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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

ALC Docket No. 19-ALJ-07-0089-CC

South Carolina Coastal Conservation League, ...Appellant,

vs.

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

PETITION FOR WRIT OF SUPERSEDEAS

TO: THE COURT OF APPEALS AND THE RESPONDENTS:

PLEASE TAKE NOTICE that the Appellant, South Carolina Coastal Conservation League ("Appellant" or "the League"), by and through their undersigned attorneys, hereby petitions the Court, pursuant to South Carolina Appellate Court Rule 241(c), for an order imposing a supersedeas of matters decided in the Final Order and Decision on appeal from the Administrative Law Court ("ALC"), so as to stay a portion of the beachfront construction proposed by Respondent, Debordieu Colony Community Association ("DCCA") pending resolution of this appeal. Such supersedeas is necessary in order to preserve jurisdiction, prevent this appeal from being rendered entirely moot and meaningless, and thereby preserving the status quo.

Introduction

The objectives of the Appellant, a nonprofit environmental advocacy group dedicated to protecting natural landscapes and quality of life in South Carolina, are threatened without

intervention of this Court. Without the supersedeas requested, this appeal would be rendered moot and meaningless and would deprive the Appellant of its due process right to judicial review. The supersedeas being requested would, therefore, preserve the status quo until this Court can review the ALC's Final Order.

Legal Standard

In a typical case, matters under appeal to this Court are automatically stayed so that this Court's meaningful review is preserved. *See* SCACR Rule 241 ("As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree."). However, this stay does not apply to appeals from contested cases of state agency permitting decisions. SCACR Rule 241(b)(11). As this is an appeal of a critical area permit and coastal zone consistency certification ("Permit") issued by Respondent South Carolina Department of Health and Environmental Control ("DHEC"), the automatic stay is not in place here. Rather, administrative appeals such as this are stayed upon motion "for an order imposing a supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal." *See* SCACR Rule 241(c)(1).[1]

While a stay is not automatic, the basis upon which this Court should grant supersedeas is not a particularly onerous one: "the appellate court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming

[1] Appellant contends this provision of the Appellate Court Rules as applied to state agencies constitutes an anachronism. Prior to 2006, appeals from administrative tribunals were filed in Circuit Court and would only reach this Court subsequently. While there may have been sound rationale for not imposing an automatic stay on an administrative appeal that had already had one level of judicial review, that rationale evaporates under the current system, wherein administrative tribunal decisions are appealed directly to this Court. The administrative appeals process removing the Circuit Court from the process was changed in 2006 by way of 2006 S.C. Acts 387. The Appellate Court Rules have not been updated in response.

moot." *See* SCACR Rule 241(c)(2). The South Carolina Supreme Court has held that "the general rule is that the effect of a supersedeas or stay is to suspend proceedings and preserve the status quo pending the determination of the appeal or proceeding in error" and to prevent a case from becoming moot. *Melton v. Walker*, 209 S.C. 330, 336, 40 S.E.2d 161, 164 (1946) (citing 4 C.J.S., Appeal and Error §§ 626, 662). Thus, preserving the status quo is equated with preserving the Court's jurisdiction.

Factual and Procedural Background

Appellant brought this administrative case on behalf of its members, including those members who reside within Debordieu Colony, seeking reversal of DHEC's decision to issue the Permit to DCCA to conduct beach renourishment and install three hard erosion control structures known as groins on the beachfront at Debidue Island, a barrier island on the coast. (Exhibit A, ALC's Final Order, p. 2, 7). Immediately downdrift of Debidue Beach is the Belle Baruch Foundation's property, which includes the Hobcaw tract that bounds the Atlantic and also includes an 18,000-acre National Estuarine Research Reserve (NERR) managed by the University of South Carolina. (*Id*. p. 16).

A groin is defined as "a structure designed to stabilize a beach by trapping littoral drift. Groins are usually perpendicular to the shore and extend from the shoreline into the water far enough to accomplish their purpose." S.C. Code Ann. Reg. 30-1(D)(26). The groins are to be constructed of rock and will extend between 300 and 400 feet perpendicular to the beach, with the southernmost structure to be located at the border between the Debordieu Colony property and the Hobcaw Tract.

In its Final Order, the Administrative Law Court concluded that Appellant offered testimony about the groins affecting "the useability of the beach for walking, biking, and other

forms of recreation." (Exhibit A p. 21). When the groins are installed, the beach will necessarily be unusable because of the installation of the three groins which are several hundred feet in length and require the placement of several tons of rock on the public trust property. Appellant's members will necessarily suffer an injury if the groins are allowed to be installed because the installation will interrupt their use and enjoyment of the beach. Appellant's members will suffer additional injuries while the groins trap sand and interrupt their ability to walk along the beach. If the ALC's Order is reversed, Appellant's members will also be injured upon the groins removal from public beach which will be a prolonged process involving the excavation of tons of rock from the beach. This interruption and injury will not occur if the status quo is maintained throughout the appeal.

Case History

The Permit under appeal in this case was granted under the South Carolina Coastal Tidelands and Wetlands Act, S.C. Code Ann. § 48-39-10 et seq. and the regulations promulgated thereunder. Appellant challenged that portion of the Permit authorizing the installation of the three groins on the following bases that ultimately were appealed to this Court:

a. Whether the permitted groins will have a detrimental effect on adjacent/downdrift areas;
b. Whether the permitted groins violate § 48-39-290(A)(8)(a)-(e) in that the beach in question does not experience a high erosion rate;
c. Whether erosion threatens existing development.

Appellant challenged SCDHEC's permitting decision by requesting a contested case before the Administrative Law Court. On July 16, 2019, Respondent DCCA filed a motion to lift the automatic stay.

In opposition to the Motion to Lift Stay, the Belle Baruch Foundation, who also appealed the Permit and whose contested case was consolidated with Appellant's contested case, filed an affidavit from Dr. Mohamed Dabees, who is a licensed professional engineer. He stated that:

> The cost and time required to remove the structures (including preparation of technical specifications, bid preparation and consideration, mobilization of crews and equipment, and then implementation of a removal plan) will be significant impediments to prompt and complete removal of the structures, resulting in a prolonged removal process. This removal process will further compound the irreparable harm to and impacts of the proposed groins on the Petitioner.

(Exhibit C, p. 3, Affidavit of Mohammed Dabees).

The ALC issued its order staying any construction under the Permit on August 28, 2019. (Exhibit B). The ALC ordered that though DCCA would be allowed to seek a federal permit from the U.S. Army Corps of Engineers, the automatic stay was ordered to remain in place and that "the Motion to Lift Automatic Stay to construct or install the groins is DENIED until further review of this Court." *Id.* at 14.

The ALC also expressed concern about "DeBordieu's ability to adequately remove the groins should they receive an adverse ruling…." (Exhibit B at 7). "Specifically, removal of the groins would require Respondent to un-install millions of pounds of rock and mats associated with the three groin structures. This would involve the labor of deconstructing three groins without permanent impact to the area and transporting rocks and materials away from the area." *Id*.

Prior to the hearing on the merits, the Belle Baruch Foundation reached a settlement of their appeal with DHEC and DCCA, which resulted in the issuance of an amendment to Special Condition 22 of the Permit. Appellant did not take issue with the amended language of Special Condition 22, but out of an abundance of caution, filed a requested for contested case hearing of the amendment provision on June 22, 2020 and the two cases were consolidated for hearing

purposes. The contested case hearing was conducted on August 24-26, 2020 and the ALC issued its Final Order affirming the issuance of the Permit on January 15, 2021. Appellants timely filed their Notice of Appeal of the Final Order of the ALC on February 15, 2021.

Appellant became aware in July of 2021 that DCCA was preparing to mobilize towards conducting renourishment and installation of the groins through its own publication of a newsletter to its members. (Exhibit D, DCCA Newsletter).

Pursuant to SCACR Rule 241(c)(1) and SCALC Rule 68, on July 19, 2021, Appellant filed a Motion for Supersedeas with the Administrative Law Court and a hearing was held on September 15, 2021. The ALC issued its Order Denying Stay on September 27, 2021. (Exhibit E, Order Denying Stay).

Discussion

Appellant seeks a stay to preserve this Court's jurisdiction for review of the ALC's Order and to prevent this case from becoming moot should DCCA undertake the construction of the groins. A failure to preserve the status quo, meaning a public beach without the challenged groins, would render Petitioner's appeal moot. The Supreme Court of South Carolina has recognized that even if the initial effects of a decision can be remediated, the appeal could still become moot.

The South Carolina Supreme Court issued a writ of supersedeas in circumstances similar to this appeal. The litigation underlying *Kiawah Development Partners, II v. S.C. Dept. of Health & Envtl. Control*, in which Appellant was also involved, centered on the installation of a bulkhead and revetment along the shoreline at Captain Sams Spit on Kiawah Island. 411 S.C. 16, 766 S.E.2d 707 (2014). The Supreme Court granted the Appellant's petition for a writ of supersedeas on July 22, 2010, and then denied a petition to lift the writ of supersedeas on July 11, 2014. (Exhibit G, Order Granting Petition for Supersedeas; Exhibit H, Order Denying Petition to Lift Writ of

Supersedeas). Even though the revetment and bulkhead could be removed following a reversal, the environmental damage in that case would have occurred when those were installed just as the environmental injury in this case would occur when the groins are installed. Here, if the groins could, with great effort, be removed upon the reversal of the ALC's order, the damage that attends their installation will already have transpired and additional damage would be imposed on the public beach at the time of their removal.

In *Town of Arcadia Lakes v. S.C. Dept. of Health & Env. Control*, there was a challenge to DHEC's authorization of a plan to fill wetlands and excavate a pond as part of an apartment complex construction. *See* 404 S.C. 515, 521, 745 S.E.2d 385, 389 (Ct. App. 2013). Construction of the apartment complex proceeded as the appeal was pending. (Exhibit F, Supreme Court Order, p. 1). The South Carolina Supreme Court granted a petition for a writ of certiorari to consider the appeal, but by the time the Court heard the case, the fill and excavation had been completed. *Id*. Therefore, the Court dismissed the appeal as moot on the basis of the permitted activity having been completed, citing the fact the ALC's decision had not been stayed under SCAR Rule 241 even though the wetland fill could have been excavated later if the challenger's received a favorable ruling. *Id*. at 2. Though this order was unreported and Appellant is not citing this as binding precedent, the case does demonstrate that under a set of similar facts, an appellate court can and has dismissed a case as moot.

Similarly, in a non-environmental setting, the S.C. Supreme Court entertained a petition for supersedeas where the underlying order terminated parental rights, affected an adoption and name change of a child. *Berry v. Ianuario*, 281 S.C. 21, 21, 314 S.E.2d 308, 308 (1983). Although a subsequent order from the appellate court could remediate the harm done by the trial court's

order, the Supreme Court granted the petition "in order to prevent the appeal from becoming moot." *Id*.

The ALC discounted the decision in *Berry* reasoning that it "has not found, nor have the parties provided it with, any South Carolina law that parental rights can be reinstated once they are terminated." (Exhibit E, p. 10). Of course, the issue isn't whether parental rights can be reinstated once terminated. This issue is whether a decision terminating parental rights can be appealed and reversed. There is no question that such a decision is subject to judicial review and, in the appropriate case, reversal. *See, e.g.*, *South Carolina Dep't of Social Services v. Smith*, 311 S.C. 426, 429-30, 429 S.E.2d 807, 809 (1993)(reversing order terminating parental rights); *South Carolina Dep't of Social Services v. Doster*, 283 S.C. 532, 533, 324 S.E.2d 86, 86-87 (Ct.App. 1984)(reversing termination of parental rights); *Greenville County Dep't of Social Services v. Bowes*, 313 S.C.188, 189, 437 S.E.2d 107, 108 (1993)(reversing termination of parental rights of mother). There is little doubt that a family court matter differs from an environmental case but in *Berry* the Supreme Court determined that a supersedeas would prevent some of the injuries that would attend a reversal. In this case, a supersedeas would similarly prevent some of the injuries that will befall Appellant's members and also prevent a reversal from exacerbating these injuries.

It is certain that the permitted activity Appellant has sought to preclude, the construction of groins, will be completed before a ruling by this Court and likely before any oral argument is held. Given the cases cited here, the appeal could be rendered moot and Appellant would lose its constitutionally guaranteed right to judicial review unless this Petition is granted. Appellant has satisfied SCACR's Rule 241's requirement for supersedeas relief.

Appellant has constitutionally protected due process rights that entitle it to administrative finality before construction activities occur on a fragile and dynamic area. The Fourteenth

Amendment provides in pertinent part that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S.C.A. Const. Amend. 14.

Article I, Section 22 of the South Carolina Constitution provides as follows:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, **and he shall have in all such instances the right to judicial review.**

(emphasis added). The Supreme Court has interpreted this section to provide a right of judicial review to interested parties seeking to challenge environmental permitting decisions: "parties with an interest in [SCDHEC environmental] certification are entitled to notice, an opportunity to be heard, and judicial review." *See League of Women Voters of Georgetown County v. Litchfield-by-the-Sea*, 305 S.C. 424, 426, 409 S.E.2d 378, 380 (1991); *see also Ogburn-Matthews v. Loblolly Partners*, 332 S.C. 551, 562, 505 S.E.2d 598, 603 (Ct. App. 1998)("[t]he requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review"), *overruled on other grounds, Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 560 S.E.2d 410 (2002). In this case, any review that comes after these three large structures are constructed on the beachfront extending into the ocean can hardly be described as "meaningful" by any standard of due process. At this point, only a stay can necessarily protect Appellant's due process rights.

This constitutional provision and the Supreme Court's interpretation thereof draw relevance here from the fact the Administrative Law Court falls within the executive department and it has in fact acted as an arm of the administrative agency in deciding contested cases like the

one under appeal.[2] Tracking the language of Section 22, then, the Final Order under appeal is a "quasi-judicial decision of an administrative agency" and Appellant shall not be finally bound by such administrative decision until it has had the opportunity to avail itself of the right to judicial review. Appellant's only opportunity for such judicial review is with this Court. In sum, the lack of a stay threatens a constitutional right to judicial review. Appellant submits an order of supersedeas is necessary to preserve the status quo until it has received judicial review of the administrative decision. Moreover, a later reversal of the ALC's Order would not only require removal of the groins but this removal would "compound the irreparable harm to and impacts of the proposed groins…." (Exhibit C, Aff. Dabees, p. 3).

The status quo in this case must be preserved by preventing the installation of three groins that bisect the public beach over hundreds of feet. At the contested case hearing, several members of the League testified they regularly walk, bike and otherwise recreate on the beach where the groins would be installed. (Exhibit A, p. 20). Allowing for the significant disruption of the natural beach by the construction of these groins including the placement of tons of rock on the beach, before Appellant can obtain judicial review, runs contrary to the standard of preserving the status quo. This interruption is separate from and in addition to the minor interruption caused by the placing of renourishment sand on the beach which is part of the Permit that Appellant did not challenge. This distinction was lost on the ALC.

In the hearing before the ALC, Appellant presented evidence that the installation of these groins would negatively impact not only the public's use of Debidue Beach but will likely negatively impact their use of and interest in the Hobcaw Barony property downdrift of the project.

[2] An agency "means each state board, commission, department, executive department or officer, other than the legislature, the courts, the South Carolina Community Development Board of the Tobacco Settlement Revenue Management Authority, authorized by law to make regulations or to determine contested cases." S.C. Code Ann. § 1-23-10(1).

These interests justify meaningful judicial review as to whether impacts to these public resources comports with the Coastal Tidelands and Wetlands Act and the regulations promulgated thereunder. Such review can only occur concurrently with supersedeas granted under SCACR Rule 241.

This Court should also waive any bond or only require a nominal bond in this matter because Appellant is a nonprofit organization and the interest sought to be protected is a public resource. Requiring a bond is not required and is left to the discretion of this Court. SCACR Rule 241(c)(3) ("The granting of supersedeas or the lifting of the automatic stay under this Rule **may be conditioned** upon such terms, including but not limited to the filing of a bond or undertaking, as the … appellate court, or judge or justice of the appellate court may deem appropriate.")(emphasis added). Bond was not required by the Supreme Court of South Carolina in the earlier decisions, see Exhibit G and H, and should not be required here.

This Court should either waive any bond or set only a nominal bond because this is an environmental case and Appellant is a nonprofit organization of limited means. Setting a bond in the amount Respondent, DCCA seeks, over $13,000,000.00, would necessarily deprive Appellant of its right to judicial review. Federal courts have reduced appeal bonds when the appellant is an environmental interest group with limited resources and a high bond would have precluded meaningful appellate review. *Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322, 322-23 (9th Cir. 1975)(reducing appeal bond from $4,500,000 to $3,500).

In an analogous setting, federal courts routinely require only a nominal bond when granting preliminary injunctions in environmental cases if the requester is a nonprofit because requiring a bond "would effectively deny access to judicial review." *People of California v. Tahoe Regional*

Planning Agency, 766 F.2d 1319, 1325 (9th Cir. 1985); *see also, Natural Resources Defense Council, Inc. v. Morton*, 337 F.Supp. 167 (D.C.C. 1971), aff'd on other grounds, 148 U.S.App. D.C. 5, 458 F.2d 827 (1972)(security of $100 required despite claim of $750,000 to several million dollars' damage to result if injunction granted); *West Virginia Highlands Conservancy v. Island Creek Coal Company*, 441 F.2d 232 (4th Cir. 1971)(no security required); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 331 F.Supp. 925 (D.D.C. 1971)($1.00 security to support injunction of construction of Tennessee-Tombigbee Waterway project): *Powelton Civic Home Owners Assoc. v. Dep't of Housing and Urban Development*, 284 F.Supp. 809 (E.D. Pa. 1968)(no security required despite request for $20,000,000 security); *Sierra Club v. Froehlke*, 359 F.Supp. 1289 (S.D. Texas 1971)($100 security to support order ceasing construction of two major hyro projects); *Bragg v. Robertson*, 54 F.Supp.2d 635, 652 (S.D.W.Va. 1999)(recognizing the court's discretion and requiring a $5,000 bond when mining company claimed losses in excess of $20,000,000 and potential loss of hundreds of jobs); *American Federation of Teachers-West Virginia, AFL-CIO v. Kanawha County Bd. of Educ.*, 592 F.Supp.2d 883, 906 (S.D.W.Va. 2009)($100 bond set).

The Court in Bragg noted that "commenters have observed the propriety of requiring little or no security in litigation of this type: [I]t is common for courts in environmental cases brought by environmental groups or individuals with limited means, particularly in NEPA cases, to require little or no security." 54 F.Supp. 2d at 652-53 (quoting Daniel Riesel, *Temporary Restraining Orders, Preliminary Injunctions, and Stays Pending Appeal in Environmental Litigation*, SA85 A.L.I.-A.B.A. 899, 955 (1996)(citing numerous cases) and citing 11A Charles A. Wright, Arthur R. Miller, Mary Kay Kane, *Fed.Prac. & Proc.Civil 2d* § 2954 (2d Ed. 1995)).

As in a NEPA case, the South Carolina General Assembly has specifically provided a mechanism for an "affected person" to obtain judicial review of agency decisions including those affecting the environment. S.C. Code Ann. § 44-1-60(G); *Preservation Society of Charleston v. S.C. Dep't of Health & Envtl. Control*, 430 S.C. 200, 212-19, 845 S.E.2d 481, 487-91 (2020) Setting an exorbitant bond in this matter would deprive Appellant of its right to judicial review. This Court, as the Supreme Court did in the *Kiawah Development Partners, II*, should not require Appellant to post any bond as a condition of granting supersedeas.

The Administrative Law Court's dicta relating to the issue of the amount of bond should be disregarded. Perhaps recognizing that Appellant would seek supersedeas in this Court, the ALC included dicta about the amount of any subsequent bond in an attempt to control that determination. The ALC improperly characterized this advisory opinion concerning the amount of any subsequent bond as a finding of fact. (Exhibit E, pp. 12-15). Rule 241(c)(3) expressly provides that "the granting of supersedeas … may be conditioned upon such terms … as [the] appellate court, or judge or justice of the appellate court may deem appropriate." Rule 241 (c)(3), SCACR. Other cases recognize that appellate courts may reduce previously set bonds. *See e.g., Bunkum v. Manor Properties*, 321 S.C. 95, 97, 467 S.E.2d 758, 759 (Ct.App. 1996)(noting that the Supreme Court reduced the appeal bond from $150,000 to $36,400 upon Bunkum's filing for supersedeas in that forum); *Bentree Apartments v. Allen*, 1991 WL 11766245 at *1 (Supreme Court of South Carolina Aug. 20, 1991)(Supreme Court reduced appeal bond from $375.00 per month to $8.00 per month). Here, even if the ALC had set a bond, this Court is free to alter it. The ALC failed to set a bond, however, and the ALC's attempt to limit this Court's discretion as provided by the Appellate Court Rules is unavailing.

Moreover, the ALC's supposed finding relating to the amount of the bond disregards Appellant's nonprofit status, the environmental nature of this case and the speculation inherent in the amount of Respondent's bond request. Appellant is a 501(c)(3) nonprofit organization with fewer than 40 people on staff. As a nonprofit, Appellant necessarily has limited means to pay any bond set by this Court in connection with its Petition for supersedeas. It would be impossible for Appellant to must a bond in the amount Respondent DCCA sought at the ALC. Requiring Appellant to post such a bond would mean that Appellant would be unable to seek judicial review of the ALC's erroneous Order. Therefore, Appellant respectfully requests that this Court, like others in similar situations, either waive the posting of a bond or only require a nominal bond commensurate with Appellant's nonprofit status.

Conclusion

For these reasons, Appellant prays that this Court issue an Order Granting Supersedeas, waive any posting of a bond or only require a nominal amount for a bond and stay the relief granted in the Order of the Administrative Law Court.

s/Leslie S. Lenhardt
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Mt. Pleasant, SC
October 13, 2021

EXHIBIT A

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, vs. South Carolina Department of Health and Environmental Control and DeBordieu Colony Community Association, Respondents.	)	Docket No. 19-ALJ-07-0089-CC **FINAL ORDER**
South Carolina Coastal Conservation League, Petitioner, vs. South Carolina Department of Health and Environmental Control and DeBordieu Colony Community Association, Respondents.	)	Docket No. 20-ALJ-07-0161-CC

Appearances:

For Petitioner:	Leslie S. Lenhardt, Esq., and Benjamin D. Cunningham, Esq.
For Respondent DCCA:	Tracey C. Green, Esq., J. Joseph Owens, Esq., and Randolph R. Lowell, Esq.
For Respondent DHEC:	Bradley D. Churdar, Esq. and Sallie P. Phelan, Esq.

