

RECEIVED

Aug 16 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2021-000158

South Carolina Coastal Conservation League,Appellant,

v.

South Carolina Department of Health and Environmental Control and
DeBordieu Colony Community Association, Respondents.

Initial Brief of Respondent

Tracey C. Green (Bar No. 9342)
WILLOUGHBY & HOEFER, P.A.
P.O. Box 8416
Columbia, South Carolina 29202
(803) 252-3300
tgreen@willoughbyhoefer.com

Randolph R. Lowell (Bar No. 16145)
J. Joseph Owens (Bar No. 102794)
WILLOUGHBY & HOEFER, P.A.
133 River Landing Drive, Suite 200
Charleston, South Carolina 29492
(843) 619-4426
rlowell@willoughbyhoefer.com
jowens@willoughbyhoefer.com

Attorneys for DeBordieu Colony Community Association

Table of Contents

Table of Authorities	ii
Statement of Issues on Appeal	iv
Statement of the Case	1
Statement of the Facts	3
1. Location of DeBordieu Colony.....	3
2. Morphology of Debidue Island.....	4
3. History of Erosion and Mitigation Projects at DeBordieu Colony	7
4. Recent Erosion Experience and Consequences at DeBordieu Colony	9
5. Project Analysis	10
6. Permit Application Review.....	14
7. Permit at Issue.....	17
Standard of Review.....	22
1. ALC Standard	22
2. Agency Deference.....	23
3. Judicial Review Standard.....	23
Summary of Argument.....	24
1. High Erosion Rate.....	24
2. Erosion Threatening Development	25
3. DOWNDRIFT IMPACT.....	26
Argument.....	26
1. The ALC correctly found that SCCCL failed to establish that there is not a high erosion rate in the Project area for purposes of § 48-39-290(A)(8).	27
A. <i>DHEC’s determination that erosion exceeding -3 ft./yr. is a high rate of erosion is entitled to deference and requires affirming the ALC on this issue.....</i>	<i>28</i>
B. <i>Even if the question of a high erosion rate is purely factual, the ALC’s carefully reasoned decision regarding the existence of high erosion in the Project area should be affirmed.....</i>	<i>30</i>
C. <i>To summarize, under any analysis, the erosion rate at DeBordieu Beach is high for purposes of § 48-39-290(A)(8).....</i>	<i>35</i>
2. The ALC correctly ruled that the groins are proposed for installation in an area with erosion threatening existing development.	36
3. The ALC correctly and properly determined that the proposed groins will not cause a detrimental effect on adjacent or downdrift areas.....	44
Conclusion	50

Table of Authorities

	Page(s)
State Cases	
<i>Al-Shabazz v. State</i> , 338 S.C. 354, 527 S.E.2d 742 (2000)	36
<i>DIRECTV, Inc. & Subsidiaries v. S.C. Dep’t of Revenue</i> , 421 S.C. 59, 804 S.E.2d 633 (Ct. App. 2017).....	22, 32
<i>Duvall v. S.C. Budget & Control Bd.</i> , 377 S.C. 36, 659 S.E.2d 125 (2008)	45
<i>Etiwan Fertilizer Co. v. S.C. Tax Comm’n</i> , 217 S.C. 354, 60 S.E.2d 682 (1950)	23, 29
<i>Fields v. Melrose Ltd. P’ship</i> , 312 S.C. 102, 439 S.E.2d (Ct. App. 1993).....	36
<i>Forest Dunes Assocs. v. Club Carib, Inc.</i> , 301 S.C. 87, 390 S.E.2d 368 (Ct. App. 1990).....	48
<i>Jones v. Lott</i> , 387 S.C. 339, 692 S.E.2d 900 (2010), <i>abrogated on other grounds by Repko v. County of Georgetown</i> , 424 S.C. 494, 818 S.E.2d 743 (2018).....	48
<i>Jones v. S.C. Dep’t of Health & Env’t Control</i> , 384 S.C. 295, 682 S.E.2d 282 (Ct. App. 2009).....	22
<i>Kiawah Dev. Partners, II v. S.C. Dep’t of Health & Env’t Control</i> , 411 S.C. 16, 766 S.E.2d 707 (2014)	<i>passim</i>
<i>S.C. Coastal Conservation League v. S.C. Dep’t of Health & Env’t Control</i> , 354 S.C. 585, 582 S.E.2d 410 (2003)	47, 48, 49
<i>Smith v. S.C. Dep’t of Soc. Svcs.</i> , 284 S.C. 469, 327 S.E.2d 348 (1985)	36
<i>TNS Mills, Inc. v. S.C. Dep’t of Revenue</i> , 331 S.C. 611, 503 S.E.2d 471 (1998)	44
State Statutes	
S.C. Code Ann. § 1-23-380(5)	23
S.C. Code Ann. § 1-23-600(A)(5)	22
S.C. Code Ann. § 44-1-60(f).....	1
S.C. Code Ann. § 48-39-260.....	48
S.C. Code Ann. § 48-39-260(1)(b)	6, 49
S.C. Code Ann. § 48-39-260(3)	49
S.C. Code Ann. § 48-39-270(1)	49
S.C. Code Ann. § 48-39-280(A)	49
S.C. Code Ann. § 48-39-280(A)(1)	28
S.C. Code Ann. § 48-39-280(B)	28
S.C. Code Ann. § 48-39-290.....	48

S.C. Code Ann. § 48-39-290(A)(8)	<i>passim</i>
S.C. Code Ann. 48-39-290(A)(8)(a)(i–iii)	44

Rules

Rule 208(b)(1)(B), SCACR	48
--------------------------------	----

State Regulations

S.C. Code Ann. Regs. 30-1(26)	28
S.C. Code Ann. Regs. 30-1(46)	28
S.C. Code Ann. Regs. 30-13(N) (Supp. 2002).....	47
S.C. Code Ann. Regs. 30-15(H)	43
S.C. Code Ann. Regs. 30-15(G)	47
S.C. Code Ann. Regs. 30-21	29

Other Authorities

<i>EarthWord-Scour</i> , U.S. Dep’t of the Interior, U.S. Geological Survey (June 11, 2016), https://www.usgs.gov/news/earthword-scour	7
<i>What is a Nor’easter?</i> , Nat’l Weather Serv., https://www.weather.gov/safety/winter-noreaster (last visited July 27, 2021).....	39
<i>State Beachfront Jurisdictional Lines</i> , S.C. Dep’t of Health & Env’t Control, https://scdhec.gov/environment/your-water-coast/ocean-coastal-resource-management-ocrm/ (last visited July 27, 2021).....	28

Statement of Issues on Appeal

1. S.C. Code Ann. § 48-9-290(A)(8) allows installing groins on beaches with “high erosion rates.” Based on its surveys and evaluations of all the State’s beaches, DHEC has for many years identified erosion rates exceeding -3.0 ft./yr. as high erosion. The ALC found, based on substantial evidence, that the erosion rates calculated by DCCA for the Project area, which were not disputed by SCCCL, constituted high erosion because of the conditions experienced in that area, including the recurring and rapid loss of sand. Should this Court affirm the ALC’s finding that there is high erosion in the Project area?
2. S.C. Code Ann. § 48-9-290(A)(8) authorizes the installation of groins on beaches “with erosion threatening existing development.” There is substantial evidence showing that erosion is threatening houses behind and south of a bulkhead at the Project area as well as the bulkhead itself. These houses constitute development at the Project area. Should this Court affirm the ALC’s finding that erosion at the Project area is threatening existing development?
3. S.C. Code Ann. § 48-9-290(A)(8) authorizes the installation of groins on beaches if “thorough analysis demonstrates that the groin will not cause a detrimental effect on adjacent or downdrift areas.” There is substantial evidence that DCCA and DHEC thoroughly evaluated the impact that installing groins in the Project area could have on the downcoast property. There also is substantial evidence that the Permit requires an extensive monitoring and mitigation plan, including future renourishment projects if and when the downcoast erosion reaches certain trigger points. These trigger points in the final Permit were agreed to by the downcoast landowner. Should this Court affirm the ALC’s finding that the groins will not cause a detrimental impact on the downcoast property?

Statement of the Case

In this administrative matter, the South Carolina Coastal Conservation League (SCCCL) challenges an initial and amended Critical Area Permit and Coastal Consistency Certification (Permit) issued to DeBordieu Colony Community Association (DCCA) by the South Carolina Department of Health and Environmental Control (DHEC),¹ authorizing DCCA to perform sand renourishment and groin installation on the beach adjacent to its community property in Georgetown County, South Carolina (Project). *See* **(R. pp.)** (Pet'r's Exs. 41, 77). SCCCL challenges DHEC's approval of the groin installation, not the renourishment.

The Original Permit for the Project was issued by DHEC staff on January 24, 2019. **(R. pp.)** (Pet'r's Ex. 41). On February 7, 2019, SCCCL filed its Request for Final Review Conference with the DHEC Board. **(R. pp.)**. On March 7, 2019, the Board denied SCCCL's Request and declined to hold a final review conference, making the staff decision regarding the Original Permit the final agency decision. **(R. pp.)**; *see* S.C. Code Ann. § 44-1-60(f).

SCCCL timely requested a contested case hearing on April 5, 2019, contending that DHEC's issuance of the Original Permit was contrary to the pertinent statutes, regulations, and the Coastal Management Program **(R. pp.)**. DCCA's neighboring property owner, The Belle Baruch Foundation (Baruch), also requested a contested case hearing on April 3, 2019, similarly challenging DHEC's issuance of the Permit. **(R. pp.)**. On July 1, 2019, the separate contested cases were consolidated for hearing. **(R. pp.)**.

Prior to the merits hearing, Baruch and DCCA entered into a Settlement Agreement, whereby DCCA agreed, with approval from DHEC, to amended conditions for the Original Permit,

¹ The office within DHEC that handled the review and authorization of the permit at issue is the Office of Coastal Resource Management (OCRM).

including to move the southernmost groin to the north, further away from the Baruch property line, and to “reduce the length of the southernmost groin, lower the trigger point for mitigation, and significantly increase the amount and quality of the mitigation should it become necessary.” **(R. pp.)**. The ALC then issued an Order dated April 3, 2020, dismissing Baruch’s contested case and directing DHEC to modify the Original Permit in accordance with the terms of the Settlement Agreement. **(R. pp.)**. DHEC issued a new permit on April 15, 2020 **(R. pp.)** (Amended Permit, and together with Original Permit, Permit), which incorporated the terms of the Settlement Agreement, as directed by the Order of Dismissal. **(R. pp.)** (Pet’r’s Ex. 77). SCCCL filed a Request for Final Review Conference as to the Amended Permit on April 20, 2020. **(R. pp.)**. On May 21, 2020, the DHEC Board denied SCCCL’s request and declined to hold a final review conference, again making the staff decision on the Amended Permit the final agency decision. **(R. pp.)**.

SCCCL timely requested a contested case hearing on June 22, 2020, challenging DHEC’s issuance of the Amended Permit. **(R. pp.)**. By consent motion of all the parties in the Original Permit and Amended Permit Cases, the ALC consolidated those cases by Order dated July 30, 2020. **(R. pp.)**. A hearing on the consolidated cases was held before the ALC in Columbia, South Carolina on August 24-26, 2020. The ALC issued a Final Order on January 15, 2021, ruling that SCCCL failed to show by a preponderance of the evidence that DHEC erred in granting the Permit. **(R. pp.)**. SCCCL timely filed a Notice of Appeal on February 16, 2021. **(R. pp.)**.

Statement of the Facts

Illustration 1 DeBordieu Colony Beach

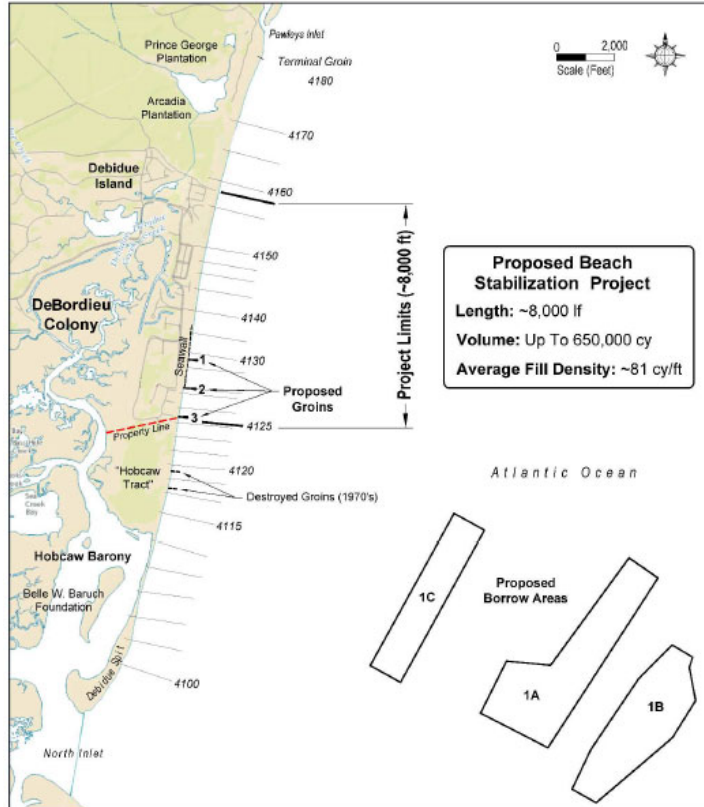


FIGURE 1.1. Debidue Island showing proposed beach stabilization project limits (DeBordieu Colony) and three groins to reduce sand losses. Sand would be dredged from portions of offshore areas 1A, 1B, and/or 1C.

1. Location of DeBordieu Colony²

DeBordieu Colony is a private community located in Georgetown County. The beachfront portion of DeBordieu Colony is approximately 8,000 feet (1.5 miles) in length and known as DeBordieu Beach. It is bounded on the south by Hobcaw Tract, Baruch's beachfront property, and on the north by Arcadia Plantation beach. DeBordieu Beach, Hobcaw Tract, and Arcadia

² Illustration 1, (R. pp.) (Resp'ts' Jt. Ex. 54), is found in a report submitted to DHEC in support of the Permit application. The chart illustrates the local island geography, project area, and the proposed aspects of the permit at issue. (R. pp.) (Tr. pp.370-372).

