this action and/or any of the issues in this case.
RESPONSE:
See Response to Request #1.

3. Produce all documents which relate to the claims or defenses in this action.
RESPONSE:
See Response to Request #1.

4. Produce all documents upon which the Petitioner relies to support its position in Petitioner's Prehearing Statement and/or the Request for Contested Case, whether or not the Petitioner intends to introduce the same as evidence.
RESPONSE:
See Response to Request #1.

5. Produce all documents upon which the Petitioner intends to rely and/or refer to during the hearing of this case, including but not limited to photographs, videos, plats, sketches, figures, models, maps, reports, data files or other prepared documents that Petitioner intends to use and/or introduce as exhibits.
RESPONSE:
See Response to Request #1.

6. Produce all documents that were referred to and/or reviewed, regardless of whether they were relied upon, in the remand of this case.
RESPONSE:
See Response to Request #1.

7. Produce all documents Petitioner reviewed and/or considered, regardless of whether relied upon, in assessing where the demarcation line should fall between the Standard Erosion Zone and the Unstabilized Inlet Erosion Zone on Captain Sams Spit, including but not limited to:

a. All digital terrain models with zone demarcations including any associated documents, analysis, and/or figures;
b. The digital terrain model referred to in Petitioner's Supplemental Submission on Remand dated June 5, 2019 on page 2;
c. All bathymetric surveys, figures and data for Kiawah Island and Captain Sams Spit;
d. Reports, figures, models, studies and/or data generated by third parties, including but not limited to Coastal Science & Engineering's July 2016 Inlet Relocation Monitoring Report as referred in Petitioner's Supplemental Submission on Remand dated June 5, 2019 at page 2;
e. Aerial photographs;
f. Videos or other animated portrayals; and
g. Survey reports, including but not limited to CSE Survey Report No. 11 dated March 2018 as referred in Petitioner's Supplemental Submission on Remand dated June 5, 2019 at page 2.

RESPONSE:
See Response to Request #1.

8. Produce all documents Petitioner reviewed and/or considered, regardless of whether relied upon, in assessing where the baseline should be located, including but not limited to:
   a. All beach profile elevation data including but not limited to associated documents, analysis and/or figures;
   b. All maps of Captain Sams Spit from the last 50 years, including the map titled "2015 Dune Crest Points" referred to in Petitioner's Supplemental Submission on Remand dated June 5, 2019 at page 2; and
   c. All topographical data, including but not limited to dune topographical survey data from SW+A Surveying, LLC from 2016 referred to in Petitioner's Supplemental Submission on Remand dated June 5, 2019 at page 2.

RESPONSE:
See Response to Request #1.

9. Produce all documents Petitioner reviewed and/or considered, regardless of whether relied upon, in evaluating shoreline erosion and/or accretion at Captain Sams Spit including but not limited to:
   a. All aerial imagery, including but not limited to the October 13, 2016 NOAA aerial photographs as referred to in Petitioner's Supplemental Submission on Remand dated June 5, 2019 at page 2;
   b. All reports, data, figures, tables, spreadsheets or other documents relating to shoreline change rates; and
   c. all documents supporting or refuting that Captain Sams Spit "has experienced an unbroken trend of accretion in the past 70 years".

RESPONSE:
See Response to Request #1.

10. Produce all documents Petitioner has considered and/or reviewed, regardless of whether relied upon, in determining whether the baseline should be located along the post-Hurricane Matthew escarpment.

RESPONSE:
See Response to Request #1.

11. Produce all documents that relate to any expert Petitioner consulted about any of the issues in this case, including but not limited to:
    a. any and all documents relating to communications with the expert;
    b. any and all documents, videos, audios, photographs, charts, graphs, reports, figures, data and any other forms of information provided to or received from an expert;
    c. any and all notes, reports, figures, tables, spreadsheets, memoranda, and/or other feedback or work from the expert, including but not limited to both draft and final forms;
    d. any and all information upon which the expert referred to and/or relied upon in forming his/her opinion(s) and/or assessing any issues in this case;
    e. any reports, treatises, articles, textbooks or other secondary authorities that the expert referred to and/or relied upon in forming his/her opinions and/or assessing any issues in this case; and
    f. a current curriculum vitae and/or any other document that Petitioner intends to use to establish the expert's qualifications.

RESPONSE:
See Response to Request #1.

12. Produce all documents between the Petitioner and any third persons and/or witnesses related to the issues in this case including but not limited to:
    a. any and all documents relating to communications with third persons;
    b. any and all documents, videos, audios, photographs, charts, graphs, reports, data and any other forms of information provided to or received from third persons;
    c. any and all reports, memorandum, and/or other feedback or work from third persons, including but not limited to both draft and final forms;
    d. any and all information upon which third persons referred to and/or relied upon in forming his/her opinion(s) and/or assessing any issues in this case; and
    e. any reports, treatises, articles, textbooks or other secondary authorities that third persons referred to and/or relied upon in forming his/her opinions and/or assessing any issues in this case.

RESPONSE:
See Response to Request #1.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS KDP II, LLC

September 1, 2020
Charleston, South Carolina

APPENDIX

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP, II, LLC, Petitioner, v. SOUTH CAROLNA DEPT. OF HEALTH & ENVIRONMENTAL CONTROL, Respondent.	)	Docket No. 18-ALJ-07-0047-CC **MOTION FOR STAY ON BEHALF OF COASTAL CONSERVATION LEAGUE**

TO: THE ADMINISTRATIVE LAW COURT AND COUNSEL OF RECORD:

YOU WILL PLEASE TAKE NOTICE that Coastal Conservation League ("the League") hereby moves this Court for an Order staying this case pending the League's appeal of the denial of its motion to intervene. Should this case proceed any further towards a hearing, the League's interests will remain unprotected and it would be irreparably harmed by being excluded from the remaining discovery to be had in the case. Given the lack of prejudice to the Petitioner and given DHEC's consent, equity requires a stay of the proceedings before this Court before it progresses any further.

This Court regularly grants stays where equity and judicial economy warrant. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Harbour Town Yacht Club Boat Slip Owners Assn. v. Safe Berth Mgmt., Inc.*, 411 F.Supp.2d 641 (D.S.C. 2005), quoting *Landis v. North American Co*., 299 U.S. 248, 254, 57 S.Ct. 163 (1936).

An equitable stay may be invoked if balancing the injury to the prejudice to the existing parties leads to this conclusion. In making this determination, the court "must weigh competing interests and maintain an even balance." *Merritt Bros. v. Marine Realty Credit Corp.*, 307 S.C. 213, 216, (1992), quoting *United States Central Building Supply, Inc. v. Wilke*, 685 F.Supp. 936, 938 (D.C.Md. 1988). "The party seeking a stay must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative." *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983).

In considering the propriety of a stay, a court should consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether [he] will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties ...; and (4) where the public interest lies." *Nken v. Holder*, 129 S.Ct. 1749 (U.S. 2009) *quoting Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (U.S. 1987).

I. The League has, in its appeal, demonstrated a significant likelihood of success on the merits.

In the Order under appeal, the ALC's findings and conclusions failed to apply South Carolina rules on intervention and legal precedent. First, the League has an important interest in the outcome of this case – protecting South Carolina's beaches for the benefit of the public, and specifically the coastal resources of Captain Sams Spit at issue in this case – that existing parties cannot adequately defend on their own and whose interests are, therefore, not adequately protected. Its members use and enjoy the beach/dune system on Captain Sams Spit that the beachfront jurisdictional lines are designed to protect and would be irreparably harmed by being prohibited from being a party this latest and interconnected appeal designed to facilitate a 50-house

development on the Spit. The League's interest in the outcome of this contested case is directly linked to two other contested cases that similarly impact the outcome of the future development proposed on Captain Sams Spit. This Court did not consider the extensive litigation of other permits issued to facilitate KDP's plans to develop the Spit, and the irrefutable connection among them.

In the first contested case filed in early 2009, the League challenged DHEC's issuance of a critical area permit that would have authorized construction of a bulkhead combined with a sloping rock revetment along the Kiawah River side of the Spit. The League appealed the adverse decision of the Administrative Law Judge, which, after two rehearings, resulted in the Supreme Court's Opinion reversing and remanding the ALC's decision to issue the permit for the bulkhead/revetment. *Kiawah Development Partners, II, Inc. v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 766 S.E.2d 707 (2014) (hereinafter *KDP I*).