STATEMENT OF THE CASE

This matter originally came before the South Carolina Administrative Law Court (ALC or Court) pursuant to a Request for Contested Case Hearing filed by Petitioner South Carolina Coastal Conservation League (League) challenging the decision of the South Carolina Department of Health and Environmental Control (Department) to issue Permit 2017-01795 (the Permit) to

Respondent DeBordieu Colony Community Association (DCCA) for beach renourishment and the construction of three groins along a 1.5-mile section of Debidue Island in Georgetown County, South Carolina. This original case, docket number 19-ALJ-07-0089-CC, was consolidated for hearing purposes with another Request for Contested Case filed by the Belle W. Baruch Foundation (Baruch) (docket number 19-ALJ-07-0088-CC) challenging the same permit issued by the Department.

While the litigation was pending in these cases, Baruch and DCCA filed a Joint Motion for Approval of a Settlement Agreement. Baruch and DCCA sought the Court's approval of a settlement agreement modifying Permit No. 2017-01795 in accordance with the agreement. On April 3, 2020, the Court dismissed Baruch's case with prejudice consistent with the Settlement Agreement. The Court also approved the modification of Permit 2017-01795; in particular, Special Condition 22.

On April 15, 2020, consistent with this Court's Order of Dismissal, the Department issued an Amended Permit, which remained identified as permit number 2017-01795. The Department advised that the amendment was made part of the original Permit and was subject to the full terms of the Permit as issued. After this Amended Permit was issued, the League requested a Final Review Conference before the Department's Board, which was denied. The League thereafter filed a second Request for Contested Case to challenge the Amended Permit. This case was assigned docket number 20-ALJ-07-0161-CC and was consolidated with the League's original case pursuant to an Order of Consolidation issued on July 30, 2020.

Accordingly, at the time of the merits hearing in this case, the League's two contested cases challenging the original Permit and the Amended Permit were before the Court. The merits hearing was held on August 24-26, 2020, at the Court's offices in Columbia, South Carolina.

FINDINGS OF FACT

Permit/Amended Permit at Issue

On January 24, 2019, the Department issued Permit 2017-01795 to DCCA to perform beach renourishment and construct three groin structures along a 1.5-mile section of Debidue Island in Georgetown County, South Carolina (the Project). The Permit authorizes two activities to be conducted within the protected critical area. First, the Permit allows DCCA to add "up to 650,000 cubic yards of beach-compatible sand" along approximately 1.5 miles (8,000 feet with 500 to 1,000 feet of tapers) of shoreline along Debidue Island. Second, the Permit authorizes

DCCA to install three permanent, sheet-pile-type groins extending from "300 and 400 feet from the back beach/bulkhead to the low tide line" at the southern end of the Project site. In order to secure these groins, the Permit authorizes armor stone scour aprons along both sides of all three groins at the seaward end of the structures. The apron for each groin will require approximately 1,500 tons of stone placed on 5,600 square feet of marine mattresses. The sheet piles will be made of steel or a composite reinforced fiberglass material and will be capped with concrete or a composite material.

The purpose of the work allowed under the Permit is "to restore the recreational beach, protect infrastructure and homes, reduce potential storm damages, maintain property values and the community tax base, maintain dry beach habitat for shorebirds and sea turtles, reduce renourishment frequency, and provide excess nourishment volume beyond the trapping capacity of each groin so that sand bypassing occurs to the downcoast area and erosion rates are reduced below the background erosion rate of - 8.1 cy/ft/yr for the downcoast area." The groin profile will be constructed to match the native beach slope. The northernmost groin will be placed along the bulkhead/seawall and be 300 feet in length terminating into the bulkhead. The middle groin will be 400 feet in length and will terminate at the southern terminus of the bulkhead. The southernmost groin will be 300 feet in length and be placed approximately twenty-five feet north of the property line between DCCA and Baruch.

The Permit also requires DCCA to comply with sixteen "General Conditions" and twenty-six "Special Conditions." The Special Conditions are Project-specific conditions that take precedence over DCCA's plans submitted with its permit application. Several of the Special Conditions address when construction can be undertaken to avoid disrupting sea turtles during their nesting season. For example, Special Condition 1 prohibits construction between July 1st and October 31st in accordance with the U.S. Fish and Wildlife Service's letter regarding the Project.

Another condition, Special Condition 15, requires that "[a]ccess along the beach in the vicinity of the new groins must be maintained or improved." This condition further provides that "[i]f access is impacted or eliminated, temporary access around or over the groins must be established immediately" and "[w]ithin 30 days of notification from the department, a plan to provide permanent access around or over the groins must be submitted by the entity responsible for the groin construction." The permanent access plan must be implemented within ninety days of the Department's approval of the plan.

Particularly important to this litigation, Special Condition 18 requires DCCA to monitor the Project site. Specifically, DCCA is required 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. Special Condition 20 provides the schedule for each type of monitoring. Special Condition 22 discusses the actions to be taken should the monitoring required by Special Condition 18 show "an increased erosion rate along the adjacent or downdrift beaches that is attributable to the three new permitted groins." If this type of erosion occurs, Special Condition 22 provides:

> SCDHEC-OCRM will require either that the groins be reconfigured so that the erosion rate on the affected beach does not exceed the historical/background rate, that the groins be removed, and/or 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. Specifically, if the running average erosion rate within the Hobcaw Tract [Baruch's property] from the southernmost groin to 1,600 feet south of the southernmost groin exceeds the historical/background rate of 8.1 cy/ft/yr,[1] mitigation will be required. 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 8.1 cy/ft/yr. 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. The permittee's agent, in a letter dated May 16, 2018, estimates that it would cost approximately $250,000 to reconfigure or remove the groins if required. The Letter of Credit dated August 17, 2018, serves as [DCCA's] commitment to reconfigure groins, remove groins, and/or restore the adversely affected beach through renourishment should it be determined that the three groins contemplated under this permit resulted in increased erosion rates. [DCCA] also implements a Beach Preservation Assessment, which generates funds solely dedicated to beach preservation.

The "trigger point" for mitigation under the original Permit was an erosion rate of - 8.1 cy/ft/yr. This volumetric change rate was developed to exclude the effects of the four beach renourishment projects that have been completed at Debidue Beach to better represent the natural

[1] Although the Permit appears to refer to the historical background rate as a positive 8.1 cy/ft/yr, which would indicate accretion, it is actually referring to an erosional rate. An erosional rate is usually referred to as a negative rate, as in – 8.1 cy/ft/yr. The Amended Permit, as discussed below, also includes "positive" rates that are actually "negative" rates of erosion. For the purposes of this Order, negative change rates will indicate erosion and positive change rates will indicate accretion.

background erosion rate. Matt Slagel, the Department's Beachfront Permitting Project Manager, explained that when the erosion rate begins to approach - 8.1 cy/ft/yr, then two years before that point DCCA should begin planning for renourishment or some other kind of mitigation. However, this two-year timeline for preparation for mitigation was not specifically included in the Permit.

The Department later amended the Permit in response to the Settlement Agreement reached between DCCA and Baruch. Special Condition 22 was amended 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
>
> 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.

The effect of the amendment was to lower the trigger point for mitigation from - 8.1 cy/ft/yr to - 6.0 cy/ft/yr. In addition to this volumetric trigger, the amendment added a land loss trigger above mean high water, which is located in subsection (a) of amended Special Condition 22. This land loss trigger rate is 0.75 acres per year. A land loss of 0.75 acre loosely equates to a shoreline change rate of – 7 to - 8 ft/yr. Having two mitigation trigger rates instead of one provides increased protection for the downdrift area because it reduces the chances that the need for mitigation will not be detected. For this reason, the Amended Permit is more robust than others the Department has issued for groins on Hunting Island and Folly Beach, which vaguely instructed mitigation would be required if the historic erosion rate increased but did not set a number or trigger rate. The amendment also shifted the southernmost groin twenty-five feet north of the shared property line with Baruch and about forty-five feet west. Finally, the amendment incorporated a new letter of credit from DCCA committing $1 million in funds for mitigation and access to DCCA's Beach Preservation Fund in contrast to its commitment of $500,000 in the original Permit.

History of DeBordieu Colony

The development of DeBordieu Colony on Debidue Island began in the 1970s. In 1981, a bulkhead (seawall) was built to address erosion. The bulkhead failed during Hurricane Hugo in 1989 and was thereafter rebuilt. The current bulkhead is approximately 4,500 feet long and terminates about 1,000 feet north of the last house in DeBordieu Colony. During the initial development of the area, no houses were built south of the bulkhead; however, when a new developer took over in 1985, several oceanfront homes were built south of the bulkhead in a section of the community called Ocean Green. Due to on-going erosion, DeBordieu Colony has conducted several beach renourishment projects over the years. Specifically, renourishment projects took place in 1990, 1998, 2006, and 2015, or about every eight to nine years. Each attempt at renourishment has required greater and greater amounts of sand to protect the beach. The 1990

and 1998 projects were smaller and placed around 100,000 to 200,000 cubic yards on the beach. The 2006 and 2015 projects were significantly larger at around 500,000 to 600,000 cubic yards each and required sand to be dredged from offshore and pumped onto the shoreline. The current Project intends to place the largest amount of sand to date, 650,000 cubic yards, on the beach.

Morphology of Debidue Island

Debidue Island is a barrier island along the coast of South Carolina. Barrier islands are dynamic places that often change rapidly; they are shaped by tides and storms. Debidue Island is bookended by two inlets, Pawley's Inlet to the north and North Inlet to the south. Sand generally migrates from the north to south along the South Carolina coast, although inlets can change and sometimes reverse the movement of sand in areas proximate to them. North Inlet is close enough to influence the erosional patterns at the Project area but not close enough to change the general migration pattern of sand from north to south in the project area.

Historic data from Debidue Island evidences an increasing erosion rate from north end of the island to the south end of the island. The erosion in the Project area is influenced by the closure in the 1930s of another inlet that used to exist on Baruch's Hobcaw tract just south of the property line between DCCA and Baruch. Due to the changing morphology associated with the closing of the old inlet on the Hobcaw Tract and the continued existence and dynamics of North Inlet further south, Debidue Beach is unstable and not in equilibrium. A beach that is in equilibrium is reflected by an arcuate beach that forms an arc—or C-shape—between the inlets or other anchor points along the coast. In contrast, the shoreline of a coastal area that is not in equilibrium tends to have an S-shape, with part of the beach forming an arc and the other part extending into the ocean in an effort to reach an equilibrium shape. The northern part of Debidue Island is an arcuate shape anchored by Pawley's Inlet in the north and extending to the northern part of DeBordieu Colony's property, but the southern part where the Project will be located is more of an S-shape. This particular set of morphological circumstances where the Project is proposed contributes to the higher rate of erosion at the south end of Debidue Island compared to the north end. The proposed groins will, in effect, create a new anchor point to form the arcuate beach shape on the southern part of Debidue Island and allow that shoreline to approach equilibration.

Erosion Rate at the Project Area

The parties disagree about whether the background erosion rate at Project area is "high" for the purpose of installing the groins and introduced the testimony of experts on the subject. The

background erosion rate is the erosion rate that would accrue based on existing morphological conditions without the influence of erosional structures or renourishments.

Dr. Timothy William Kana, the President of Coastal Scient & Engineering (CSE), gave expert testimony on the erosion rates at Debidue Island.[2] He was qualified as an expert in beach erosion, coastal geomorphology and processes, sediment buckets and transport, beach restoration, planning design and implementation, and tidal inlet sediment dynamics. Dr. Kana has studied the beachfront of Debidue Island off and on since 1974. He published a thesis on coastal processes on Debidue Beach in the 1970s, participated in consulting with a firm on an assessment and restoration plans for Debidue Beach in the 1980s, and in the 1990s helped design restoration projects and renourishment for the beach. Therefore, Dr. Kana has extensive experience in the area at issue. The Court found him to be highly credible and his testimony was persuasive.

In Dr. Kana's opinion, volumetric measures of change in the amount of sand on the beach are more accurate than shoreline change rates because volumetric measurements are better at removing "noise" in the shoreline change system caused by tides or other influences. For example, because DeBordieu Colony has a 4,500 ft bulkhead in front of part of its property, the shoreline cannot change and move inland; however, that does not mean erosion stops. Even with the bulkhead in place, erosion still occurs, it is just more likely to be reflected in a volumetric change in sand rather than a shoreline change. Nevertheless, for long-term, historical analyses of erosion, shoreline change rates are the most available measure because cross-sectional beach profiles used for volumetric measures did not become readily available until the 1990s when the Department installed several "monuments" on the beaches to monitor and measure changes more precisely.

To evaluate the shoreline and volumetric changes at the Project area, Dr. Kana and his team looked at shoreline change from the 1930s to the 1990s using aerial photography and data on beach cross sections collected from the 1990s and forward. This practice is consistent with how experts in his field evaluate erosion rates and shoreline changes. Dr. Kana also consulted studies by the University of South Carolina and the Army Corps of Engineers, his own firm's historic work in the area, the Department's estimated erosion rates, and a study performed by Applied Technology Management (ATM), another coastal engineering firm that analyzed a prior renourishment project on Debidue Beach . The Court finds the methodology used by Dr. Kana and CSE in estimating

[2] Dr. Kana's firm, CSE, developed the proposed Project before the Court.

the background erosion rate at DeBordieu Colony is a well-accepted method in the field of coastal morphology.

For the purposes of discussing shoreline change on Debidue Island, the island's coastline was broken into four Reaches. Reaches 1 and 2 comprise the northern parts of the island, Reach 3 is the Project area, and Reach 4 is comprised of the Hobcaw Tract. It is undisputed that the erosion rate increases from Reach 1 to Reach 4. Dr. Kana testified the average erosion rate for Reach 3, where the Project will be located, is - 4.2 cy/ft/yr (volumetric change rate), which equates to approximately - 5.5 ft/yr (linear shoreline change rate). Notably, the rate of - 4.2 cy/ft/yr is an average for all of Reach 3. Furthermore, the south end of Reach 3 is eroding at a much more rapid rate than the northern end of Reach 3 and its rate is likely to be closer to CSE's estimated erosion rate for Hobcaw tract of - 8.1 cy/ft/yr or approximately - 10.5 ft/yr. In comparison, the northern part of the island has an erosion rate of between 1.4 cy/ft/yr and - 0.4 cy/ft/yr.

Dr. Kana classified an erosion rate of - 4.2cy/ft/yr as a moderate to high erosional rate.[3] In Dr. Kana's opinion, whether an erosion rate is high or not based upon the context of the area at issue. He explained that although some other South Carolina beaches are eroding at a much higher rate of - 20 ft/yr, Debidue's rate is also high because of the gradient of the shoreline change rate from the north to the south end of the island. The change in gradient is not only reflected by CSE's estimated shoreline change rates for the Reaches, but also by the Department's baseline and setback line. The baseline[4] and setback line[5] diverge as they proceed south, growing to three to

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[3] Dr. Haiqing Liu Kaczkowski, the principal engineer at CSE, also classified the erosional rate as "high." Dr. Kaczkowski was qualified as an expert in modeling studies and evaluations of coastal engineering projects, coastal erosion assessment and beach restoration, and design and engineering of erosion control structures. Although she classified the rate as high, she also opined that the threshold rate for when a hard structure is needed to control erosion is an average erosion rate of – 5 cy/ft/yr. However, Dr. Kaczkowski did not state whether she considered – 5 cy/ft/yr to be a threshold for what is considered moderate versus high.

[4] The baseline is established in different ways based upon the nature of the area. For a standard erosion zone, it 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). Furthermore, "[i]n a standard erosion zone in which the shoreline has been altered naturally or artificially by the construction of erosion control devices, the baselines must be established by the Department using the best scientific and historical data, as where the crest of the primary ocean front sand dune for that zone would be located if the shoreline had not been altered." *Id.*

[5] 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 and adopted by the Department in the State Comprehensive Beach Management Plan. However, all setback lines shall be established no less than twenty feet landward of the baseline, even in cases where the shoreline has been stable or has experienced net accretion over the past forty years." S.C. Code Ann. Regs. 30-1(46); *see also* S.C. Code Ann. § 48-39-280(B).

four times further apart than they are on the northern part of Debidue Beach , which means that the erosion rate is increasing toward the southern end of the beach.

Importantly, in estimating the background erosion rate, Dr. Kana and his team excluded data that was collected soon after renourishments at Debidue Island because renourishment events can artificially raise the background erosion rate. The sudden large increase of sand after a renourishment provides more sand for the system to move more quickly and has driven the erosion rate up as high as - 30 ft/yr in the past, which is much higher than the background erosion rate before renourishment. Erosion rates slowly stabilize after renourishment events and come into an equilibrium. Although Dr. Kana did not use data from renourishments to establish the background erosion rate, he reviewed the prior effects of renourishments on Debidue Beach. Dr. Kana opined that CSE's analysis with respect to the prior renourishment projects demonstrates that there is less erosion on the Hobcaw Tract after renourishments and there is some net gain on Debidue Beach, but this gain is at a much lower rate than is desirable. In other words, frequent nourishment has been required to keep pace with erosion along Debidue Beach.

Dr. Kana's classification of the erosion rate as high is consistent with the Department's historic classification of erosion rates. The Department has historically considered any erosion rate above - 3 ft/yr to be high since the Coastal Council (DHEC-OCRM's predecessor) was created.[6] This threshold for what constitutes a high erosion rate is based on an analysis of shoreline changes across the state, both erosional and accretional, using an analysis of its statewide network of approximately 500 beach monuments and prior studies of erosion in South Carolina. The - 3 ft/yr rate does not necessarily represent the mean erosion rate because the Department finds the range to be more probative than the mean. Nevertheless, during rebuttal, Mr. Slagel explained that, based on the Department's most recent statewide shoreline change rate calculations from 2017, the average shoreline change rate for the State was - 1.5 ft/yr. He also testified that the median shoreline change rate for the State was - 0.11 feet per year. Accordingly, the Department's classification of an erosion rate above - 3 ft/yr as high is supported by data on the State mean.

In contrast, the League introduced the testimony of Dr. Robert Young, who was qualified as an expert in the fields of coastal geology, coastal processes, and coastal zone management

[6] The Department mostly relies on shoreline change rates because this data goes back hundreds of years to the late 1800s and provides a big-picture view of how the shoreline has changed over time. In contrast, the Department only has about thirty years' worth of volumetric data using the monuments.

policies. In Dr. Young's opinion, Reach 3 does not have a high erosion rate. Dr. Young did not quarrel with Dr. Kana's proposed erosion rate; rather, he believes a shoreline change rate of - 4.2 cy/ft/yr or - 5.5 ft/yr is moderate erosion rate in South Carolina. His opinion on what is a low, medium, or high rate is based upon his historic knowledge, his observation of shorelines for high erosion indicators like trees falling into the ocean, and his qualitative experience of 25-30 years in the State of South Carolina. However, he had not conducted a quantitative statewide erosion assessment. Rather, Dr. Young relied, in part, on a report commissioned by the Department and authored by Chester Jackson (the Jackson Report)[7]. According to Dr. Young, the Jackson Report estimates the mean erosion rate in South Carolina to be between - 6 to - 7 ft/yr, including both accretionary shorelines and erosional shorelines. Dr. Young essentially equated the mean shoreline change rate with moderate erosion, suggesting that for an erosional rate to be "high," it would need to be above the mean. Dr. Young also relied on the Department's Coastal Hazard Vulnerability Assessment website, which reflected that DeBordieu Colony was an area of moderate to low erosion at – 6-7 ft/yr. He stated this website relied on data from the Jackson Report.

However, I find the Jackson Report is not as reliable or probative as other evidence introduced in this case for a several reasons. First, the rate cited by Dr. Young in the Jackson Report was the mean shoreline change rate for erosional areas only. The Jackson Report provided an overall mean rate for erosional and accretional areas that is approximately - 0.14 m/yr or - 0.46 ft/yr. Second, the testimony indicated the Jackson Report likely did not filter out the renourishment events when establishing shoreline changes for the report. Like Dr. Kana, Dr. Young agreed that looking at erosion immediately after a renourishment can be misleading and give a falsely high rate because the system is out of equilibrium for a while. Additionally, the Jackson Report only used data sets from three "shoreline years" to conduct an end-point analysis: one from the 1800s, one from the 1930s, and one from the 2000s, whereas the Department calculates shorelines rates using seven to nine shoreline years for a more accurate data set. Lastly, because the Department's Coastal Hazard Vulnerability Assessment website suffers from the same limitations as the Jackson

[7] This report is entitled "Mapping Coastal Erosion Hazards Along Sheltered Coastlines in South Carolina 1849 to 2015."

Report, I do not find it to be reliable either. In sum, I found Dr. Young's testimony to be less credible than the opposing evidence.[8]

Overall, I find the preponderance of the evidence shows the erosion rate at the Project area is high. In particular, I find the Department's long-standing interpretation of what constitutes a "high" erosion rate is significantly persuasive. The Department has historically considered an erosion rate over - 3 ft/yr to be high. Although the Department's shoreline rate change threshold of -3 cy/ft/yr is not recorded in any statute or regulation, both Mr. Slagel and the Department's former employee of many years, William Eiser, recognized its existence. The Department's rate represents the threshold at which point moderate erosion changes to high erosion, and the erosion rate at the Project area exceeds this threshold. Therefore, the erosion rate at the Project area is high.[9] Moreover, Dr. Kana's opinion that a rate of -4.2cy/ft/yr or -5.5 ft/yr is moderate to high is consistent with the Department's interpretation. And, - 5.5 ft/yr is much greater than the average shoreline change rate for the State in 2017 as calculated by Mr. Slagel, which was - 1.5 ft/yr. It is also greater than the median shoreline change rate for 2017, which was - 0.11 ft/yr.