Plantation beach are all located on Debidue Island,³ which is approximately five miles in shoreline length bounded by Pawleys Inlet to the north and by North Inlet to the south. The southern tip of Hobcaw Tract extends down to North Inlet and forms Debidue Spit,⁴ a large sandspit that is also part of the Baruch property. Including Debidue Spit, Hobcaw Tract measures approximately 2.5 miles in shoreline length, while Arcadia Plantation beach is approximately one mile in length to Pawleys Inlet. *See (R. pp.) (Resp'ts' Jt. Ex. 1f.)*.

2. Morphology of Debidue Island

According to Dr. Timothy Kana,⁵ the dynamics associated with former or existing tidal inlets adjacent to a barrier island⁶ tend to be the main cause of erosion along the beachfront at those islands. *(R. p.) (Tr. p.390, ll.18-25)*. A stable section of beach with a net zero change in sand volume generally does not suffer from erosion and is referred to as being in “dynamic equilibrium”. *(R. pp.) (Tr. pp.385-90)*. Sand on a beach in dynamic equilibrium can still move back and forth

³ The separate names and spellings of the community, beachfront area, and island sometimes cause confusion. For ease of reference, the following summary is provided:

- i. DeBordieu Colony – the private community located in Georgetown County, South Carolina, whose beachfront area is the subject of this dispute.
- ii. DeBordieu Beach – the beachfront area at DeBordieu Colony, which is bounded by Baruch property to the south (“Hobcaw Tract”) and Arcadia Plantation to the north.
- iii. Debidue Island – the barrier island upon which a large part of DeBordieu Colony is located, including the beachfront area known as DeBordieu Beach.
- iv. Debidue Spit – the spit, or narrow land formation at the southern end of Debidue Island.

⁴ Debidue Spit is undeveloped and the Project will serve to protect the spit.

⁵ Dr. Kana is the President of Coastal Science & Engineering (CS&E) and is the project manager for the Project. *(R. p.) (Tr. p.358, ll.18-19)*. Dr. Kana is a preeminent expert in the field of coastal geology and processes. He was presented by DCCA as an expert in beach erosion, coastal geomorphology and processes, sediment budgets and transport, beach restoration, planning design and implementation, and tidal inlet sediment dynamics. *(R. p.) (Tr. p.367, ll.5-10)*.

⁶ There is no dispute that barrier islands, which are coastal islands separated from the mainland, are “very dynamic places, *shaped by storms and tides.*” *(R. pp.) (Tr. p.229, ll.11-12) (emphasis added)*.

along the beach, but there is generally very little or no net loss of sand along that beach in the long term. **(R. p.)** (Tr. p.385, ll.15-23). For the most part, a beach in dynamic equilibrium tends to have a concave C-shape, also referred to as an “arcuate” shape. **(R. p.)** (Tr. p.386, l.1). This equilibrium shape limits erosion by keeping the sand trapped within the arcuate area so that it is naturally restored to the beach after a storm or other erosion-causing event. **(R. p.)** (Tr. p.386, ll.1-11). In contrast, a beach that is not in dynamic equilibrium tends to have an S-shape, *see* Illustration 2, **(R. pp.)** (Resp’ts’ Jt. Ex. 55), where a section of the beach forms the more stable, arcuate C-shape, and the remainder of the beach bulges into the ocean where wave forces are more active upon it, leading to greater levels of erosion in the bulged section. **(R. pp.)** (Tr. p.387, l.21-p.388, l.6).

As shown in Illustration 2, Debidue Island has an S-shaped beach and, as would be expected, experiences increased erosion along the bulged southern shoreline. Indeed, Debidue Island is one of the few places in South Carolina where the “gradient” in the erosion rate dramatically increases from the north to south, which is consistent with the conditions that would be expected based

on the island’s shape and the north to south wave movement. **(R. pp.)** (Tr. p.71, ll.4-24; p.371, l.24-p.372, l.1; p.373, ll.19-24; p.392, l.22-p.393, l.4; p.399, ll.5-7). Although the northern part of Debidue Island has a low erosion rate and actually accretes sand in some years, the erosion rate at the southern part of DeBordieu Beach is much higher, and waves in that area tend to carry away sediment more rapidly than it is restored to the beach. **(R. p.)** (Tr. p.374, ll.6-21). Dr. Kana testified

Illustration 2
Shape of DeBordieu Colony



that locations like the Project area “often time have difficulty maintaining a beach nourishment project because the sand is drawn off so rapidly by the adjacent inlet.” **(R. p.)** (*Id.*). Dr. Kana testified that Debidue Island has not reached dynamic equilibrium and will continue to suffer high erosion at the southern end of the island where the Project will be located. **(R. pp.)** (Tr. p.386, ll.11-15; p.387, ll.12-15).

The significance of the high erosion experienced at the southern end of DeBordieu Beach is that it is impossible for a dry sand beach to form and remain in existence naturally. As DCCA’s expert William Eiser⁷ explained, a dry sand beach is important because it serves as a “bank of sand that can have sand withdrawn from it during storm conditions, then ... redeposited during normal conditions.” **(R. p.)** (Tr. p.622, ll.20-23). It thus serves as a “buffer” that “protect[s] whatever infrastructure or houses are located landward of it.” **(R. pp.)** (Tr. p.622, l.24-p.625, l.2).⁸ The high erosion at the southern end of DeBordieu Beach robs the area of the sand necessary to serve this function, threatening the safety of existing structures on the beach. *See* **(R. p.)** (Tr. p.616, ll.21-24) (“Beach renourishment sand and artificial dunes that are created [in the Project area] are quickly lost and so, the erosion threat to those structures continues.”).

⁷ Mr. Eiser is currently the President of Eiser Coastal Engineering, which assists individuals and entities in obtaining coastal permits and reviewing jurisdictional oceanfront development lines established by DHEC. **(R. p.)** (Tr. p.584, ll.17-20). He was qualified as an expert in coastal zone processes and coastal zone management. **(R. p.)** (Tr. p.591, ll.19-21). Mr. Eiser worked for OCRM (or its predecessor, the Coastal Council) from 1989 to 2015. **(R. pp.)** (Tr. pp.584-88). Among other duties during his time at DHEC, he was directly responsible for developing jurisdictional beachfront development lines based on the beach monument data, *see* discussion *infra* p.28 & n.34, as well as reviewing and analyzing hundreds of beachfront permit applications. **(R. pp.)** (Tr. p.588, ll.6-17; p.590, l.24). Mr. Eiser served as Project Manager for DHEC for three of DeBordieu Colony’s previous renourishment projects. **(R. p.)** (Tr. p.626, ll.15-16).

⁸ The State expressly seeks to “protect, preserve, restore, and enhance the beach/dune system ... to provide ... a source for the preservation of dry sand beaches” S.C. Code Ann. § 48-39-260(1)(b).

3. History of Erosion and Mitigation Projects at DeBordieu Colony

Residential development at DeBordieu Colony began in the 1970s. Due to chronic erosion, a range of shoreline protection measures have been implemented there. The first project occurred

Illustration 3
DeBordieu Colony Bulkhead



around 1970 and involved construction of two timber groins along Hobcaw Tract. *See (R. pp.) (Resp'ts' Jt. Ex. 1g, p.15).*⁹ However, the structures were not maintained or adequately protected from scour¹⁰ and failed by the early 1980s. *(Id.)*. A sand-scraping program was started in the mid-1970s, using sand from the wet beach to form a protective dune after storms or other erosive

events, especially at the southern end of DeBordieu Beach. *(Id.)*. The scraping program provides only short-term relief and has been unsuccessful in stemming the effects of long-term erosion. *See (R. pp.) (Tr. p.104, ll.5–12; p.519, ll.13–21).*

In 1981, due to continued erosion and chronic dune recession, a timber bulkhead (seawall) supported by pilings was constructed along the southern end of DeBordieu Beach to protect adjacent houses and hold the shoreline in place. *(R. p.) (Tr. p.391, ll.6-12); see also (R. pp.)*

⁹ Respondents' Joint Exhibit 1g, "Beach Erosion Management Alternatives – 30 Year Plan" (Alternatives Analysis), is a report drafted by CS&E taken from the DHEC permitting file and was not admitted for the truth of the matter asserted, but to show what DHEC considered in evaluating the Permit Application. It provides useful background information regarding the Project and DHEC's analysis. *See also (R. pp.) (Resp'ts' Jt. Ex. 29, pp.651-822) (Supplementary Report 1 to Alternatives Analysis).*

¹⁰ Scour is erosion that "occurs when water erodes the sediments that surround the base or support structures for bridges, roads, and other man-made buildings" and is "often caused by fast-moving water, [such as] during floods." *EarthWord-Scour*, U.S. Dep't of the Interior, U.S. Geological Survey (June 11, 2016), <https://www.usgs.gov/news/earthword-scour>.

(Resp'ts' Jt. Ex. 1g, p.17). A neighborhood known as Ocean Green, which included several oceanfront homes, was built south of the bulkhead beginning in 1985. **(R. p.)** (Tr. p.332, ll.3-7). The initial bulkhead was destroyed by Hurricane Hugo in 1989. **(R. p.)** (Tr. p.616, ll.14-16). The bulkhead was thereafter rebuilt, and currently extends approximately 4,500 feet along DeBordieu Beach, ending approximately 1,000 feet north of the Hobcaw Tract. **(R. pp.)** (Tr. p.391, ll.6-12). Illustration 3 on page 7, **(R. pp.)** (Resp'ts' Jt. Ex. 31, p.1), is a recent image of the bulkhead and shows water reaching the bulkhead at high tide.

Due to substantial and continuing erosion, DeBordieu Colony implemented four renourishment projects on DeBordieu Beach in 25 years: 1990, 1998, 2006, and 2015. Each of these projects has added increasingly larger amounts of sand to protect the beach. The projects in 1990 and 1998 were smaller scale projects using trucks to haul sand to the beach from inland excavating pits. **(R. p.)** (Tr. p.437, ll.9-12). The 2006 and 2015 projects, however, were larger scale hydraulic fill projects—similar to the Project—in which sand was pumped by dredge from offshore borrow areas to the beach using a large pipeline and then spread on the beach by bulldozers. **(R. p.)** (Tr. p.437, ll.12-17). The more recent projects each placed around 550,000 to 600,000 cubic yards of sand onto DeBordieu Beach. **(R. p.)** (Tr. p.151, ll.23-24).¹¹ To date, the community has spent approximately \$16,900,000 (actual costs, unadjusted for inflation) on erosion mitigation projects, adding approximately 1,690,000 cubic yards of sand to the beach to combat the persistent erosion. **(R. pp.)** (Resp'ts' Jt. Ex. 1g, p.19).

¹¹ The base quantities of sand for the 2006 and 2015 renourishment projects at DeBordieu Beach were 550,000 cubic yards and 600,000 cubic yards, respectively. *See* **(R. pp.)** (Resp'ts' Jt. Ex. 1g, p.34).

4. Recent Erosion Experience and Consequences at DeBordieu Colony

Based on projected erosion levels, the sand added to DeBordieu Beach in 2015 was expected to last five or six years (2021) before an additional renourishment project would be needed. **(R. p.)** (Tr. p.378, ll.15-20). However, successive storm events¹² on the South Carolina coast in recent years have adversely impacted the longevity of the 2015 renourishment project and the dry sand beach established by that project has eroded much faster and earlier than expected. **(R. p.)** (Tr. p.504, ll.1-5). According to Dr. Kana, the bulkhead at the Project area was exposed by erosion a mere two years after the 2015 project was implemented. **(R. p.)** (Tr. p.503, ll.14-16). Presently, the bulkhead at the Project area is currently exposed almost all the time and waves regularly bounce off of it at high tide. **(R. p.)** (Tr. p.375, ll.1-20). Indeed, witnesses for all the parties agreed that it currently is not possible to walk past the bulkhead at high tide. **(R. pp.)** (Tr. p.33, ll.14-18; p.215, ll.16-18; p.342, ll.12-13). The lack of a protective dry sand beach in front of the bulkhead means that waves can more easily overtop the bulkhead or reach the existing development behind the bulkhead and cause damage to those structures. **(R. pp.)** (Tr. p.375, ll.3-11; p.622, l.18-p.623, l.2). The wave action against the exposed bulkhead also causes it to scour, which results in erosion surrounding the wall. **(R. pp.)** (Tr. p.621, ll.4-8).

Because of the severe and persistent erosion, the Project area and the adjacent structures are susceptible to flood damage and worsening erosion. Dr. Kana testified that, among other dangers, the lack of a protective beach has caused waves to reach and damage development in the

¹² Hurricanes Isaias, Dorian, Irma, and Matthew are several of the recent storms that have impacted the Project area and caused increased erosion since the 2015 renourishment project. However, as further outlined, *see* discussion *infra* p.38 & n.4, DeBordieu Colony has also suffered extensive erosion as a result of seasonally expected Nor'easter storms, *see* discussion *infra* p.39, n.48, and high-tide events since 2015 (and prior).

Project area much quicker than if a dry sand beach were present. **(R. p.)** (Tr. p.375, ll.7-11).¹³ Ms. Blanche Brown, General Manager for DeBordieu Colony, testified about the damaging impacts to the beach and adjacent properties in the Project area from recent storm events. **(R. pp.)** (Tr. pp.518-523). Ms. Brown and other witnesses provided testimony and photographic evidence of property damage resulting from recent storms to several houses and infrastructure in the Project area. **(R. pp.)** (Tr. pp.343-47); *see also* **(R. pp.)** (Resp'ts' Jt. Exs. 68-71). DHEC further provided testimony regarding the hazardous condition of the beach and pictures taken from various site visits conducted pursuant to its review of the Permit. **(R. pp.)** (Tr. p.155, l.4-p.156, l.17; Resp'ts' Jt. Ex. 31). Those pictures show evidence of waves cresting over the bulkhead and further reveal that the escarpment line¹⁴ is landward of the bulkhead in the Project area, among other depictions. **(Id.)**; *see also* discussion *infra* pp.37-39. All of this evidence shows that the Project area is undergoing severe and persistent erosion posing a danger to the adjacent development.