While the first contested case was pending before the Supreme Court following the ALC's Order on Remand, the ALC conducted a second contested case hearing on the League's challenge to a new set of permits authorizing the construction of an access road, water and sewer lines, and a 2,370' steel sheet pile wall along the Kiawah River, also to facilitate the proposed 50-house residential development on Captain Sams Spit. 2018 WL 4854113 (Admin. Law Judge Div. 2018, hereinafter "the 2018 ALC Order").[1] Importantly, the ALC found that in "1999, the Department established a baseline and set-back line on the Spit, effectively opening the Spit for development. The last critical line on the Spit was certified by the Department in June 2016. As of 2016, the Spit had approximately 174 acres of highland, and approximately 44.03 acres of that highland was

[1]The ALC cited to the 2018 Order in its Order denying intervention.

buildable area above the baseline and critical line." *Id*. at 4. As if foreshadowing KDP's pending contested case over the jurisdictional lines, the ALC explained that:

> The proposed project will be accessed through the neck of the Spit by way of an "access corridor." The access corridor will be used to accommodate the access road, stormwater system, and underground utilities. However, the width of the access corridor is constrained by the critical line on the river side of the Spit and the set-back line on the ocean side. As previously mentioned, the width of the access corridor has been steadily shrinking as the critical line moves oceanward due to the erosion of the riverbank while the set-back line remains fixed. . . . Rick Karkowski, the project engineer, explained that "given some adjustment to the design as permitted we could make the project still work as intended" based upon the Department's most recent critical line certified in June 2016.

Id. at 6. The ALC's 2018 Order shows exactly why the League has a significant stake in the outcome of this appeal: "Coastal contends that due to the instability of the neck and continued movement of the critical line oceanward, the proposed location of the SSPW and road as of April 10, 2015, now falls within the critical area." *Id*. at 6. In other words, the League has argued that KDP does not have enough space in the "access corridor" to build a road, a steel wall and other infrastructure given the location of the critical line and the baseline. As is abundantly clear from the Supreme Court and the ALC's orders, the critical line is moving landward as the river erodes, so, naturally, KDP wants the jurisdictional baseline and setback line on the beachfront side to move seaward in order to give itself more space to build the road, steel wall and infrastructure.

This Court is correct that the issue in the instant appeal is not whether or not the access road can be built – an issue which is being litigated in an appeal pending before the Supreme Court – but the ALC cannot simply put on blinders to the facts and circumstances which underly the League's interests at stake. But that is what happened, even while specifically citing to the 2018 ALC Order authorizing the steel wall. In other words, while the underlying issue in the instant case is whether the agency properly determined the baseline and setback lines for Captain Sams

Spit, the ALC cannot ignore how the outcome of the contested case, should Petitioner prevail, will impact the League. The impacts of that outcome – which would be to move the jurisdictional lines further seaward and thus provide more space for and facilitate the construction of an access road – would irreparably harm the League members' use and enjoyment of the pristine, undeveloped barrier island spit over which the League has been working to protect for approximately eleven years.

The League has participated at every step of the administrative and judicial processes with respect to the proposed development on Captain Sams Spit, and in particular the loss of the public trust tidelands that will result, and should have been permitted to intervene in a proceeding where these same interests are clearly at stake. The interests of the League are clear and significant in this case and intervention should have been granted.

Moreover, the League's motion did not run afoul of the rules for timing of filing such a motion. At the time the motion to intervene was considered, the contested case had just recently been restored to the ALC's active docket and discovery was just commencing. The case is not even scheduled to be heard before August of 2021. There would have been ample time for the League to have "caught up" and been involved in the process and it was error for this Court to deny the motion based on the timeliness of the motion. The time this case has been pending prior to the League's motion is irrelevant to Appellant's intervention motion. Appellant should not be penalized for KDP's decision to file a request for contested case hearing in 2018. The League had no role in the negotiations with SCDHEC during the lengthy remand, and should not be kept out of the case because of delays in which it had no hand.

Therefore, as set forth in its Initial Brief to the Court of Appeals and in this motion, the League is likely to prevail in its appeal.

II. The League will be irreparably harmed absent the imposition of a stay and the public interest dictates that a stay should be granted.

The timing of this motion to stay the case is significant. While there has already been extensive written discovery conducted and a significant number of documents produced by the parties, the initial deposition in this case has yet to be conducted. However, that deposition is imminent and scheduled for this Friday, March 19, 2021. The League is informed that there are still a significant number of expert and lay witnesses to be deposed and if these are conducted without the League's participation, when the Court of Appeals reverses the Order Denying Motion to Intervene, the League would likely have to go to the time-consuming and significant expense of re-deposing these witnesses, not to mention requiring the League to basically start from scratch in re-litigating the contested case. The League's significant impacts to its members raised by the contested case are included in its basis for irreparable harm should the case proceed further.

Moreover, the public interest weighs heavily in favor of staying the contested case. In its erroneous application of the intervention standard, this Court ignored the **public property** at stake here – the lands below the high water mark which are adjacent to and abut the Petitioner's property and the inherent nature of the property as subject to changes in its boundaries The lands to be impacted by this development have been recognized directly by the South Carolina Supreme Court in *KDP I* as public trust lands. *Kiawah Devel. Partners II, Inc. v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 766 S.E.2d 707 (2014). In *KDP I*, the Court ruled that the Public Trust Doctrine is the lodestar in protecting the public's beneficial uses of the Kiawah River critical area. It directed that "public access is to be accorded great protection while private economic development is suspect and only permitted when in the public interest." *Id*. at 41, 722. The Court

noted that if "there ever were a case of substantial adverse effect on public access, it is this case." *Id*. at 42, 722.

Under the Public Trust Doctrine, tidelands (areas between the high water mark and the low water mark), submerged lands and navigable waters are held in trust for and subject to public purposes and rights of navigation, boating, bathing, fishing, recreation and enjoyment. *Sierra Club v. Kiawah Resort Associates*, 318 S.C. 119, 456 S.E.2d 397 (1995); S.C. Opinion Attorney General 329 (Dec. 10, 1970). The public has the right to use public trust lands and waters for recreational purposes, including fishing, bathing, swimming and other recreational uses. *Id.*; *Martin v. Waddell*, 41 U.S. 367 (1842).

Despite the unambiguous ruling of the Supreme Court, this Court's characterization of this underlying contested case as one solely involving "privately owned" property fails to account for the adjacent public property and public uses at stake and to continue with the case without a ruling on the League's appeal further places the League's interests in jeopardy. More importantly, it fails to account for the League's distinct interests established by the General Assembly in maintaining the public's dry sand beach and preventing structures from being located too close to the beach/dune system. *See* S.C. Code Ann. §48-39-260(1) (protecting and enhancing the beach/dune system), (6) (preserving existing public access and promote enhanced public access). As stated above, the public trust resources that would be devastated by this development have been challenged on many levels and the League and the public must have the right to continue to fight to protect these resources.

III. **There will be minimal to no prejudice to the Petitioner in this case.**

This case has, both at the ALC and the appellate levels, been moving at a snail's pace. Petitioner's contested case has been pending since its initiation in 2018 and there was a lengthy remand to

DHEC that was clearly agreed to by the Petitioner. Despite the restoration of the case to the ALC's active docket back in March of 2020, depositions have yet to begin in the contested case proceeding. Indeed, this court's scheduling order has set the hearing for August 24, 2021, five months from the date of this motion.

There is no urgency to the determination of the issue of the movement of the setback and baselines, particularly in light of the fact that the Petitioner currently does not have the necessary authorizations to proceed with any construction activities. The ALC stayed the effect of its decision on the most recent set of development permits for the property, pending resolution of an appeal now before the S.C. Supreme Court Oral arguments are scheduled for March 23, 2021, but not until after the Court renders a decision will any construction activities be possible on the Spit.

In sum, Petitioner would experience no prejudice to delay this case until the Court of Appeals renders a decision. Yet Petitioner would experience prejudice if a stay is not granted. If the Court of Appeals reverses this Court's decision on the League's intervention motion, all of the work that is ready to take place would have to be done all over again.

Pursuant to SCRCP Rule 11, the League has consulted with counsel for DHEC, who consents to this motion and with counsel for KDP, who does not to this motion.

WHEREFORE, Coastal Conservation League respectfully requests that this Court issue an order permitting its intervention in this contested case.

[SIGNATURE BLOCK FOLLOWS]

Leslie S. Lenhardt, S.C. Bar. No. 15858
Attorney for Coastal Conservation League

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March 17, 2021

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP, II, LLC, Petitioner, v. SOUTH CAROLINA DEPT. OF HEALTH & ENVIRONMENTAL CONTROL, Respondent.	)	Docket No. 18-ALJ-0047-CC **PETITIONER'S RESPONSE IN OPPOSITION TO COASTAL CONSERVATION LEAGUE'S MOTION FOR STAY**

INTRODUCTION

On February 5, 2018, the Petitioner, KDP, II, LLC ("Petitioner" or "KDP"), initiated this Appeal and Request for Contested Case Hearing pursuant to S.C. Code § 48-39-280, seeking review of the delineation of the oceanfront jurisdictional lines made by the Respondent, South Carolina Department of Health and Environmental Control ("the Department") in October 2017. The lines at issue are on the highland of KDP's beachfront property on the western end of Kiawah Island generally referred to as Captain Sams Spit ("the Property"). KDP is authorized to develop the Property under the terms of its development agreement with the Town of Kiawah Island that has approved a subdivision plat for the Property.