Background Rate of the Hobcaw Tract

In order to protect the downdrift beach, the Hobcaw Tract, from downdrift effects, the Permit and Amended Permit includes mitigation trigger rates. These trigger rates are based upon the estimated background erosion rate for the Hobcaw Tract so that mitigation can be implemented when the monitored erosion rate at Hobcaw begins to exceed the background erosion rate. The Amended Permit requires monitoring for ten years initially. The evidence shows the background erosion rate for the Hobcaw Tract, or Reach 4, is estimated to be - 8.1 cy/ft/yr or - 10.5 ft/yr.[10]

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[8] I also recognize that Regulation 30-21 of the South Carolina Code of Regulations states:

> Debidue is a private beach community. Access is controlled by a security gate. The entire beach is developed, and public access is nonexistent. The island is highly erosional in areas.

S.C. Code Ann. Regs. 30-21(D)(5)(b). However, this assessment of Debidue Island is discussed in the context of evaluating public access for the purpose of the State Beachfront Management Plan and does not specify which areas of the island are "highly erosional." *Id.* Therefore, I do not find it to be very probative.

[9] The League noted the erosion rates at the Project are not comparable to the erosion rates at Hunting Island or Folly Beach, which have erosion rates of approximately – 15 to - 20 ft/yr. However, Hunting Island and Folly Beach represent some of the highest erosion rates in the entire State. Moreover, the Court does not find that, for an erosion rate to be considered high, it must represent the extreme end of the erosional spectrum like Hunting Island or Folly Beach.

[10] The League did not express an opinion about what would constitute an adequate monitoring program.

Downdrift Impact

Purpose and Function of Groins

A groin is a "hard"[11] erosion control structure that is placed on the beach to reduce erosion. Regulation 30-1(26) defines a groin as follows:

> Groin - a structure designed to stabilize a beach by trapping littoral drift. Groins are usually perpendicular to the shore and extend from the shoreline into the water far enough to accomplish their purpose. Groins are narrow and vary in length from less than one hundred feet to several hundred feet. Groin fields are a series of two or more groins which, because of their proximity to each other, have overlapping areas of influence. Consequently, the entire groin field must be considered as one system in order to accurately analyze beach response.

S.C. Code Ann. Regs. 30-1(26) (2012). The function of a groin is to reduce the flow of sand along the shore (littoral drift) and retain some of that sand on the updrift side of the groin. In South Carolina, the longshore current carries sand along the shore and generally moves sand from north to south. Therefore, to trap sand on the updrift side of a groin, the groin must be placed perpendicular to the longshore sediment current. These structures are usually viable for decades.

In this case, the three proposed groins are designed to trap sand on the critically eroding part of Debidue Beach and thereby slow the rate of erosion in this area. The groins will be low-profile groins that follow the natural slope or contour of the beach. They are estimated to trap between 50,000 to 75,000 cubic yards of sand (trapping capacity) upon full equilibrium. DCCA plans to renourish the beach before installing the groins to create a platform upon which to build the groins.

For a period of time after the groins are installed, they will not be visible because the renourishment will cover them with about three times more sand than the trapping capacity of the groins. In other words, more sand than the groins can hold will be on the beach, which will allow the excess sand to erode and move naturally down the shore with the longshore current while the groins remained covered. However, eventually the excess sand will erode and expose portions of the groins. The groins may be exposed from less than a foot to three to four feet in some areas, mostly in the front beach. The exposure of the groins may require persons walking on the beach to hop over the structures in certain areas, but the groins should remain covered and freely passable along the back beach.

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[11] In contrast, renourishment is a "soft" solution to erosion.

Initially, the excess sand from the renourishment will prevent the groins from having the effect of withholding sand from the downdrift beach. In fact, the downdrift beach—the Hobcaw Tract—is likely to initially receive more sand than it would in the absence of a renourishment. Indeed, Dr. Kana opined that in the first five years after nourishment Hobcaw will benefit from the excess sand from the renourishment. However, once the excess sand is eroded, the groins' function to trap sand on the updrift side will begin to affect the downdrift beach. Specifically, because not as much sand is reaching the downdrift side to nourish it, the groin can exacerbate erosion on the downdrift side.

Nevertheless, the effect of a groin or groins on the downdrift side can be mitigated. DCCA proposes to initially mitigate the impact in this case by renourishing the beach when the groins are installed. Dr. Kana and Dr. Young opined the amount of the renourishment in this case will exceed the traffic capacity of the three groins in the initial years. Additionally, DCCA will install semi-permeable groins that will allow some flow of sand around and over the groins. However, eventually, despite the groins' semi-permeability, the groins will reach their trapping capacity and the excess sand from the renourishment will have been eroded with the result that, without further renourishment, erosion on the downdrift side of the groins will be exacerbated. Therefore, once the groins reach their trapping capacity and erosion is exacerbated, further mitigation through renourishment will be needed. Mr. Slagel explained that the volumetric mitigation trigger should catch this point and trigger the proper mitigation.

Although the groins will require further renourishment eventually, Dr. Kana estimated installing the groins would result in the renourishment lasting twice as long as a renourishment conducted without them. Thus, instillation of the groins would reduce the frequency of renourishments to approximately every twelve years.

Downdrift Impact Analysis

If left unchecked, groins will eventually cause a downdrift impact unless further renourishment is conducted in the future to supply more sand to the system. However, modeling analyses can help predict the extent of the impact and what designs may lessen the impact. In this case, CSE created a downdrift analysis for DCCA to show the impact of the groins on the downdrift side of the groins. Dr. Kaczkowski, who supervises the engineering activities at CSE, including modeling erosion and engineering design, explained she used two modeling programs, Genesis and Delft3D, to model downdrift impacts of the proposed groins. Both models are well-recognized

and used in her profession. Delft3D is a three-dimensional model used to evaluate the hydrodynamics and the morphological trend of the identified area. Genesis, which is approved by the Army Corps of Engineers, is a one-dimensional model that requires less data and, therefore, runs faster than Delft3D. Although the Delft 3D model has the benefit of modeling the coastal area in three dimensions, it takes a very long time to run due to all of the data that must be processed. Accordingly, Dr. Kaczkowski used Delft 3D to simulate one year of conditions with the groins in place, and used Genesis to simulate twenty-seven years of the impact that renourishment will have on the downcoast properties

Dr. Young rendered no opinion with respect to CSE's use of Delft3D, but stated Genesis was not appropriate to use in areas like the Project area where inlets complicate shoreline changes. Dr. Kaczkowski conceded Genesis cannot handle an inlet feature and to compensate for Genesis's inability to model inlets, she excluded data from the inlets surrounding the project area (Pawley's Inlet and North Inlet) when running this model. Dr. Kaczkowski concluded overall that Genesis shows that the proposed renourishment will result in a positive downdrift impact, and this positive impact will more than compensate for the adverse impact caused by the three proposed groins.

Furthermore, using Delft3D, Dr. Kaczkowski was able to reproduce the coastal dynamics of the Project Area. When using Delft3D, wave input[12] is important, and CSE used a gauge seventeen miles offshore and then extended the computational model domain to where the wave station is located.[13] The wave data from the last thirty-five years was schematized, or classified, into different groups based on wave characteristics and used as a model input.[14] The Delft3D results reasonably reflected the trend of erosion in the Project area, especially with respect to the areas of interest in Reaches 3 and 4, and also reflected that, as occurs naturally, the erosion rate increases from north to south on Debidue Island.

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[12] Dr. Kaczkowski stated that CS&E considered two sources of wave data, Wave Information Study (WIS) and Wavewatch II, and that the use of both of these sources is standard in her profession. She ultimately selected WIS for its analysis because that data set generated a higher level of erosion and, thus, was more conservative in that it would overestimate the erosional impact of the groins for purposes of analyzing the downcoast impact.

[13] Dr. Kaczkowski acknowledged that using a gauge located seventeen miles offshore could introduce some imprecision into the modeling results but testified that it did not here because the computational domain was extended to the gauge. She testified that the gauge is not an actual physical gauge but output from a test model that shows the wave history over the last thirty-five years.

[14] Coastal challenged the schematization of the data as excluding some data, but Dr. Kaczkowski testified that all the main wave data is included and only about 0.1% of the wave data is excluded.

Additionally, Dr. Kaczkowski explained using a simulation of "increased bed level" groins best reflected the low-profile groins proposed for the Project, and this simulation showed the impact of the groins would extend approximately 1,500 feet south of the last groin. Delft3D was also used to determine the sand velocity in the Project Area. Determining sand velocity is important because the higher the velocity, the greater the likelihood of localized erosion occurring in the Project area. Based on the modeling results, the three groins will accumulate sand and downcoast erosion ultimately will increase, but the impact of the groins will be limited to the area 1,500 feet south of the last groin. Moreover, the erosional impact of the groins will be much less than the positive impact of the nourishment, and the combined impact of the groins and nourishment will result in a fifty percent reduction in the historic erosion rate.

I find Dr. Kaczkowski's testimony to be very credible. In fact, Dr. Kana explained the actual estimates made by CSE were more conservative than the modeling estimates of downcoast impacts. CSE prepared sand budgets based on a background erosion rate at Hobcaw of - 8.1 cy/ft/yr, which equates to losing about 34,000 cubic yards of sand annually. With the Project, however, Hobcaw is expected to lose only approximately 20,000 cubic yards of sand annually over the ten years after completion of the Project. I thus conclude the installation of the groins will affect approximately 1,500 feet of shoreline south of the southernmost groin. Furthermore, with the addition of the renourishment, the net result of the Project will be an overall reduction in the historic erosion rate. Indeed, Hobcaw will receive a benefit from the Project, and is unlikely it will not suffer an overall detrimental impact.

Baruch's Downdrift Property

The Baruch property not only includes the Hobcaw Tract; it also includes an 18,000-acre National Estuarine Research Reserve (NERR) also known as the Baruch Institute for Marine Science, which is managed by the University of South Carolina. The NERR is one of twenty-eight similarly designated and protected areas along the east and west coast of the United States that are administered by the National Oceanic and Atmospheric Association (NOAA). Their mission is to protect and study estuaries to support coastal management through scientific research and public education.

The Department received some comment letters, including a letter from the National Marine Fisheries Service, evidencing a concern about the downdrift effect of the groins on the Baruch property and the NERR. However, the evidence reflects the effects of the groins will be

limited to approximately 1,500 feet south of the southernmost groin and the mouth of the inlet where the NERR is located is over two miles south of the groin. Therefore, I find the installation of the groins will not directly affect the NERR.

Threaten Existing Development

There are no guidelines for determining when a structure is "threatened." The Department has inferred that the threshold for when a structure is threatened must be less than a structure that is in "imminent danger," which is defined as a structure being twenty feet from erosion. S.C. Regs. Ann. 30-15(H) ("A structure is determined to be in imminent danger when the erosion comes within twenty feet of that structure."). The Department also exercises its discretion as to whether a structure is threatened, and it does not require that a minimum number of structures be threatened before a groin may be considered. In exercising its discretion, the Department does not necessarily require structures to be threatened 365 days a year; rather, they should have a history of repeatedly being threatened over time.

The Department determined that approximately six homes south of the bulkhead and twelve homes landward of the bulkhead are threatened at the Project. Interestingly, the League's own Rule 30(B)(6) witness, Ms. Pate, personally believes homes along Debidue Beach are threatened. She sent an email to her colleagues at the League in which she observed the houses behind the seawall and along the southern end of Debidue Beach were "severely threatened." She explained that a storm like Dorian results in the ocean coming very close to the front door of these houses.

I find that erosion is threatening existing development at DeBordieu Colony. Homes, particularly at the southern end of the bulkhead, are mere feet from the bulkhead and photographic and video evidence of the site in 2019 show the bulkhead is currently being compromised because water is washing over the bulkhead and eroding the sediment behind it.[15] Most recently, during Hurricane Isaias, water overtopped the seawall and eroded areas behind it. When the waves overtop the wall, they threaten to flood the homes behind the wall and destabilize them. Additionally, Mr. Eiser has observed the vegetation line is landward of some of the houses, which

[15] DHEC Exhibit 31 includes several photos taken on September 18, 2019, that show evidence of waves cresting over the bulkhead in some areas and coming within several feet of houses along the beach or bulkhead. Mr. Slagel testified he took these while Hurricane Humberto was a category 1 storm off the shore of South Carolina although it never actually threatened the State. DHEC Exhibit 32 also shows a video of waves cresting over the bulkhead and washing out the area behind it within close proximity to the southernmost structure behind the bulkhead.

is an indicator of how far ocean water has extended or can extend. Indeed, some homes along the bulkhead are oceanward of both the Department's baseline and setback line. Moreover, although water does not wash over the bulkhead every day, overtopping is likely to occur during storm events that are not necessarily hurricanes. Nevertheless, regardless of storms or tides, the testimony and evidence show erosion has caused the bulkhead to be exposed on a regular basis, the beach is impassible in front of it at high tide, and the lack of dry beach in front of the bulkhead undermines its stability.[16]

Currently, the bulkhead remains functionally intact, but its longevity will be reduced unless action is taken to better protect it. Dr. Young conceded that if a renourishment is not completed, the bulkhead is likely to fail within ten years. Still, in Dr. Young's opinion, erosion is not threatening existing development at DeBordieu. Although he acknowledged "a little bit of water" comes over the bulkhead, he observed that none of the houses along Debidue Beach are falling into the sea.[17] I find that a house does not have to be falling into the ocean to be threatened. Indeed, if a house is falling into the sea, it is no longer threatened by erosion, it is being actively destroyed by erosion—its destruction is imminent.

Financial Commitment

The Amended Permit documents DCCA's new letter of credit committing $1 million in funds for mitigation in contrast to its commitment of $500,000 in the original Permit. According to Blanch Brown, the General Manager of DCCA, this letter of credit confirms DCCA can cover $1 million in costs associated with any remediation necessary as a result of mitigation for the groin impact—either reconstructing or removing the groins and renourishment an impacted beach. The Department found both amounts to be sufficient based upon different engineering estimates submitted in association with the permit showing the cost to remove the groins would likely range

[16] Mr. Slagel conducted two site visits: one in June 2018 and one in November 2018. The purpose of the visits was to document site conditions during June when weather conditions are calmer and during November when they are stormier. In June, Mr. Slagel observed that there was not dry sand beach in front of the seawall. In November, he observed less beach in front of the bulkhead and dune that had been located just south of the bulkhead in June was cut in half by erosion. Mr. Slagel noted the southernmost property was very close to the beach with "almost no protection."

[17] Dr. Young opined that to be threatened, a structure would need to be within a distance of ten times the annual erosion rate as measured from the mean high tide line. However, that opinion was not based upon any compelling statutory or regulatory authority but rather his opinion to how the current law should be applied. Moreover, he did not offer an opinion on whether the structures behind DeBordieu fit his definition of threatened or not. I did not find his testimony to be persuasive.

between $250,000 to $435,000. Notably, these estimates were based upon removal of the groins only and not any renourishment that might be required following that removal.

DCCA also maintains a Beach Preservation Fund, which contains funds to cover the cost of beach maintenance and restoration at DeBordieu Colony. It is a annually funded account that started in 2017 and is projected to go through 2033. And, as incorporated into the Amended Permit:

> 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.

Dr. Young opined the $1 million commitment was not sufficient because mitigation would require more than that amount to mobilize sand with dredges much less remove groins in the process as well. However, Dr. Young acknowledged that he has no experience with groin removal or the project costs associated with them.

In contrast, Dr. Kana's testimony was more persuasive on this point. Dr. Kana testified that, based on a general estimate provided by a contractor who installs groins, the three groins could be removed for approximately $435,000. Furthermore, although Dr. Kana has not been personally involved in completely removing groins, CSE has been involved with pulling groins up and repositioning them during the construction and installation process. Dr. Kana opined that, after watching the groin construction at Hunting Island and Folly Beach, the process of demolishing the work would be fairly straightforward. In fact, the process would be facilitated by the use of the steel sheet piles, which can be removed relatively easily. Additionally, the rock from the scour aprons can be removed by large track hoes. Thus, Dr. Kana believed that the removal could be accomplished for less than $435,000.

Overall, I find the League failed to show by a preponderance of the evidence that DCCA's financial commitment is insufficient to cover the costs of mitigation and/or groin removal. Beyond speculation, the League presented no evidence to show that the cost of removing the groins and any necessary renourishment beyond that already contemplated by DeBordieu Colony would exceed the available funds.[18]

[18] I find Dr. Kana's testimony more persuasive on this point given his experience with projects like the one at issue in this case.

Alternatives

As part of its permit application, DCCA submitted a thirty-year plan CSE created for DCCA entitled: Beach Erosion Management Alternatives, 30-Year Plan, DeBordieu Colony, South Carolina (the Plan). This Plan was developed to help DCCA evaluate how to best manage Debidue's beach over the next thirty years. The Plan ultimately recommended renourishment with the installation of three groins. The alternative of constructing a single groin at the southern end of Debidue Beach was considered but rejected because of the length required for a single groin to accomplish its intended purposes. Similarly, constructing two groins was rejected as an option because of the length that would be required for the groins to accomplish their objective.[19]

Mr. Slagel explained the Department also considered the alternative of renourishment without any groins and how this would affect sand transport. However, the Department, as does this Court, recognized that DCCA has no obligation to continue renourishing the beaches in the absence of groins. But with the groins, DCCA would have an obligation under the permit to renourish or conduct mitigation based upon the triggers. Furthermore, clearly groins can extend the life of a beach and therefore reduce the frequency of renourishments and the disruptions that they cause cumulatively over time. Reduced disturbances to the beach and borrow areas can positively affect the environment and wildlife compared to more frequent renourishments. It also limits the disturbance of the use of the beach by the public. I thus conclude the proposed design involving three groins accompanied by a renourishment best accomplish the goal of preventing erosion for a longer period of time with less long-term impact to the environment as long as they are renourished when appropriate under the conditions of the Permit/Amended Permit.

Value and Enjoyment

Several members of the League who are part-time or full-time residents of DeBordieu Colony expressed concerns about their use and enjoyment of the beach after the groins are installed. These residents walk, bike, and otherwise recreate on the beach. For example, Erin Pate, formerly the League's North Coast Office Director, is a resident of DeBordieu Colony and visits Debidue Beach frequently. She and her family bike and walk on the beach, and they use the beach area where the proposed groins would be located. Ms. Pate is concerned that the groins will make

[19] The three-groin design, which includes less lengthy groin, will reduce the downdrift impacts compared to the impact that would be expected from one or two longer groins.

walking or biking on the beach "nearly, if not completely, impossible." She is concerned about losing access to a natural, wide beach, which she believes is an asset that contributes to property values. However, she has found the beach in front of the bulkhead to be impassible at high tide in front of the bulkhead despite "a great deal of accretion this year." Some other residents are concerned the groins will create the potential for injury and drowning, or otherwise present a hazard for which DCCA will be liable.[20]

In terms of whether the groins will increase the potential for injury or drowning, no factual evidence was presented to support this concern, and I therefore I cannot make such a finding. Similarly, the evidence did not support Ms. Pate's opinion that groins will lower property values. Overall, the primary concern expressed about the installation of the groins was their effect on the useability of the beach for walking, biking, and other forms of recreation. Initially, useability should not be impeded by the groins. In fact, access and usability will be increased because the beach will be restored in front of the seawall, which was previously impassible at high tide and restricted residents' ability to walk on the beach. Furthermore, the amount of sand deposited in the renourishment will completely cover the groins at first. However, the groins will eventually be uncovered mainly across the front beach and could force some people to hop over them while walking or impede the use of bicycles. However, Dr. Kana also explained that the groins should remain relatively covered at the back beach without impediment. Therefore, as the groins move towards their trapping capacity, they will impact the usability of the front part of the beach, but other parts will remain freely passable. Moreover, the installation of groins will make the beach much more useful at high tide and will reduce the need to renourish the beach, which itself creates a disturbance to public use of the beach.

I thus conclude that the benefits of constructing the groins offset the limited impacts to the citizens who expressed concerns.

ISSUES

1. Whether the Project violates section 48-39-290(A)(8) of the South Carolina Code (Supp. 2019) because: (1) Debidue Island does not have a high erosion rate; (2) erosion is not threatening existing development; (3) the monitoring is insufficient and based upon erroneous criteria with

[20] Any liability ensuing to DCCA as a result of the installation of the groins is not an issue for consideration by this Court.

respect to the alleged baseline or background historical erosion rate and the use of the running average erosion rate and Regulation 30-21; (4) the groins will cause detrimental downdrift effects;[21] and (5) DCCA has not submitted an adequate financial commitment to show it can cover the cost of removing the groins and restoring the beach if necessary.

2. Whether the groins will have a significant negative impact upon the important natural resource of the public beach in violation of section 48-39-20(D) of the South Carolina Code (2008).

3. Whether the Project violates section 48-39-30 of the South Carolina Code (2008) because it is inconsistent with this State's policy to protect sensitive and fragile areas from inappropriate development.

4. Whether the Project violates the Coastal Zone Management Act's general considerations under section 48-39-150 of the South Carolina code (2008 & Supp. 2019), including consideration of impacts to wildlife and other natural resources, creation of erosion, the economic benefit analysis, and the adverse environmental impacts of the Project.

5. Whether the Project violates sections 48-39-250(4) and (6) of the South Carolina Code (2008 & Supp. 2019) because it is inconsistent with this State's findings regarding discouraging unwise ocean development and encouraging the beach to accrete and erode naturally.

6. Whether the Project violates section 48-39-260 of the South Carolina Code (2008 & Supp. 2019) because it is inconsistent with this State's policy to "protect, preserve, restore and enhance the beach/dune system" and to provide "a source for the preservation of dry sand beaches which provide recreation and a major source of state and local business revenue."

7. Whether the Project is contrary to Regulation 30-11(B)(10) of the South Carolina Code of Regulations (2012) because it would have a significant negative impact on the value and enjoyment of adjacent property owners.

[21] The League also raised the issue of whether the groins will have a detrimental effect on adjacent/downdrift areas in violation of Regulation 30-15(G)(2). This regulation repeats the content of section 48-39-290(A)(8); therefore, a violation of 48-39-290(A)(8)would necessarily be a violation of Regulation 30-15(G)(2). For this reason, I discuss these two issues together *infra*.

8. Whether the permit is deficient because it employs inaccurate or improper data with respect to requiring certain mitigation if erosion of the beach adjacent to the Hobcaw Tract exceeds - 8.1ft/cy/yr.

9. Whether the permit is deficient because it does not provide and require for sufficient safeguards to be implemented to protect persons who may be injured by the groins either on the beach or as groins extend into the ocean.