5. Project Analysis

DeBordieu Colony engaged CS&E in or about 2014 to begin preparing a long-term shoreline management plan for the community. **(R. p.)** (Tr. p.369, ll.11-15). CS&E prepared and conducted several analyses regarding the erosion on DeBordieu Beach and options for addressing it, including the Alternatives Analysis. **(R. pp.)** (Resp'ts' Jt. Ex. 1g; Resp'ts' Jt. Ex. 29, pp.651-822). In total, the process of preparing the analyses took approximately 2.5 years, representing

¹³ Dr. Kana's concerns for the current condition of the Project area were echoed by other experts. *See* discussion *infra* pp.35-43.

¹⁴ It is undisputed that an escarpment line is "an erosional cut that's made on the beach or [] on a dune face" that is caused by erosion. **(R. p.)** (Tr. p.292, ll.13-15). Stated another way, it is a place where the elevation changes suddenly. This escarpment line is shown in several of the photographs included in Respondents' Joint Exhibit 31. **(Id.)**

hundreds of hours spent on site-inspections, research, engineering, modeling, drafting, correspondence, review, and other analysis. **(R. p.)** (Tr. p.369, ll.12-15).

In the Alternatives Analysis, CS&E reviewed and analyzed various options¹⁵ to address the erosion issue at DeBordieu Beach over a 30-year planning horizon, extending through 2045. **(R. pp.)** (Resp'ts' Jt. Ex. 1g, p.27). CS&E concluded that a renourishment project via offshore dredge with groins was the only viable long-term option. **(Id.)**. Based on how quickly renourished sand has been lost from the Project area historically and after 2015, coupled with the ongoing erosion levels, the study determined that the cumulative cost of all the expected renourishment projects at more frequent intervals without groins was projected to exceed \$70 million between 2015 and 2045. **(R. pp.)** (Resp'ts' Jt. Ex. 1g, p.49). By comparison, a renourishment project with groins was expected to increase the life of each successive renourishment, reducing the 30-year cost by over 50%. **(Id.)**.¹⁶ But the benefits of the groins are not just financial. Mr. Slagel explained that the increased longevity of sand retention in the Project area that the groins would provide after renourishment is viewed as beneficial by DHEC because it will result in less frequent disturbances to the beach. **(R. pp.)** (Tr. p.73, ll.20-25-p.74, ll.1-13).¹⁷

CS&E also prepared a Downdrift Impact Analysis (DIA) to evaluate potential impacts in the Project Area from the proposed groins, including preliminary engineering studies for the

¹⁵ Alternatives considered by CS&E included but were not limited to (1) an offshore dredge renourishment project without groins (like the previous two projects at DeBordieu Beach); (2) an offshore dredge renourishment project with groins (as the Project is currently permitted); (3) abandoning the structures threatened by erosion in the Project area; and (4) the "do nothing" alternative. **See (R. pp.)** (Resp'ts' Jt. Ex. 1g, pp.27-48; Resp'ts' Jt. Ex. 29, pp.651-822).

¹⁶ The Alternatives Analysis calculated the cost for the renourishment without groins and with groins alternatives through 2045 to be approximately \$72.5 million and \$29.8 million, respectively. **(R. pp.)** (Resp'ts' Jt. Ex. 1g, p.i). The results of the Alternatives Analysis are not challenged by SCCCL, and no competing data or analysis was submitted by Dr. Young

¹⁷ SCCCL's expert, Dr. Robert Young, agreed that more frequent beach renourishments can lead to greater "environmental impact" to any given project area. **(R. p.)** (Tr. p.273, ll.14-21).

Project, calculation of the erosion rates, and digital modeling **(R. pp.)** (Resp'ts' Jt. Ex. 1f). For purposes of the analysis, Debidue Island's coastline was broken into five "Reaches," and the average erosion rates at each Reach were calculated. Reaches 1 and 2 comprise the northern parts of the island, Reach 3 is the Project area, Reach 4 is comprised of the Hobcaw Tract, and Reach 5 is Debidue Spit. **(Id.)**; *see also* **(R. pp.)** (Tr. p.392, 1.5-p.393, 1.4; Resp'ts' Jt. Ex. 60).

To calculate the erosion rates for each Reach, Dr. Kana testified that his team reviewed and evaluated historical shoreline changes using aerial photography and data on beach cross sections obtained from governmental and other sources. **(R. pp.)** (Tr. p.395, 11.7-25-p.400, 11. 1-9). Dr. Kana and his team also reviewed and evaluated CS&E's previous erosion data and analyses for the Project area, DHEC's estimated erosion rates, and a study performed by Applied Technology Management, a different coastal engineering firm that had conducted a prior renourishment project on DeBordieu Beach. **(Id.)**. CS&E used all of this information in determining the erosion rates for DeBordieu Beach and Hobcaw Tract. It is undisputed that the erosion rate on DeBordieu Beach increases from Reach 1 to Reach 4 (north to south). For analytical purposes, CS&E further identified the average erosion rate for each of the Reaches, which are summarized in Table 1. *See* **(R. pp.)** (Resp'ts' Jt. Ex. 60).

Table 1
Summary of Erosion Rates by Reach

Reach	Locality	Length (ft)	Long-Term Volumetric Change Rates* (cy/ft/yr)	"7-yr" Post-Nourishment Change Rates** (cy/ft/yr)	Difference (cy/ft/yr)
1	Arcadia	2,130	1.4	3.3	1.9
2	DeBordieu North	4,615	-0.4	2.8	3.2
3	DeBordieu South	3,910	-4.2	1.6	5.8
4	Hobcaw Tract	4,180	-8.1	-1.7	6.4
5	Debidue Spit	4,410	-4.3	-3.3	1.0

It is important to note that the erosion rates shown for each of the Reaches is an average for that Reach; i.e., the erosion rate does not magically ramp up at the end of a Reach but steadily increases from north to south. With respect to Reach 3, which is where the groins will be located, the calculated average erosion is -4.2 cy/ft./yr. (volumetric change rate), which equates to approximately -5.46 ft./yr. (linear shoreline change rate).¹⁸ **(R. pp.)** (Resp'ts' Jt. Ex. 1f, p.19); *see* **(R. p.)** (Tr. p.404, ll.14-18). However, Dr. Kana explained that the south end of Reach 3—i.e., the Project area—is eroding much more rapidly than the northern end of Reach 3, which is confirmed by the fact that the setback line continues to diverge from the baseline¹⁹ as it runs from north to south along DeBordieu Beach. **(R. p.)** (Tr. p.424, ll.6-15, 20-22). Thus, at the south end of Reach 3, DeBordieu Beach is experiencing erosion approaching the estimated erosion rate for Hobcaw

¹⁸ Dr. Kana explained that “volumetric” means computing the amount of sand located in a cross section of the beach. He opined that the benefit of using a volumetric analysis is that it reflects the quantity of sand on the beach versus simply looking at the shoreline change, which can vary from day to day. He compared the volumetric analysis to a “big sand box.” **(R. p.)** (Tr. p.403, ll.1-2). In sum, a volumetric analysis focuses on the quantity of sand on a beach that is sufficient to maintain the dune line and stem erosion. *See* **(R. p.)** (Tr. p.402, ll.10-25). Dr. Kana also testified that the volumetric -4.2 cy/ft./yr. equals approximately -6 ft./yr. linear rate if multiplied by the appropriate convertor. **(R. pp.)** (Tr. p.404, ll.14-18). Although the precise number is a -5.46 ft./yr. linear rate, any discrepancy is irrelevant to the high erosion rate analysis. *See* discussion *infra* pp.30-35.

¹⁹ *See* discussion *infra* p.28, n.34 regarding the definition of baseline and setback lines.

Tract of -8.1 cy/ft./yr., or approximately -10.5 ft./yr. By comparison, the northern part of the island has an erosion rate of between 1.4 cy/ft./yr. and -0.4 cy/ft./yr. *See* **(R. pp.)** (Resp'ts' Jt. Ex. 60). The erosion rates calculated by CS&E are not contested by SCCCL. **(R. p.)** (Tr. p.267, ll. 16-24).

CS&E also used digital modeling software to assist in determining expected impacts from the proposed Project on the downdrift property area. CS&E determined that, in the early years of the Project, any increased erosion rate on an approximately 1,500-foot section of Hobcaw Tract immediately south of the groins along will be offset through the placement of sand on the beach in amounts far exceeding the trapping capacity for the groins, thus allowing downward transport of the sand from DeBordieu Beach. **(R. pp.)** (*Id.*); *see also* **(R. pp.)** (Tr. p.560, 1.20-p.561, 1.9). In fact, CS&E determined that the renourishment and mitigation components of the Project would over time result in a 50% *increase* in the amount of sand flowing to the 1,500-foot area of Hobcaw Tract south of the last groin compared to the expected loss of sand without the Project. **(R. pp.)** (Tr. p.561, ll.2-9). That is, CS&E's modeling shows that, because the proposed and future renourishment projects will place sand on the beach far in excess of the groins' trapping capacity, the erosion rate on Hobcaw Tract immediately past the groins will be 50% less than the historical rate of erosion.

6. Permit Application Review

On November 10, 2017, after completion of the many analyses, DCCA applied for the Permit, proposing beach renourishment and the construction of three groin structures on the southern end of DeBordieu Beach (Application). *See* **(R. pp.)** (Resp'ts' Jt. Ex. 1a). DCCA proposed placing up to 650,000 cubic yards of sand onto the beach, with the sand to be taken from

borrow areas located approximately 1.5 to 2 miles offshore.²⁰ *See (R. pp.)* (Resp'ts' Jt. Ex. 1f, p.3, Figure 1.1). Furthermore, each of the three proposed groins would extend between 300 and 400 feet from the back beach/bulkhead to the low tide line and would be constructed to a "low profile" matching the native beach slope and desired berm width. *(Id.)*.²¹

Matt Slagel²² served as the Project Manager for DHEC-OCRM and was responsible for evaluating the Permit application. *(R. p.)* (Tr. p.51, ll.14-17). Mr. Slagel testified that DHEC reviewed the information submitted with the Application, which included the Alternatives Analysis and the DIA along with other submissions. *(R. pp.)* (Tr. p.54, l.17-p.55, l.2; p.56, ll.19-21). Mr. Slagel testified that, during the review, DHEC requested more information from DCCA on several occasions, including further analysis of alternative groin designs. *(Id.)*.²³ Mr. Slagel also testified that, during the review period, DHEC received input from a coastal engineering consultant, Humiston & Moore (H&M), which had been hired by Baruch to review and evaluate

²⁰ The sand will be pumped onto the beach using a hydraulic dredge at the borrow area, which pumps the sand directly to the beach. *See (R. pp.)* (Pet'r's Ex. 41). Alternatively, the sand will be dredged using a self-propelled hopper dredge which will excavate the sand from the borrow area into a large bin in the vessel. *(Id.)*. The hopper dredge then will move closer to shore and attach to a pipeline running to the beach, which will be used to pump the sand directly to the beach from the dredge. *(Id.)*. The effect of renourishment at the beach is the same using either the traditional hydraulic dredge or hopper dredge. *(Id.)*. Again, SCCCL is not opposing the renourishment of DeBordieu Beach.

²¹ *See discussion infra* pp.18-20, 44-50 (discussing additional aspects of the permitted groins in further detail).

²² Mr. Slagel received his undergraduate degree in Environmental Science from the University of Virginia, and his Master of Science in Ocean Sciences from the University of California at Santa Cruz. He initially started working for DHEC as a NOAA Coastal Management Fellow in 2007 and returned to DHEC in 2018 to serve in his current position after several years working for North Carolina's Division of Coastal Management (that state's OCRM equivalent). *(R. pp.)* (Tr. p.115).

²³ Mr. Slagel testified that, at DHEC's request, CS&E provided additional layout options for the groins, including one-groin and two-groin options, instead of the three-groin proposal submitted to DHEC. *(R. pp.)* (Tr. p.143, ll.14-25-p.144, ll.1-7). CS&E determined those alternative options were likely to increase downdrift impacts due to the longer length of groin that would be necessary under either option. *(Id.)*; *see also (R. p.)* (Tr. p.198, ll.21-24).

potential impacts from the Permit application on its behalf. **(R. pp.)** (Tr. p.141, ll.2-5; p.162, ll.17-20). According to Mr. Slagel, H&M made a recommendation regarding what length of downdrift beach should be monitored for potential downdrift impacts on the Hobcaw Tract. **(R. pp.)** (Tr. p.141, l.19-p.142, l.12). He testified that DHEC agreed with H&M's recommendation to include the 1,600 feet adjacent to the southernmost groin as the relevant monitoring area based on CS&E's modeling data,²⁴ and ultimately modified the Permit to require that the more localized area downdrift of the southernmost groin be evaluated for potential downdrift impacts. **(Id.)**.

DHEC also determined that the erosion rates for each Reach calculated by CS&E were consistent with its own erosion data. **(R. p.)** (Tr. p.146, ll.1-16). Mr. Slagel further testified that, during its review, DHEC considered the modeling performed by CS&E to evaluate the potential downdrift impacts from the groins for purposes of including appropriate mitigation requirements in the final Permit. *See* **(R. pp.)** (Tr. p.57, ll.3-22; p.134, ll.9-23; p.137, ll.1-12). Mr. Slagel explained that, although DHEC cannot independently operate the models used by CS&E to evaluate downdrift impacts, the results of the modeling were consistent with DHEC's internal erosion data for the Project area. **(R. p.)** (Tr. p.57, ll.3-22). Mr. Slagel also testified that, after consultation with the U.S. Army Corps of Engineers, DHEC accepted the method used by CS&E to calibrate the model and ensure its accuracy. **(R. pp.)** (Tr. p.134, ll.9-23). Mr. Slagel explained that DHEC used the modeling results to inform its determination on the validity of the DIA and the appropriate mitigation provisions. **(R. pp.)** (Tr. p.57, ll.3-22; p.137, ll.1-12). No other entity, including SCCCL, submitted proposed modeling results to DHEC.²⁵

²⁴ *See* **(R. pp.)** (Tr. p.141, l.19-p.142, l.12; p.177, ll.12-23; p.460, ll.1-16; p.475, ll.22-25; p.496, l.14-p.497, l.23; p.560, ll.11-19).