On May 26, 2020, the League filed its motion to intervene. In its motion the League said that it opposed any development of the Property and alleged it had an interest in preventing a road to the approved subdivision on the Property that is the subject of an entirely separate contested permit proceeding. The League made no showing by affidavit or otherwise of what proof it intended to offer that the Department is not already going to offer in this case. It did not come

forward with an expert report or with any analysis of the factors to be considered in setting the jurisdictional lines at issue. The League made zero showing that the public interest that it purports to advance is not being adequately represented by the Department which is charged by law with administering and enforcing the applicable statutes and regulations.

KDP opposed the motion, asserting the statutory provisions governing appeals over the location of the jurisdictional lines do not allow participation by third parties such as the League. KDP also showed that the League failed to establish any of the necessary criteria for intervention and that joinder of the League would unduly prolong this proceeding that was initiated more than three years ago.

This Court issued its Order Denying the motion to intervene on July 10, 2020, holding:

A. **The League will not be aggrieved or adversely affected by the final order.** Here, the League has no personal stake in the delineation of the base and setback lines. The injury about which the League and its affiant complain (that the possibility of a seaward movement of the jurisdictional line "will create the opportunity for Petitioner to construct a road"), is neither actual nor imminent but rather conjectural or hypothetical. The League has presented no evidence that a decision by the Court establishing the jurisdictional lines will result in any individualized or particularized harm.

B. **The League's Intervention will cause undue delay and prejudice KDP.** The addition of the League as a party at this late stage would introduce new attorneys and witnesses and added discovery (written and depositions) thereby prolonging the proceedings which have already been unduly delayed through no fault of Petitioner. Intervention by the League would also serve to exponentially increase the time and costs incurred by Petitioner in preparing for and trying this contested matter where any possible interest the League may have is speculative at best.

C. **The League's Motion to Intervene was untimely.** This case has been pending with the Court since February 5, 2018 and is a matter of public record. Thus, even if the League did not have actual knowledge of this pending case, the League should have known by the exercise of reasonable diligence that a request for a contested case hearing had been filed and sought to intervene in a timely manner so as to not prejudice existing parties to the litigation. Moreover, other facts [including multiple news articles with statements by League personnel] indicate that the League was aware as early as 2016 that the baseline for the Property would be set in 2017.

Order at pp. 4-5 (including citations to *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1991) and *Sea Pines Ass'n for the Protection of Wildlife, Inc. v. S.C. Dep't of Natural Resources*, 345 S.C. 594, 550 S.E.2d 287 (2001)).

On July 29, 2020, the League filed its notice of appeal of the Court's decision denying the motion to intervene. The appeal was docketed in the South Carolina Court of Appeals and assigned Appellate Case Number 2020-001090. Eight months after initiating its appeal, on March 17, 2021, the League filed this motion to stay. In the motion to stay the League asserts that a stay pending completion of its appeal is proper because its appeal has a significant likelihood of success on the merits, it will be irreparably harmed absent the imposition of a stay, public interest dictates a stay should be granted, and there will be "minimal to no" prejudice against KDP. Motion at pp. 2-8. Each of these assertions is incorrect.

In summary, the League's motion should be denied for reasons that include but are not limited to the following:

- The League is not a party to this proceeding and has no standing to file a motion to stay;
- The League's appeal divested this Court of jurisdiction over the issues on appeal; moreover, the motion presents a rehash of arguments in support of its motion to intervene that could have been raised in a motion to reconsider and is untimely;
- Even if the Court were to consider the motion despite these fatal deficiencies, the League has not shown by clear and convincing evidence it meets any of the necessary elements that must be established to justify a stay; and
- KDP would suffer considerable prejudice by the entry of a stay.

For the reasons herein set forth, the motion for stay should be denied.

DISCUSSION

1. THE LEAGUE IS NOT A PARTY AND CANNOT FILE A MOTION TO STAY.

The League is not a party to this case and, as such, is not entitled to file any motions before this Court. That is why the motion to stay fails to cite any Rule that provides an opportunity for nonparties to interject themselves into a case by simply filing motions. The exception to that limitation, of course, is a motion to intervene which the League already filed and lost. *See* SCALCR 20(A) (stating any ***person*** may move for leave to intervene may intervene). On the other hand, the ALC Rules clearly state that it is only "upon the motion of any ***party***" that the ALC may stay its final orders. SCALCR 29(E). In addition to limiting motions for stay to a ***party***, a motion to stay must be filed by a party "prior to the filing of a petition for judicial review." *Id.* In this instance the League, which is not a party, is attempting to obtain a stay eight months after it filed its notice of appeal.

The League had its opportunity to seek intervention. This Court denied the motion and the Rules do not afford the League, as a nonparty, the right to now file any other motion, including a motion to stay.

2. THE SUBSTANCE OF THE MOTION IS THAT THIS COURT DID NOT RULE CORRECTLY IN DENYING THE LEAGUE'S MOTION TO INTERVENE; THE LEAGUE'S APPEAL DEPRIVES THE ALC OF JURISDICTION TO FURTHER RULE ON THE MERITS OF THE MOTION TO INTERVENE AND ITS REQUEST FOR FURTHER CONSIDERATION OF ITS MOTION BY THIS COURT IS UNTIMELY.

In its motion, the League argues that this Court did not really understand its arguments in favor of intervention and should have granted its motion to intervene. The League asserts primarily that this Court did not fully appreciate how much litigation the League has pursued against KDP involving the Property and how militantly opposed the League is to any development at all on the Property. Of course, as the Court recognized, the degree of the League's antagonism to the approved development of Captain Sams does not equate with a showing of the requisite interest

needed to support intervention in this particular case.

The League also asserts that this Court must not have realized the need for protection of the tidelands on the back side of Captain Sams occasionally used by its members, nor appreciated the recreational use of its members of the beach and dune system on the front side of Captain Sams when the Court denied the motion to intervene. In referencing the dunes, the League conveniently forgets to point out that the public's and its members' rights in the recreational use of the beach stop at the mean high water line. The League and the public have no recreational interest in the dunes on KDP's private property.

Rule 205 of the South Carolina Appellate Court Rules explains that upon appeal the lower court surrenders jurisdiction over matters affected by the appeal. Rule 205, SCACR. Rule 205 provides that "[n]othing in these Rules shall prohibit the lower court, commission or tribunal from proceeding *with matters not affected by the appeal*." *Id.* (emphasis added). In its motion for stay, the League argues the merits of its motion to intervene as a basis for stay, even though that matter is the exact issue that is on appeal. This Court has no jurisdiction to entertain a motion by the League dealing with the matters that are now on appeal.

If the League thought that this Court should change its mind about intervention, the proper avenue for it to present its arguments to this Court would have been through a motion to reconsider under Rule 29(D), SCALCR, within ten days of the order. The League's effort to reargue the merits of its motion to intervene before this Court under the guise of proving its likelihood of success on the merits nine months after the ruling is well beyond the time allowed for such motion in addition to the Court's being without jurisdiction to determine it given the League's pending appeal of the order.

3. EVEN IF THE COURT WERE TO CONSIDER THE MERITS OF THE MOTION TO STAY, THE LEAGUE FAILS TO ESTABLISH EQUITY WEIGHS IN FAVOR OF STAYING THE CASE.

Even if the Court were to consider the League's procedurally deficient motion to stay, the League's motion would still fail.

There is no fixed rule that establishes the circumstances calling for granting or denying a motion to stay. "The granting of a motion for a stay of proceedings rests entirely within the discretion of the trial [court]." *Thompson v. Swicegood*, 430 S.C. 648, 659, 845 S.E.2d 920, 925 (S.C. App. 2020), reh'g denied (Aug. 10, 2020), citing *City of Spartanburg v. Belk's Dep't Store of Clinton*, 199 S.C. 458, 20 S.E.2d 157, 167 (1942).

Generally, the propriety of a stay depends on the circumstances of a particular case. *See Indiana State Police Pension Trust v. Chrysler LLC*, 556 U.S. 960 (2009). In evaluating the need for a stay, a court should consider: "whether the stay applicant has made a strong showing that he is likely to succeed on the merits; whether the applicant will be irreparably injured absent a stay; whether issuance of the stay will substantially injure the other parties interested in the proceeding; and where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 770–71 (1987). The court's decision to deny a motion to stay is in the discretionary power of the court, reviewed only on an abuse of discretion basis. *Talley v. John-Mansville Sales Corp.*, 285 S.C. 117, 328 S.E. 2d 621 (1985). No one factor holds particular importance; courts are to weigh the "competing interests" and "maintain an even balance." *Charleston Advancement Acad. High Sch. v. Acceleration Acads., LLC*, No. 2:20-CV-01676-DCN, 2020 WL 4016256, at *4 (D.S.C. July 16, 2020)(quoting *Landis*, 299 U.S. 254-55). Courts do not take the task of imposing a stay lightly, as a "stay 'is not a matter of right' and the party seeking a stay bears the burden of demonstrating the presence of the *exacting standards* for the granting of such relief." *Condon v. Haley*, 21 F. Supp. 3d 572, 587 (D.S.C. 2014)(emphasis added)(quoting *Nken*, 556 U.S. at 433-34). As the League noted in its pending

motion, "The party seeking a stay must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative." *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983). Motion to Stay, p. 2. The League does not come close to showing clear and convincing circumstances warranting the extraordinary remedy of a stay of this case that is five months from trial.