10. Whether the groins violate the Public Trust Doctrine.

STANDARD OF REVIEW

The ALC has jurisdiction over this case pursuant to section 1-23-600(A) of the South Carolina Code (Supp. 2019) section 44-1-60 of the South Carolina Code (Supp. 2019), and sections 48-39-10 *et seq.* of the South Carolina Code (2008 and Supp. 2019).

The Court serves as the finder of fact and makes a *de novo* determination regarding the matters in controversy. *See* S.C. Code Ann. § 1-23-600(B)(Supp. 2019); *Brown v S.C. Dep't of Health and Envtl. Control*, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002); *see also Marlboro Park Hosp. v. S.C. Dep't of Health and Envtl. Control*, 358 S.C. 573, 579, 595 S.E.2d 851, 854 (Ct. App. 2004). Therefore, as the trier of fact, the Court may give testimony the weight that he or she determines it deserves. *Florence Cnty. Dep't of Soc. Servs. V. Ward*, 310 S.C. 69, 72-73 425 S.E.2d 61, 63 (Ct. App. 1992).

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

The proper standard of proof in an administrative case before the ALC is a "preponderance of the evidence." *Anonymous (M-156-90) v. State Bd. Of Med. Exam'rs*, 329 S.C. 371, 375-76,

496 S.E.2d 17, 19 (1998); *Nat'l Health Corp. v. Dep't of Health and Envtl. Control*, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989). Furthermore, the burden of proof is upon the party asserting the affirmative of an issue. *Leventis v. Dep't of Health and Envtl. Control*, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000). Therefore, the League, as the petitioner, bears the burden of proving the issuance of the Permit was not proper under the statutory and regulatory framework.

DISCUSSION

Section 48-39-290(A)(8)

Section 48-39-290 discusses "[r]estrictions on construction or reconstruction seaward of the baseline or between the baseline and the setback line; exceptions; special permits." S.C. Code Ann. § 48-39-290(A). It prohibits new construction or reconstruction seaward of the baseline except as allowed under this statute. *Id.* Pursuant to subsection (A)(8), new groins are only allowed if certain requirements are met. The League argues the proposed groins failed to meet several of these requirements.

High Erosion Rate

Groins are only allowed "on beaches that have high erosion rates with erosion threatening existing development or public parks." § 48-39-290(A)(8). The League argues DCCA cannot meet this requirement because the erosion rate at Debidue Beach is not "high" and the erosion is not threatening existing development. I conclude the League has failed to show by a preponderance of the evidence that these requirements have not been met.

There is no statutory or regulatory guidance defining what is a "high" erosion rate. It is an important consideration that the Department has uniformly considered a "high" erosion rate to be above – 3 ft/yr for decades. If the Department's interpretation of "high erosion" is a legal interpretation, then it is entitled to deference. Indeed, when interpreting a statute or regulation administered by an agency that "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." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 33, 766 S.E.2d 707, 717 (2014) (internal quotation marks and citation omitted). In determining whether interpretation is worthy of deference ago courts must consider whether the interpretation has been long-standing. *See Media Gen. Commc'ns, Inc.*, 388 S.C. at 149, 694 S.E.2d at 530–31 ("An agency's long-standing interpretation of a statute is usually entitled to be given deference and should not be overruled by a reviewing court in the absence of cogent

reasons, but the interpretation will not be sustained if it contradicts a statute's plain language."); *see also Etiwan Fertilizer Co.*, 217 S.C. at 354, 60 S.E.2d at 682 ("[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 reasons.").

Here, however, the Department's interpretation has never been codified or published. Furthermore, there was no allegation that the Department's interpretation of what is a "high" erosion rate was based upon its interpretation of the meaning of that language. Rather, this long-standing interpretation has been based upon the Department's factual analysis of the shoreline change rates and the application of those facts to reach a conclusion of what is the appropriate threshold for determining a high erosion rate. Nevertheless, 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.

Although the League contends the Department's threshold rate was "developed arbitrarily and based on studies that do not support the conclusion that 3 feet per year is high," I do not find the Department's interpretation to be arbitrary or unreasonable. The Department's threshold rate of – 3.0 ft/yr is based, in part, on the review of data from the Department's 500 monuments across the State and prior studies of the erosion rates in the State. Further, I found Dr. Kana's analysis of what is high erosion in South Carolina persuasive and his opinion that the uncontested erosion rate of – 4.2 cy/ft/yr or – 5.5 ft/yr was high is consistent with the Department's interpretation.

The League further contends the "erosion rate" referred to in the statute cannot be represented by the Department's rate of – 3.0 ft/yr because, in arriving at this rate, the Department considered accretional coastlines in the State in addition to erosional coastlines. In other words, the League argues that when developing the threshold rate at issue, the Department erroneously considered the overall shoreline change rates in the State instead of just the erosional change rates in the State. Again, consideration of this issue is unnecessary because I found Dr. Kana's factual opinion that the Project was located in an area of high erosion to be persuasive. Additionally, although the statute uses the term high "erosion rate" and not a high "shoreline change rate," it does not instruct that when determining what a high erosional rate is, the change rates across the State, including accretional ones, cannot be considered. I conclude it is reasonable for the Department to consider the "shoreline change rate" when determining if a structure meets the

threshold for what is "high." In other words, examining erosion rates in the context of shorelines change rates as a whole provides a broader picture of how certain erosional rates fall within the spectrum of the State's rates as a whole. Overall, whether I follow the Department's interpretation or that of Dr. Kana, I conclude that the uncontested erosion rate of – 4.2 cy/ft/yr or – 5.5 ft/yr is a high erosion rate under section 48-39-290(A)(8).

Threatening Existing Development

Section 48-39-290(A)(8) requires erosion to be threatening existing development. The League argues there was no evidence that erosion was threatening existing structures outside of storm events. I find the League failed to show existing structures are not threatened by erosion. As discussed *supra*, "threatened" is not defined in any statute or regulation. "Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning." *See Lee v. Thermal Eng'g Corp.*, 352 S.C. 81, 91–92, 572 S.E.2d 298, 303 (Ct. App. 2002). In Merriam-Webster's Online Dictionary, "threatened" is defined as "having an uncertain chance of continued survival." MERRIAM-WEBSTER'S ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/threatened (last visited Jan. 12, 2021). In discerning whether a structure is threatened, the Department also looks comparatively to whether the structure is in "imminent danger." This phrase provides clarity because a structure is in "imminent danger" when it is twenty feet from erosion. *See* S.C. Code Ann. Regs. 30-15(H) ("A structure is determined to be in imminent danger when the erosion comes within twenty feet of that structure."). Also, in Merriam-Webster's Online Dictionary, "imminent" is defined as "ready to take place: happening soon." MERRIAM-WEBSTER'S ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/imminent (last visited Jan. 12, 2021).

In this case, by any reasonable definition, several structures behind the southern portion of the bulkhead and adjacent to it are threatened by erosion. The photographic and video evidence from multiple site visits showed water encroaching within feet of several of the homes and overtopping the bulkhead, which is causing erosion and scour behind the bulkhead in addition to allowing water to flow toward the lower level of homes directly behind the bulkhead. Some of this evidence was procured while a storm passed by South Carolina, but some was not. Water does not necessarily overtop the bulkhead on a daily basis, but the bulkhead is exposed to wave action on a daily basis and lacks the protection and cover of a dry sand beach in front of it. Thus, erosion is not only threatening the structures behind the bulkhead but the structure of the bulkhead

itself. It is eminently clear that erosion is threatening existing structures and this requirement of section 48-39-290(A)(8) has been fulfilled.

Insufficient Monitoring

The League argues the Project violates section 48-39-290(A)(8) because the monitoring under the Permit/Amended Permit "is insufficient and based upon erroneous criteria with respect to the alleged baseline or background historical erosion rate and the use of the running average erosion rate and Regulation 30-21." The League failed to explain this argument in its proposed order, leaving the Court to speculate as to their exact quarrel with the monitoring program and background erosion rate. Subsection 48-39-290(A)(8)(a) requires:

> The applicant shall institute a monitoring program for the life of the project to measure beach profiles along the groin area and adjacent and downdrift beach areas sufficient to determine erosion/accretion rates. For the first five years of the project, the monitoring program must include, but is not necessarily limited to:
>
> (i) establishment of new monuments;
>
> (ii) determination of the annual volume and transport of sand; and
>
> (iii) annual aerial photographs.
>
> Subsequent monitoring requirements must be based on results from the first five-year report.

Based upon my review of the monitoring program outlined in the Permit/Amended Permit, I find the monitoring program meets the statutory requirements of section 48-39-290(A)(8) and the League failed to show otherwise by a preponderance of the evidence. *See Anonymous (M-156-90)*, 329 S.C. at 375-76, 496 S.E.2d at 19.

Detrimental Downdrift Effects

The League also argues the Project violates section 48-39-290(A)(8) because the groins will cause detrimental downdrift effects. Subsection 48-39-290(A)(8)(b) provides "[g]roins may be permitted only after thorough analysis demonstrates that the groin will not cause a detrimental effect on adjacent or downdrift areas." This requirement is repeated in Regulation 30-15(g)(2), which the League also contends the Project violates. S.C. Code Ann. Regs. 30-15(G)(2) ("Groins may only be permitted after thorough analysis demonstrates that the groin will not cause a detrimental effect on adjacent or downdrift areas."). The League argues this statutory provision does not allow for mitigation to be considered when analyzing whether the groins will cause a detrimental effect. The League contrasts the groins that are currently being proposed with other

groins that do not produce detrimental downdrift effects because the downdrift property owner is the same or the groin is placed at the end of a littoral cell where sand would merely move into the ocean rather than past a downdrift beach.[22] The League argues these groin placements would not cause a detrimental downdrift effect regardless of mitigation.

I conclude that if the statute only allowed for groins that did not require mitigation or were placed so as not to create a detrimental effect at the League suggests, then the statute would have no reason to include monitoring, mitigation, and notice provisions for downdrift property owners. *See* § 48-39-290(A)(8)(c) ("If the monitoring program established pursuant to subitem (a) shows an increased erosion rate along adjacent or downdrift beaches that is attributable to a groin, the department shall require either that the groin be reconfigured so that the erosion rate on the affected beach does not exceed the preconstruction rate, that the groin be removed, and/or that the beach adversely affected by the groin be restored through renourishment."); § 48-39-290(A)(8)(d) ("Adjacent and downdrift communities and municipalities must be notified by the department of all applications for a groin project."). Moreover, the League's example of the groins that do not create a detrimental downdrift effect indicates that the operable word is "detrimental." All groins create a downdrift impact as evidenced their very function and the expert testimony in this case, but whether it constitutes a "detrimental" impact is the question. There is nothing in the statute that states mitigation cannot be considered when evaluating whether the effect of a groin will be "detrimental." I conclude that mitigation that is built into the groin project may be considered when analyzing whether the groins will cause a detrimental downdrift effect.

In this case, the League correctly notes that all the experts agreed that the groins, without the mitigation of the simultaneous renourishment, would cause a detrimental effect on the downdrift Hobcaw Tract. Groins, by their very nature, cause this effect. However, the evidence presented by Dr. Kana and Dr. Kaczkowski also showed that the accompanying renourishment of 650,000 cu/yds of sand was more than enough to mitigate this detrimental downdrift effect for several years and even increase the flow of sand to the Hobcaw Tract during that time. Nevertheless, at some point, the excess sand from the renourishment will erode such that the groins may begin to cause a detrimental effect; however, I conclude the mitigation trigger rate in the

[22] This last type of groin is called a "terminal groin." It is a groin that is located at the end of a littoral cell where, if the sand were not captured, it would have gone out into the ocean rather than being deposited on a beach below the groin. There is a terminal groin at the end of Folly Beach.

Amended Permit, which is less than the background erosion rate for the Hobcaw Tract of – 8.1 ft/yr, should trigger mitigation before the detrimental effects of the groins are felt. Therefore, I find the League failed to show by a preponderance of the evidence that the groins will cause a detrimental effect on the downdrift property such that they cannot meet the requirements of section 48-39-290(A)(8)(b). *See Anonymous (M-156-90)*, 329 S.C. at 375-76, 496 S.E.2d at 19.

Financial Commitment

Finally, the League argues the Project will violation section 48-39-290(A)(8) because DCCA has not submitted an adequate financial commitment to show it can cover the cost of removing the groin and restoring the beach if necessary. Section 48-39-290(A)(8)(b) & (c), in relevant part, provides:

> The applicant shall provide a financially binding commitment, such as a performance bond or letter of credit that is reasonably estimated to cover the cost of reconstructing or removing the groin and/or restoring the affected beach through renourishment pursuant to subitem (c).
>
> (c) If the monitoring program established pursuant to subitem (a) shows an increased erosion rate along adjacent or downdrift beaches that is attributable to a groin, the department shall require either that the groin be reconfigured so that the erosion rate on the affected beach does not exceed the preconstruction rate, that the groin be removed, and/or that the beach adversely affected by the groin be restored through renourishment.

I find the League failed to show by a preponderance of the evidence that DCCA has failed to meet these statutory requirements. The credible evidence showed the removal of the groins could cost approximately $435,000. This is well-within DCCA's letter of credit for $1 million submitted with the Amended Permit. Furthermore, DCCA is already willing to spend several million on this Project, which includes a simultaneous renourishment that should do more than restore the beach if the groins must be removed early on after they are installed. And, if the groins must be removed several years later, then DCCA's Beach Preservation Fund, which is predicted to grow to $10-12 million over the next twelve years, will be able to compensate for any deficiencies.

Section 48-39-20(D)

Section 48-39-20 includes several legislative declarations of findings, including subsection (D), which provides "[t]he coastal zone and the fish, shellfish, other living marine resources and wildlife therein, may be ecologically fragile and consequently extremely vulnerable to destruction by man's alterations." While the League included this issue in its most recent Amended Prehearing

Statement, the League did not discuss this statute in its arguments at trial or in its proposed order. Nevertheless, the first seven special conditions of the Permit/Amended Permit directly address the protection of wildlife and marine resources during the installation of the groins and renourishment. Therefore, I conclude the League failed to show by a preponderance of the evidence how the Project violates section 48-39-20(D). *See Anonymous (M-156-90)*, 329 S.C. at 375-76, 496 S.E.2d at 19.

Section 48-39-30

Section 48-39-30 discusses legislative declarations of policy. The specific subsection the League is concerned with is subsection (B)(1), which provides that is the policy of this State

> To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;

S.C. Code Ann. § 48-39-30(B)(1). The League merely argues the permitted groins are contrary to this policy without explaining why. Without some argument or explanation, the Court is again left to speculate as to how this policy is violated. The League has not explained why the proposed groins qualify as "inappropriate development" under this declaration of policy such that they should not be permitted. Accordingly, the Court can only conclude the League failed to show by a preponderance of the evidence that the Project violates this statutory declaration of policy. *See Anonymous (M-156-90)*, 329 S.C. at 375-76, 496 S.E.2d at 19.

The CZMA's General Considerations under § 48-39-150

Section 48-39-150 discussed several general considerations the Department should be guided by when evaluating whether to approve or deny a permit. While the League included this issue in its most recent Amended Prehearing Statement, the League did not discuss this statute in its arguments at trial or in its proposed order. Therefore, I conclude the League failed to show by a preponderance of the evidence how the Project violates section 48-39-150. *See Anonymous (M-156-90)*, 329 S.C. at 375-76, 496 S.E.2d at 19.

Sections 48-39-250(4) and (6)

The League makes a conclusory argues that the permitted groins are inconsistent with sections 48-39-250(4) and (6). Overall, section 48-39-250 describes legislative findings regarding the beach/dune system in the State. Subsection (4) provides the following legislative finding:

> Chapter 39 of Title 48, Coastal Tidelands and Wetlands, prior to 1988, did not provide adequate jurisdiction to the South Carolina Coastal Council to enable it to effectively protect the integrity of the beach/dune system. Consequently, without adequate controls, development unwisely has been sited too close to the system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect the system from this unwise development.

Subsection (6) makes the following finding:

> Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle. This space can be provided only by discouraging new construction in close proximity to the beach/dune system.

The Court is left to speculate as to exactly how the installation of three groins violates the policy in subsection (6), which seems to be directed more at the original development of some parts of DeBordieu Colony that are now threatened by erosion due to their close proximity to the dune/beach system. Subsection (4) is more probative. This subsection finds that it "is both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle." *Id.* Installing groins would clearly alter the natural cycle of erosion at Debidue Beach; indeed, that is the very purpose of the groins. Therefore, this finding is a consideration when evaluating the Permit/Amended Permit at issue. However, it is not determinative of whether the Permit/Amended Permit should be granted; if it were, then groins would not be permitted by statute at all because they all artificially disturb the erosion/accretion cycle. This policy finding must be balanced against what is allowed under our statutory law, which includes groins. In this case, the best long-term option to balance protecting the threatened structures at Debidue Beach and limiting environmental disturbances over time was the proposal to install three groins with an accompanying renourishment.

Section 48-39-260

The relevant part of section 48-39-260 provides 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." S.C. Code Ann. § 48-39-260(1)(b). The League makes a conclusory argument that the proposed groins are inconsistent with this section. I do not necessarily find the proposed groins are inconsistent with this section. The purpose of the installing the groins, especially the two northernmost groins, is to create and preserve a dry sand beach in front of the bulkhead. Currently, there is no dry sand beach in front of the southern end of the bulkhead, which prevents people from recreating on that part of the beach at, or near, high tide. I find the League failed to show by a preponderance of the evidence that the proposed groins should not be permitted because they are inconsistent with this section. *See Anonymous (M-156-90),* 329 S.C. at 375-76, 496 S.E.2d at 19.

Regulation 30-11

Regulation 30-11 requires the Department to be guided by the considerations in section 48-39-150, which includes considering "[t]he extent to which the proposed use could affect the value and enjoyment of adjacent owners." S.C. Code Ann. Regs. 30-11(B)(10). The League argues the Permit will have a significant negative impact on the value and enjoyment of adjacent property owners, contrary to Reg. 30-11. In support of their argument, the League cites to four property owners and members of the League who testified that their recreational activities on Debidue Beach and along the Hobcaw Tract would be impeded by both the construction and existence of the groin field. The League argues that as the renourishment sand is inevitably eroded away, the impact to beach recreation will become greater and greater.

I conclude the proposed groins will impact the use and enjoyment of the beach, but this impact will not be significantly negative. The evidence showed the groins will eventually become exposed to an extent, particularly towards the front beach. The exposure of the groins will likely require persons walking down the beach to step over them and will likely prevent a bicycle from traveling unimpeded down the front beach. However, the evidence also showed the groins are unlikely to be exposed on the back beach where access should remain to recreate on the beach without impediment. Importantly, a significant portion of the area where the groins will be placed is currently unusable during high tide because there is no dry sand beach in front of the bulkhead, which was acknowledged by the Leagues witnesses. Therefore, this portion of the beach will be regained for recreation and enjoyment as a result of the proposed groins. Because of the positive effect the Project will have in front of the bulkhead, I do not find their overall impact to the use

and enjoyment of the beach is prohibitive in granting the Permit/Amended Permit. Moreover, only one League member testified she was concerned the groins would lower property values but provided no evidence to support her opinion. *Clark v. Greenville County*, 313 S.C. 205, 437 S.E.2d 117 (1993) ("Bald allegations of diminution in property value are insufficient to create a genuine issue of fact regarding damages absent any competent evidence showing the existence, amount, or causation of damages.").

Lastly, it is notable that the Permit/Amended Permit contains Special Condition 15, which requires that "[a]ccess along the beach in the vicinity of the new groins must be maintained or improved." This condition further provides that "[i]f access is impacted or eliminated, temporary access around or over the groins must be established immediately" and "[w]ithin 30 days of notification from the department, a plan to provide permanent access around or over the groins must be submitted by the entity responsible for the groin construction." Accordingly, I find the League failed to show by a preponderance of the evidence that the proposed groins are inconsistent with Regulation 30-11(B)(10) such that the Permit/Amended Permit should be denied. *See Anonymous (M-156-90)*, 329 S.C. at 375-76, 496 S.E.2d at 19.

Data Supporting Mitigation if Erosion of the Hobcaw Tract Exceeds - 8.1ft/yr

The League provided no specific argument on this issue. The credible evidence supported a background erosion rate at the Hobcaw Tract of – 8.1 ft/yr. Therefore, I conclude the League failed to show by a preponderance of the evidence that this erosion rate was incorrect or otherwise defective or deficient. *See Anonymous (M-156-90)*, 329 S.C. at 375-76, 496 S.E.2d at 19.

Safeguards to Protect Persons Who May Be Injured by the Groins

While the League included this issue in its most recent Amended Prehearing Statement and quoted Mr. Lacey's testimony about the danger of injury from groins in their Proposed Order, the League did not discuss this statute in its arguments at trial or in its proposed order. Therefore, I conclude the League failed to show by a preponderance of the evidence how the Project violates section 48-39-150. *See Anonymous (M-156-90)*, 329 S.C. at 375-76, 496 S.E.2d at 19.

Public Trust Doctrine

While the League included this issue in its most recent Amended Prehearing Statement, the League did not discuss this statute in its arguments at trial or in its proposed order. Therefore,

I find the League failed to show by a preponderance of the evidence that the Project violates the Public Trust Doctrine. *See Anonymous (M-156-90)*, 329 S.C. at 375-76, 496 S.E.2d at 19.

CONCLUSION

I find the League failed to show by a preponderance of the evidence that the Department erred in granting DCCA a permit for the proposed groins. *See Anonymous (M-156-90)*, 329 S.C. at 375-76, 496 S.E.2d at 19.

IT IS THEREFORE ORDERED that the Department's issuance of Permit/Amended Permit 2017-01795 is **AFFIRMED**.

AND IT IS SO ORDERED.