²⁵ SCCCL also did not conduct any modeling that it submitted at trial, and it does not contest CS&E's modeling results. It rather contends that the erosion calculated by CS&E is not high, never mind the legal and factual basis supporting the ALC's finding. SCCCL's approach is simply to

Finally, Mr. Slagel testified that DHEC received and evaluated information regarding the required financial commitment of DeBordieu Colony to provide funds to mitigate possible future downdrift impacts from the groins, including a Letter of Credit and a Beach Preservation Fund established by DeBordieu Colony. **(R. pp.)** (Tr. p.55, ll.21-25-p.-56, ll.1-5; p.131, ll.18-24-p.132, ll.1-5). DCCA obtained an initial letter of credit in the amount of \$500,000 to mitigate any detrimental impacts from the groins on the downdrift beach, but later obtained an increased letter of credit for \$1,000,000. **(R. pp.)** (Tr. p.64, ll.15-23); *see also* **(R. pp.)** (Resp'ts' Jt. Ex. 46). DCCA further agreed to use available funds from its Beach Renourishment Fund²⁶ after the Project is constructed to conduct any required mitigation. **(R. p.)** (Tr. p.518, ll.4-7).

7. Permit at Issue

On January 24, 2019, DHEC granted the Original Permit approving in pertinent part the proposed groin installation:

The work also includes the installation of three sheet pile-type groins along the southern end of the project site. Each groin will be constructed of vertical sheet pile walls (sheets ~15-20 feet long) and extend between 300 and 400 feet from the back beach/bulkhead to the low tide line. Armor stone scour aprons will be installed along either side of the sheet piles at the seaward end of each structure, and each scour apron will consist of approximately 1,500 tons of armor stone placed on 5,600 square feet of marine mattresses. Groins will be constructed to a profile matching the native beach slope and desired berm width. The sheet piles will be made of steel or composite reinforced fiberglass material and will be capped with concrete or composite material. The majority of the sand will be placed in the groin area to satisfy groin trapping capacity and to facilitate construction using land-based equipment.

(R. pp.) (Original Permit, Pet'r's Ex. 41).

make generalized criticisms of CS&E's work without actually engaging in a technical analysis of that work.

²⁶ DCCA's Beach Preservation Fund is an account funded through assessments collected from DCCA property owners each year through 2033. **(R. pp.)** (Tr. pp.517-518). Over the 12 years following construction of the Project, the accumulated funds are estimated to total approximately \$10-12 million. *See* **(R. pp.)** (Pet'r's' Ex. 77).

The groins designed for the Project are often identified in testimony as “low-profile groins,” which, as referenced above, are constructed from capped sheet piles and follow the natural slope or contour of the beach, with the landward end of the groin designed to be no higher than the natural dry sand beach. *See, e.g., (R. p.)* (Tr. p.623, ll.8–20). Illustration 4 shows what one of these

Illustration 4
Folly Beach Groins



groins looks like as placed on Folly Beach.²⁷ In addition to being more aesthetically pleasing than traditional groins, such as those installed at Pawleys Island or other locations in the State, the effect of the modern low-profile design is to allow excess sand to move around and over the structures to provide sand to the downdrift beach. (*Id.*); *see also (R. pp.)* Tr. p.177, ll.12-23; p.265, ll.17-22; p.487, ll.8-25).²⁸ As they are engineered, “[m]ost of the structure[s] will be buried” after

²⁷ Illustration 4 was not moved or introduced into evidence but was shown demonstratively to the ALC to demonstrate what an in-place low profile groin looks like.

²⁸ Dr. Kana explained that CS&E designed a low-profile groin similar to those planned for the Project that was installed at Folly Beach County Park in 2013. (**R. p.**) (Tr. p.444, ll.14-15). This is the groin shown in Illustration 4. According to Dr. Kana, before that groin was installed, Folly Beach County Park was closed due to the extensive erosion suffered on the beach and parking lot there from recent storms. (**R. pp.**) (Tr. p.445, ll.19-25; p.446, ll.1-4). Since the construction of that groin, which was also installed with a renourishment project, the shoreline of the beach has since been restored and now extends much further out into the ocean from its prior pre-construction condition. (**R. p.**) (Tr. p.446, ll.5-24). According to Dr. Kana, the groin at Folly Beach is currently exposed less than one foot above the beach, and the results from that project in terms of rejuvenation to the beach have actually turned out to be better than expected since the installation. (**R. pp.**) (Tr. p.446, ll.23-24; p.449, ll.7-10). Dr. Kana also testified that similar low-profile groins designed by CS&E and installed at Hunting Island State Park are mostly buried such that people

installation, **(R. p.)** (Tr. p.450, l.3), and the goal of the design is “to keep as much of the structure[s] buried and invisible to the casual observer as possible.” **(R. p.)** (Tr. p.450, ll.8-10);²⁹ *see also* **(R. pp.)** (Resp’ts’ Jt. Ex. 64) (groin design profile).

Furthermore, as referenced, there will be three groins: groin one will be approximately 300 feet in length, groin two approximately 400 feet, and groin three approximately 300 feet. **(R. pp.)** (Tr. pp.58-59; Pet’r’s Exs. 41, 77). The groins will be spaced approximately 1,000 feet apart, with the first groin approximately resting in the middle of the bulkhead; the second resting at the southern end of the bulkhead; and the third near DCCA’s southern property line.³⁰ *See (Id.)* Moreover, the 650,000 cubic yards of sand added to the beach will exceed the trapping capacity of the groins, which is between 50,000 to 70,000 cubic yards of sand per groin. **(R. pp.)** (Tr. p.448, l.20-p.449, l.1). Accordingly, “in simple numbers, [there is] about three times as much sand as [is] need[ed] to satisfy the [] trapping capacity of each groin.” **(Id.)**.³¹ This will serve to provide a

can walk over them on the upper beach, while groin exposure on the lower beach may be 2 to 4 feet, at maximum. **(R. p.)** (Tr. p.449, ll.7-10).

²⁹ Table 2, **(R. pp.)** (Resp’ts’ Jt. Ex. 64), shows the expected profile of the second proposed groin compared to the current and renourished beach profiles. *See (R. pp.)* (Tr. pp.454-457). Table 2 also shows the profile of renourishment which was conducted in 2015 for purposes of comparison to the current project.

³⁰ In the Original Permit, the third groin was proposed for placement at the southern end of DeBordieu Beach adjacent to the Hobcaw Beach property line. As a result of the Settlement Agreement and issuance of the Amended Permit, the third groin now will be located approximately 25 feet farther north and approximately 50 feet farther west than contemplated in the Original Permit. *See (R. pp.)* (Pet’r’s Ex. 77, p.3).

³¹ In addition, the sand placed on the beach during renourishment does not end at the property line between DeBordieu Beach and the Hobcaw Tract. Instead, it extends past the property line on to and out from Hobcaw Tract public beach. *See (R. pp.)* (Pet’r’s Ex. 77, p.3). Moreover, the excess sand placed during the renourishment process will move freely downcoast during the construction of the groins, which occurs after the renourishment. **(R. pp.)** (Tr. p.442, ll.12-24). As referenced, after installation of the groins, excess sand will for some time continue to bypass the groins downcoast due to their low-profile design. **(R. p.)** (Tr. p.487, ll.8-25).

readily available source of sand for the downcoast property in the initial years following installation of the groins.

Notably, the Original and Amended Permits also require DCCA to comply with 26 “Special Conditions” and 16 “General Conditions.” (**R. pp.**) (Pet’r’s Exs. 41, 77) Special Condition 18 requires DCCA to monitor the beach profile, conduct post-storm surveys, conduct bathymetric surveys, take beach sediment samples, take samples from the borrow area (where renourishment sand is harvested), take aerial photographs, monitor compaction of the renourished beach, and monitor escarpment formation. *See (Id.)*.

Significantly for this appeal, Special Condition 22 in the Original and Amended Permits imposes requirements if there is “an increased erosion rate along the adjacent or downdrift beaches that is attributable to the three new permitted groins.” *See (Id.)*. In the Original Permit, mitigation was required when the background erosion rate³² approached -8.1 cy/ft./yr. (**R. pp.**) (Pet’r’s Ex. 41). But in response to the Baruch Settlement Agreement and ALC Order of Dismissal, DHEC amended Special Condition 22 as follows:

22. If the monitoring data collected according to Special Condition #18 shows an increased erosion rate along the adjacent or downdrift beaches that is attributable to the three new permitted groins, SCDHEC-OCRM will require mitigation as follows:

- a. that the groins be reconfigured so that the erosion rate on the affected beach does not exceed the background rate of .75 acre per year or 6.00 cy/ft./yr., (as set forth below in paragraphs 1 and 2);
- b. that the groins be removed; and/or

³² The background erosion rate is the natural erosion rate occurring on a specific shoreline based on existing morphological conditions. (**R. p.**) (Tr. p.408, ll.13-16). Put more simply, it is the existing average erosion rate, often expressed in feet of erosion per year. The background rate excludes the effects from renourishment projects because the additional sand modifies the natural erosion rate. (**R. pp.**) (Tr. p.408, l.22-p.409, l.12). As designed, the Project is expected to decrease the background erosion rate at both the Project area and on the adjacent Hobcaw Tract as a result of the groins and continued renourishments. (**R. p.**) (Tr. p.461, ll.1-3).

c. that the beach adversely affected by the groins be restored through renourishment. Baseline volume and shoreline position conditions will be based on the pre-project survey conditions. Subsequent analyses of project performance will be made relative to these baseline conditions.

1. Specifically, if the average erosion area for two consecutive years above Mean High Water (MHW) within the Hobcaw Tract from the southernmost groin to 4,180 feet south of the southernmost groin exceeds .75 acre per year, mitigation will be required. For purposes of this provision, MHW is defined as 2.05' NAVD '88 and the initial baseline condition for MHW will be determined by a survey to be taken within one month prior to the beginning of Project construction. After completion of the Project, MHW will be determined annually by a survey taken in May of each year.

2. Mitigation will also be required if the running average erosion rate within the Hobcaw Tract from the southernmost groin to 1,600 feet south of the southernmost groin exceeds the rate of 6.00 cy/ft./yr. Mitigation will also be required if the running average erosion rate from 1,600 feet south of the southernmost groin to 4,180 feet south of the southernmost groin exceeds the rate of 6.00 cy/ft./yr.

3. The exact form of mitigation required will depend on the location and extent of the adverse impact. When mitigation work is required, it must be completed as soon as possible, normally within three months.

4. DCCA has obtained a commitment for a letter of credit in the amount of \$1,000,000, which shall be in place prior to the commencement of construction. DCCA has provided documentation regarding the beach fund approved by its members to pay for this installation of groins and renourishment and for any future work that may be required on the Debidue or Hobcaw beaches. This community approval is for 17 years. After paying for the project, DCCA will accumulate funds over the following 12 years, estimated to be approximately \$10-\$12 million (based on current estimates for the project cost). These funds will be available for additional beach renourishment and/or groin reconfiguration or removal if needed. These funds are in addition to the \$1 million Letter of Credit.

(R. pp.) (Pet'r's Ex. 77, pp.1-2). In sum, the amendment—which is a product of the agreement of Hobcaw and DCCA—lowered the mitigation trigger point from -8.1 cy/ft./yr. to -6.0 cy/ft./yr. In addition to this volumetric trigger, the amendment added a shoreline loss-based trigger point of .75 acres per year. *See (Id.)*. A land loss of 0.75 acre in the affected area of Hobcaw Tract equates to a shoreline change rate between -7 and - 8 ft./yr. **(R. p.)** (Tr. p.463, ll.12-17).

In sum, the Amended Permit is more restrictive than the initial monitoring and mitigation conditions set forth in the Original Permit. As the ALC found, including two mitigation trigger rates increases protection for the downdrift area because it reduces the mitigation trigger rate well below the historic background erosion rate while also increasing the likelihood that the need for mitigation will be detected promptly. As noted, the Amended Permit also increased the Letter of Credit from \$500,000 to \$1,000,000. Mr. Slagel explained that the land-loss monitoring conditions in Special Condition #22 are more robust than any monitoring conditions DHEC has ever required, including those for recent groin/renourishment projects located on Hunting Island and Folly Beach. **(R. pp.)** (Tr. p.159, 1.17-p.160, 1.10). And finally, the amendment also shifted the southernmost groin 25 feet north of the shared property line with Baruch and about 45 feet west, further limiting the impact to the Hobcaw Tract property.

Standard of Review

1. ALC Standard

The ALC is the fact finder in a contested permitting case and makes a *de novo* determination regarding the matters in controversy arising from the agency's initial permitting decision. *E.g., Jones v. S.C. Dep't of Health & Env't Control*, 384 S.C. 295, 303, 682 S.E.2d 282, 287 (Ct. App. 2009). As the party challenging issuance of the Permit, SCCCL bears the burden of proving before the ALC by a preponderance of the evidence that DHEC should not have issued the permit. S.C. Code Ann. § 1-23-600(A)(5); *e.g., DIRECTV, Inc. & Subsidiaries v. S.C. Dep't of Revenue*, 421 S.C. 59, 78, 804 S.E.2d 633, 643 (Ct. App. 2017).

2. Agency Deference

The Supreme Court has held that “where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency’s interpretation absent compelling reasons.” *Kiawah Dev. Partners, II v. S.C. Dep’t of Health & Env’t Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014). If a statute or regulation administered by the agency “is silent or ambiguous with respect to the specific issue, the court then must give deference to the agency’s interpretation of the statute or regulation, assuming the interpretation is worthy of deference.” *Id.* In determining whether an agency interpretation is worthy of deference, courts must also consider whether the interpretation has been long-standing. *See, e.g., Etiwan Fertilizer Co. v. S.C. Tax Comm’n*, 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950) (“[W]here the construction of the statute has been uniform for 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 reason.”).