No Likelihood of Success on Appeal and No Proof of Any Possible Harm

The League first argues that it has demonstrated a "significant" likelihood of success on its appeal, boldly stating that "the ALC's findings and conclusions failed to apply South Carolina rules on intervention and legal precedent." Motion at p. 2. The League does not mention that it faces a nearly insurmountable presumption in favor of the ALC's discretion in its appeal of the Order Denying Intervention. The standard governing its appeal gives significant deference to this Court's ruling.

The South Carolina Supreme Court recently discussed the high bar facing the League in its appeal of the Order Denying its motion to intervene:

> The decision to grant or deny a motion to … intervene in an action pursuant to Rule 24, SCRCP, lies within the sound discretion of the trial court." *Ex parte Gov't Emps. Ins. Co. (Ex parte GEICO)*, 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007).
>
> On appeal, this Court will not disturb the trial court's decision absent a manifest abuse of discretion that results in an error of law. *Id.* (quoting *Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 438, 633 S.E.2d 143, 145 (2006)).
>
> Moreover, the error of law must be so opposed to the trial court's sound discretion "as to amount to a deprivation of the legal rights of the party." *Id.* (citation omitted).

Ex parte Builders Mut. Ins. Co., 431 S.C. 93, 847 S.E.2d 87, 90 (2020). Because so much weight is given to the trial court's decision, "reversal of a denial of permissive intervention has been termed 'so unusual as to be almost unique.'" *Id.* at 91 (quoting *S.C. Tax Comm'n v. Union Cty. Treasurer*, 295 S.C. 257, 262, 368 S.E.2d 72, 75 (Ct. App. 1988).

In the Order Denying DCCA's motion to intervene, the Court found the League "has no personal stake in the delineation of the base and setback lines" and that "the League has presented no evidence that a decision by the Court establishing the jurisdictional lines will result in any individualized or particularized harm." Order at p. 4. The ALC also found intervention by the League would cause undue delay in the proceedings and would prejudice KDP, which is not warranted given the very weak argument the League made as to its alleged interest in the proceedings. *See* Order at 5 ("Intervention by the League would also serve to exponentially increase the time and costs incurred by Petitioner in preparing for and trying this contested matter where any possible interest the League may have is speculative at best.") Further, the ALC found facts indicating "the League was aware as early as 2016 that the baseline for the Property would be set in 2017" yet the League failed to act in a timely manner. *Id.*

Rather than address its burden on appeal of the ALC's findings, the League's motion merely parrots the arguments it made in its initial motion to intervene, which the Court considered and denied. *See* Motion at p. 5 (repeating that the League's members will lose enjoyment of the Property and restating that it followed proper timing procedures for intervention). Of particular note is the League's baseless assertion that its motion to intervene was timely filed. Addressing the important language of SCALC Rule 20, the ALC clearly found in its Order denying the League's motion to intervene that the motion was not timely:

> SCALC Rule 20(C) provides that a motion to intervene "shall be filed as early in the proceedings as possible to avoid adverse impact on the existing parties or the disposition of the proceedings." The League asserts that "it was unaware of the existence of this particular appeal" and that even if it had been so aware, it maintains that it would not have been appropriate to intervene during the pendency of a motion to dismiss. This case has been pending with the Court since February 5, 2018 and is a matter of public record. Thus, even if the League did not have actual knowledge of this pending case, the League should have known by the exercise of reasonable diligence that a request for a contested case hearing had been filed and sought to intervene in a timely manner so as to not prejudice existing parties to the

> litigation. Moreover, other facts indicate that the League was aware as early as 2016 that the baseline for the Property would be set in 2017.

Order at p. 5.

It is essential to note that the League submitted nothing more than an argument of legal precedent on the standard for granting a stay, without any corresponding factual showing to support those arguments. There is no showing of how or why the Department cannot properly protect or that it ever has failed to properly protect South Carolina's beaches for the public benefit. Likewise, the League's assertion that it will prevail on a theory that its "members use and enjoy the beach/dune system on [the Property]" is not possible. *See* Motion at p. 2. The referenced beach/dune system is located on private land owned by KDP; the League's members have absolutely no right to use the dunes and, as such, clearly cannot prevail on such a claim.

The League trumpets its commitment to preserving tidelands and protecting them for the people of South Carolina under the Public Trust Doctrine: "The League has participated at every step of the administrative and judicial processes with respect to the proposed development on [the Property], and *in particular the loss of the public trust tidelands that will result*, and should have been permitted to intervene in a proceeding *where these same interests are clearly at stake*." Motion for Stay, p. 5. Unlike the permit litigation waged by the League over alleged diminishment of tidelands through an erosion control structure, this case does not involve the tidelands at all. The chief interest the League proclaims is not in play in determining where the baseline and setback line should be properly located on the *upland*, above the tidal beach on the oceanfront and above the critical line on the river side. This telling lack of recreational interest is in and of itself reason for this Court to conclude that the League is not likely to succeed on the merits of its appeal.

As this Court recognized in denying the motion to intervene, the purported interest of the League in preventing a road being constructed to the residential development approved for the

Property by the Town of Kiawah Island is the subject of other administrative litigation that has been pending for five years and is now on appeal to the State Supreme Court. This other pending proceeding is the appropriate one for litigation of KDP's plans to build a road and the League's purported interest in protecting adjacent tidelands that might be damaged by an in-ground steel sheet pile wall, not this one. Whether a road can or cannot be built has nothing to do with the application of the statutory criteria to the facts that govern the setting of these two particular jurisdictional lines.

Additionally, the League has failed to make any showing whatsoever of how its involvement will lead to success on the merits in this ALC proceeding, even in the unlikely event it were to prevail on its appeal of the order denying intervention. The League was mum in its initial motion to intervene and mum in its motion to stay on the proof it would offer, if any, relevant to the determination of the baseline and setback line, much less proof that would be different from the Department's. It provided no affidavits from witnesses or experts. It made no substantive showing of reasons the Department could not adequately represent the public interest in making sure the baseline and setback line are properly established, nor how its joinder would influence the outcome, other than to considerably delay it.

The League will not be aggrieved or adversely affected by the final order of this case, because it has no rights or interests at issue in this case. This case deals only with the upland privately owned by KDP. The League has no right to recreational use of the upland and its members have no interest different from the public at large sufficient to establish organization constitutional standing. *See generally*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1991); *Sea Pines Ass'n for the Protection of Wildlife, Inc. v. S.C. Dep't of Natural Resources*, 345 S.C. 594, 550 S.E.2d 287 (2001).

The motion to intervene and the motion to stay are both void of any facts that the League intends to prove that affect the location of the two upland jurisdictional lines, and completely fail to make any showing of facts or arguments that are not going to be ably presented by the DNEC.

4. KDP WOULD BE EXTREMELY PREJUDICED BY A STAY; THE LEAGUE'S GOAL IS TO DRAW OUT THE PROCEEDINGS RATHER THAN A SPEEDY RESOLUTION OF ITS APPEAL.

The League asserts that a stay would not prejudice KDP because this case has already "been moving at a snail's pace." Motion at pp. 7-8. That assertion is patently false. The contested hearing is set for August 24, 2021, just five months from now. A stay pending the completion of the League's appeal could suspend these proceedings for three to four years at the current rate appeals are decided by the Court of Appeals, not to mention the additional time for the Supreme Court to act on a petition for certiorari.[1] In answer to this Court's question, the League has not filed a motion for expedited disposition of its appeal.

This ALC case was initially filed in February 2018. If this proceeding were stayed, the contested case hearing might not realistically occur until 2025 or 2026. That is hugely prejudicial to KDP, the landowner, the sole party that is allowed to appeal under the statute governing appeals from the Department's delineations of the baseline and setback line. *See* S.C. Code Ann. § 48-39-280(E) ("A landowner claiming ownership of property affected who feels that the final or revised setback line, baseline, or erosion rate as adopted is in error, must be granted a review of the setback line, baseline, or erosion rate, or a review of all three."). There is no provision in the statute for persons who are not property owners to become involved in the proceedings. The League is not an affected landowner. It has no right to partake in the landowner's proceeding in this Court, yet

[1] Counsel for KDP argued two appeals in the Court of Appeals in 2020. Both those appeals were initially taken in 2017. The Court of Appeals rendered a decision on one on March 3, 2021, and has yet to rule on the other.

is trying desperately to keep the landowner from obtaining its guaranteed review of the jurisdictional delineations by the Administrative Law Court in a timely manner.