_____

Ralph King Anderson, III
Chief Administrative Law Judge

January 15, 2021
Columbia, South Carolina

CERTIFICATE OF SERVICE

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

Stephanie Perez
Judicial Law Clerk

January 15, 2021
Columbia, South Carolina

EXHIBIT B

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, vs. South Carolina Department of Health and Environmental Control and DeBordieu Colony Community Association, Respondents.	)	Docket No. 19-ALJ-07-0089-CC **ORDER GRANTING IN PART AND DENYING IN PART MOTION TO LIFT STAY**
The Belle W. Baruch Foundation, Petitioner, vs. South Carolina Department of Health and Environmental Control and DeBordieu Colony Community Association, Respondents.	)	Docket No. 19-ALJ-07-0088-CC

This matter comes before the South Carolina Administrative Law Court (ALC or Court) pursuant to separate Requests for Contested Case Hearings filed by Petitioner South Carolina Coastal Conservation League (SCCCL) and Petitioner Belle W. Baruch Foundation (Baruch) challenging the decision of the South Carolina Department of Health and Environmental Control (Department) to issue Permit 2017-01795 (the Permit) to Respondent DeBordieu Colony Community Association (DeBordieu) for beach renourishment and the construction of three groins along a 1.5 mile section of Debidue Island in Georgetown County, South Carolina. By Order dated July 1, 2019, the two cases were consolidated for hearing purposes. Thereafter, DeBordieu filed a Motion to Lift Stay (Motion). Petitioners filed responses in opposition to DeBordieu's Motion. The Court held a hearing on the Motion on August 7, 2019.

BACKGROUND

This consolidated proceeding arises from the Department's decision to issue a Critical Area Permit and Coastal Zone Consistency Certification (CZCC) to DeBordieu, permitting it to perform beach renourishment and groin installation on the beaches of Debidue Island. The Permit authorizes two types of activity to be conducted within the protected critical area. First, the Permit allows DeBordieu to add "up to 650,000 cubic yards of beach-compatible sand" along approximately 1.5 miles (8,000 feet with 500 to 1,000 feet of tapers) of shoreline along Debidue Island. Second, the Permit authorizes DeBordieu to install three permanent sheet-pile-type groins extending from "300 and 400 feet from the back beach/bulkhead to the low tide line." In order to secure these groins, the Permit authorizes armor stone scour aprons along both sides of all three groins at the seaward end of the structures. Each of the groins will require approximately 1,500 tons of stone placed on 5,600 square feet of marine mattresses. The Permit also requires DeBordieu to monitor the erosion surrounding the groins and to mitigate the erosion affecting Baruch's Hobcaw property (Hobcaw), which is the adjoining property south of DeBordieu.

STANDARD OF REVIEW

A stay is automatically imposed when a party files a Request for Contested Case. S.C. Code Ann. § 1-23-600(H)(2) (Supp. 2018) ("A request for a contested case hearing for an agency order stays the order."). The stay must remain in place for ninety days after a contested case is initiated before the Court. § 1-23-600(H)(4)(a). After ninety days, a party may file a motion to lift the automatic stay. *Id.* Before May 2018, the party moving to have the automatic stay lifted had the burden of proof. However, the General Assembly amended the statute in May 2018 to shift the burden of proof to the party bringing the contested case—the petitioner. § 1-23-600(H)(4)(a). Now, the petitioner must meet four requirements to preserve the automatic stay. *Id.* Specifically, the petitioner must prove:

> (i) the likelihood of irreparable harm if the stay is lifted,
>
> (ii) the substantial likelihood that the party requesting the contested case and stay will succeed on the merits of the case,
>
> (iii) the balance of equities weigh in favor of continuing the stay, and
>
> (iv) continuing the stay serves the public interest.

Id. Since the four requirements are conjoined by the word "and" between the third and fourth requirements, the petitioner must prove each of the four requirements. *Bohlen v. Allen*, 228 S.C.

135, 143, 89 S.E.2d 99, 103 (1955) (noting "the word 'and' connotes something in addition to that which has preceded, the elements which are connected necessarily being grammatically [sic] co-ordinance"). If the petitioner fails to prove any of the requirements, "[t]he court *shall* lift the stay." § 1-23-600(H)(4)(a) (emphasis added); *see Richland Cty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 309, 811 S.E.2d 758, 767 (2018) ("Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement."). Finally, if the stay is lifted, the "action undertaken by the permittee or licensee does not moot and is not otherwise considered an adjudication of the issues raised by the request for a contested case hearing." *Id.* In other words, the outcome of the motion to the lift the stay does not prejudice a party or otherwise affect the ultimate decision of the Court at the merits hearing.

Although this standard for lifting the automatic stay was recently amended, the prior decision-making process for lifting the automatic stay is not inapplicable since the previous legislation also required consideration of "irreparable harm." *Compare* S.C. Code Ann. § 1-23-600(H) (Supp. 2013) *with* S.C. Code Ann. § 1-23-600(H) (Supp. 2018). Indeed, the same four requirements in the new law have been considered previously in this State's jurisprudence. For example, the current language of the stay is very similar to the language and principles either currently, or formerly, applicable to injunctions within this State. *See Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 454–55, 626 S.E.2d 34, 36 (Ct. App. 2005) ("To establish a cause of action for injunction, the plaintiff must show (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." (internal quotation marks and citation omitted)); *Cty. of Richland v. Simpkins*, 348 S.C. 664, 671, 560 S.E.2d 902, 906 (Ct. App. 2002) (holding "the equities of both sides are to be considered, and each case must be decided on its own particular facts" and then "the court of equity must 'balance the equities' between the parties in determining what if any relief to give"). This Court has also addressed the same criteria for lifting the automatic stay in previous decisions regarding the past version of the law.

DISCUSSION

DeBordieu's request that the stay be lifted is not a typical request because it cannot necessarily proceed with its project even if the Court lifts the stay. Specifically, DeBordieu needs to first acquire a permit from the U.S. Army Corps of Engineers (the Corps) before it can

commence the project. DeBordieu argued at the hearing that it was possible the Corps would grant them a permit if this Court lifted the stay.[1] Therefore, it is unclear whether a stay would result in the Corps granting DeBordieu a permit or not. The uncertainty of the Corps permit creates conjecture regarding what the Court is allowing to occur if the stay is lifted. That uncertainty is a consideration in determining whether to lift the stay and allow DeBordieu to proceed. Thus, the Court evaluates this Motion through a unique lens of the uncertainty of the Corps permit.

Irreparable Harm

"Irreparable harm" is not defined in section 1-23-600(H)(4)(a), and it was not previously defined in the old version of the stay either. Where a term is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning. *Lee v. Thermal Eng'g Corp.*, 352 S.C. 81, 91-92, 572 S.E.2d 298, 303 (Ct. App. 2002). According to Black's Law Dictionary, an irreparable injury is "[a]n injury that cannot be adequately measured or compensated by money and is therefore often considered remediable by injunction." Black's Law Dictionary 789-90 (7th ed. 1999). Our case law further instructs that whether harm is irreparable is "not decided by narrow and artificial rules." *Peek*, 367 S.C. at 455, 626 S.E.2d at 36. Rather, what constitutes irreparable harm is a factual determination unique to each case. *See Sisters of Charity Providence Hospitals v. S.C. Dep't of Health & Envtl. Control, et al.*, Docket No. 14-ALJ-07-0332 (S.C. Admin. Law J. Div. November 5, 2014). It has been held that, to be irreparable, the harm must be "neither remote nor speculative, but actual and imminent." *Gracepointe Church v. Jenkins*, 2006 WL 1663798 (D.S.C. June 8, 2006) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991)).

Furthermore, the construction of groins is an activity which may be permitted in certain situations. S.C. Code Ann. § 48-39-290(A)(8) (Supp. 2018); Specifically, "[n]ew groins may be allowed . . . on beaches that have high erosion rates with erosion threatening existing development ." § 48-39-290(A)(8). Furthermore, "new groins may be constructed . . . in furtherance of an ongoing beach renourishment effort." *Id.* Therefore, the construction of groins is not, in and of itself, "irreparable harm."

[1] The Court is not aware of an instance in which the Corps of Engineers has approved a project in the middle of litigation before this Court.

Showing irreparable harm is the weakest part of Petitioners' cases. Generally, irreparable harm in the context of a lifting a stay, similar to that in the context of imposing a preliminary injunction, is harm that will occur during the pendency of the action. *Bethesda Softworks, L.L.C. v. Interplay Entm't Corp.*, 452 F. App'x 351, 354 (4th Cir. 2011) ("The traditional office of a preliminary injunction is to protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits."); *accord Cty. of Richland v. Simpkins*, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002). Here, Petitioners contend that construction of the three proposed groins as described in the Permit will irreparably harm them in several ways. I find that several of the alleged harms raised by Petitioners do not constitute irreparable harm.

For example, Petitioner Baruch contends that it will be irreparably harmed if construction is allowed prior to discovery in this case because it is at a disadvantage without the facts it would garner from discovery to support its arguments in this Motion. This point was not raised at the hearing. Furthermore, the General Assembly provided for the lifting of a stay without any reference to its effect upon discovery. Therefore, I did not find it this issue is a material consideration.

Next, Petitioner Baruch cites to the affidavit of Dr. Mohamed A. Dabees for the contention that construction of the groins will permanently alter the nearshore sand pathways by allowing extensive erosion to occur prior to the trigger for mitigation currently included in the Permit. Petitioner SCCCL's expert, Dr. Robert Young, appears to agree. However, the evidence did not reflect that the harm asserted by Petitioners would occur during the pendency of this action. Neither of Petitioners' expert witnesses established that the alleged increased erosion on Hobcaw due to the groins will begin immediately. Rather, it appears that for a period of a couple years, Petitioner Baruch's Hobcaw tract (just south of the project) would likely receive an influx of sand before the erosive effect of the groin installation would be felt on downdrift beaches. This litigation will be concluded well before the erosive effects will begin to appear. Therefore, lifting the stay and allowing the renourishment and groin installation to go forward will cause no irreparable harm to Petitioners in the form of erosion during the pendency of this action.

Furthermore, SCCCL provided affidavits from several of its members who live in DeBordieu Colony who attested that they would be deprived of their use and enjoyment of the

beach during the renourishment and construction of the groins. The affidavits also evidence concerns that after construction the groins would lessen the aesthetic value of the beach, increase the danger of swimming and recreating on the beach, and overall lessen the affiants' use and enjoyment of the beach. SCCCL argues that the loss of use and enjoyment during construction is a loss that cannot be recouped through money or regained by the removal of the groins—it is a permanent loss of time to enjoy the beach.

While it is potentially true that SCCCL's members will lose the ability to use and enjoy at least part of the beach during the renourishment and construction, the Court does not find this to be an irreparable harm because of its temporary nature. There was no indication that the entire beach or access to it would be blocked during construction. Additionally, the harm is reparable because the beach will be restored for the same types of use an enjoyment, albeit in an altered condition with the groins. Similarly, the aesthetic and recreational concerns after the installation of the groins would not be irreparable because, if this Court decides against DeBordieu at the merits hearing, the groins would be removed, and the beach restored to its original condition.

Additionally, some of SCCCL's affiants' concerns were largely conclusory assertions without any supporting detail or assertions for which the was no expertise offered in support. For example, Mr. Lacy opined the groins would create dangerous rip currents, which may be true, but would require expert testimony that was not provided. Similarly, Ms. Altman opines that constructing the groins will not stop erosion even though she provides no basis for rendering opinion testimony of that sort. And Mr. Ford raises concerns about DeBordieu's liability for accidents and other damages caused by the groins for which he asserts that himself and other persons who live at DeBordieu Colony would bear the financial risk. Mr. Ford does not appear to hold a position with DeBordieu Colony that would make him qualified to speak on this subject. Statements such as these do not comply with Rule 702, SCRE, and must be disregarded by the Court in the exercise of its gatekeeping function. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 446-47, 699 S.E.2d 169, 175 (2010) (holding that court must exercise gatekeeping function); *see also Risher v. S.C. Dept. of Health & Envtl. Control*, 393 S.C. 198, 205, 712 S.E.2d 428, 432 (2011) (holding that a putative expert must "have acquired by reason of study or experience or both such knowledge and skill in a profession or science" that he is more qualified than the finder of fact "to form an opinion on the particular subject of his testimony") (quotations omitted)).

Nevertheless, DeBordieu's ability to adequately remove the groins should they receive an adverse ruling is a concern for this Court, especially considering the absence of a Corps permit and the restricted timeframes within which DeBordieu must work. The evidence at the hearing showed DeBordieu provided a commitment of at least $250,000 for groin removal. DeBordieu Colony also has a reserve fund of approximately $3.2 million and a beach preservation fund of approximately $3.6 million. While the $250K commitment would be available for removal of the groins, there was no guarantee that DeBordieu's other funds would be available for groin removal.

The cost of removing three groins, which the parties disagree about, would appear to cost at least $750K. Specifically, removal of the groins would require Respondent to un-install millions of pounds of rock and mats associated with the three groin structures. This would involve the labor of deconstructing three groins without any permanent impact to the area and transporting rocks and materials away from the area. Baruch's expert, Dr. Dabees, averred that

> the cost and time required to remove the structures (including preparation of technical specifications, bid preparation and consideration, mobilization of crews and equipment, and then implementation of a removal plan) will be significant impediments to prompt and complete removal of the structures, resulting in a prolonged removal process. This removal process will further compound the irreparable harm to and impacts of the proposed groins on the Petitioner.

In the report prepared by Coastal Science & Engineering for DeBordieu, the estimated total cost of the groins is $3.5 million or approximately $1.2 million per groin. Dr. Debees further averred that "the estimated cost of removal of the structures and stone components allowed by the Permit would be similar to [same order of magnitude] the initial construction costs." Based upon Dr. Debees estimation of the cost of removal, which is essentially equivalent to the cost of installation, $250,000 is clearly not enough to cover the cost of removal of three completed groins.

On the other hand, DeBordieu's expert, Dr. Kana, strongly disagreed with the cost of removal propounded by Dr. Debees. He averred that the cost of removing one groin would be approximately $250,000 because the cost of removal would not need to include the cost of purchasing the material. Dr. Kana further opined that probably only the groin immediately adjacent to Hobcaw would need to be removed, and it would take approximately a month to remove a groin. It is unclear to the Court why DeBordieu has not estimated the total cost of removal of all three groins, especially considering there is a possibility that if the stay is lifted, DeBordieu could complete construction of all three groins before this Court issues its decision

after the merits hearing. Regardless, it is clear that $250,000 will not cover the removal of three groins even by Dr. Kana's estimate.

The purpose of DeBordieu posting a bond is to insure that any harm resulting from DeBordieu's actions can be rectified. *See Keith v. Day*, 60 N.C. App. 559, 561, 299 S.E.2d 296, 297 (1983). Recognizing the difficulty of remediating environmental injury, it is especially important that DeBordieu be in a position to fully fund the complete removal of the groins and restoration of the beach should they receive an adverse decision. *See S.C. Dep't of Wildlife & Marine Res. v. Marsh*, 866 F.2d 97, 100 (4th Cir. 1989). Here, Baruch has provided an affidavit of an expert who avers that the cost of removal will be similar to the cost of the construction, which would put the cost of removal near $3.5 million. DeBordieu's expert averred that the removal of one groin would cost $250,000, from which we can infer that the removal of three groins would require $750,000. DeBordieu's evidence of a $250,000 commitment does not meet either expert's estimation of the cost of removal.

Therefore, although there was some evidence that DeBordieu maintains a reserve of money that could pay for the cost of removing all three groins, that reserve money has not been allocated toward removal of the groins and, in fact, it is set aside for beach preservation which presumably would be allocated towards the construction of the project. Accordingly, I find there is insufficient evidence of the necessary funds to guarantee the costs of removal. And, if there is insufficient money to remove the groins and thereby remediate the harm, the resulting harm from the installation of the groins would be irreparable.[2]

Therefore, I find Petitioner have met their burden to show irreparable harm.

Substantial Likelihood of Success on the Merits

When determining what constitutes a "substantial likelihood of success on the merits" it is helpful to refer to this State's injunction jurisprudence, which also addresses the likelihood of success on the merits. Our courts have held that "[i]n evaluating whether a plaintiff is entitled to a preliminary injunction, the court must examine the merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of

[2] DeBordieu argues Petitioners will have an adequate remedy by statute for removal of the groins pursuant to section 48-39-290(A)(8)(e). However, this statute governs removal after adverse effects from the groin installation have occurred. Here, the issue is the removal of groins pursuant to a loss at trial before any adverse effect occurs.

entitlement to relief." *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011). The Court of Appeals echoed this principle in *Peek v. Spartanburg Regional Healthcare System* when it held "[t]he determination of whether to grant an injunction should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in determining whether a prima facie showing has been made." 367 S.C. at 456, 626 S.E.2d at 37. Accordingly, I find Petitioners do not have to establish their case on the merits, but rather make a prima facie showing that they are entitled to relief.

Here, Petitioners have cited several issues that are worthy of consideration by this court. For instance, both Petitioners' experts submitted affidavits in which they opine the background erosion rate submitted by DeBordieu for Hobcaw is inappropriately inflated and incorrect. DeBordieu has submitted evidence that the background erosion rate is 8.1 cy/ft/yr. This rate is important because it establishes the trigger point for mitigation to take place after the groins are constructed. If the groins cause erosion at Hobcaw to exceed the purported background erosion rate of 8.1 cy/ft/yr, then DeBordieu will be required to engage in mitigation effort pursuant to the Permit.

Baruch's expert, Dr. Dabees attests the background erosion rate is inaccurate because it is based on outdated data and it is "much higher than existing background erosion rate." Specifically, he opines that DeBordieu's calculated rate "conflates historic erosion by including large historical morphologic changes, beach nourishment events and recent change into one linear rate." Further, he opines "the trigger is based upon an unusually high trigger number that does not bear a direct relationship to what is going to occur on the Baruch's beach without the construction of the groins." Dr. Debees concludes that the inflated background erosion rate "minimizes [DeBordieu's] responsibilities to mitigate for down coast erosion due to the groins after construction of the groins." Dr. Debees also notes that "none of the criteria to be used for mitigation quantifies actual loss of upland property along the downcoast beach at Baruch," but rather relies on "volumetric change," which "sidesteps potential groins related erosion at specific locations on the Baruch beachfront by combining gains and losses over a large area that also includes sand transported offshore due to the groins." Overall, Dr. Debees expresses a concern that DeBordieu's argument that it will prevent adverse effects to Hobcaw through mediation is meaningless if the mitigation trigger is based upon an inflated background erosion rate.

SCCCL's expert, Dr. Rob Young, also finds DeBordieu's estimated background erosion rate of 8.1cy/ft/yr at Hobcaw to be "inappropriately high" because it was based on "a period of time when the island was changing planiform shape in response to inlet migration." Dr. Young asserts that the inlet affecting the movement of sand at Hobcaw has moved south and that the use of "profile volume loss as a mitigation trigger, rather than shoreline change or land loss, does not adequately address the potential harm caused to downdrift property." As a result of the inappropriately high background erosion rate, he opines that damage to Hobcaw will go unmitigated.

In contrast, DeBordieu argues Petitioners have presented no credible evidence that the erosion rate is not high or approximately 8.1cy/ft/yr. DeBordieu's background erosion rate is supported by the affidavit of its expert, Dr. Kana. DeBordieu argues its estimate is consistent with the Department's historic erosion rate for the area. Nevertheless, the issue is again whether Petitioners have made a prima facie showing that they are entitled to relief. Overall, Petitioners have presented a prima facie case that the background erosion rate of 8.1cy/ft/yr at Hobcaw may not adequately protect Hobcaw from adverse effects from the groins if this rate is, indeed, inappropriately high.

Petitioners also contend the Department failed to adequately establish the two statutory conditions precedent for constructing groins: (1) a high erosion rate and (2) that erosion is threatening existing development or public parks. § 48-39-290(A)(8). Petitioner Baruch argues the Department's conclusion that the average erosion rate of 4.2 cy/ft/yr for 1940-2000 at DeBordieu is "high" and was made without comparing this rate to other beaches in the area or in South Carolina to give the number import relative to others. Petitioner SCCCL also attacks the Department's finding of a "high" erosion rate, asserting that over the past fourteen years, with two renourishments, the erosion rate at DeBordieu is positive 1.4cy/ft/yr. SCCCL also notes that the erosion rate calculated during the corresponding time of Hurricane Hugo (1989-1996), a catastrophic event, was 3.18 cy/ft/yr, which is less than the purported current background rate at DeBordieu. Overall, Petitioners complain the Department classified the background erosion rate at DeBordieu as "high" without any relative data points to show what is "low" and without adequately taking into account the renourishments, the addition of the bulkhead, and other events that have affected the rate over the years.

DeBordieu, for its part, argues Petitioners are "quibbling" with the erosion rates and its estimates are well-supported and consistent with the Department's historic erosion records. DeBordieu notes Petitioners have not put forward their own erosion rates to counter those submitted by DeBordieu and merely argue the rates are incorrect.

Whether or not the erosion rate is "high" at DeBordieu is a question of fact to be presented at trial for this Court's determination. And, because it is a necessary component to granting the Permit for a groin, a finding that the erosion rate at DeBordieu is not high would affect the merits of this case. At this stage in the case, Petitioners have presented adequate evidence to establish a prima facie case that what number or rate qualifies as "high" under the statute is unclear and the rate submitted by DeBordieu may not be correct. Therefore, on this issue, Petitioners have presented a prima facie case of success on the merits.

Balance of the Equities

I find that the balancing of the equities favors maintaining the automatic stay based on the unique factual circumstances of this case. DeBordieu contends that placing the sand and groins on the beach will enhance the beach for its users, better protect it from any storm events, and help decrease the frequency and intensity of future renourishments. It further argues that the project will not cause any immediate harm to Hobcaw. This appears to be correct regarding the sand installed upon the beaches and regarding the groins, if installed as permitted.

However, if Petitioners' allegations are correct, the time frame in which Petitioners are assured from harm is uncertain. That uncertainty is further exacerbated by the unknown timeframe for the Corps to grant the permit and the regulatory time constraints for constructing the project. Laws protecting turtle nesting require construction to take place between November 1st and April 30th. DeBordieu explained at the hearing that it intends to start construction this November (2019) if it receives a Corps permit by then. This case is scheduled to be heard in mid-February 2020. Therefore, when the permit is granted by the Corps is a dynamic and important factor in considering whether to lift the stay in this case. For instance, if the permit is not granted until January, then the groin construction may be only at its initial stages when the case is heard. Consequently, if this Court were to determine DeBordieu should not be granted the critical area permit and CZCC, then allowing the project to proceed in this case could result in partially constructed groins that would need to be removed prior to April 30th. However, if removal by

April 30th is not possible, partially constructed groins would remain on the beach for approximately six months, the effects of which are unclear to this Court because no evidence has been presented regarding this particular scenario.