3. Judicial Review Standard

This Court “may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact.” S.C. Code Ann. § 1-23-380(5). Instead, this Court must affirm unless the ALC’s decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. The ALC’s decision is supported by substantial evidence if, “looking at the entire record on appeal, [there is] evidence from which reasonable minds could reach the same conclusion as the

ALC.” *Kiawah Dev. Partners, II*, 411 S.C. at 28, 766 S.E.2d at 715. Thus, on factual questions, the standard of review is that the agency’s decision must be sustained except to the extent that it has made clearly erroneous findings.

Summary of Argument

S.C. Code Ann. § 48-39-290(A)(8) provides that “[n]ew groins may be allowed only on beaches that have high erosion rates with erosion threatening existing development or public parks.” The statute further provides that “[g]roins may be permitted after thorough analysis demonstrates that the groin will not cause a detrimental effect on adjacent or downdrift areas.” *Id.* SCCCL challenges the findings of the ALC that the Project meets the statutory requirements for (1) high erosion rate, (2) threatened development, and (3) alleviating any downdrift impact.

SCCCL’s theories regarding high erosion and downdrift impacts rely almost wholly on arguments inconsistent with a proper textual and plain-language reading of the governing statutory language and principles of agency deference, and they are in stark contrast to the actual conditions at the Project area as shown by the substantial evidence presented to the ALC. And SCCCL’s arguments regarding threats to development would, if accepted, effectively require properties to be falling into the ocean before groins could be installed to stop erosion—at which point it would of course be too late. This Court should affirm the ALC’s determination that the approval of the groins as part of the Project is consistent with the statutory requirements and fully supported by the evidence of record.

1. High Erosion Rate

SCCCL primarily argues that the ALC erred in ruling that DHEC properly identified the Project area as having high erosion. The record, however, demonstrates that in characterizing an erosion rate as high, DHEC carefully considers not only erosive conditions throughout the State,

but also the specific site conditions and history of a proposed project area. The record further shows that DHEC acted within its authority and discretion in determining that conditions in the Project area constitute high erosion for purposes of § 48-39-290(A)(8). Although SCCCL contends that stable and accretional beaches should not be considered when determining whether an erosion rate is high, there is no statutory basis for or case law supporting this argument, and reaching the result posited by SCCCL means not reading the statute plainly or in context. Simply put, SCCCL has not and cannot sustain its burden of showing that the ALC violated any constitutional, statutory, or regulatory provisions in reaching its decision on this issue, and its ruling is supported by substantial evidence. The decision should be affirmed.

2. Erosion Threatening Development

The ALC properly determined that the groins proposed by DCCA are warranted because the erosion being experienced in the Project area is threatening existing development. SCCCL's argument is that erosion is not threatening existing development because only storm events threaten the structures in the Project area. This proposed requirement is found only in SCCCL's filings and is wholly absent from § 48-39-290(A)(8). Moreover, the substantial evidence of record shows that erosive site conditions threaten the structures in the Project area for purposes of the applicable statutory and factual analysis: there is no protective dry sand beach or dune system; the high-tide and vegetation lines encroach within feet of many of the structures; the bulkhead is overtopped during storms and seasonably expected tidal events, resulting in flooding and damage to homes on and inland from the beach; the bulkhead will fail absent a stable dry sand beach, resulting in greater harm and threat to structures on or near the beach; and at least six structures in the Project area are not behind the bulkhead and thus could be protected only by a stable dry sand beach—which will never exist absent the Project and subsequent renourishments. The ALC

properly and correctly found that, “by any reasonable definition,” multiple structures in the Project area are threatened for purposes of the applicable statute. **(R. p.)** (Final Order, p.26). The Court should affirm the ALC on this issue.

3. DOWNDRIFT IMPACT

Although the statute authorizes the installation of groins and contemplates mitigation for any downdrift impacts resulting from the groin, SCCCL argues that, never mind the absence of any limiting language in the statute, groins are allowed only if constructed at the end of the beach or where the downdrift landowner is the same person. Because there is no legal or factual basis to support SCCCL’s position, the ALC properly determined based on the substantial evidence of record that the groins will have no detrimental effect because the renourishment and mitigation provisions of the Permit are reasonable and appropriate and will serve to identify and alleviate identifying any potential future adverse impact from installing the groins. The ALC’s decision on this issue should be affirmed.

Argument

The Project is born from a long history of erosion, flooding, and property damage along DeBordieu Beach, where extensive and costly prior measures implemented to protect homes and the public beach have often failed or been only moderately effective. The Project in its current form is the result and culmination of hundreds of hours of research, engineering, modeling, site inspection, drafting, and, ultimately, collaboration with the downdrift landowner. The evidence shows that the Project provides the best and most efficient erosion control option for the community; complies with the strict requirements of the statute; satisfies the stringent concerns of the downdrift landowner; and, perhaps most notably, operates to leave the public beach in a better and more stable state than if it were not implemented. Rather than provide specific evidence or

contesting scientific analysis to support its stated opposition, SCCCL relies on generalized accusations and biased³³ statutory interpretation arguments that ignore the actual statutory language, the evidence of record, and the conditions experienced at the Project area.

1. The ALC correctly found that SCCCL failed to establish that there is not a high erosion rate in the Project area for purposes of § 48-39-290(A)(8).

The ALC noted that the question of what constitutes a high erosion rate may be legal or factual in nature. **(R. pp.)** (Final Order, pp.24-25). The court ultimately concluded that it did not need to resolve that question because, “under the facts of this case, the Project is in the area of high erosion. **(R. p.)** (*Id.*, p.25). Although the Project area’s long history and struggle with continuing and rapid erosion is well documented and supported by the record, SCCCL nevertheless contends that DHEC and the ALC erred in concluding that the erosion rate at the project area is high. The basis for its argument is that, when DHEC determines what is a high erosion rate for the South Carolina coast, it should not consider all beaches, but instead only those experiencing erosion. Appellant’s Initial Br., pp.22-24. This argument ignores the need for DHEC to determine what is “high erosion”—a term not defined by statute or regulation—throughout the State based on its sound expertise and discretion, which the record shows that it has consistently done over many years. As a matter of simple logic, omission of stable beaches from the analysis inevitably skews the baseline for erosional beaches upward, thereby distorting the appropriate threshold for determination. Importantly, SCCCL’s argument is not based on any independent modeling, because its expert witness did not prepare or submit any independent analysis of the erosion in the Project area, instead misapplying a report prepared by a person who neither appeared in nor

³³ SCCCL’s witness, Ms. Erin Pate, who lives in DeBordieu Colony and is SCCCL’s former North Coast Office Director, was deposed as a Rule 30(b)(6), SCRCF, witness for SCCCL, during which she testified that SCCCL is opposed to all groin projects in this State, even if those projects are lawful according to the statutes in South Carolina. **(R. pp.)** (Tr. p.47, l.19-p.48, l.3).

evaluated this case. As explained more fully below, regardless of whether the question is legal or factual, the ALC must be affirmed on this issue because either (1) DHEC’s reasonable and long-standing position defining a high erosion rate is entitled to deference, or (2) the ALC’s finding that there is high erosion in the Project area is supported by substantial evidence of record.

A. DHEC’s determination that erosion exceeding -3 ft./yr. is a high rate of erosion is entitled to deference and requires affirming the ALC on this issue.

Especially in light of the fact that SCCL does not contest the erosion rates calculated by CS&E, DHEC’s legal determination of a high erosion rate for purposes of § 48-39-290(A)(8) is reasonable and entitled to deference. *See Kiawah Dev. Partners, II*, 411 S.C. at 33, 766 S.E.2d at 717. Mr. Slagel testified that DHEC considers an erosion rate greater than -3 ft./yr. to be high based on its analysis of coastal conditions throughout the state. **(R. p.)** (Tr. p.74, ll.23-24). Mr. Slagel explained that DHEC’s determination of a high erosion rate is, in part, based on its review and analysis of data from almost 500 beach survey monuments³⁴ at which physical and repetitive beach profile measurements were taken over decades. **(R. pp.)** (Tr. p.74, l.24-p.75, l.13). DHEC’s review of beach monument data for purposes of a groin permit analysis includes reference data from all monuments in the state, including those that are erosional and accretional. **(R. p.)** (Tr. p.656, l.9). Similarly, Mr. Slagel testified that, for purposes of establishing and updating the jurisdictional baselines and setback lines, DHEC reviews long-term shoreline change rates for all

³⁴ Beach monuments are survey structures established by DHEC along the coast used to determine jurisdictional lines (the baseline and setback line) for purposes of coastal development laws. For a standard erosion zone, the baseline is established “at the location of the crest of the primary oceanfront sand dune in that zone.” S.C. Code Ann. § 48-39-280(A)(1); *see also* S.C. Code Ann. Regs. 30-1(26). The setback line is “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 [using the survey monuments].” S.C. Code Ann. Regs. 30-1(46); *see also* § 48-39-280(B); *State Beachfront Jurisdictional Lines*, S.C. Dep’t of Health & Env’t Control, <https://scdhec.gov/environment/your-water-coast/ocean-coastal-resource-management-ocrm/beach-management/state-beachfront> (last visited July 27, 2021).

beaches, both accretional and erosional beaches. **(R. p.)** (Tr. p.145, ll.15-17). As noted by the ALC, DHEC's consideration of all the state's shorelines inherently "provides a broader picture of how certain erosional rates fall within the spectrum of the State's rates as a whole." **(R. p.)** (Final Order, p.26). In short, DHEC's determination of a high erosion rate based on its consideration of the erosional status of all the state's beaches is reasonable and entitled to deference.

DHEC's determination regarding high erosion rates also is long standing, further entitling it to deference. *See, e.g., Etiwan Fertilizer Co.*, 217 S.C. at 359, 60 S.E.2d at 684. Mr. Slagel testified that DHEC has maintained its position regarding the -3 ft./yr. threshold for high erosion since at least the time of the Coastal Council, which was the predecessor to OCRM. **(R. p.)** (Tr. p.76, ll.9-10). Mr. Slagel further testified that, in addition to erosion data established from beach monuments, he understood that the Coastal Council established the -3 ft./yr. threshold based on historical erosion studies. **(R. p.)** (Tr. p.76, ll.14-22). Mr. Eiser confirmed Mr. Slagel's testimony that the Coastal Council and DHEC's long-standing precedent for high erosion is accurate based on his experience developed in working for OCRM for many years. **(R. p.)** (Tr. p.596, ll.1-5). Mr. Slagel also testified that DHEC's opinion as to the high erosion rate at Debidue Beach was further informed by S.C. Code Ann. Regs. 30-21,³⁵ which expressly states that "[t]he island is highly erosional in areas." **(R. p.)** (Tr. p.147, ll.6-19). Because Regulation 30-21 provides a separate heading for Hobcaw Tract, Mr. Slagel testified that he interpreted the regulation to reference the Project area, which suffers from the highest rate of erosion on DeBordieu Beach. **(Id.)**.

In short, as a legal question, DHEC's determination of a high erosion rate is a long-standing statutory interpretation entitled to deference. As previously noted, accepting SCCCL's argument

³⁵ As Mr. Slagel noted, the regulation is also referred to as the State's Beachfront Management Plan, in which every beach in the State is described for public access purposes. **(R. p.)** (Tr. p.147, ll.6-19).

to exclude accretional beaches would arbitrarily skew the baseline for erosional beaches upward in a manner inconsistent with the true conditions experienced throughout the State. Including all shoreline change rates in the State in the high erosion rate analysis provides a “broader spectrum” of data upon which DHEC can make its evaluation, thereby leading to better informed permitting decisions. *See (R. p.)* (Final Order, p.26). Because DHEC has reasonably determined that an erosion rate exceeding -3 ft./yr. is high, has maintained that position for many years, and there is no dispute that the erosion rate in the Project area exceeds that level, DHEC’s determination that erosion in the Project area is high for purposes of § 48-39-290(A)(8) is entitled to deference and requires affirming the ALC on this issue.

B. Even if the question of a high erosion rate is purely factual, the ALC’s carefully reasoned decision regarding the existence of high erosion in the Project area should be affirmed.

Factually, DHEC and DCCA’s experts agree that the erosion rate at a project site must be evaluated in context with the historical erosional conditions experienced at the site and with the specific site conditions of the location in mind for purposes of the statute. *See (R. pp.)* (Tr. p.156, ll.10-17; p.427, ll.18-22; p.428, ll.12-25; p.578, ll.3-4). SCCCL concedes that coastlines in this state are extremely dynamic places. Appellant’s Initial Br., p.5; *see (R. p.)* (Tr. p.229, ll.11-12). SCCCL also does not challenge the erosion rates calculated by CS&E. To the extent the determination of a high erosion rate is factual—i.e., made without regard to DHEC’s long-standing interpretation—it must be based on the conditions existing in the Project area. As fully demonstrated before the ALC, the conditions on DeBordieu Beach, particularly in Reach 3, reflect very high erosion, which has for many years rapidly transported sand from the beach and prevented the independent or natural formation and maintenance of a dry sand beach. The ALC’s determination that erosion in the Project area is high for purposes of § 48-39-290(A)(8) should be affirmed.

Substantial evidence fully supports the ALC's determination. In addition to the testimony discussed above, Mr. Slagel explained that DHEC's assessment of erosion on DeBordieu Beach was based on site inspections and the real-world conditions experienced at the Project area. **(R. pp.)** (Tr. p.155, l.4-p.156, l.17). He explained that DHEC's position on the high level of erosion at DeBordieu Beach was informed by his extensive familiarity with that area since 2007, which is when he started working for DHEC-OCRM. **(R. p.)** (Tr. p.156, ll.13-17). The evidence demonstrates that Mr. Slagel has experience with and knowledge of the numerous renourishment projects conducted at the site during those years, the property damage and flooding that have occurred in recent years at the community, and the various emergency permits that have been issued to the community for purposes of conducting sand scraping and other erosion-related activities in the context of storm or other erosion events. Mr. Slagel also testified that he reviewed and evaluated the work of CS&E in determining the erosion rate on DeBordieu Beach. **(R. pp.)** (Tr. p.146, ll. 12-16). And he explained that the erosion rate at the Project area is many feet higher than typical erosion rates experienced throughout the State. **(R. p.)** (Tr. p.654, ll.18-20).