The reality is that delay is the goal of the League and the League seeks to enlist this Court's assistance in drawing out these proceedings as long as possible. The more time that transpires, the more erosion can occur on the riverbank in the bend of the Kiawah River in the "neck" where the access corridor is located. The more erosion, the less highland between the river's critical line and the setback line.

KDP is entitled to a timely determination of the correct location of the baseline and setback line on the Property in this administrative proceeding between it and the appropriate regulatory agency. While the League's members claim a recreational interest in the tidelands involved in entirely different permit proceedings, they have no right of use or enjoyment, recreational or otherwise, to KDP's highland. Having no standing whatsoever in these proceedings, the League should not be allowed to use its claim to some illusory right to completely shut down this case for the next four years or more to frustrate the statutory rights of KDP.

As this Court explained in its Order denying the motion to intervene, the League's request to intervene was both untimely and somewhat misleading. The League's motion to intervene claimed it knew nothing about the preceding events in the case during 2017, 2018, and 2019. *See* Motion at p. 3. But, as the Court found these assertions were far from accurate:

> This case has been pending with the Court since February 5, 2018 and is a matter of public record. Thus, even if the League did not have actual knowledge of this pending case, the League should have known by the exercise of reasonable diligence that a request for a contested case hearing had been filed and sought to intervene in a timely manner so as to not prejudice existing parties to the litigation.
>
> Moreover, other facts indicate that the League was aware as early as 2016 that the baseline for the Property would be set in 2017. An article in the Post & Courier quoted Dana Beach, the League's executive director as stating, "setting it [the baseline] next year will put the setback line in the river and the baseline 100 feet

> back in the former dunes." *Hurricane confirms instability of Capt. Sam's Spit*, Post and Courier, October 16, 2016, available online at https://www.postandcourier.com/opinion/editorials/hurricane-confirms-instability-of-capt-sams-spit/article1cba2d94 -9643-11e6-8d44-974a15f79888. html.

Order at p. 6. Additionally, this matter has already been significantly delayed. *See* Order at p. 5 ("Petitioner has been denied a timely final adjudication on the merits for more than thirty-two months. The addition of the League as a party at this late stage would [improperly prolong] the proceedings which have already been unduly delayed through no fault of Petitioner.").

The League's motion to stay is yet another instance of its efforts to prolong these proceedings and delay a resolution indefinitely to advance its agenda of thwarting KDP at every turn, even in an instance like this one where it utterly fails to meet the test for intervention and utterly fails to show how it is likely to succeed on its appeal of the discretionary ruling of this Court or likely to succeed in presenting proof on the jurisdictional lines that will not be presented and vigorously advocated by the Department.

CONCLUSION

The League advances the novel premise that a stranger to a legal proceeding already denied participation by discretionary order of the Court has the right to cause the proceeding to grind to a halt for years by filing a motion to intervene and then appealing the denial of that motion. This untenable supposition would grant third persons more power over legal proceedings than the litigants, who in most instances cannot appeal interlocutory orders.

For the foregoing reason, the Court should exercise its discretion and deny the League's motion for stay.

Respectfully Submitted

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ATTORNEYS FOR PETITIONER, KDP, II, LLC

March 26, 2021
Charleston, SC

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP II, LLC, Petitioner, vs. SOUTH CAROLINA DEPARTMENT OF HEALTH & ENVIRONMENTAL CONTROL, Respondent.	)	Docket No. 18-ALJ-07-0047-CC **CERTIFICATE OF SERVICE**

I hereby certify that on **March 26, 2021**, in Charleston, South Carolina, I served a copy of the foregoing **PETITIONER'S RESPONSE IN OPPOSITION TO COASTAL CONSERVATION LEAGUE'S MOTION FOR STAY,** by electronic mail only, to the following:

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP, II, LLC, Petitioner, v. SOUTH CAROLNA DEPT. OF HEALTH & ENVIRONMENTAL CONTROL, Respondent.	Docket No. 18-ALJ-07-0047-CC **REPLY TO PETITIONER'S RESPONSE TO MOTION FOR STAY ON BEHALF OF COASTAL CONSERVATION LEAGUE**

In its Response in Opposition to the Motion for Stay, Petitioner places obligations on the Coastal Conservation League that simply are not required under the law. Petitioner states, the "League made no showing by affidavit or otherwise of what proof it intended to offer that the Department is not already going to offer in this case." First, the League is not required to put up its case at this stage in the proceedings, particularly where it has not been involved in the discovery process. The time for evidence is the merits hearing, or a motion for summary judgment, both of which occur after discovery is complete. The League complied with the rule on intervention and has very clearly described the interests at stake for it and its members and the impact that it stands to suffer from a decision in favor of the Petitioners. No legal support exists for KDP's theory that the League mus thire an expert witness and provide testimony "by affidavit or otherwise" – essentially being prepared for trial – to even be permitted intervention in the proceedings. In addition to the lack of legal support, the League submits that KDP advocatess an unreasonable and unrealistic expectation upon parties seeking intervention. It should go without saying, but DHEC cannot adequately represent the interests of the League because its interests are distinct and do not encompass the impacts to the League's members who will be negatively affected by this

decision and in turn the development of the Spit. DHEC is focused in this case on the methodology of the calculation of the jurisdictional lines on the property owned by KDP. However, the larger picture implications from a decision favorable to the Petitioners is relevant and should be considered by this Court. Because of this, the League's evidence is necessarily going to be distinct from DHEC's. Second, KDP succumbs to the same deficiency that it accuses the League of: KDP provides no factual or legal support for its contention that it will be harmed by a stay (or by intervention). The contested issue before the Court is whether DHEC properly established its jurisdictional beachfront lines which are, quite literally, lines in the sand. KDP has failed to substantiate its claims of harm, particularly where it does not have, and has not presented, any approved development plans, much less shown how any plans would be impacted by the DHEC decision. In short, KDP has presented no factual or legal arguments as to why a stay would be prejudicial.

The League has not been able to locate a case directly addressing the specific question of the standing of an appellant who has been denied intervention or the court's jurisdiction to entertain a stay motion; certainly, if there were adverse authority on the issue of standing, Petitioner would have provided it. However, there is precedent for such a motion. See League of Women Voters of Mich. v. Johnson, 902 F.3d 572 (6th Cir. 2018); Drewes Farms Partnership v. City of Toledo, 2019 WL 5420611 (N.D.Oh. 2019); John R. Sand and Gravel Co. v. United States, 60 Fed.Cl. 347 (April 3, 2004); Western Energy Alliance v. Zinke, 877 F.3d 1157 (10th Cir. 2017). In League of Women Voters of Michigan, three proposed legislative intervenors filed motions to stay pending appeal of the order denying their intervention, which is attached hereto as **Attachment 1**. In Western Energy, the District Court for the District of New Mexico ordered a stay of the proceedings pending the appeal of the intervention denial, which is attached hereto as **Attachment 2**. Following the stay,

the Tenth Circuit ordered that the appellants demonstrated a right to intervention and remanded the case with instructions to allow the appellants to intervene as parties. 877 F.3d 1157.

Furthermore, with regard to Petitioner's argument that the Rules of the Administrative Law Court preclude this motion, such argument is contrary to the Rules. Administrative Law Court Rule 2.H. defines a "party" to include "each person or agency named or admitted as a party or properly seeking and entitled to be admitted as a party, including a license or permit applicant." Such definition necessarily includes the League as a party because it is using the available rules and procedures to seek to be admitted as a party in this appeal. Even setting aside SCALC Rule 2.H., the League submits that the rules should not displace the legal precedent allowing this motion.

The League must also reiterate the circumstances surrounding the issue of the timeliness of the League's motion to intervene. It is significant that the Petitioner filed not one but two requests for contested cases in this proceeding. This is because the nature of the proceeding changed so significantly from the initial request for contested case hearing and the second request for contested case hearing. The initial request filed on February 15, 2018 challenged the extension of the public comment period. Procedurally it was unclear what issues were before this Court, based on the Department's motion to dismiss and this Court's order on the motion. Even if the League had been aware of the initial phase of the appeal, the considerations of whether to seek intervention based on what was actually before the court likely would have been very different. Following the remand, DHEC made an official determination on the lines and KDP not only moved to lift the stay but also filed a new request for contested case hearing on March 6, 2020. Also following the renewed request for contested case, this Court required the parties to file amended prehearing statements, recognizing the alteration of the issues presented in the proceedings.