Dr. Kana estimates that it will take six months to complete the project. Therefore, although lifting now could result in the completion of the project by April 2020, that assumption is based upon the Corps permitting the project before November 2019. If that does not occur, the Court is left authorizing a project that will not be completed, resulting in an uncertainty as to the impact of that uncompleted project. Moreover, DeBordieu has been renourished on a regular schedule in 1990, 1998, 2006, and 2015. Following that schedule of renourishment every 8-9 years, the next needed renourishment would be in 2021. Since the hearing in this case will be in February 2020, the benefit of decreasing the frequency and intensity of future renourishments is offset by the danger of allowing an uncertain project to proceed.

Public Interest

"[T]he petitioner must prove . . . continuing the stay serves the public interest." This issue must be considered in the context of the purpose of the statutes or regulations governing the conduct. In this case, the policy of South Carolina is to "preserve existing public access and promote the enhancement of public access to assure full enjoyment of the beach by all our citizens . . . ." S.C. Code Ann. § 48-39-260(6) (2008). In furtherance of that goal, the General Assembly established a policy of preserving beaches in this State. S.C. Code Ann. § 48-39-280(A) (Supp. 2018) ("A policy of beach preservation is established."). One of the tools in carrying out that policy is renourishment projects, which may include groin construction and maintenance where necessary "to extend the life of such projects." S.C. Code Ann. § 48-39-20(3) (2008).

Here, in support of their contention that continuing the stay serves the public interest, SCCCL presented evidence relating to the effect of the project upon SCCCL's members and presumably implying similar effects upon the public at large. This evidence included:

1. The sand previously used in 2015 was not compatible with the sand on DeBordieu beach and looked and felt horrible;
2. The debris and sediment that came from prior renourishment made it harder to enjoy the beach
3. The construction of groins would significantly interfere with some of the SCCCL's members or their family's personal use of the beach

4. The groins will make swimming, fishing, boating, surfing and walking on the beach harder because you will have to avoid and work around the structures;
5. The groins could cause harm to people of all ages; and
6. The construction of groins would expose DeBordieu to potential liability.

These assertions do not establish that continuing the stay serves the public interest. Generally, the effects that SCCCL identifies are common to the installation of any groin, and the Legislature has determined that groins are permissible in high erosion areas where development is threatened. More specifically, the first two allegations only relate to the previous project and offer no comparative evidence regarding the permitted project. The third and fourth allegations related to the personal use of SCCCL's members. Although SCCCL members are also members of the general public, I do not find that the harm that was asserted establishes that continuing the stay serves the public interest. The fifth allegation was speculative, and the last allegation was simply irrelevant.

On the other hand, although there is no dispute that absent renourishment of the beach DeBordieu will continue to suffer erosion which will eventually threaten existing development, that impact has not been quantified so that the Court can access the imminence of the threat. Furthermore, in this case, the Court's consideration of what serves the public interest must be made in the context of established public policy. *See* S.C. Code Ann. § 48-39-30 (2008); § 48-39-290(A)(8). Therefore, the Court must weigh the public policy of preserving the beach against the public policy of allowing the public's use the beach. Here, until the evidence establishes the groins should be constructed to protect the beach, the protection of the public's access to and use of the beach weighs in favor of continuing the stay.[3] Moreover, since the hearing in this case will be in February 2020 and the current condition of this public beach on DeBordieu does not reflect an immediate need for renourishment, I find that continuing the stay serves the public interest.

Conclusion

I find Respondent DeBordieu should be allowed to proceed with obtaining a permit from the Corps. Respondent DeBordieu may also begin developing and implementing the initial aspects of the groin construction including the process of beach renourishment in anticipation of

[3] It is notable that DeBordieu asserts the footprint of these groins is narrow and designed to match the natural beach profile. However, the Court was unable to determine the implications of that description from the evidence before it.

constructing the groins. However, this Court does not lift the stay to allow construction of the groins at this time. Nevertheless, at the conclusion of the merits hearing, and after the record is more fully developed regarding the nature and impact of the groins, the court may revisit this issue to determine if the stay should be lifted pending the court's decision in this matter.

IT IS THEREFORE ORDERED that Respondent's Motion to Lift Automatic Stay is GRANTED IN PART to allow Respondent DeBordieu to obtain a permit from the Corps of Engineers for the project and to begin developing and implementing the initial aspects of the project limited to the process of beach renourishment.

IT IS FURTHER ORDERED that the Motion to Lift Automatic Stay to construct or install the groins is DENIED until further review by this Court.

AND IT IS SO ORDERED.

_____

Ralph King Anderson, III
Chief Administrative Law Judge

August 28, 2019
Columbia, South Carolina

CERTIFICATE OF SERVICE

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

E. Harvin Belser Fair
Judicial Law Clerk

August 28, 2019
Columbia, South Carolina

EXHIBIT C

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, vs. South Carolina Department of Health and Environmental Control and DeBordieu Colony Community Association, Respondents.	)	Docket No. 19-ALJ-07-0089-CC
The Belle W. Baruch Foundation, Petitioner, vs. South Carolina Department of Health and Environmental Control and DeBordieu Colony Community Association, Respondents.	)	Docket No. 19-ALJ-07-0088-CC
STATE OF FLORIDA COUNTY OF COLLIER	)	**AFFIDAVIT OF DR. MOHAMED DABEES**

BEFORE ME this day personally appeared Dr. Mohamed Dabees, who, first being duly sworn, states as follows:

1. I am an expert in coastal engineering, and my work focuses on coastal processes modeling, tidal inlets, beach erosion control, long-term morphology, regional sand management, beach restoration and coastal structures.

2. I obtained my Bachelor's degree in Civil Engineering in 1988 from Alexandria University, and my Master's degrees in Civil Engineering and Engineering Management from Drexel University in 1995. I obtained a Doctorate in Coastal Engineering from Queens University, Canada, in 2000. I am a Licensed Professional Engineer in the State of Florida and am currently the Vice President and Project Engineer at Humiston & Moore Engineers. I have over 25 years of experience in the field of coastal engineering.

3. In connection with the above-captioned case, I have reviewed the Permit 2017-01795(the Permit) issued by South Carolina Department of Health and Environmental Control (DHEC) and the Technical Report supporting the permit application titled " Downdrift Impact Analysis" prepared by Coast Science & Engineering Inc (CSE). The following statements summarize general findings and comments related to the referenced project to support the Response to Motion to Lift Stay on behalf of petitioner, The Bell W. Baruch Foundation. I offer these statements in my professional opinion to a reasonable degree of engineering certainty,

4. The Permit involves an area of Debidue Island in Georgetown County, South Carolina. The primary issue for determination in this matter is the impact of the structures allowed by, and conditions for issuance of, Permit 2017-01795 to Respondent DCCA for beach re-nourishment and the construction of three groin structures adjacent to the north boundary of property owned by The Belle W. Baruch Foundation property.

5. Construction of the groins as authorized by the Permit will permanently alter the nearshore sand pathways and will result in irreparable harm by allowing extensive erosion to occur prior to the trigger for mitigation currently included in the Permit.

6. The groins allowed by the Permit function by providing a physical barrier to the sand moving along shore. As such, once the beach fill erodes beyond a certain point, the supply of

sand to the Baruch property will be effectively halted resulting in a significant increase in erosion due to the presence of the groin. This erosion will cause irreparable harm to Baruch's upland property, which is located downcoast of the southmost groin.

7. The Baruch Foundation will be irreparably harmed if the stay is lifted and the proposed groins are constructed. First, there would be irreparable harm to the beaches and upland property at Hobcaw immediately downdrift of the groin field.

8. If construction begins or is completed on the structures and stone components allowed by the Permit and then the current appeal is successful, it is my considered opinion that the cost and time required to remove the structures (including preparation of technical specifications, bid preparation and consideration, mobilization of crews and equipment, and then implementation of a removal plan) will be significant impediments to prompt and complete removal of the structures, resulting in a prolonged removal process. This removal process will further compound the irreparable harm to and impacts of the proposed groins on the Petitioner.

9. If installed, partially or completely, the structures and stone components allowed by the Permit cannot be completely removed promptly. Therefore, if construction is allowed to begin then there will be an irreparable impact upon the downdrift property, including that of the Belle Baruch Foundation.

10. It is reasonable and customary for engineers to rely on their experience and knowledge to estimate the probable cost of a given project or a component of that project. I am trained and experienced in projects including erosion control structures and rendering opinions as to probable cost of construction for similar type projects.

11. In my professional opinion, to a reasonable degree of engineering certainty, the estimated cost of removal of the structures and stone components allowed by the Permit would be

similar to [same order of magnitude] the initial construction costs.

12. The mobilization cost for the type of equipment required for removal is similar to that needed for construction. In fact, the time and effort to remove the stone and structures may even be more than what is needed for installation due to structural elements' changes in the marine environment. The staging costs and disposal costs may also offset or exceed the cost of the construction material.

13. Even if it were possible to completely remove the structures and stone components allowed by the Permit, the cost would be significantly higher than the estimated cost of $250,000 referenced in the Permit. The cost would, therefore, exceed the referenced $250,000 line of credit the Permit cites as DCCA's "commitment to reconfigure groins, remove groins, and/or restore the adversely affected beach through renourishment should it be determined that the three groins contemplated under this permit resulted in increased erosion rates."

14. There is a second reason I am of the opinion that allowing the permitted activities will result in irreparable harm to the Petitioner. The Permit erred in the selection of single mitigation criteria and assigning a high erosion rate that does not represent existing conditions as trigger.

15. The modeling and analysis provided with the permit application lacked demonstration of adequate model validation and did not provide necessary detail of model results including shoreline response and equilibrium conditions for existing and post groin construction conditions. This information is necessary to assess potential long-term impacts on the actual shoreline immediately south of the southernmost proposed groin.

16. It is also important to note that none of the criteria to be used for mitigation quantifies actual loss of upland property along the downcoast beach at Baruch. Instead, the

Permit's monitoring/mitigation trigger is based on total volume of sand that is exchanged over a large area that includes the upland as well as underwater parts of the active beach profile. This volumetric change sidesteps potential groins related erosion at specific locations on the Baruch beachfront by combining gains and losses over a large area that also includes sand transported offshore due to the groins.

17. The background erosion rate cited in the permit conditions as -8.1 cy/ft/ year is an inaccurate representation of existing conditions along the Baruch's property's shoreline. This background erosion rate which is set as the benchmark or mitigation triggers is much higher than existing background erosion rate. It conflates historic erosion by including large historical morphologic changes, beach nourishment events and recent change into one linear rate.

18. This background erosion rate does not fully represent the existing conditions in the area. Setting a high background rate as a linear rate for mitigation down coast of impermeable groin field represents high likelihood of irreparable harm to the downcoast shoreline of the Baruch property. In other words, the trigger is based upon an unusually high trigger number that does not bear a direct relationship to what is going to occur on the Baruch's beach without the construction of the groins. Consequently, this criteria reduces and minimizes DCCA's responsibilities to mitigate for down coast erosion due to the groins after construction of the groins.

19. The assumptions made to set such a high background rate are inaccurate and indicate unsustainable physical conditions. If, for discussion, one assumes such a high rate of background erosion did exist at Hobcaw, that rate would provide more evidence that construction of a groin field at Debidue (updrift of such a high chronic erosion area) will be detrimental and will cause irreparable harm to the Hobcaw segment of beach.

20. These irreparable harms will result if the permitted structures are constructed at any time, including prior to trial as requested by Respondent's Motion to Lift Stay.

21. I hold these opinions to a reasonable degree of engineering certainty.

Further, Affiant Sayeth Not.

Dr. Mohamed Dabees

SWORN to and subscribed before me this 30 day of July 2019, by Mohamed Dabees, who is

✓ personally known to me;
___ produced identification (type of identification produced: n/a .

Celia M. Fellows
Signature of Notary Public

Printed Name: Celia M. Fellows

Commission Expires: Feb, 21, 2021

CELIA M. FELLOWS
Notary Public – State of Florida
Commission # GG 075358
My Comm. Expires Feb 21, 2021
Bonded through National Notary Assn.

EXHIBIT D

THE BLUE HERON
June/ July 2021
Publication of the DeBordieu Colony Community Association "DCCA" www.debordieucolony.org

DeBordieu Colony Celebrates America with a Weekend of Fun!

DeBordieu Colony and its residents know how to throw a party and this year, maybe more than most, we are going all out – to celebrate our independence, our health, and the reopening of our community. Last year's July 4th Celebration was cancelled due to COVID, and even a last-minute cancellation this year by our former fireworks company because of supply issues and staffing didn't stop us. The show will go on, literally, on Saturday, July 3 at 9 PM.

Our new fireworks company has promised us a bigger, and better fireworks extravaganza, and we can't wait!

Join family, friends and neighbors to celebrate America's birthday with spectacular July 4th Festivities! Full details below, refer to the www.DeBordieuColony.org for more information.

Saturday, July 3rd
9:00 PM: Fireworks at the Clubhouse
At 8:45 PM Luvan Blvd. will be closed to vehicle traffic at Bonnyneck and the east end of Wallace Pate to accommodate pedestrian traffic.

Sunday, July 4th
4th of July Parade
9:00 AM Parade Line-Up (Ocean Park)
10:00 AM Parade Begins
As a friendly reminder -

- Please be respectful of friends and neighbors who want to stay dry
- Water balloons and/or garden hoses are not allowed
- Everyone is encouraged to participate, but remember…
  leave those super-soaker water guns at home

AROUND THE COLONY

DeBordieu Home & Garden Club

Sassy Tugwell & Renee Davis

It brings us great joy to announce the DeBordieu Home and Garden Club (DHGC) 2021-22 season will proceed with a full slate of activities for your enjoyment. Plans are currently underway for us to re-launch with the **Annual Chef's Dinner on Thursday, September 30, 2021, in the Colony Room of the Clubhouse**. Details will follow closer to that time.

Join the DHGC for the Upcoming Season!
Dues are $30 per family
and include invitations to all activities taking place
September 2021 through May 2022.

The tentative season will feature seven events:

Two of these events are free to members and the remaining ones are at an individually discounted rate of $20 per person. Should you plan to attend two events individually, or just one event as a couple, you have more than paid for your yearly membership!

Join us today! Make your check out to DHGC and send it to:
Sassy Tugwell, 357 Calais Street, Georgetown, SC 29440

We hope to see you all very soon!

Take a book, lend a book:

The DCCA Community Affairs has coordinated placement of lending libraries near the playground on DeBordieu Blvd. for adults and children.

Save the date!

2nd Annual 5K Run/
Walk S.C.U.T.E. LOOP
Saturday, October 23, 2021 at 8:00 AM

Adults and children are encouraged to participate in-person or virtually for good family fun! Visit us at www.debordieuscute.org for more information. Hosted by: DeBordieu & Hobcaw S.C.U.T.E. and the DCCA Community Affairs Committee

DeBordieu Colony Beach Rules

- STAY OFF the sand dunes; they are very fragile and provide protection from storm surges.
- No glass; enjoy any beverage in a plastic or metal container.
- Individuals under the age of 21 are prohibited from consuming alcohol.
- Do not disturb turtle nesting areas. (They are protected by federal law.)
- Dogs must be leashed from 9 a.m. to 7 p.m. During other hours, dogs must be under voice control and always kept away from turtle nesting areas.
- Please clean up after pets and dispose of properly. (Pet waste bags are located at several beach accesses.)
- Please remove trash and personal property when you leave.
- Items left on the beach overnight will be removed.
- Fires and fireworks are prohibited on the beach.
- Please fill in any holes dug on the beach before you leave.

Rules comply with SC Law and will be enforced by DeBordieu and Georgetown County Sheriff's Officers.

For further information call DeBordieu Community Safety and Security (843) 546 - 8520

COMMUNITY BOARD BRIEFS

The following are highlights from the DCCA June 19 Board Meetings:

Reported:

- **Currently, there are 57 ARB applications in review, and 71 active permitted projects**
- **Coastal Asphalt has completed the curbing, milling and paving on Blue Heron, Cotillion and Summerwood, as well as the patching along Luvan Blvd. The project will continue after Labor Day.**
- **The Sand Road License Agreement has been signed by all parties. Locks have been installed. Security will be monitoring these areas in accordance with agreement terms.**
- **Georgetown County Council unanimously approved a resolution to join the state's legal action against Hobcaw Barony, and it supports maintaining public access to North Inlet.**
- **Beach renourishment project is on track. Groin design and bid packages are being completed, with a pre-bid meeting to be scheduled for late July.**
- **Payments continue to come in on the annual beach assessment, which is due June 30.**
- **DeBordieu is listed in the Southern Living article, "Seven South Carolina Beaches Perfect for a Relaxing Lowcountry Getaway."**

Approved:

- **The 2021-2022 committee chairs and members.**
- **Adjusted compensation for one department.**
- **Spending up to $40,000 from the Capital Account on engineering services agreement to review and recommend options for additional paths and surfaces on Luvan Blvd.**
- **The encroachment of the corner edge of the garage over the rear setback of the house located on 537 Lantana Circle.**

Approved Board minutes are available online at www.debordieucolony.org

A friendly reminder…
Beach Preservation assessments are due by June 30

SCUTE

Betsy Brabson & Robin Baughn

The 2021 season began on May 19 with our first nest on Hobcaw Beach. It is shaping up to possibly rival the 2020 season which tied our second best season with 75 nests. To date, DeBordieu has 22 nests and Hobcaw 15 on our 6 miles of beach. SC has over 2400 nests with a higher concentration to our south. Several volunteers are working on their SC DNR certification, walking with their trainers at sunrise, having a chance to probe crawls and occasionally go through the nest relocation procedure. Our first nests will likely begin hatching in late July. SC DNR has not yet decided if volunteers can conduct public nest inventories.

There have been two turtle encounters; which is always exciting! Under a full moon, on the night of May 25, a turtle was seen emerging from the surf around 8 PM. She nested south of Walkway #3 and returned to the ocean two hours later. On the morning of June 10 around 6:30 AM, a nesting loggerhead was spotted just north of the Access Road. Daytime nesting is rare and likely means the turtle has tried night after night unsuccessfully to find a good habitat. It's also great training for volunteers to observe the nesting process and take photographs and videos. Visit us at www.debordieuscute.org for updates with videos and inventory status!

Signs have been erected along the high tide line midway down Hobcaw Beach. The purpose is to alert beachwalkers to keep themselves and their dogs low on the beach due to nesting shorebirds. The nests of these birds are just scrapes in the sand and with the eggs being very cryptic. When the mother is flushed off the nest, the eggs are vulnerable to overheating. Please be cautious.

As always, please remember sea turtles 'dig the dark' so lights out by 10 PM during nesting/hatching season, May to October along the oceanfront. Any holes dug on the beach should be below the high tide line so they will fill in naturally. Please help keep our beautiful six miles of beach safe and clean.

Photo by: Betsy Brabson

DCCA Community Affairs is sponsoring a blood drive

When: Monday, August 9, 2021

Time: 10 AM to 2 PM

Where: Clubhouse Parking Lot

Shhh……Georgetown Noise Ordinance is in effect from 9 pm to 7 am. DeBordieu Colony is brimming with residents and guests during the summer months, and Georgetown County Sheriff's Department reminds everyone that excessive noise is prohibited in residential communities from 9 pm to 7 am. Please be mindful of this ordinance and respectful of your friends and neighbors.

Boxes must be broken down and flattened.

DeBordieu Recycling Guidelines

Community recycling…

Community residents and their guests can conveniently recycle glass, aluminum, steel cans, plastics, newspapers, magazines, and cardboard boxes. For everyone's benefit please read and follow the guidelines below:

Cardboard Bin

Paper

Accepted: Corrugated cardboard, newspapers, magazines, phone books, catalogs, paperboard (cereal and shoe) boxes
Not Accepted: Styrofoam, pizza boxes, wax cardboard
How to Recycle Boxes: Break down or flatten all boxes

Commingle Bin:

Aluminum & Steel

Accepted: Any aluminum beer, soft drink or food containers, any metal (steel) food cans
Not Accepted: Aluminum foil or pie plates and other such items
How to Recycle Aluminum & Steel: Empty and rinse all cans

Plastics

Accepted: All Plastic #1 thru #6 (check bottom of container for number)
Not Accepted: All other plastic containers. No toys and no bags of any kind
How to Recycle Plastic: Rinse all containers

Glass Bin

Glass

Accepted: Food & beverage containers; green, clear and brown
Not Accepted: Glass plates, ceramic materials or any glass that is not a food or beverage container
How to Recycle Glass: Remove metal tops. Rinse all containers

THESE BINS ARE NOT TO BE USED FOR DISPOSAL OF HOUSEHOLD GARBAGE

Seasonal Reminders for Safety and Enjoyment

Share the road

Be aware and share the road! Whether you are on two wheels or four, there is plenty of room for everyone to travel safely on the roadways in DeBordieu Colony.

- As we have more and more families in our community, it is important to watch for small children playing. A kicked ball into the street will result in disastrous consequences for an inattentive driver and a child. Please be aware of your surroundings.
- Pedestrians are encouraged to walk, jog, or operate golf carts on the pedestrian paths.
- Bicycles and Golf Carts traveling on roads have the same rights and responsibilities as any other vehicle driver.

Golf Carts

- State law requires golf cart operators to have a valid driver license, and be at least 16-years-old. Parents please do not allow your underage children to operate a golf cart in DeBordieu Colony. This is against the law, even if the child is accompanied by a parent or adult. Reports of underage drivers may be made to the Gate (843.546.8520).
- Operation of golf carts is limited to daylight hours only, even if the cart is equipped with lights.
- Be mindful of all traffic signs and stop/yield where posted.

Dogs

All dogs are required to be leashed, and controlled by its owner at all times. Doggie bags are available at the Beach Club Access and Walkways No. 6 and 12. Please be respectful of your neighbors and use them. Please put bags in trash can.

Surf Fishing

- Do not fish in populated areas.
- If you want to swim, avoid waters being fished or those with lots of bait fish.

DeBordieu Colony
181 Luvan Boulevard
Georgetown, SC 29440
www.debordieucolony.org

DCCA ADMINISTRATION DIRECTORY

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Administrative Assistant

GATEHOUSE

Phone: 843-546-8520 Fax: 843-546-8532

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EXHIBIT E

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, v. South Carolina Department of Health and Environmental Control and DeBordieu Colony Community Association, Respondents.	)	Docket No. 19-ALJ-07-0089-CC **ORDER DENYING MOTION FOR SUPERSEDEAS**

Appearances:

For Petitioner: Leslie S. Lenhardt, Esq.
For Respondent DCCA: Tracey C. Green, Esq., J. Joseph Owens, Esq.
For Respondent DHEC: Sallie P. Phelan, Esq.