Dr. Kana testified that the erosion rate at the Project area should "definitely" be considered high, specifically where the erosion rate at the south end (where the groins will be located) is much higher than at the north end of Reach 3. **(R. pp.)** (Tr. p.424, ll.2-9; p.428, l.25); *see also* discussion *supra* pp.5-6, 12-14 (discussing erosion gradients and increasing erosion rates in Reach 3). He explained that, for purposes of determining if an area has high erosion, it is necessary to place the proposed project area in context of the beach by analyzing the site conditions and history of erosion in that location. **(R. pp.)** (Tr. p.427, ll.18-22; p.428, ll.8,18-19). In other words, Dr. Kana

determines high erosion based on his analysis of conditions in the area in question rather than applying a one-size-fits-all scale. *See (R. p.)* (Tr. p.428, ll.19-21).³⁶

Similarly, Dr. Haiqing Kaczkowski³⁷ also testified that the erosion rate at the Project area should be considered high in the context of current site conditions and the “unhealthy” state of the beach at the Project area. *(R. p.)* (Tr. p.581, ll.12-24). She further testified that, due to the precarious state of the beach at the Project area, it is imperative for the community to “find a solution and do it as fast as possible before the condition gets worse.” *(R. p.) (Id.)*. Therefore, in her opinion, the erosion rate at the Project area should be considered high and the Project should be constructed as soon as possible. *(R. p.) (Id.)*.³⁸

³⁶ Much of SCCCL’s criticism of Dr. Kana’s testimony as it relates to this issue is based on a statement made that the erosion rate for Reach 3 would only be considered “moderate, getting towards high.” *See* Appellant’s Initial Br., p.10. Again, though, that statement is a general observation regarding erosion rates outside the context of a specific project area. As explained in the text, Dr. Kana states that the erosion rate where the groins will be located is “definitely” high. It also should be noted that the background gradient of erosion at the Project area remains high despite previous renourishment projects. *See* discussion *supra* pp.5-6. And, of course, the ALC was entitled to evaluate the credibility of the witnesses as the finder of fact. *E.g., DIRECTV, Inc.*, 421 S.C. at 80, 804 S.E.2d at 644.

³⁷ Dr. Kaczkowski is a registered professional engineer and is currently employed as the principal engineer at CS&E. *(R. p.)* (Tr. p.529, l.6). Dr. Kaczkowski supervised the modeling and design for the Project, including by signing the drawings regarding the design of the groins submitted to DHEC. *(R. p.)* (Tr. p.536, ll.17-20). She was qualified as an expert in modeling studies and evaluations of coastal engineering projects, coastal erosion assessments and beach restoration, and design and engineering of erosion control structures. *(R. p.)* (Tr. p.533, ll.15-20).

³⁸ Although SCCCL criticizes Dr. Kaczkowski’s opinion on this issue by noting that she previously stated that an erosion rate of -5 cy/ft./yr. should generally be the “magic number” to trigger a groin project, Appellant’s Initial Br., p.11, it does so by again ignoring Dr. Kaczkowski’s testimony that evaluating erosion “depends on where the project is located.” *See (R. p.)* (Tr. p.578, ll.3-4). In any event, as noted by the ALC, Dr. Kaczkowski did not state whether she considered -5 cy/ft./yr. to be a threshold for what is considered a moderate versus high erosion rate for purposes of the statutory groin analysis. *(R. p.)* (Final Order, p.9 n.3). She also did not say that groins are never justified if the erosion rate is lower than that number.

Although SCCCL’s expert witness, Dr. Young,³⁹ testified that the erosion rate at the project area was not high and was only moderate, the support for his testimony was derived not from his own modeling or analysis, but in very large part from a report commissioned by DHEC and authored by Chester Jackson (Jackson Report). **(R. pp.)** (Tr. pp.250-51). According to Dr. Young, the Jackson Report estimates the average erosion rate in South Carolina to be between -6 and -7 ft./yr., which exceeds the average Project area erosion rate for Reach 3 calculated by CS&E. **(R. p.)** (Tr. p.250, ll.22-23). However, Mr. Slagel testified that using the Jackson Report to evaluate the erosion at DeBordieu Beach is problematic because the average erosion rate in the Jackson Report is based on data from beaches that are erosional only, **(R. p.)** (Tr. p.649, ll.3-9); *see* **(R. pp.)** (Tr. pp.648-55), and is thus not representative of South Carolina beaches as a whole. Mr. Slagel further explained that, “if you’re incorporating the full data set for both erosional and accretional” beaches, the Jackson Report actually concludes that the average erosion rate for the State is equal to -.14 meters per year, which equates to -.46 ft./yr. **(R. pp.)** (Tr. p.649, ll.6-7; p.650, ll.11-18). This level obviously is below the rate calculated for the Project area by CS&E—it should be noted here that SCCCL did not challenge the erosion rates determined by CS&E—and also lower than the level DHEC views as a high level of erosion. And, again, it should be noted that the erosion rate for Reach 3 shown in Table 1 is an average for that Reach, with a higher erosion rate occurring in the Project area at the southern end of Reach 3.

Other evidence supports the ALC’s determination that the erosion rate experienced in the Project area is high. Mr. Eiser testified about the State of the Beaches analyses that he supervised and conducted during his service with OCRM. The State of the Beaches reports were a series of

³⁹ Dr. Young was qualified as an expert in the fields of coastal geology, coastal processes, and coastal zone management policies.

annual reports DHEC developed in which it published breach profile data taken from monuments or from beach survey data that DHEC contracted to have collected. **(R. p.)** (Tr. p.600, ll.5-13).⁴⁰ These reports evaluated the health of the State's many beaches and their erosional status.

Mr. Eiser explained that, pursuant to his review and analysis of the 2009 State of the Beaches Report, which he was responsible for compiling and drafting during his time at OCRM, the erosion rates in South Carolina are relatively low along large segments of the South Carolina coastline. For instance, the Grand Strand area, which represents approximately one-third of the entire South Carolina coastline, is eroding at a rate of only zero to -2 ft./yr. **(R. p.)** (Tr. p.599, ll.8-12). Mr. Eiser further explained that other beaches in the State have much higher erosion rates but represent vastly smaller segments of the coastline. **(R. p.)** (Tr. p.599, ll.1-3). As support, Mr. Eiser cited in part to a 1988 report published by Dr. Kana, which determined that only 26 out of 88 miles of the developed coastline in South Carolina, or roughly 30%, was eroding at a rate greater than -1 ft./yr. **(R. pp.)** (Tr. p.596, ll.18-25-p.597, ll.1-3). Mr. Eiser opined that, based on his review of the erosion data in the 2009 State of the Beaches Report and corroborating studies,⁴¹ when combined with his professional experience working with beach erosion in this State for the past 30 years, DHEC's determination that erosion exceeding -3 ft./yr. is high erosion was an appropriate and reasonable determination and, consequently, erosion at the Project area is high for purposes of applying the statute. **(R. pp.)** (Tr. p.595, ll.9-25-p.596, ll.1-5).

⁴⁰ The State of the Beaches Report is no longer published by DHEC. **(R. p.)** (Tr. p.600, l.16). The 2009 State of the Beaches Report was the last one published by DHEC.

⁴¹ As referenced by Mr. Slagel, Mr. Eiser further testified that certain historical studies informed his opinion as it relates to high erosion rates in the State. In addition to the 1988 Kana Report, Mr. Eiser testified that a report published in 1977 determined that erosion rates in South Carolina "typically range from 30 centimeters to 1 meter per year, which is roughly one to three feet." **(R. p.)** (Tr. p.596, ll.11-18).

In sum, the record more than adequately supports the ALC's finding that the erosion rate on DeBordieu Beach is a high level of erosion. SCCCL's single-minded focus on excluding data from accretional beaches ignores not only DHEC's reasonable and long-standing interpretation to the contrary, but also the factual evidence presented regarding the beach erosion conditions experienced throughout the State and the erosional conditions in the Project area. Indeed, SCCCL's position would require DHEC to review erosion data for purposes of the groin statute in a vacuum, without consideration of the real-time site conditions and historical erosion history of a proposed project area, or the normal erosion conditions experienced at extensive lengths of coastline (like the Grand Strand) for purposes of comparison. As noted by the ALC, DHEC's evaluation of high erosion rates for purposes of the groin statute is reasonably based on its consideration of overall shoreline change rates, including beaches that may be stable or accretional, "which provides a broader spectrum of the State's rates as a whole." (R. p.) (Final Order, p.26).

C. To summarize, under any analysis, the erosion rate at DeBordieu Beach is high for purposes of § 48-39-290(A)(8).

For the reasons stated above, SCCCL has not presented a "compelling" or "cogent" argument to contravene the required agency deference and overturn DHEC's long-standing position that beach erosion exceeding -3 ft./yr. is a high erosion rate for purposes of its analysis of the Project under the groin statute. *See Kiawah Dev. Partners, II*, 411 S.C. at 28, 766 S.E.2d at 718. SCCCL also has not met its burden to show that the ALC's determination that there is a high erosion rate in the Project area is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record."⁴² Rather, the substantial evidence of record fully supports the determination by DHEC and the ALC that the erosion rate at the Project area is "high"

⁴² The ALC concluded that "whether the Department's interpretation is a legal one or a factual one does not matter in this case because under the facts of this case, the Project is in the area of high erosion." (R. p.) (Final Order, p.25).

for purposes of the statute, and that SCCCL failed to sustain its burden to demonstrate otherwise. The finding of the ALC that there is a high erosion rate in the Project area should be affirmed.

2. The ALC correctly ruled that the groins are proposed for installation in an area with erosion threatening existing development.

Beyond the requirement of a high erosion rate, § 48-39-290(A)(8) allows constructing groins only on beaches “with erosion threatening existing development or public parks.” There is no statutory definition or regulatory guidance for identifying “threatened structures.” (**R. p.**) (Tr. p.103, ll.5-11). In a single-page argument, SCCCL rejects the ALC’s determination that existing development is threatened in the Project area, contending that structures in that area are threatened only by storm events and not by erosion. Appellant’s Initial Br., p.25. Given the paucity of discussion and lack of citations on this issue, SCCCL’s argument is essentially no more than a “mere expression of dissatisfaction with the ruling.” *Al-Shabazz v. State*, 338 S.C. 354, 379, 527 S.E.2d 742, 755 (2000). The Court therefore should reject this issue as abandoned on appeal. *See Fields v. Melrose Ltd. P’ship*, 312 S.C. 102, 106 n.3, 439 S.E.2d at 285 n.3 (Ct. App. 1993) (“[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argument in a short, conclusory statement without supporting authority.”); *see also Smith v. S.C. Dep’t of Soc. Svcs.*, 284 S.C. 469, 471, 327 S.E.2d 348, 349 (1985) (holding that a “petition [for review of administration action] must include all that is necessary to enable the appellate court to decide whether the ruling complained of was erroneous”).

Regardless, however, the record is wholly unresponsive of SCCCL’s argument and substantial evidence supports the ALC’s determination. As the ALC found, the evidence

**Illustration 5
Receded Vegetation Line**



demonstrates that structures behind the bulkhead, the bulkhead itself, and several houses south of the bulkhead are all threatened by erosion. The evidence shows that water repeatedly encroaches on several homes and regularly overtops the bulkhead. For example, Respondents’ Joint Exhibit 31 includes 16 pictures of the Project area taken in September 2019. **(R. pp.)**.

According to Mr. Slagel, those pictures were taken while Hurricane Humberto, a Category 1 storm, was over one hundred miles from the shoreline of South Carolina and never threatening the State. **(R. p.)** (Tr. p.166, ll.6-11). Nevertheless, the pictures show evidence of waves cresting over the entirety of the bulkhead, coming within several feet of or even intruding under houses, and extensively eroding what little dune remains in some areas. **(R. pp.)** (Resp’ts’ Jt. Ex. 31). For example, Illustration 5 shows a rugged escarpment line⁴³ and destroyed dune system behind the bulkhead (seen in the background with very high water), which appears to be at least several feet high.⁴⁴ Illustration 6 shows high water approaching the bulkhead, and Illustration 7 shows the

⁴³ See discussion *supra* p.10 n.14 (defining escarpment line).

⁴⁴ Respondents’ Joint Exhibit 32, **(R. pp.)**, is a series of short phone videos also taken by Mr. Slagel during the September 2019 site visit, which also reveal waves cresting over the bulkhead and eroding adjacent areas in close proximity to the homes in the Project area.

bulkhead at high tide. The ALC considered these and other photographs and videos from Respondents' Joint Exhibit 32 in its Final Order. **(R. p.)** (Final Order, p.26).

With respect to the current erosional status of the Project area, Mr. Slagel testified that he had not recently visited the Project area but had reviewed post-Isaias⁴⁵ imagery and stated that the dune that previously had been located in front of the houses south of the bulkhead had largely eroded. **(R. p.)** (Tr. p.200, ll.6-22). He further testified that images revealed the bulkhead itself was overtopped and further erosion landward of the structure occurred as a result. **(R. p.)** (Tr. p.200, ll.6-22). The site conditions evident in Respondents' Joint Exhibit 31 and other exhibits,⁴⁶ and the recent imagery referred to by Mr. Slagel above make clear that the high tide line in the Project area is landward of the bulkhead or approaches the foundations of the houses south of the bulkhead, in many instances.

Illustration 6
Water Approaching Bulkhead



Illustration 7
Bulkhead and High Tide Line



Mr. Slagel also explained that DHEC determined there to be six oceanfront houses south of the bulkhead “that, depending on any given day, are threatened,” based on whether a storm has passed or other conditions. **(R. p.)** (Tr. p.105, ll.2-9). He further testified that, landward of the

⁴⁵ Hurricane Isaias was a Category One storm that made landfall near Ocean Isle Beach, North Carolina (approximately 50 miles north of DeBordieu Colony).