It is not lost on the League that it seems counter-intuitive to ask the Court to stay a case on the grounds that this same Court made errors of law. Nonetheless, that is the standard that the League is constrained by, that the League is likely to succeed on the merits of its appeal and therefore that it is likely the case will be remanded to the Administrative Law Court. The League has set forth its grounds for appeal and identified a basis for prevailing both in its motion and in its Initial Brief, which the League would be pleased to submit to this Court for its review.

As for the Court's inquiry into why the League did not seek an expediting of its appeal, it is correct that the Appellate Court Rules provide for such a request under SCACR 263(b), though at this point the League's initial brief has been filed and this rule may not be applicable at this point. However, the League did not choose to do so because of its knowledge that such motions are typically granted in extremely urgent cases involving the rights of children such as termination of parental rights and at least one instance involving an election.

It is appropriate for the League to file this motion before this Court and it respectfully requests that the Court grant the same.

[SIGNATURE BLOCK FOLLOWS]

Respectfully submitted,

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March 31, 2021

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP, II, LLC, Petitioner, v. SOUTH CAROLINA DEPT. OF HEALTH & ENVIRONMENTAL CONTROL, Respondent.	)	Docket No. 18-ALJ-0047-CC **AFFIDAVIT OF RAY C. PANTLIK IN OPPOSITION TO MOTION TO STAY OF THE RESPONDENT AND TO SUPPLEMENT KDP'S RESPONSE TO MOTION TO STAY OF PROPOSED INTERVENOR**

PERSONALLY APPEARED before me Ray C. Pantlik, who being duly sworn, testifies as follows:

1. I offer this Affidavit as testimony, under oath and under penalty of perjury, stating and affirming that I have personal knowledge of the facts set forth herein, that I am competent to testify to the matters set forth herein, and that all statements included herein are truthful and accurate.

2. I am employed by Kiawah Partners as the director of real estate development and have served in that capacity for around thirty years.

3. KDP II, LLC ("KDP") owns beachfront property of over 150 acres of upland on the southwestern end of Kiawah Island known as Captain Sams Spit ("Captain Sams" or "the Property"). Captain Sams is about a mile long and extends southwesterly to Captain Sams Inlet, which separates Kiawah Island and Seabrook Island.

4. I am a licensed professional engineer; I oversee almost all aspects of the development of raw land for Kiawah Partners including obtaining permits and approvals, coordinating with outside engineers and other land professionals, and monitoring site work and installation of infrastructure. In that capacity I have been integrally involved in the planning and permitting for KDP for the approved development of Captain Sams including all matters relating to the establishment of the baseline and setback line by the Department.

5. In 2005 KDP and the Town of Kiawah Island entered into a Development Agreement whereby KDP agreed to forgo a 325-room hotel on property near Captain Sams in return for a limited residential development of Captain Sams of a maximum of fifty residential lots on no more than 20 acres using low impact development techniques. KDP is required to put a conservation easement on the remaining land on Captain Sams preserving in a natural state in perpetuity. These vested rights to this limited residential development were repeated in an amended and restated Development Agreement with the Town of Kiawah Island on December 5, 2013, that remains in effect.

6. The first phase of the subdivision of lots on Captain Sams Spit is known as Cape Charles Phase I. The Town of Kiawah Island approved this subdivision plat in 2011 and again in 2013.

7. The location of the baseline and setback line on beachfront property in South Carolina significantly affects the use and development of that land.

8. The South Carolina Department of Health and Environmental Control ("the Department") sets the jurisdictional lines on all beachfront property in South Carolina. That includes open land as well as lots that already contain homes or buildings.

9. S.C. Code Ann. § 48-39-280 establishes the standards and procedures the Department must use to delineate jurisdictional lines.

10. In October of 2017, pursuant to the then-existing version of S.C. Code Ann. § 48-39-280, the Department released its preliminary delineations of the jurisdictional lines for the Property.

11. KDP disagreed with the Department's proposed baseline and setback line on Captain Sams released in October 2017 and followed the established statutory and regulatory procedures for objecting to and appealing the delineations on the Property.

12. KDP filed a Request for a Final Review Conference with the Board of the Department on November 30, 2017. When the Board declined to conduct a Final Review Conference, KDP filed its Appeal and Request for Contested Case Hearing with this Court on February 5, 2018.

13. The Department moved to dismiss KDP's appeal on October 24, 2018. This Court denied the motion to dismiss by Order dated March 29, 2019.

14. As I understand it, this case may be the only case left out of almost 50 similar appeals filed by other landowners.

15. The Department's delineation of the baseline and setback in October 2017 placed those lines in essentially the same position as when it delineated those lines in October 2009 during the last delineation cycle, even though there has been significant accretion of the beach on Captain Sams since 2009.

16. KDP vigorously disputes the Department's 2017 delineation and believes that the Department did not correctly apply the statutory and regulatory criteria for determining their location and that the correct location is well seaward of the 2009 and 2017 locations designated by the Department.

17. The riverbank in the "neck" of Captain Sams is being eroded by the Kiawah River. The rate of this erosion is less than the rate of accretion of the beach. As a result, the location of the baseline and setback line is critical to realization of KDP's vested rights to the limited residential development on less than 20 acres of Captain Sams.

18. It is imperative to KDP that there be a timely determination of its appeal as soon as possible. Trial of the case is scheduled for August 24, 2021, per the Second Amended Scheduling Order entered November 18, 2020 with the Department's consent.

19. Almost a year ago, in May of 2020, the South Carolina Coastal Conservation League ("the League") filed a Motion to Intervene in this docket. I understand the operative statute to only allow appeals by a landowner or his representative:

> A landowner claiming ownership of property affected who feels that the final or revised setback line, baseline, or erosion rate as adopted is in error, upon submittal of substantiating evidence, must be granted a review of the setback line, baseline, or erosion rate, or a review of all three.

S.C. Code Ann. § 48-39-280(E) (effective June 3, 2016, to May 2, 2018).

Pursuant to amendment effective May 2018, the statute now reads:

> A landowner [or his appointee] claiming ownership of property adversely affected by the establishment of a baseline or setback line, upon submittal of substantiating evidence, must be granted a review of the baseline or setback line.

S.C. Code § 48-39-280(F)(1).

20. The League's Motion to Intervene said that "Members of the League live on Kiawah Island and use and enjoy the waters, wetlands, and other natural resources of Kiawah, and Captain Sam's Spit in particular. Members of the League boat and otherwise recreate in the waters, wetlands and beaches surrounding Kiawah Island, including the spit on which Petitioner seeks to develop a 26-lot subdivision known as Cape Charles Phase I." However, none of these areas are on the highland owned by KDP where the baseline and setback line are located and proposed to be located, nor will the access or use of the beach and public trust tidelands by the League's members be impaired in any manner by the location of these two jurisdictional lands.

21. There is some discussion in the Motion about potentially different approaches to the litigation as a reason to permit intervention of the League. However, the League has admitted the Department is asserting the positions that the League wants advanced. There is no conflict between the positions of the League and the Department. The League wants the lines to be where the Department set them. According to the website for the League's attorneys, the Motion to Intervene seeks an order "upholding DHEC's 2017 jurisdictional line determination and preventing it from moving seaward." *Advocates Propose to Intervene in Effort to Revise Jurisdictional Lines on Captain Sams Spit*, SCELP Press Release, posted May 26, 2020, available online at: https://scelp.org/posts/view/184 (Copy attached as Exhibit A to KDP's Opposition to Motion to Stay, emphasis added). The League did not establish nor contend in its Motion to Intervene that the Department could not effectively advocate for the jurisdictional lines it delineated.

22. The League has been a habitual opponent to any permitting or approvals sought by KDP involving the development of Captain Sams (as approved by the Town of Kiawah Island which has also approved the subdivision plat for Cape Charles). The cases are numerous and include:
    - ALC Docket No. 09-ALJ-07-0029-CC;
    - ALC Docket No. 09-ALJ-07-0039-CC;
    - South Carolina Supreme Court Appellate Case No. 2016-000707;
    - ALC Docket No. 15-ALJ-07-0369-CC; and
    - South Carolina Supreme Court Appellate Case 2019-000074.

23. The League's litigation against KDP has resulted in four Supreme Court opinions and another case was recently argued before the Supreme Court:
    - Kiawah Development Partners, II, Inc. v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 766 S.E.2d 707 (2014) ("KDP I");

- Kiawah Development Partners, II, Inc. v. S.C. Dep't of Health & Envtl. Control, 422 S.C. 632, 813 S.E.2d 691 (2018) ("KDP II"); and
- S.C. Coastal Conservation League v. SCDHEC & Kiawah Development Partners II, Appellate Case No. 2019-000074; 2018 ALC Order, 2018 WL 4854113.

24. Based on our experience in other litigation, if the League is allowed to intervene in this case, it will seek to extend the proceedings and appeal any adverse determination, to thwart KDP and extend the overall litigation to capitalize on the continuing erosion on the river side of Captain Sams.