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (Court or ALC) on a Motion for Supersedeas (Motion) filed by Petitioner South Carolina Coastal Conservation League (League) pursuant to Rule 241(c) of the South Carolina Appellate Court Rules (SCACR) and Rule 68 of the Rules of Procedure for the Administrative Law Court (SCALC Rules). Petitioner asks this Court to impose a supersedeas staying the operation of the Court's Final Order in this case pending the resolution of Petitioner's appeal. This Court's Final Order affirmed the issuance of a permit by the South Carolina Department of Health and Environmental Control (Department) to Respondent DeBordieu Colony Community Association (DCCA) to construct three groins on Debidue Island in Georgetown, South Carolina. Petitioner argues the supersedeas is necessary to preserve the status quo and, therefore, prevent the appeal from becoming moot. DCCA filed a Response in Opposition, and Petitioner filed a Reply.[1] A hearing on the Motion was held at the Court's offices in Columbia, South Carolina, on September 15, 2021. After a thorough review of the filings in

[1] The Reply was not properly submitted to the ALC. However, the arguments made in the Reply were reiterated at the hearing in this matter and were therefore considered by the ALC.

this case and consideration of the parties' arguments, I conclude the Motion must be denied for the reasons stated below.

PROCEDURAL BACKGROUND

This matter originally came before the Court pursuant to a Request for Contested Case Hearing filed by the League challenging the Department's decision to issue Permit 2017-01795 to DCCA for beach renourishment and the construction of three groins along a 1.5-mile section of Debidue Island. This original case, docket number 19-ALJ-07-0089-CC, was consolidated for hearing purposes with another Request for Contested Case filed by the Belle W. Baruch Foundation (Baruch) (docket number 19-ALJ-07-0088-CC) challenging the same permit issued by the Department. While the litigation was pending in these cases, Baruch and DCCA filed a Joint Motion for Approval of a Settlement Agreement. On April 3, 2020, the Court dismissed Baruch's case with prejudice consistent with the Settlement Agreement, which included the amendment of the permit.

On April 15, 2020, consistent with this Court's Order of Dismissal, the Department issued an Amended Permit, which remained identified as permit number 2017-01795. The Department advised that the amendment was made part of the original Permit and was subject to the full terms of the Permit as issued. After this Amended Permit was issued, the League requested a Final Review Conference before the Department's Board, which was denied. The League thereafter filed a second Request for Contested Case to challenge the Amended Permit. This case was assigned docket number 20-ALJ-07-0161-CC and was consolidated with the League's original case pursuant to an Order of Consolidation issued on July 30, 2020.

Accordingly, at the time of the merits hearing in this case, the League's two contested cases challenging the original Permit and the Amended Permit were before the Court. The merits hearing was held on August 24-26, 2020, at the Court's offices in Columbia, South Carolina. On January 15, 2021, the Court issued a Final Order in this case affirming the Department's issuance of the permit, as amended. On February 15, 2021, the League appealed this Court's Final Order to the South Carolina Court of Appeals.[2] The League has raised the following three issues before the Court of Appeals:

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[2] Although the Final Order disposed of two cases, which were consolidated for hearing purposes, the League did not appeal docket number 20-ALJ-07-0161-CC, but instead, only appealed docket number 19-ALJ-07-0089-CC. Therefore, the Motion before this Court only listed that docket number as well.

1. Did the ALC err in finding that [the] proposed permit does not violate S.C. Code Ann. § 48-39-290(A)(8), which states that new groins are only allowed "on beaches that have high erosion rates"?
2. Did the ALC err in finding that [the] proposed permit does not violate S.C. Code Ann. § 48-39-290(A)(8), which states that new groins are only allowed on beaches "with erosion threatening existing development or public parks"?
3. Did the ALC err in finding that [the] proposed permit does not violate S.C. Code Ann. § 48-39-290(A)(8)(b), which states that "[g]roins may be permitted only after thorough analysis demonstrates that the groin will not cause a detrimental effect on adjacent or downdrift areas"?

In the matter now before the Court, the League contends that DCCA will complete its renourishment and construction activities before its appeal is concluded, resulting in the case becoming moot. Based upon the permit, DCCA's renourishment and construction activities are limited to the time period of November 1 through June 30 of any given year to avoid disturbing sea turtle nesting season. Therefore, if a supersedeas is not imposed, DCCA could begin construction as early as November 1, 2021. Based on the affidavit of Steven Traynum,[3] DCCA currently plans to begin mobilization in October of this year, start construction in November, and

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3 Steven Traynum is a project manager as Coastal Science & Engineering (CSE), the firm hired by DCCA to evaluate its options for renourishment and erosion control at Debidue Beach. Mr. Traynum did not testify at the merits hearing in this case and, therefore, has not been qualified as an expert.

The League argues this Court should not rely on Mr. Traynum's affidavit because he is not a professional engineer, his deposition showed minimal involvement with the project, and he was not qualified as an expert. Following the submission of his initial affidavit, DCCA submitted a supplemental affidavit for Mr. Traynum in which Mr. Traynum attests to his experience as a project manager for groin installation projects at Hunting Island, South Carolina, Edisto Island, South Carolina, and his experience as an assistance project manager for groin installation at Folly Beach, South Carolina. He avers he has extensive experience with groin analysis, design, permitting, construction, installation oversight, modification, and subsequent monitoring. The evidence thus reflects that although Mr. Traynum did not initially have extensive involvement with the project at the time he was originally deposed in this case, his involvement with this matter is now significant. For instance, Mr. Traynum is now the project manager for construction, oversight, installation, and subsequent monitoring of this project. Accordingly, he is very familiar with the project, and he is authorized to speak about the project on behalf of CSE.

Mr. Traynum attests that the concerns he voices in his original affidavit concerning the imposition of a supersedeas are a product of his professional opinion to a reasonable degree of scientific certainty. He further attests that the documents he relied upon in forming his opinions in the affidavits are the type of materials reasonably relied upon by experts in the field. The validity of Mr. Traynum's attestations was verified in supplemental affidavits submitted by Dr. Timothy Kana and Dr. Haiqing Kaczkowski, both of whom were qualified as experts and testified at the merits hearing in this case. The League contends Dr. Kana's and Dr. Kaczkowski's affidavits merely serve to bolster Mr. Traynum's affidavit when their own affidavits would have been more reliable and compelling.

Overall, I conclude the supplemental affidavits resolve any concerns this Court may have had about the credibility or reliability of Mr. Traynum's original affidavit. Accordingly, I find Mr. Traynum's affidavits to be credible and reliable, although I find they are entitled to less weight than testimony subject to cross-examination given at the merits hearing in this case. Moreover, the affidavits of Dr. Kana and Dr. Kaczkowski, both of whom were determined to be reliable experts by this Court and subject to cross examination, were very credible.

complete the project by February 2022. Groin construction is expected to commence approximately two weeks after the renourishment and take twelve to fourteen weeks to complete.

DISCUSSION

The serving and filing of a notice of appeal does not automatically stay the enforcement of an order of this Court. S.C. Code Ann. § 1-23-600(H)(5) (Supp. 2020); S.C. Code Ann. § 1-23-610(A) (Supp. 2020), *see also* Rule 241(b)(11), SCACR (providing appeals from administrative tribunals are an exception to the automatic stay in appeals). However, Rule 241(c), SCACR, provides that when no automatic stay is imposed, a party may move for an order imposing a supersedeas of matters decided in the order being appealed. *See* SCALC Rule 68 ("[T]he South Carolina Appellate Court Rules . . . may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules."). Generally, a supersedeas is a writ or order that suspends or stays the enforcement of a judgment pending appeal. *See, e.g.*, *Supersedeas*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A writ or bond that suspends a judgment creditor's power to levy execution, usu. pending appeal."). The motion for a supersedeas must first be made in this Court. Rule 241(d)(1), SCACR. When determining whether to grant the motion for supersedeas, the Court "should consider whether such an order is necessary to preserve jurisdiction or the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR. Additionally, the court has the authority to condition the granting of the supersedeas upon such terms it may deem appropriate, including the filing of a bond. Rule 241(c)(3), SCACR.

Status Quo

The League moves this Court for a supersedeas, in part, to preserve the status quo. Whether to preserve the status quo is not a consideration contemplated by Rule 241; rather, preserving the status quo is the effect of granting a supersedeas. *Melton v. Walker*, 209 S.C. 330, 336, 40 S.E.2d 161, 164 (1946) (holding "[t]he general rule is that the effect of a supersedeas or stay is to suspend proceedings and preserve the status quo pending the determination of the appeal or proceeding in error"). Nevertheless, the League argues that "preserving the status quo is equated with preserving the Court's jurisdiction."

Equating preserving the status quo with preserving jurisdiction is an overly broad assertion, and I do not find that jurisdiction will always be lost if the status quo is not maintained. If this were the case, then there should be no exceptions to the imposition of the automatic stay on appeal.

Yet, the legislature has made it clear that some cases, like this one, are exempt from the automatic stay. § 1-23-600(H)(5) ("A final decision issued by the Administrative Law Court in a contested case may not be stayed except by order of the Administrative Law Court or the Court of Appeals."); § 1-23-610(A)(2) ("Except as otherwise provided in this chapter, the serving and filing of the notice of appeal does not itself stay enforcement of the administrative law judge's decision."). In fact, the legislature's recent revision of the statute governing the lifting of the automatic stay following a request for a contested cases from a decision by a State board or commission shows the legislature's intent to make it easier to lift stays even before the contested case is determined by the ALC, thus allowing permitted projects to move forward. § 1-23-600(H)(4)(a) ("The court **shall** lift the stay unless the party that requested a contested case hearing proves: (i) the likelihood of irreparable harm if the stay is lifted, (ii) the substantial likelihood that the party requesting the contested case and stay will succeed on the merits of the case, (iii) the balance of equities weigh in favor of continuing the stay, and (iv) continuing the stay serves the public interest." (emphasis added)). The legislature's determination to allow the automatic stay to be more easily lifted when a contested case comes to the ALC, and to impose no automatic stay following the ALC's final order in these cases, reflects a legislative conclusion that the benefits of allowing projects to move forward can outweigh the potential cost of reversal on appeal. *See* § 1-23-600(H)(4)(a); § 1-23-600(H)(5); § 1-23-610(A). Indeed, allowing projects to move forward makes sense in cases where actions taken pursuant to the lower court's ruling can be adequately, and cost-effectively, reversed upon an adverse ruling on appeal.

Use of the Beachfront

In this case, the status quo the League seeks to preserve is the natural processes of the beachfront and the "natural ebb and flow that allows for unhindered access for the members of the public who regularly use it." While I agree with the League that allowing the groins to be constructed will not preserve the status quo, the legislature has made it clear that in cases like this, preserving the status quo is not the default on appeal, it is the exception. *See* § 1-23-600(H)(5); § 1-23-610(A). Therefore, the League must show a specific need for a stay under the facts of this case—the League must show preserving the status quo is necessary to preserve jurisdiction or prevent an issue from becoming moot. Rule 241(c)(2), SCACR.

Turning to the current appellate litigation and issues raised in that litigation, it is notable that "unhindered access for members of the public" is not one of the issues the League is litigating

on appeal. Nor has the League provided any argument why preserving unhindered public access is necessary to retain jurisdiction. *Id.* Therefore, preserving the status quo of unhindered public access is not necessary to prevent this "issue" from becoming moot, since it is not an issue.[4] *Id.* Moreover, the facts presented at trial indicate that ultimately access to the beach will be protected by a specific requirement of the permit.[5]

Preserving the Natural Ebb and Flow of the Beachfront

Next, the League contends that allowing "the significant disruption of the natural beach" through the construction of the groins before the League can obtain judicial review is contrary to preserving the status quo. However, the League's desire to preserve the status quo of the natural ebb and flow of the beach is ironic because the League does not oppose DCCA renourishing the beach, which is part of the contested permit. The addition of this sand is a significant, unnatural addition to the environment that involves the use of heavy machinery to add hundreds of thousands of cubic yards of sand to the beach that will change the shape of the beachscape and the amount of sand moving within the littoral system. The League nonetheless maintains that because it did not contest the renourishment before this Court, the renourishment is part of the "status quo." Yet, if the status quo is truly maintained in this case, the beach would remain in the condition it is in absent the permit (no renourishment or groin construction).

Irony aside, the League has failed to show that maintaining the natural ebb and flow of the beach without the groins is necessary to prevent the loss of jurisdiction or to prevent an issue or

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[4] Even if this issue were considered, approximately 2,000 ft. of DeBordieu Colony beach is so eroded that there is no walkable area from mid-tide and higher. As a result, during at least half of any typical day, beachgoers cannot walk the beach from the north side of DeBordieu Colony to the south side. At the south end of the bulkhead, there are presently only a few hours of access around low tide. The permitted project (which includes renourishment and installation of the groins) will remedy those restrictions allowing the beach to be passable in front of the bulkhead at high tide. Furthermore, access to the beach will be limited by the sand renourishment project which the League. Construction of the groins will mostly coincide with that renourishment project.

[5] Special Condition 15 of the permit requires that "[a]ccess along the beach in the vicinity of the new groins must be maintained or improved." This condition further provides that "[i]f access is impacted or eliminated, temporary access around or over the groins must be established immediately" and "[w]ithin 30 days of notification from the department, a plan to provide permanent access around or over the groins must be submitted by the entity responsible for the groin construction." The permanent access plan must be implemented within ninety days of the Department's approval of the plan.

Additionally, as this Court found in its Order, after groin construction, beach access and useability should not be impeded by the groins. Initially, the amount of sand deposited in the renourishment will completely cover the groins. However, the groins will eventually be uncovered across mainly the front beach and could force some people to hop over them while walking or impede the use of bicycles. Nevertheless, Dr. Kana testified the groins should remain relatively covered at the back beach without impediment. Therefore, as the groins move towards their trapping capacity, they will impact the usability of the front part of the beach, but other parts will remain freely accessible.

the case from becoming moot. "A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Byrd v. Irmo High Sch.*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) (quoting *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)). Here, if the groins could not be removed and the beach could not be restored upon completion of construction, or if DCCA was no longer governed by the permit upon completion of the project, then the case would be rendered moot because (1) a judgment reversing the issuance of the permit would have no effect on the controversy and (2) redress would be impossible. However, the League has failed to show that the groins cannot be removed, and the beach restored if the appellate court issues an adverse ruling.

At the merits hearing in this case, Dr. Timothy William Kana[6] explained that although he has not been personally involved in completely removing groins, he has experience with pulling groins up and repositioning them during the construction and installation process. Dr. Kana opined that, after observing groin construction at Hunting Island and Folly Beach, the process of groin removal would be fairly straightforward. The groins will be constructed using sheet pile, and each section of sheet pile can be removed relatively quickly by breaking the cap connecting the sheets. The rocks used to create the scour would then be removed, and the beach would be returned to its natural state. This project could be completed in approximately four weeks. Mr. Traynum also attested in his affidavit that based upon CSE's experience with repositioning groins, it is likely the groins could be removed in approximately four weeks and the beach restored to its original condition. Accordingly, construction of the groins in this case would not render the League's appeal moot.

Furthermore, when this Court originally addressed the issue of lifting the stay in this matter, the Court denied that request because of a concern that there were insufficient funds to pay for the removal of the groins. Since that determination, DCCA addressed those concerns at the merits hearing. Specifically, Dr. Kana opined the groins could be removed for around $435,000.[7] Mr.

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[6] Dr. Kana is the President of CSE, and the Court qualified him as an expert in beach erosion, coastal geomorphology and processes, sediment buckets and transport, beach restoration, planning design and implementation, and tidal inlet sediment dynamics. The Court found Dr. Kana to be highly credible and his testimony to be persuasive.

[7] The League's expert witness at the merits hearing, Dr. Robert Young, opined that $1 million would not be enough to mobilize sand with dredges much less remove groins. However, Dr. Young acknowledged that he has no experience

Traynum similarly attested that the groins could be removed for $500,000 or less. Additionally, in accordance with the permit issued in this case, DCCA supplied a letter of credit showing it can cover $1 million in costs associated with any remediation necessary as a result of mitigation for the groin impact—either reconstructing or removing the groins and renourishment of the impacted beach. DCCA also maintains a Beach Preservation Fund, which contains funds to cover the cost of beach maintenance and restoration at DeBordieu Colony. It is a seventeen-year annually funded account that started in 2017 and is projected to go through 2033, at which point it is estimated it will contain $10-12 million in funds. Therefore, DCCA established that removal of the groins in the event of a reversal is feasible, and it has the finances to undertake the removal of the groins and restoration of the beach.

In opposition to the evidence presented by DCCA, the League refers to the affidavit of Dr. Mohamed Dabees, which was offered by The Belle Baruch Foundation in response to DCCA's Motion to Lift Stay when the Baruch was still a party to this case.[8] The League maintains this affidavit remains relevant even though Dr. Dabees is not one of its witnesses and was not called at trial. Although affidavits are allowed to support motions, the Court finds Dr. Dabee's affidavit should not be given much weight. Dr. Dabees' assertions were not subject to cross-examination as was the testimony at trial and further, his affidavit was not submitted for the purpose of the Motion currently before the Court.

Moreover, consideration of Dr. Dabee's affidavit does not change this Court's determination that the groins can be successfully removed, and the beach restored if the appellate court issues an adverse ruling. In his affidavit, Dr. Dabees attested that, in his expert opinion, "the cost and time required to remove the structures (including preparation of technical specifications, bid preparation and consideration, mobilization of crews and equipment, and then implementation of a removal plan) will be significant impediments to prompt and complete removal of the structures, resulting in a prolonged removal process." In other words, Dr. Dabees was concerned with how promptly the groins could be removed but he did not attest they could not be removed.[9]

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with groin removal, or the project costs associated with them. I therefore found Dr. Kana's testimony on the subject of groin removal to be more credible and persuasive.

[8] The Belle Baruch Foundation entered into a settlement agreement with the Department and withdrew as a party to the case after this Court's order on the Motion to Lift Stay was issued.

[9] The League also cited to this Court's concerns in its Order on the Motion to Lift Stay about the DCCA's ability to adequately remove the groins. At that time, the Court was concerned about the removal and its cost, but as explained

In sum, because there is no testimony or affidavits supporting the position that the groins, if constructed, cannot be removed and the beach restored in the event of an adverse ruling, then there is no evidence to show the issue of permitting the groin construction will become moot upon completion of construction. *See Byrd*, 321 S.C. at 431, 468 S.E.2d at 864 ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." (quoting *Mathis*, 260 S.C. at 346, 195 S.E.2d at 715)). I further find the groins could be removed upon reversal of the permit for approximately $435,000, and DCCA has the funds to finance this removal.

A Completed Project Does Not Render the Case Moot

Despite the testimony and attestations that the groins can be adequately removed and the beach restored, the League argues that if the permitted activity is completed before a ruling on the appeal is issued, then the case will nevertheless be rendered moot under the South Carolina Supreme Court's ruling in *Town of Arcadia Lakes v. S.C. Dep't of Health & Env't Control*, S.C. Sup. Ct. Order dated April 9, 2015 (*Arcadia Lakes*). *See also Town of Arcadia Lakes v. S.C. Dep't of Health & Env't Control*, 433 S.C. 47, 52, 855 S.E.2d 325, 328 (Ct. App. 2021), *reh'g denied* (Mar. 25, 2021) ("Our supreme court granted a writ to review this court's decision but dismissed the writ because the Developer finished the project while the appeal was pending, rendering moot any dispute about DHEC's permitting decision." (citing S.C. Sup. Ct. Order dated April 9, 2015.)). In this unpublished, un-reported opinion, the South Carolina Supreme Court dismissed the case as moot because the construction activities authorized under the contested permit issued by the Department had been completed during the pendency of the action. *Arcadia Lakes*, S.C. Sup. Ct. Order dated April 9, 2015. The Supreme Court found that because the activities authorized by the permit were completed, the Respondent's "coverage under the [permit] is now terminated" and "it is now impossible for this Court to grant any redress in the context of the issues as framed and litigated below (i.e., modify or revoke authorization for [Respondent's] construction activities under the state-wide general permit)." *Id.*

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above the Court's concerns were assuaged by Dr. Kana's testimony at the merits hearing. Therefore, the Court does not have the same concerns now having benefited from the testimony presented at trial.

Based upon this Supreme Court order, the League contends this case will become moot if DCCA finishes the permitted project before the appeal can be resolved. At the outset, the Supreme Court's order in *Arcadia Lakes* was not only unpublished, but un-reported. It therefore has no precedential value and cannot be relied upon in this case. Additionally, unlike DCCA in this case, the Respondent's "coverage" under the contested permit in *Arcadia Lakes* was terminated once the authorized construction activities were completed. Here, DCCA will be covered by the contested permit even after the groins are constructed due to the numerous special conditions in the permit that govern the monitoring of the groins for the duration of their existence. Therefore, unlike in *Arcadia Lakes*, because DCCA will remain covered by the permit, the possibility of redress (amendment or denial of the permit) will remain even after construction is completed. *See Byrd*, 321 S.C. at 431, 468 S.E.2d at 864 ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." (quoting *Mathis*, 260 S.C. at 346, 195 S.E.2d at 715)). Therefore, in this case, it will be possible for the appellate court to grant effectual relief—removal of the groins and restoration of the beach—even after the groins are constructed.

The League also cites to *Berry v. Ianuario*, 281 S.C. 21, 314 S.E.2d 308, (1983), in further support of its argument that allowing the actions granted by a lower court to proceed to completion will render an appeal moot. In *Berry*, the South Carolina Supreme Court granted a motion for supersedeas to stay the operation of the lower court's order, which terminated a father's parental rights and directed the child to be adopted by the mother's husband. *Id.* at 21, 314 S.E.2d at 308. In a very brief order, the Supreme Court explained it granted the supersedeas "to prevent the appeal from becoming moot." *Id.* The League maintains that the termination and adoption could have been reversed if an adverse ruling had been handed down and yet the Supreme Court found the appeal would be rendered moot if the lower court's order was carried out. However, the Supreme Court did not explain its reasoning why the case would be rendered moot. Certainly, the fact that this was a Family Court matter and the implications of completing an adoption process before the efficacy of that adoption is determined is not lost upon this Court. Furthermore, this Court has not found, nor have the parties provided it with, any South Carolina law that parental rights can be reinstated once they are terminated. *See* S.C. Code Ann. §§ 63-7-2510 to -2620 (2010 & Supp. 2020). Accordingly, *Berry* is distinguishable from the case at bar because it is a family court case

involving different dynamics and redress would not necessarily have been possible in *Berry* had the family court's order terminating parental rights and granting adoption been carried out. Therefore, I do not find it persuasive.