⁴⁶ E.g., **(R. pp.)** (Resp'ts' Jt. Ex. 29, pp.1046-53, 4970-76, 5164-78; Exs. 51-52; Exs. 68-71).

bulkhead itself, there are approximately 12 houses that DHEC considers threatened. (*Id.*). Mr. Slagel testified that this determination was based, in part, on multiple site visits to the Project area. In June 2018, Mr. Slagel observed erosive conditions and almost no dry sand beach in front of the bulkhead at the Project area. (**R. pp.**) (Tr. p.155, 1.5-p.156, 1.17). In November 2018, Mr. Slagel observed even less dry sand beach adjacent to the bulkhead and Project area and noted that the dune system to the south of the bulkhead in the Project area had been completely cut in half by erosion since his initial visit. (*Id.*). He further stated that the southernmost property was “very close to the beach with almost no protection.” (**R. pp.**) (Tr. p.156, 11.8-9).⁴⁷ He acknowledged that the houses may not be under direct threat every day, but stated that DHEC has concluded that if the houses are threatened and have shown a repeated history of being threatened over time, then the statutory requirement is met. (**R. p.**) (Tr. p.105, 11.2-21).

Although SCCCL wants to disregard the impact of storms in the statutory analysis, the record fully supports the conclusion that the lack of a dry sand beach results in a threat to structures on an eroding beach. According to Dr. Kana, the lack of a dry sand beach causes waves to “reach development much quicker,” “overtop the [bulkhead],” “cause erosion behind the [bulkhead],” and subject the bulkhead to “possible failure.” (**R. p.**) (Tr. p.375, 11.7-11). Notably, Dr. Kana further explained that the problems associated with continued erosion at the bulkhead were at times the result of seasonably expected fall high tides and Nor’easters.⁴⁸ (**R. pp.**) (Tr. p.504, 1.20-p.505, 1.8). Specifically, Dr. Kana testified that fall tides combined with Nor’easters is “one of the [] biggest

⁴⁷ According to Mr. Slagel, the purpose of the visits was to document site conditions during June, when weather conditions are calmer, and November, when they are stormier. (**R. p.**) (Tr. p.155, 11.8-17).

⁴⁸ “A Nor’easter is a storm along the East Coast of North America, so called because the winds over the coastal area are typically from the northeast. These storms may occur at any time of year but are most frequent and most violent between September and April.” *What is a Nor’easter?*, Nat’l Weather Serv., <https://www.weather.gov/safety/winter-noreaster> (last visited July 27, 2021).

issues of the eroded beach at the seawall [where] wave overtopping runup gets higher and that's creating flood problems" for properties located behind the bulkhead. **(R. pp.)** (*Id.*). He also explained that, due to erosive conditions experienced at the site, there is often no dry sand in portions of the Project area. **(R. p.)** (Tr. p.375, ll.1-20). Dr. Kana and other witnesses also testified that, during a normal high tide, the water comes all the way up to the bulkhead at the Project area. **(R. pp.)** (Tr. p.33, ll.14-18; p.215, ll.16-18; p.342, ll.12-13).

Mr. Eiser echoed these concerns, testifying that the Project area's lack of a dry sand beach in effect robs it of a normal buffer and bank of sand that may be withdrawn during storm conditions, then redeposited during normal conditions. **(R. pp.)** (Tr. p.622, l.18-p.623, l.2). In other words, a dry sand beach provides a buffer, or a sacrificial volume of sand that can be lost during a storm while still protecting houses or infrastructure. The lack of a dry sand beach robs the Project area of this natural protection. (*Id.*); *see also* discussion *supra* pp.5-6 & n.8.

As the ALC found, erosion also threatens the bulkhead itself, which serves to protect existing development in the Project area. Mr. Eiser testified that the structures behind the south end of the bulkhead are threatened because the bulkhead was not designed to be exposed to constant tidal and wave action and is endangered by the erosive conditions currently existing at its location. **(R. pp.)** (Tr. p.616, ll.11-14; p.619, ll.8-18; p.620, ll.15-23). Specifically, he testified that the bulkhead is not tall enough or deep enough in the ground and, thus, does not provide enough protection for current conditions. (*Id.*). He further explained that, if only a small portion of the bulkhead is in the sand, the base may scour away, and water will start eroding the structural support for the bulkhead. **(R. p.)** (Tr. p.621, ll.4-8). He noted that a benefit of renourishment is that, by placing sand on the ocean side of the structure, it (and the houses behind it) will be protected from damage caused by storm waves. **(R. pp.)** (Tr. p.621, ll.12-14; p.622, l.18- p.623, l.2). He further

testified that five or six houses located south of the bulkhead have no protection whatsoever. **(R. p.)** (Tr. p.616, ll.17-20). Notably, Mr. Eiser also testified that he bases his opinion regarding the threat to structures on the location of the vegetation line at the Project area and its proximity to the houses, which he testified is a good indicator of how far landward the ocean water has extended or can extend on a high tide. **(R. p.)** (Tr. p.618, ll.2-11).

Along those lines, Ms. Blanche Brown, General Manager for DCCA, testified about the impacts to DeBordieu Beach from Hurricane Isaias in 2020. **(R. pp.)** (Tr. pp.519-523). She provided photographic evidence of the water damage resulting from the hurricane to houses south of the bulkhead and behind it. *See* **(R. pp.)** (Resp'ts' Jt. Exs. 68-71). Notably, the houses south of the bulkhead were supposedly protected by a sand-scraped dune at the time, which had been constructed after Hurricane Dorian washed away the dune system the year prior. **(R. p.)** (Tr. p.519, ll.13-21). However, Hurricane Isaias completely washed away that artificial dune. **(Id.)**. Ms. Brown also testified that waves and surge resulting from Hurricane Isaias washed over the beach and flooded DeBordieu Boulevard, which is located behind the row of houses along the bulkhead. **(R. p.)** (Tr. p.523, ll.5-17). According to Ms. Brown, the flood water was deep enough that it also blocked the entrance to a separate street that is an additional row further back from the beachfront. **(Id.)**.

Simply put, there is more than substantial evidence in the record supporting the ALC's determination that development at the Project area is threatened. To be sure, SCCCL's witness, Dr. Young, dismissively characterized the damage suffered by the community as a result of recent storms and tidal events as merely "a little bit of water [] com[ing] over the bulkhead." **(R. p.)** (Tr. p.252, ll.12-22). But in minimizing the conditions existing at the Project area and suffered by residents of DeBordieu Colony, he ignored the testimony of SCCCL's own witness, Mr. Francis

Ford, a resident of DeBordieu Colony, who stated that waves from Hurricane Dorian in 2019 passed over the dunes and into the street *to reach the second row of houses*. **(R. p.)** (Tr. p.343, ll.14-25). Dr. Young did acknowledge that a home should be considered threatened before it is falls into the ocean, **(R. p.)** (Tr. p.271, l.7), although SCCCL suggests that the threat does not arise long before that occurs. Dr. Young also admitted that, if the community does not continue to renourish the beach, the bulkhead will eventually fail within the next ten years. **(R. pp.)** (Tr. p.271, l.12-p.272, l.5). And Ms. Erin Pate testified that structures in the Project area are threatened by erosion and acknowledged sending an email from her work account characterizing those properties as “severely threatened.” **(R. pp.)** (Tr. p.36, ll.15-24). Although she attempted to deny making that assessment in her official capacity, she admitted that the houses located behind the bulkhead should be considered threatened based on her personal experience as a resident of the community. **(R. p.)** (Tr. p.42, ll.13-23). Mr. Ford also testified that he believed waves will continue to approach the homes in the Project area if continued renourishment projects are not implemented, which, he stated, was “the whole point in the beach renourishments.” **(R. p.)** (Tr. p.347, ll.20-21).⁴⁹

At bottom, SCCCL takes issue with how imminent the threat posed by erosion must be before groins are justified and, thus, takes issue with DHEC’s determination of that threat. But

⁴⁹ SCCCL also asserts that the ALC misinterpreted the groin statute by considering that the bulkhead (rather than the homes) is a threatened structure. Appellant’s Initial Br., p.25. It references a sentence in the Final Order, **(R. pp.)** (p.26), stating that “[w]ater does not necessarily overtop the bulkhead on a daily basis, but the bulkhead is exposed to wave action on a daily basis.” SCCCL’s argument on this issue takes out of context the finding in the Final Order, and the obvious conclusion and purpose for the ALC’s reference to site conditions at the bulkhead. As outlined in this Section, the structures in the Project area are objectively threatened by continued erosive conditions at the site, despite the presence of the bulkhead along certain lengths of the Project area. While the bulkhead does provide some protection for those homes in its current condition, experts for both sides agree that it will fail unless DCCA continues to renourish the beach, resulting in further damage to the houses in that area. Accordingly, the ALC’s reference to the condition of the bulkhead was a simple acknowledgment of the fact that an already-threatened area of beach will face even more peril if and when the bulkhead fails.

because there is no statutory or regulatory language defining “threatened by erosion,” DHEC has the discretion to evaluate conditions and determine whether existing development is threatened. There is substantial evidence showing that it has done that reasonably and appropriately in this case, despite SCCCL’s single-page argument to the contrary.

Moreover, in addition to the evidence discussed above, Mr. Slagel explained that DHEC’s determination regarding the threat to structures is informed in part by a separate regulation related to emergency erosion control permits **(R. p.)** (Tr. p.103-04). That regulation allows property owners to obtain emergency permits to undertake measures like installing sandbags and performing sand scraping when their property is in “imminent danger” due to the threat of erosion. S.C. Code Ann. Regs. 30-15(H) (stating that a “structure is determined to be in imminent danger when the erosion comes within twenty feet of that structure”). Mr. Slagel explained that, “[i]f imminently threatened is 20 feet from the erosion, then threatened is possibly a number that’s greater than 20 feet[,]” which suggests that the structures in the Project area are “threatened” due to their proximity to the erosion line and the nature of recent and historical erosive conditions at the site. **(R. pp.)** (Tr. p.103, 1.23-p.104, 1.1). Mr. Slagel further testified that interpreting “threatened” for purposes of the groin statute to be a lower standard than the “imminent danger” threshold for emergency permits makes practical sense, due to the nature of renourishment and groin projects, which can take several years to get through the permitting process. **(R. pp.)** (Tr., p.152, 1.10- p.153, 1.7.). Whereas emergency permits are meant to address more immediate needs, “[f]or instance, getting a bulldozer out to the beach to scrape the sand and build the dune because there’s [] a storm just passed and there's no more protection,” **(R. p.)** (Tr. p.152, 1l.16-20), the project area at issue in a groin permit “could be farther than 20 feet from the erosion when that

application first comes in, [] but likely could need protection [] over the next handful of years.”
(R. pp.) (Tr. p.152, l.25-p.153, l.4).

In sum, the decision of the ALC finding that structures at the Project area are threatened by erosion must be affirmed. The record demonstrates that the structures in the Project area are indeed threatened due to persistent erosion. As discussed above, the record contains extensive evidence regarding the history of erosion and renourishment projects located at the Project area, property damage and flooding suffered by the community in the area of concern, and testimony from both sides which supports DHEC’s position that development in the Project area is threatened for purposes of the groin statute in the context of both storm and seasonably expected weather events. The ALC’s decision therefore is supported by substantial evidence and, moreover, DHEC’s evaluation of the imminency of the threat, although contrary to the position advanced by SCCCL, is a reasonable and legal interpretation of the statutory requirements that is subject to deference. *Kiawah Dev. Partners, II*, 411 S.C. at 28, 766 S.E.2d at 718. The ALC should be affirmed on this issue.

3. The ALC correctly and properly determined that the proposed groins will not cause a detrimental effect on adjacent or downdrift areas.

At bottom, SCCCL’s argument here is that no groin should be allowed because § 48-39-290(A)(8) does not authorize DHEC to consider mitigation when determining whether the groins will cause a detrimental effect downcoast, never mind the statutory language expressly governing the mitigation and correction of downdrift impacts. *See* Appellant’s Initial Br., p.26. This argument simply is unsupported by and inconsistent with the statutory language. *See TNS Mills, Inc. v. S.C. Dep’t of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998) (“In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect.”). Section

48-39-290(A)(8)(a)(i-iii) expressly requires all groin permits to incorporate monitoring and mitigation components, a requirement which would be unnecessary if groins are allowed only if there are no downdrift impacts in any form. **(R. p.)** (Final Order, p.28); *see Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 42, 659 S.E.2d 125, 128 (2008) (holding that the “Court must presume the Legislature intended its statutes to accomplish something and did not intend a futile act”). Perhaps more to the point, as the ALC determined, the issue framed by the statute is whether there is a detrimental downdrift impact. **(R. p.)** (Final Order, p.28). The statute does not state “that mitigation cannot be considered when evaluating whether the effect of a groin will be ‘detrimental.’” **(Id.)** Thus, the statutory language should be read as a whole to require consideration of mitigation requirements and steps when evaluating whether there will be a detrimental downdrift impact.

Viewed in this light, the ALC therefore correctly determined that the groins installed in the Project area will have no detrimental effect on adjacent or downdrift areas. And, as noted by the ALC, the initial level of sand placed on the beach through renourishment will exceed the sand trapping capacity of the groins, thereby providing a source of sand that will be transported to the adjacent Hobcaw Tract and will, in the earlier years after completion of the Project, provide levels of sand that exceed the historical transport rates observed in the area. **(R. p.)** (Final Order, p.16). Although the volume of sand transported downcoast will decline over time, DCCA will be using the Beach Assessment Fund to financially support ongoing and regular monitoring and mitigation. And, importantly, the monitoring and mitigation requirements included in the Original Permit have been enhanced in the Amended Permit pursuant to a Settlement Agreement between Baruch and DCCA and the review by and agreement of DHEC.

If the monitoring implemented by DCCA shows an increased erosion rate as a result of the groins, in addition to other requirements, the Amended Permit requires (1) that the groins be reconfigured so that the erosion rate on the affected beach does not exceed the background rate of .75 acre per year or 6.00 cy/ft./yr.; (2) that the groins be removed; and/or (3) that the beach adversely affected by the groins be restored through renourishment. *See (R. pp.)* (Special Condition #22, Pet. Ex. 77). Moreover, the accompanying renourishment aspect of the Project will include up to 650,000 cubic yards of sand, which greatly exceeds the trapping capacity of the proposed groins. *(R. pp.)* (Tr. p.627, l.18-p.628, l.2). Furthermore, as noted above, sand will also be pumped directly onto a segment of the Hobcaw Tract directly downcoast from the southernmost groin as part of the Project. *(R. p.)* (Pet'r's Ex. 77, p.3). Accordingly, the amount of sand added from the Project will initially add shoreline to the downdrift beach, to the benefit of the Hobcaw Tract. Most importantly, the ongoing commitment to mitigation in the form of additional renourishment on the Hobcaw Tract will be required under the Permit if and when the downdrift erosion rate exceeds the mitigation trigger rate, which is below the uncontested background rate of erosion on that beach. Therefore, the Project as permitted will actually *decrease* the erosion rate on the downdrift Hobcaw Tract, as well as along DeBordieu Beach. As such, the uncontested evidence shows that the Project as permitted will result in more dry sand beach to the downdrift property than if it were not implemented.