25. Adding to the cost and potential delays already harming KDP, on March 17, 2021, the League filed a Motion to Stay Proceedings. The League has asked that the ALC stay this case indefinitely while it appeals the Order Denying Intervention. Having experienced other appeals by the League, the League's request could delay a trial of the important issues dealing with the proper location of the jurisdictional lines for many years.

26. If a stay is granted, it will virtually guarantee that the League can halt this case through its appeal to the Court of Appeals and then during an appeal further to the Supreme Court. Under that scenario it could easily be five years before the case is back to the ALC for the trial currently scheduled for this coming August. The League's appeal of the first permit was not finally decided by the Supreme Court until almost five years after the appeal was taken.

27. On March 26, 2021, KDP filed its Opposition the League's Motion to Stay presenting the reasons why the requested stay should be denied.

28. On March 31, 2021, yesterday, the League filed its Reply to KDP's Response to the Motion to Stay.

29. Also on March 31, 2021, yesterday, the Department filed its Response to the Motion to Intervene but also added in its own Motion to Stay KDP's appeal even though it had agreed to amended scheduling order that set the trial for August 24, 2021.

30. In its filing the Department refers to the League's appeal of Department approvals associated with the site improvements for Phase 1 of Cape Charles that is now pending before the state Supreme Court. The Department in that other appeal is defending the permits and approvals that were issued to KDP. The Department speculates that KDP will be delayed in developing the Captain Sams when that appeal is determined. That

appeal has nothing to do with the correct position of the jurisdictional lines and is an unrelated matter in that NO issues overlap.

31. Also, the impact upon KDP of the requested stay must be seen in the context of the League's persistent litigation and the continually mounting legal costs KDP must expend when the League intervenes in proceedings related to Captain Sams. The cost of each case is exponentially increased by the costs already expended in other cases.

32. KDP has invested hundreds of thousands of dollars so far in Captain Sams in planning, engineering, and designing for Captain Sams as well as the cost of legal fees. KDP will be severely prejudiced if a stay is granted.

33. KDP is entitled to a final resolution on the merits in the near future without delay by the Department of the League. We are in the fourth year of this appeal already. KDP has also spent a considerable amount of money in preparing to try this case in August, including retention of qualified experts. A potential delay of four to five years would require KDP to reincur all those expenses again and could require KDP to engage other experts if those experts are no longer available.

34. KDP is preparing to proceed with trial beginning August 24, 2021, and is hopeful this Court will deny both Motions to Stay to allow KDP to obtain a proper determination of the lines as soon as possible for purposes of being able to proceed with its vested rights in this development in which it is so heavily invested.

Further affiant sayeth not.

Ray C. Pantlik

SWORN before me this 2nd day of April, 2021

Notary Public for the State of South Carolina

My Commission Expires: July 8, 2024

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KDP II, LLC, Petitioner, vs. SOUTH CAROLINA DEPARTMENT OF HEALTH & ENVIRONMENTAL CONTROL, Respondent.	)	Docket No. 18-ALJ-07-0047-CC **CERTIFICATE OF SERVICE**

I hereby certify that on **April 2, 2021**, in Charleston, South Carolina, I served a copy of the foregoing **AFFIDAVIT OF RAY C. PANTLIK IN OPPOSITION TO MOTION TO STAY OF THE RESPONDENT AND TO SUPPLEMENT KDP'S RESPONSE TO MOTION TO STAY OF PROPOSED INTERVENOR,** by electronic mail only, to the following:

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Paralegal

STATE OF SOUTH CAROLINA
ADMINSTRATIVE LAW COURT

KDP, II, LLC, Petitioner, v. South Carolina Department of Health and Environmental Control, Respondent.	)	Docket No. 18-ALJ-07-0047-CC **ORDER** **(Denying Motion for Stay)**

I. STATEMENT OF THE CASE

This case involves Respondent South Carolina Department of Health & Environmental Control's (Department) delineation of base and setback lines as pertains to beachfront property owned by Petitioner KDP, II, LLC (Petitioner). The matter immediately before the Administrative Law Court (ALC or Court) is a Motion to Stay[1] filed by the Coastal Conservation League (League). After reviewing the submissions and the applicable law, the League's motion is denied.

II. BACKGROUND

Petitioner owns beachfront property on Kiawah Island, South Carolina, generally referred to as "Captain Sams Spit" (Property). Petitioner is authorized to develop the Property under the terms of an agreement with Kiawah. On October 6, 2017, the Department published notice of proposed new baselines for all South Carolina beaches. Petitioner disagreed with the Department's proposed base and setback lines (delineation). At the time, Section 48-39-280(E) provided the following avenue for landowners to present their concerns to the Department about its preliminary determination:

> A landowner claiming ownership of property affected who feels that the final or revised set back line, baseline, or erosion rate as adopted is in error, upon submittal of substantiating evidence, must be granted a review of the setback line, baseline, or erosion rate, or a review of all three ...

[1] The League's motion is captioned "Motion for Stay on Behalf of Coastal Conservation League," but the prayer for relief states in part that the League, "requests that this Court issue an order permitting its intervention in this contested case." As the Court's denial of the motion for intervention is on appeal, the Court addressed the motion as one solely for a stay.

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SC Admin. Law Court

S.C. Code Ann. § 48-39-280 (Supp. 2017).[2] On November 20, 2017, Petitioner filed a Request for Final Review Conference before the Department's Board. On January 5, 2018, the Department denied the request. On February 5, 2018, Petitioner filed a Request for Contested Case Hearing with this Court. On October 24, 2018, the Department filed a Motion to Dismiss Petitioner's Request for a Contested Case Hearing arguing that Petitioner failed to exhaust its administrative remedies. On March 28, 2019, the Court issued an order denying the motion.

On June 6, 2019, the Court issued a Consent Order of Stay and Remand. Pursuant to this order, the case was stayed and remanded to the Department to allow Petitioner and the Department to confer so as to allow the Department to make a considered determination of the delineation in accordance with the applicable statutes and regulations. On December 6, 2019, the Department issued a Final Decision on Remand which left unchanged, its delineation that is under appeal. After the Department's Board declined to conduct a final review conference, Petitioner filed a Renewed Request for Contested Case Hearing After Remand and Request to Lift Stay on March 6, 2020. On June 10, 2020, the Court lifted the stay and directed all parties to update their prehearing statements and submit a consent scheduling order by June 30, 2020.

On May 26, 2020, the League filed a motion seeking intervention. By order dated July 10, 2020, the Court denied the motion concluding that: (1) the League's motion was untimely; (2) the League failed to meet its burden of demonstrating that it will be aggrieved or adversely affected by the final order; and (3) the League's intervention would unduly prolong the proceedings and otherwise prejudice Petitioner. On August 3, 2020, the League appealed. Eight months later and on March 17, 2021 (two days before depositions were to commence on March 19, 2021), the League filed a motion seeking to stay this matter pending the Court of Appeals' decision on the denial of the League's motion for intervention. On March 26, 2021, Petitioner filed a response opposing the League's motion. On March 31, 2021, the League submitted its reply. Also on March 31, 2021, the Department filed a reply to Petitioner's response to the League's motion in support of granting the stay. The Department requested that the Court exercise its discretion in

[2] The statute was later amended by 2018 South Carolina Laws Act No. 173 (H. 4683) and effective May 3, 2018 to provide in part that "A landowner claiming ownership of property adversely affected by the establishment of a baseline or setback line, upon submittal of substantiating evidence, must be granted a review of the baseline or setback line. Alternatively, the municipality or county in which the property is situated, acting on behalf of the landowner with his written authorization, or an organization acting on behalf of the landowner with his written authorization, upon submittal of substantiating evidence, must be granted a review of the baseline and setback line …" S.C. Code Ann. § 48-39-280(F)(1) (Supp. 2019).

favor of granting the stay in the interest of judicial economy and efficiency.[3] On April 2, 2021, Petitioner submitted the affidavit of Ray C. Pantlik in opposition to the motion to stay.

III. STANDARD

In *Merritt Brothers, Inc*., the South Carolina Supreme Court stated, "An equitable stay may be invoked if justified by circumstances that outweigh any potential harm to the party against whom it is operative.[4] *Merritt Brothers, Inc. v. Marine Midland Realty Credit Corp*., 307 S.C. 213, 216, 414 S.E.2d 167, 169 (1992). In making the determination, the court 'must weigh competing interests and maintain an even balance." *Id*. (quoting *U.S. Cent. Bldg. Supply, Inc. v. Wilke*, 685 F.Supp. 936, 938 (D.C. Md. 1988)). This is consistent with *Landis v. North American Co*. in which the United States Supreme Court held that, "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance*." Landis v. North American Co*., 299 U.S. 248, 244-245, 57 S.Ct. 163, 166, 81 L.Ed. 153, ___ (1936). The propriety of a stay depends on the circumstances of a particular case. *Indiana State Police Pension Trust v. Chrysler*, LLC, 556 U.S. 960, 129 S.Ct. 2275, 173 L.Ed.2d 1985 (2009). The granting of a motion for stay of proceedings rests entirely within the discretion of the trial [court]." *Thompson v. Swicegood*. 430 S.C. 468, 845 S.E.2d 920 (Ct. App. 2020) (quoting *City of Spartanburg v. Belk's Dep't Store of Clinton*, 199 S.C. 458, 20 S.E.2d 157, 167 (1942)).