Right to Meaningful Judicial Review

The League argues if the status quo is not preserved, they will be denied their due process right to judicial review—in particular, their right to "meaningful" judicial review. The League asserts it has a constitutionally protected due process right that entitles it to administrative finality before construction activities occur and any review that comes after the construction of these structures "can hardly be described as 'meaningful.'" The League cites to the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and Article I, Section 22 of the South Carolina Constitution, which provides:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, **and he shall have in all such instances the right to judicial review**.

(emphasis added).

In other words, the League contends that appellate review must be complete before construction begins in order for it to receive meaningful judicial review.

I find the League's argument to be problematic for several reasons. First, aside from describing a review after construction as being "hardly meaningful," the League provides no legal support for its position that the kind of review provided under the statutory scheme and the appellate rules is not "meaningful." Additionally, at the Motion hearing, the League admitted that it is currently receiving due process and no violation of due process has yet occurred. The League thus has not explained what violation of due process is distinct from a case being rendered moot or a court being deprived of jurisdiction, which is the standard this Court is currently considering in reviewing the League's Motion for Supersedeas. *See* Rule 241, SCACR. Accordingly, the Court fails to see the relevance of this argument to the Motion before the Court.

Second, this argument is speculative and hypothetical at this time. The League has not alleged a current deprivation of due process; indeed, they admitted at the Motion hearing that they are currently receiving due process. The due process violation contemplated by the League will not occur unless and until the permitted project is completed before the appellate process is

complete. In other words, not only is the due process issue raised by the League not relevant to the supersedeas standard, but it is also not ripe. *Cf. Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 227, 467 S.E.2d 913, 917–18 (1996) ("A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute.").

Third, the League's argument suggests the due process right to meaningful judicial review[10] will always be violated in the absence of an automatic stay. Or, at the very least, their argument suggests that Rule 241, which allows for a supersedeas (stay) to be imposed in the absence of an automatic stay, and of which the League is availing itself currently, does not provide adequate due process if it does not result in the imposition of the supersedeas (stay). In other words, even if this Court properly considers this issue pursuant to the terms of Rule 241(c), the League contends their due process rights will be violated if the result they seek is not achieved. Either interpretation of the League's argument is a facial attack on the constitutionality of the statutory scheme declining to impose the automatic stay and/or Rule 241. This court cannot address facial attacks to the constitutionality of statutes. *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 108, 705 S.E.2d 28, 38 (2011) ("It is well settled in this State that ALCs, as part of the executive branch, are without power to pass on the constitutional validity of a statute or regulation.").

For all of these reasons, the Court finds this argument is not an appropriate basis upon which to determine whether a supersedeas should be granted in this case.

Conclusion

Because the League has failed to meet its burden to show the imposition of a supersedeas is necessary to preserve jurisdiction or prevent an issue from becoming moot, I deny the League's Motion.

Bond

Although I deny the Motion, because the parties presented extensive evidence regarding the amount of a bond to be imposed had the Court granted a supersedeas, I make the following findings of fact regarding a bond should the denial of this Motion be reversed. In its Response in Opposition to the Motion, DCCA argues the League should be required to post a supersedeas bond

[10] The League's argument presumes that "judicial review" encompasses appellate review.

if the Motion is granted. Pursuant to Rule 241(c)(3), the granting of a supersedeas "may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking," as the court deems appropriate. Similarly, if the court finds the imposition of the supersedeas is insufficient to provide complete relief, the court "may order other affirmative relief upon such terms as are deemed appropriate." *Id.* Therefore, this Court has the authority to impose a bond with a supersedeas if the Court deems it appropriate. *See id.*

DCCA argues that a delay in construction will cause them to incur costs (damages) above and beyond those originally contemplated by the renourishment and construction of the groins. DCCA thus asks the Court to require the League to post a bond in the amount of these damages should the Court impose a supersedeas.

The estimated damages if construction is not completed during the current construction window were not discussed at trial. DCCA relies on the affidavit and supplemental affidavit of Mr. Traynum (and, to a lesser extent, the supplemental affidavits of Dr. Kana and Dr. Kaczkowski) to support its estimation of damages. To calculate the increased costs DCCA would incur in absence of the groins, Mr. Traynum looked data on erosion along Debidue Beach from a 2008 ATM study, a 2016 ATM study, and CSE's own studies of the area.[11] Based on post-2015 monitoring, CSE believes that if the scheduled renourishment goes forward in November of this year, construction of the groins will be possible for about six months thereafter before erosion will make the project no longer feasible. After six months, there will no longer be enough sand on the beach to accommodate the groins as designed. Similarly, erosion rates from the 2008 ATM study also show that construction would no longer be feasible after the 2021-2022 window without further renourishment. Mr. Traynum further avers that if construction is not completed during the 2021-2022 construction window, then DCCA will have to wait until the next renourishment project can be completed in about six years to construct the groins. It appears that conducting another, smaller renourishment prior to the usual six-year cycle is not practical because the current permit expires after five years, and this is the last construction window during which the groins can be completed before expiration. If the permit expires, a new permit, environmental impact analysis,

[11] The last renourishment took place in 2015. Mr. Traynum attests that between 2015-2021, the project area lost approximately 500,000 cy of sand, which represents a loss of 77% of the renourishment volume from 2015. This amount of sand loss is equivalent to $7,325,000 in 2015 costs and approximately $8,675,000 in 2021 costs.

and federal and state review will be required in addition to further consulting fees and possible litigation fees.

If DCCA cannot install the groins during the 2021 permitting window, Mr. Traynum attests it will suffer a loss up to $1,872,500 in lost mobilization and material costs, which represents approximately 70% of the total cost of the groins ($2,675,000). Additionally, if DCCA cannot complete the project during the 2021 construction window and the permit expires, DCCA will have lost approximately $400,000 in consulting and permitting fees. Further, without the groins reducing the erosion rate by 50%, DCCA will have to conduct another renourishment that it would not have had to undertake with the groins at a cost of $11,300,000 for the sand alone at 2021 costs. Finally, Mr. Traynum avers that each year without the construction of the groins will cause the beach to lose more sand than it would have lost had the groins been in place, and this lost sand has a monetary value of $4,337,500 over a six-year period.[12]

Overall, when the costs lost mobilization and material costs, the lost consulting and permitting fees, and the extra renourishment are added together, DCCA expects to suffer damages in excess of $13,500,000 if it cannot complete the groins this construction window (2021-2022).

The League simply argues DCCA has failed to show a bond is necessary and disputes these estimated damages. The League asserts the estimate of $13,500,000 is "absurd" and "[s]urely, a supplement nourishment would not be that expensive" because DCCA could always conduct another, smaller renourishment if needed. The League further contends Mr. Traynum and CSE's reliance on data after 2015 does not give a realistic picture of the erosional rates in the area, and therefore the likely damages, because Tropical Storm Ana and Hurricane Joaquin exacerbated erosion very shortly after the 2015 renourishment. The League also argues that prior data is insufficient to predict future losses but suggested no alternative method to calculate DCCA's losses.

To the contrary, in his supplemental affidavit, Mr. Traynum supplemented the 2015 data with data from ATM's 2008 study after the 2006 renourishment and came to the same result as far as impacts to the project. Additionally, Mr. Traynum averred that the post-2015 data is more reliable because storm events are increasing and the relatively calm period after the 2006

---

[12] Specifically, DCCA asserts the net loss of sand on the beach without the groins compared to the beach with the groin will cost $632,971 the first year after renourishment, and $740,906 per year averaged over the remaining period.

renourishment does not reflect the new norm of increased storms. The League offered no evidence to dispute DCCA's assertions or to support its assertions.

While past erosion rates may not be able to precisely predict future erosion rates, I find they are the best available data for predicting future erosion and DCCA reasonably relied upon them to estimate damages in this case. Furthermore, whether DCCA relies on the data from 2006 or 2015, the only evidence before the Court is that that the 2021-2022 construction window is the last feasible construction window before this permit expires. Therefore, the preponderance of evidence reflects that the cost to DCCA for completing an additional renourishment project (without groins) is approximately $11,300,000, at current 2021 project costs (i.e., 17.35/cy). *See Be Mi, Inc. v. S.C. Dep't of Revenue*, 408 S.C. 290, 297, 758 S.E.2d 737, 740 (Ct. App. 2014) ("Absent an allegation of fraud or a statu[t]e or a court rule requiring a higher standard, the standard of proof in administrative hearings is generally a preponderance of the evidence."). Furthermore, DCCA would lose the $1,872,500 in mobilization and material costs and $400,000 in consulting and permitting fees if construction is not completed in the 2021-2022 window. Accordingly, if a supersedeas is granted and the League does not prevail upon its appeal, a reasonable estimate of the amount of a bond necessary to cover DCCA's damages would be $13,500,000.

ORDER

IT IS THEREFORE ORDERED that Petitioner's Motion for Supersedeas is **DENIED**.

AND IT IS SO ORDERED.

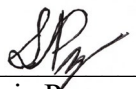
_____

Ralph King Anderson, III
Chief Administrative Law Judge

September 27, 2021
Columbia, South Carolina

CERTIFICATE OF SERVICE

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



Stephanie Perez
Judicial Law Clerk

September 27, 2021
Columbia, South Carolina

EXHIBIT F

The Supreme Court of South Carolina

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners,

v.

South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.

Appellate Case No. 2013-001521
Lower Court Case No. 2009AL0700069

ORDER

We granted a petition for a writ of certiorari to review the court of appeals' decision in *Town of Arcadia Lakes v. South Carolina Department of Health and Environmental Control*, 404 S.C. 515, 745 S.E.2d 385 (Ct. App. 2013), in which the court of appeals affirmed certifications for certain construction activities (including land disturbance and storm water discharges) under a state-wide general permit. Essentially, Petitioners' contention is that Respondent Roper Pond, LLC, (Roper) does not qualify for coverage under a state-wide general permit, and therefore, Roper's construction activities are not authorized to proceed.

At oral argument before this Court, the parties conceded Roper's construction project proceeded and was completed during the pendency of this matter.[1] As all

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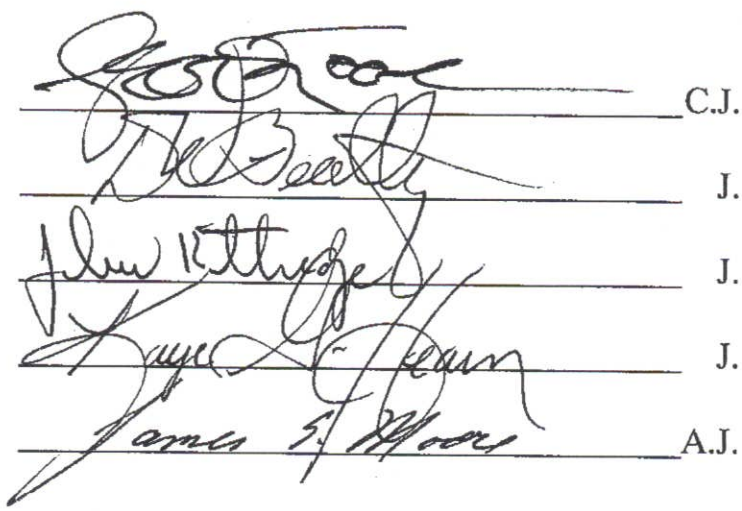
[1] "[T]he serving and filing of the notice of appeal does not itself stay enforcement of the administrative law judge's decision." S.C. Code Ann. § 1-23-610 (A)(2) (Supp. 2014); *see also* S.C. Code Ann. § 1-23-600(H)(5) (Supp. 2014) ("A final decision issued by the Administrative Law Court in a contested case may not be stayed except by order of the Administrative Law Court or the court of appeals.");

construction activities subject to and authorized by the state-wide general permit have been completed, Roper's coverage under the state-wide general permit has now terminated.

Accordingly, we dismiss this matter as moot, as it is now impossible for this Court to grant any redress in the context of the issues as framed and litigated below (i.e., modify or revoke authorization for Roper's construction activities under the state-wide general permit).[2] *See Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) ("A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court. If there is no actual controversy, this Court will not decide moot or academic questions." (citing *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973))).



_____ C.J.

_____ J.

_____ J.

_____ J.

_____ A.J.

Columbia, South Carolina

April 9, 2015

Rule 241(b)(11), SCACR (noting that, in appeals from administrative tribunals, the service of a notice of appeal does not automatically stay matters decided in orders).

[2] As to Petitioners' concerns regarding post-construction stormwater, sedimentation, and water-quality issues, counsel for Respondent South Carolina Department of Health and Environmental Control (DHEC) assured this Court at oral argument that DHEC has the ongoing ability to receive and investigate post-construction complaints and the prosecutorial discretion to initiate regulatory enforcement proceedings for any violations of applicable law.

cc:
W. Thomas Lavender, Jr., Esquire
Joan Wash Hartley, Esquire
Amy Elizabeth Armstrong, Esquire
Stephen Philip Hightower, Esquire
Jacquelyn Sue Dickman, Esquire
James Blanding Holman, IV, Esquire
The Honorable Jana Shealy

EXHIBIT G

The Supreme Court of South Carolina

Kiawah Development Partners, II, Respondent,

v.

South Carolina Department of Health and Environmental Control, Appellant.

and

South Carolina Coastal Conservation League, Appellant,

v.

South Carolina Department of Health and Environmental Control and Kiawah Development Partners, II, of whom South Carolina Department of Health and Environmental Control is Appellant,

and Kiawah Development Partners, II, is Respondent.

ORDER

The South Carolina Coastal Conservation League (SCCCL) has filed a petition for a writ of supersedeas, pursuant to Rule 241(c), SCACR.

We grant SCCCL's petition for a writ of supersedeas, and expedite the appeal.

The Appellants' initial briefs and Designations of Matter to be Included in the Record on Appeal (DOM) shall be served and filed within fifteen (15) days of this Order. Respondent shall serve and file its initial brief and DOM within fifteen (15) days after service of Appellants' initial briefs and DOM. Any reply briefs must be served and filed within five (5) days after service of Respondent's initial brief. Appellants shall serve a copy of the Record on Appeal on all parties who have served a brief within fifteen (15) days after service of the last brief. Within ten (10) days after service of the Record on Appeal, each party shall serve a copy of its final brief(s) on every other party to the appeal, and shall file fifteen (15) copies of the final brief(s) with the Clerk of Court. Appellants shall file the Record on Appeal no later than the date the final briefs are due. No extensions will be granted.

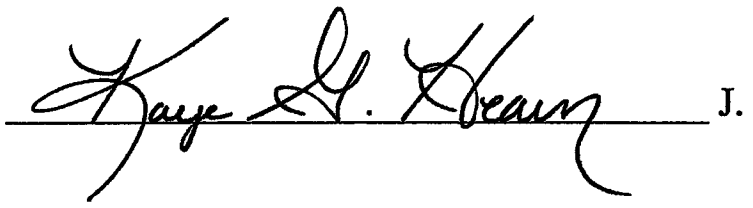
IT IS SO ORDERED.

C. J.

J.

J.

J.



J.

Columbia, South Carolina

July 22, 2010

EXHIBIT H

The Supreme Court of South Carolina

Kiawah Development Partners, II, Respondent,

v.

South Carolina Department of Health and Environmental Control, Appellant,

and

South Carolina Coastal Conservation League, Appellant,

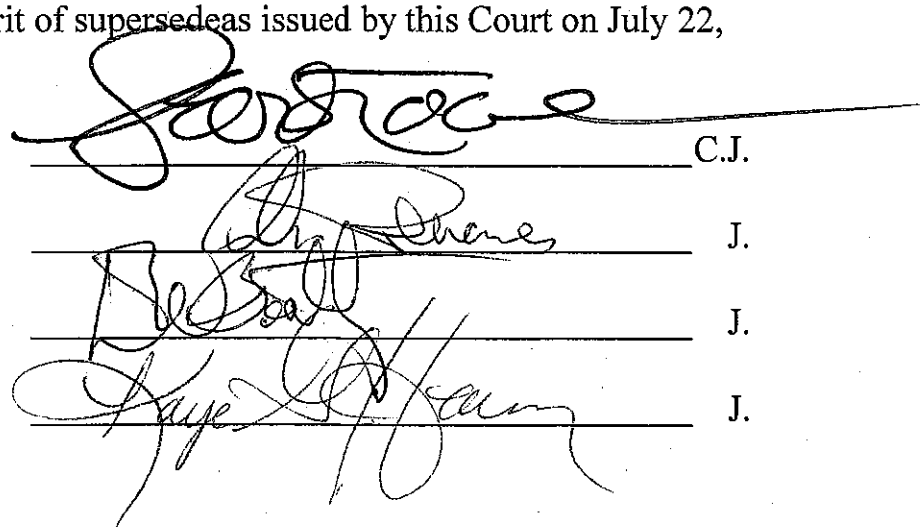
v.

South Carolina Department of Health and Environmental Control and Kiawah Development Partners, II, of whom South Carolina Department of Health and Environmental Control is, Appellant, and Kiawah Development Partners, II, is, Respondent.

Appellate Case No. 2010-155629

ORDER

Respondent moves to lift the writ of supersedeas issued by this Court on July 22, 2010. The request is denied.



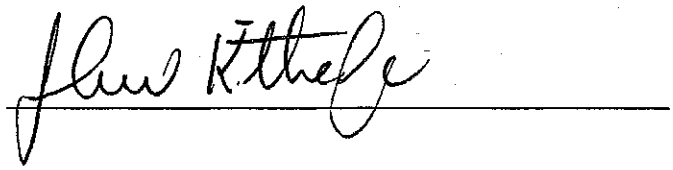
C.J.

J.

J.

J.

I would grant the motion to lift the writ of supersedeas.

 J.

Columbia, South Carolina
July 11, 2014

cc:
Jacquelyn Sue Dickman, Esquire
Allen Mattison Bogan, Esquire
Michael Robert Hitchcock, Esquire
James B. Richardson, Jr., Esquire
Robert D. Cook, Esquire
John W. McIntosh, Esquire
Bradley David Churdar, Esquire
Davis Arjuna Whitfield-Cargile, Esquire
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Gedney M. Howe, III, Esquire
Amy Elizabeth Armstrong, Esquire
George Trenholm Walker, Esquire
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Jordan R. Israel, Esquire
Frank S. Holleman, III, Esquire
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J. Wesley Earnhardt, Esquire
Michael P. Addis, Esquire
Philip L. Lawrence, Esquire
T. Parkin C. Hunter, Esquire
Jana E. Shealy

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Oct 13 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

ALC Docket No. 19-ALJ-07-0089-CC

South Carolina Coastal Conservation League, ... Appellant,

vs.

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

VERIFICATION

I, Laura Cantral, Executive Director of the Coastal Conservation League, being duly sworn, say that the Coastal Conservation League is the Appellant herein. On behalf of the Coastal Conservation League I have read the foregoing Petition and know the contents thereof and that the same is true to my own knowledge.

SWORN to and Subscribed before me)
this 11th day of October , 2021)
)
)
Notary Public for South Carolina)
)
My Commission expires: 09-13-2026

Laura Cantral
Signature of Appellant

REED RAYBORN
My Commission Expires
NOTARY PUBLIC
09-13-2026
STATE OF SOUTH CAROLINA

RECEIVED
Oct 13 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Docket No. 19-ALJ-07-0089-CC

South Carolina Coastal Conservation League, ...Appellant,

vs.

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

PROOF OF SERVICE

I hereby certify that on this date I served the Petition for Writ of Supersedeas on all parties by emailing a copy of same on October 13, 2021, to the Attorney Information System provided email addresses below, via attached e-mail:

Tracey C. Green, Esq.
Randolph R. Lowell, Esq.
Tgreen@WilloughbyHoefer.com

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

s/ Leslie S. Lenhardt
Leslie S. Lenhardt

October 13, 2021

CCL v. SCDHEC & DCCA

From: Leslie Lenhardt <leslie@scelp.org>

To: Tracey Green <tgreen@willoughbyhoefer.com>, Sallie Phelan <phelansp@dhec.sc.gov>, Bradley Churdar <churdabd@dhec.sc.gov>

Cc: Ben Cunningham <ben@scelp.org>, Amy Armstrong <Amy@scelp.org>, Rachel Oliver <rachel@scelp.org>, Elizabeth P. Kurtz <EKurtz@Willoughbyhoefer.com>, DeBruhl, Janet H. <debruhjh@dhec.sc.gov>

Subject: CCL v. SCDHEC & DCCA

Date: Wednesday, October 13, 2021 1:03 PM

Size: 617 KB

Tracey, Sallie and Brad,

For service on you, please find below a dropbox link to Appellant's Petition for Writ of Supersedeas in the above referenced matter and a verification, which is attached. Certified copies of the ALC Final Order and the Order Denying Motion for Supersedeas are being mailed today to the Court. Please confirm receipt of this email.

Thank you,
Leslie

https://www.dropbox.com/s/bdl3yusoptfcolu/Petition%20for%20Writ%20of%20Supersedeas%20with%20Exhibits.pdf?dl=0

--
Leslie Lenhardt
Staff Attorney
S.C. Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585
Phone: (843) 527-0078
leslie@scelp.org

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petition verification.pdf 447 KB

SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT

Lawyers for the Wild Side

PO Box 1380, Pawleys Island, SC 29585 | (843) 527-0078 |

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Our Mission To protect the natural environment of South Carolina by providing legal services and advice to environmental organizations and concerned citizens and by improving the state's system of environmental regulation.

October 13, 2021

VIA ELECTRONIC FILING SYSTEM

Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Coastal Conservation League v. DHEC & DeBordieu Colony Community Assn.
Appellate Case No. 2021-000158

Dear Ms. Kitchings:

Enclosed please find a Petition for Writ of Supersedeas, verification, and proof of service in the above-referenced matter. Original certified copies of the lower court's Final Order and Order Denying Motion for Supersedeas, the original verification, and the filing fee are being placed in the mail today. Thank you for your kind assistance.

Respectfully,

Leslie S. Lenhardt
Staff Attorney

Enclosure

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