Of course, DCCA is committed to ongoing renourishment activities in support of maintaining a dry sand beach in the Project area and ensuring that there is no detrimental impact to Hobcaw Tract. *See (R. pp.)* (Special Condition #22, Pet'r's Ex. 77, p.1; Tr. p.518, ll.4-11). The Beach Preservation Fund is an ongoing collection of payments from residents of DeBordieu

Colony to fund these ongoing renourishment projects.⁵⁰ But should removal of the groins and mitigation become necessary, the Beach Preservation Fund also is available to fund that undertaking and, in addition, DCCA has a seven-figure Letter of Credit (\$1,000,000) to fund any required mitigation should the Beach Preservation Fund be inadequate to support the actions needed. Combined with the Permit's monitoring requirements, which Mr. Slagel testified were the most stringent in the State, the mitigation components of the Permit mean that there will be no detrimental downdrift impact.

Although SCCCL asserts there “can be little question” that the impact of a groin should be considered in isolation from the mitigation provisions required by the statute, the fact is that the statutory language does not at all support its argument. Moreover, aside from evaluating that argument in the context of the existing statutory language, it should be considered that the current § 48-39-290(A)(8) was enacted as an amendment to the BMA in 2002 in the midst of litigation based on a pending groin project. *See S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control*, 354 S.C. 585, 582 S.E.2d 410 (2003). In that case, SCCCL argued that groins were prohibited under the BMA after DHEC issued a permit to a beach community in Hilton Head, South Carolina⁵¹ to construct four new groins and refurbish existing groins. *Id.*, 354 S.C. at 586, 582 S.E.2d at 411. SCCCL challenged the permit, contending that because groins were not

⁵⁰ As referenced above, DCCA has established a Beach Preservation Fund, which is expected to equal \$10-12 million over 12 years. **(R. pp.)** (*See* Special Condition #22, Pet'r's Ex. 77, p.1).

⁵¹ The permit in that case was issued pursuant to a then-existing regulation. Specifically, S.C. Code Ann. Reg. 30-13(N) (Supp. 2002) at that time authorized the use of groins where necessary “to enhance the design life of an ongoing renourishment effort.” The current version of that regulation no longer references groins but the requirement that new groin projects can only be implemented in the context of ongoing renourishment is specifically included in § 48-39-290(A)(8), as well as the current DHEC groin regulation, S.C. Regs. 30-15(G): “New groins may only be allowed on beaches that have high erosion rates with erosion threatening existing development or public parks. In addition to these requirements, new groins may be constructed, and existing groins may be reconstructed only in furtherance of an on-going beach renourishment[.]”

expressly listed as an exception to the then-existing prohibition on new construction on an active beach, DHEC lacked authority to issue the permit in the case. *Id.* The Supreme Court disagreed, however, holding that one BMA statute could not be read in isolation from other provisions, and concluding that “the BMA authorized OCRM to issue groin permits in furtherance of the State’s policy of encouraging certain types of erosion-inhibiting techniques and promoting beach renourishment where appropriate.” *Id.*, 354 S.C. at 589, 582 S.E.2d at 413. Although § 48-39-290 was amended during the pendency of that litigation to substantially its current form, the General Assembly notably did not amend the law to generally prohibit the construction of groins subject to exceptions. Instead, it amended the law to allow constructing groins so long as there are monitoring and mitigation programs in place to ensure no detrimental downdrift impact from the groins.

Finally, SCCCL asserts that, given the language of § 48-39-260, the Legislature intended for a groin to be considered in isolation from the rest of a beach project for purposes of determining a detrimental impact. Appellant’s Initial Br., p.28. As an initial matter, this issue is not preserved because SCCCL stated its § 48-39-260 argument as a separate issue in its Second Amended Prehearing Statement, (**R. pp.**); the ALC ruled on and rejected SCCCL’s § 48-39-260 argument separately from the downdrift impacts argument under § 48-39-290(A)(8), (**R. pp.**) (Final Order, pp.31-32); and SCCCL failed to include the § 48-39-260 argument in its Statement of Issues, *see* Rule 208(b)(1)(B), SCACR. The issue therefore is not preserved for review and should not be considered by this Court. *Jones v. Lott*, 387 S.C. 339, 345–46, 692 S.E.2d 900, 903 (2010), *abrogated on other grounds by Repko v. County of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018); *see also Forest Dunes Assocs. v. Club Carib, Inc.*, 301 S.C. 87, 89, 390 S.E.2d 368, 370 (Ct. App. 1990) (“Every ground of appeal ought to be so distinctly stated that the reviewing court

may at once see the point which it is called upon to decide without having to grope in the dark to ascertain the precise point at issue.”) (cleaned up).

Even if the Court does reach the issue, however, SCCCL’s argument should be rejected. Although § 48-39-260(3) says that the policy of the BMA is to “severely restrict the use of hard erosion control devices to armor the beach/dune system,” groins are not defined as “erosional control devices” in the BMA. *See* S.C. Code Ann. § 48-39-270(1) (defining “erosion control structures” to include only seawalls, bulkheads, and revetments); *see also* *S.C. Coastal Conservation League*, 354 S.C. at 587, 582 S.E.2d at 412 (“There is no question that groins are not ‘erosion control structures or devices’ as defined by S.C. Code Ann. § 48-39-270(1) [].”). And in 2018, the General Assembly changed the State’s beach management policy from retreat to preservation. *See* § 48-39-280(A). To this end, the BMA states that it is the policy of South Carolina to “(1) protect, preserve, restore, and enhance the beach/dune system, the highest and best uses of which are declared to provide . . . (b) a source for the preservation of dry sand beaches which provide recreation and a major source of state and local business revenue.” § 48-39-260(1)(b). As DHEC and DCCA demonstrated and the ALC found, the Project will serve the purpose of protecting, preserving, restoring, and enhancing the beach and dune system in the Project area and will help to preserve the dry sand beach on DeBordieu Beach.

To summarize, these statutory provisions and the historical background show that the General Assembly intended for monitoring and mitigation to be considered in determining whether groins will result in a detrimental downdrift impact. The uncontested expert testimony demonstrates that the background erosion rate on the downdrift Hobcaw Tract will actually *decrease* as a result of the Project, particularly in the initial years following installation of the groins as excess sand flows downcoast in levels higher than the historical erosion rate. Moreover,

DCCA is implementing a robust monitoring system to evaluate impacts to Hobcaw using levels and evaluations specifically agreed to by that adjacent landowner and to ensure that new renourishment projects are undertaken if and when the background erosion rate on Hobcaw begins to approach the defined trigger points. DCCA's commitment in this regard is long-term and fully funded, but also mandatory under the specific requirements of the Permit. Moreover, the monitoring and mitigation requirements of the Permit are more stringent than any previous groin permit in the State. SCCCL's effort to cobble together another so-called "plain language" argument—one that is anything but—was properly rejected by the ALC based on the statutory language and the evidence of record. SCCCL has not met its burden and the decision of the ALC on this issue should also be affirmed.

Conclusion

For the reasons explained above, the ALC's decision should be affirmed.

Respectfully submitted,

s/Tracey C. Green

WILLOUGHBY & HOEFER, P.A.

Tracey C. Green (Bar No. 9342)

Post Office Box 8416

Columbia, South Carolina 29202-8416

(803) 252-3300

tgreen@willoughbyhoefer.com

Randolph R. Lowell (Bar No. 16145)

J. Joseph Owens (Bar No. 102794)

133 River Landing Drive, Suite 200

Charleston, SC 29492

(843) 619-4426

rlowell@willoughbyhoefer.com

jowens@willoughbyhoefer.com

Attorneys for DeBordieu Colony Community Association

August 16, 2021
Columbia, South Carolina

RECEIVED

Aug 16 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2021-000158

South Carolina Coastal Conservation League,Appellant,

v.

South Carolina Department of Health and Environmental Control and
DeBordieu Colony Community Association, Respondents.

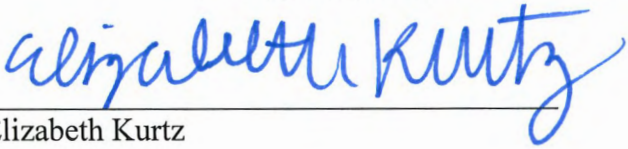
PROOF OF SERVICE

This is to certify that I, Elizabeth Kurtz, a paralegal with the law firm Willoughby & Hoefler, P.A., have caused to be served this day one (1) copy each of **Respondent DeBordieu Colony Community Association's Initial Brief and Designation of Matter** via electronic mail at the email addresses reflected in the Attorney Information System and as set forth below:

Leslie S. Lenhardt, Esquire
Benjamin D. Cunningham, Esquire
SC Environmental Law Project
leslie@scelp.org
ben@scelp.org

Sallie P. Phelan, Esquire
Bradley D. Churdar, Esquire
SCDHEC
phelansp@dhec.sc.gov
churdabd@dhec.sc.gov

A copy of the email serving counsel as stated above is attached hereto as Exhibit 1.


Elizabeth Kurtz

This 16th day of August, 2021
Columbia, South Carolina

EXHIBIT 1

Elizabeth P. Kurtz

From: Elizabeth P. Kurtz
Sent: Monday, August 16, 2021 4:22 PM
To: Leslie Lenhardt; ben@scelp.org; Churdar, Bradley; 'Phelan, Sallie P.'
Cc: Tracey Green; J. Joseph (Joe) Owens; Randy Lowell
Subject: South Carolina Coastal Conservation League v. SCDHEC and DeBordieu Colony Community Association | Appellate Case No. 2021-000158
Attachments: 2021-08-16 Filing Ltr re Initial Brief.pdf; 2021-08-16 Respondent's Initial Brief.pdf; 2021-08-16 Respondent's Designation of Matter.pdf; 2021-08-16 POS re Respondent's Initial Brief.pdf

Good afternoon,

Attached for service upon you are the following:

1. Filing letter to the Hon. Jenny Abbott Kitchings;
2. Respondent DeBordieu Colony Community Association's Initial Brief and Designation of Matter; and
3. Proof of Service (without a copy of this email).

Should you have any difficulty opening any of these documents, please advise us. If you have any questions, do not hesitate to let us know.

Thank you,



Elizabeth P. Kurtz
Paralegal
WILLOUGHBY & HOEFER, P.A.
930 Richland Street (29201)
P.O. Box 8416
Columbia, SC 29202
(o) 803.252.3300 | (d) 803. 771.2133
ekurtz@willoughbyhoefler.com

Confidentiality Notice: The information contained in this transmittal, including any attachment, is privileged and confidential information and is intended only for the person or entity to which it is addressed. If you are neither the intended recipient nor the employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any disclosure, copying or distribution or the taking of any action in reliance on the contents of this transmittal is strictly prohibited. If you have received this transmittal in error, please contact the sender immediately by telephoning the sender at (803) 252-3300 and, also, please delete this transmittal from any computer or other data bank. Upon request, we will reimburse your reasonable costs of notifying us of a transmission error. Thank you.

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. This advice may not be forwarded (other than within the taxpayer to which it was sent) without our express written consent.

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

MITCHELL M. WILLOUGHBY
JOHN M.S. HOEFER
RANDOLPH R. LOWELL**
TRACEY C. GREEN
CHAD N. JOHNSTON
JOHN W. ROBERTS
ELIZABETH ZECK*
ELIZABETHANN L. CARROLL
ANDREW J. D'ANTONI
R. WALKER HUMPHREY, II***
ANDREW R. HAND****
J. JOSEPH OWENS

ELIZABETH S. MABRY
J. PATRICK HUDSON
OF COUNSEL

JOSEPH H. FARRELL, III
SPECIAL COUNSEL

*ALSO ADMITTED IN TEXAS

**ALSO ADMITTED IN WASHINGTON, D.C.

***ALSO ADMITTED IN CALIFORNIA

****ALSO ADMITTED IN NORTH CAROLINA

August 16, 2021

VIA ELECTRONIC FILING BY EMAIL

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED

Aug 16 2021

SC Court of Appeals

Re: *South Carolina Coastal Conservation League v. SCDHEC and DeBordieu Colony
Community Association*, Appellate Case No. 2021-000158

Dear Ms. Kitchings:

Attached for electronic filing by email in accordance with Supreme Court Order 2020-05-29-02, part (c)(6), and pursuant to Rule 240(e) of the South Carolina Appellate Court Rules, Respondent DeBordieu Colony Community Association respectfully submits its Initial Brief and Designation of Matter to be Included in the Record on Appeal. As permitted by Order 2020-05-29-02, part (c)(6), the attached filing is being made to the email address for the Court of Appeals. As also permitted by the Court, no other copies, whether paper or electronic, are being provided.

By copy of this letter, we are serving counsel for Appellant via email as permitted by Order 2020-05-29-02, part (g)(3), and attached is a proof of service to that effect.

Thank you. If you have any questions or need additional information, please contact me at your convenience.

Sincerely,

WILLOUGHBY & HOEFER, P.A.

Tracey C. Green

TCG/epk

cc: Leslie S. Lenhardt, Esquire
Benjamin D. Cunningham, Esquire
Sallie P. Phelan, Esquire
Bradley D. Churdar, Esquire

OFFICES:

COLUMBIA | 930 RICHLAND STREET, COLUMBIA, SC 29201 | 803.252.3300 FAX 803.256.8062

CHARLESTON | 133 RIVER LANDING DRIVE, SUITE 200, CHARLESTON, SC 29492 | 843.619.4426 FAX 843.619.4490