IV. DISCUSSION

In its motion for stay, the League primarily rearticulates the same arguments, albeit in more detail, it raised in its motion for intervention, and then outlines why the Court's ruling was in error presumably to demonstrate its likelihood of success on appeal. In addition to reasserting the public's interest in the case and why it would be served by a stay, the League further states that if a stay is not granted and the appellate court reverses the order denying intervention, it would incur significant time and expense in re-deposing witnesses. It also states that the case could potentially have to be relitigated. The League also maintains in conclusory fashion that any adverse prejudice

[3] The Department's reply requested that the League's and its motion to stay be granted, however, as a procedural matter, the Department neither filed a motion nor joined in the League's motion. The League's motion stated that the Department consented to the motion.

[4] In its motion, the League represented or paraphrased this sentence as, "An equitable stay may be invoked if balancing the injury to the prejudice to the existing parties leads to this conclusion," omitting reference to potential harm.

to Petitioner would be minimal, if any, as Petitioner does not yet have the authorizations necessary to proceed with construction activities. It also notes the lengthy remand to which Petitioner agreed but the Court notes that the unusual procedural posture of the case was dictated by the Department's inability to complete a timely statutorily mandated review of the base and setback lines.[5]

In Petitioner's response to the League's motion, Petitioner maintains that it will be prejudiced by any further delay including adverse financial ramifications. As this Court noted in its order denying the League's motion for intervention, because of the Department's inability to timely arrive at a final decision as to the delineation of the baseline and set back lines for the property, Petitioner has been denied a timely final adjudication on the merits. As of now, it has been more than three years, and an order of this Court granting the motion could delay the delineation of those lines for several more years. Petitioner opines that the motion to stay is another instance of the League's efforts to prolong the proceedings and indefinitely delay resolution in order to advance its agenda in thwarting Petitioner.[6] In particular, Petitioner submits that a delay in this litigation will afford the League the opportunity to capitalize on the continuing erosion on the river side of Captain Sams Spit.

Petitioner also notes that while the League argues it has demonstrated a significant likelihood of success on the merits, the League failed to address the deferential standard on review. *See Ex parte Builders Mut. Ins. Co.*, 431 S.C. 93, 98-99, 847 S.E.2d 87, 90 (2020) ("On appeal, this Court will not disturb the trial court's decision absent a manifest abuse of discretion that results in an error of law … Moreover, the error of law must be so opposed to the trial court's sound discretion "as to amount to a deprivation of the legal rights of the party.").

Finally, the Department requests that the Court exercise its discretion in favor of granting the stay in the interests of judicial economy and efficiency to avoid any hardship in having to duplicate its litigation efforts should the appellate courts rule in favor of intervention.

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[5] Petitioner had to file the request for a contested case hearing when it did to preserve its rights. Irrespective of Petitioner's consent, the case had to be remanded to the Department in order for a final agency decision to be rendered so that the contested case could proceed. No new or second request for a contested case hearing had to be filed. This case was never removed from the docket and the filing which Petitioner captioned "Renewed Request for Contested Case Hearing After Remand and Request to Lift Stay," was simply the manner in which Petitioner elected to advise the Court that a final agency decision had been issued and the matter was ready to proceed at the ALC. This Court routinely requests updated prehearing statements.

[6] In fact, in response to the Court's inquiry, the League concedes it has done nothing to try to secure an expeditious ruling on its appeal of the order denying intervention. Not only has no motion to expedite been filed but also, the League has requested and been granted three extensions of time within which to file its initial brief.

Here, neither the League nor the Department have demonstrated by even a preponderance of the evidence,[7] circumstances which would warrant the issuance of a stay. The League has not demonstrated a likelihood of success on the merits and has provided nothing that the Court has not previously considered. The Court stands firm in its decision that the application of statutory criteria to the facts that govern the setting of jurisdictional lines on beachfront property is not a matter in which the League holds any unattenuated or cognizable interest. In its motion to intervene, the League states that "Members of the League live on Kiawah Island and use and enjoy the waters, wetlands, and other natural resources of Kiawah, and Captain Sam's Spit in particular. Members of the League boat and otherwise recreate in the waters, wetlands and beaches surrounding Kiawah Island, including the spit on which Petitioner seeks to develop a 26-lot subdivision known as Cape Charles Phase I." As noted by the undisputed affidavit of Mr. Pantlik, "[N]one of these areas are on the highland owned by Petitioner where the baseline and setback line are located and proposed to be located, nor will the access or use of the beach and public trust tidelands by the League's members be impaired in any manner by the location of these two jurisdictional lands." The Court agrees.

Next, the League sets forth no information that would lead the Court to believe that it has relevant evidence to offer beyond what the Department is already prepared to offer in this case. While the League asserts in conclusory fashion that the Department is not able to adequately represent its interests, the League has admitted that the Department is asserting the position that the League wants advanced, and their positions are more than merely consistent. The League wants the lines to be established where the Department left them upon its last review and nothing has been presented which calls into the question, the Department's ability to effectively advocate for the jurisdictional lines it delineated. According to the website for the League's attorneys which was attached to Mr. Pantlik's affidavit, the League's intervention motion "was aimed at upholding DHEC's 2017 jurisdictional line determination and preventing it from moving seaward." *Advocates Propose to Intervene in Effort to Revise Jurisdictional Lines on Captain Sams Spit,* SCELP Press Release, posted May 26, 2020, available online at: https://www.coastalconservationleague.org/news/press-releases/advocates-propose-to-intervene-

[7] In its motion and citing *Williford v. Armstrong World Industries, Inc*., 715 F.2d 124, 127 (4th Cir. 1983), the League states, "The party seeking a stay must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative."

in-effort-to-revise-jurisdictional-lines-on-captain-sams-spit/. The League argued in a conclusory manner that the Department could not represent the environmental interests of the League and its members. However, the Department which is charged with the administration of Chapter 39 of Title 48, is bound by the legislative declaration of findings and state policies. S.C. Code Ann. §§ 48-39-20; -30; and -280 (2008 and Supp. 2020). The Department's regulations also acknowledge the import of the public's use of these lands and waters, and it is named as the steward[8] of the State's coastal resources. S.C. Code Ann. Regs 30-1 (Supp. 2020). Moreover, any change in the base and setback lines in and of itself will not affect the public property that the League maintains is at stake. Irrespective of where the lines are set, the areas upon which the public navigates, boats, bathes, recreates, and otherwise enjoys will still be able to be used for the same purpose.

Finally, the League argues that if the appellate courts grant intervention, it "would likely have to go to the time-consuming and significant expense of re-deposing these witnesses." Similarly, the Department argues that it may suffer hardship in having to duplicate any litigation efforts. However, neither the League nor the Department addressed the actual harm[9] to Petitioner if this case is stayed which is detailed in Mr. Pantlik's affidavit. Without regard to the cases in which the League had a cognizable interest and was properly admitted as a party, the Court agrees with Petitioner that here, Petitioner is entitled to a final resolution on the merits in the near future without any further delay or duplicative costs. This matter is nearly four years old and Petitioner has already expended a considerable amount of money and resources in preparing to go forward with this matter in August. A potential delay of four to five years would require Petitioner to reincur all of those expenses again and could require Petitioner to engage other experts if its current experts are no longer available.

After balancing the competing interests in this matter and weighing the equities, the Court denies the League's request to stay. This conclusion was not arrived at lightly. As stated by *Merritt Brothers*, an equitable stay may be invoked if justified by circumstances that outweigh any potential harm to the party against whom it is operative. Here, the Court finds that the circumstances posited by the League and Department in favor of a stay do not outweigh potential harm that would be caused to Petitioner as a result of a stay. While not determinative, a denial of

[8] S.C. Code Ann. Regs 30-1.6 (Supp. 2020).
[9] *Merritt Brothers, Inc*., references potential harm, a lower standard.

the stay would not put the moving party "between a rock and a hard place" as contemplated by *Tally v. Johns-Manville Sales Corp*., 285 S.C. 117, 328 S.E.2d 621 (1985).

V. ORDER

IT IS THEREFORE ORDERED that the Coastal Conservation League's Motion to Stay the above-captioned matter is **DENIED.**

AND IT IS SO ORDERED.

SHIRLEY C. ROBINSON
Administrative Law Judge

April 16, 2021
Columbia, South Carolina

CERTIFICATE OF SERVICE

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

Ti'a Smith
Judicial Law Clerk

April 16, 2021
Columbia, South Carolina