**STATE OF SOUTH CAROLINA**
**ADMINISTRATIVE LAW COURT**

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| South Carolina Department of Environmental Services and South Carolina Coastal Conservation League,<br><br>Petitioners,<br><br>v.<br><br>Rom Reddy,<br><br>Respondent. | Docket No. 24-ALJ-07-0232-CC<br><br>**AMENDED FINAL ORDER** |



**Appearances**:

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| For DES: | Bradley D. Churdar, Esq.<br>Sallie Phelan, Esq. |
| For SCCCL: | Leslie S. Lenhardt, Esq.<br>Lauren Milton, Esq. |
| For Respondent: | *Pro se*[1] |

## STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (Court or ALC) pursuant to a request for contested case filed by Respondent Rom Reddy[2] pursuant to subsection 1-23-600(A) of the South Carolina Code (Supp. 2025) and section 44-1-60 of the South Carolina Code (2018).

Respondent challenges the administrative order issued by the South Carolina Department of Environmental Services (DES or Department) wherein it found Respondent violated the South

[1] Mr. Reddy represented himself during the hearing. However, he retained Brandon Gaskins to represent him in submitting his Motion for Reconsideration and responding to the other parties' motions.

[2] Originally, this case was captioned to include Mrs. Renee Reddy as a Respondent. During the hearing, Rom and Renee Reddy moved the Court to remove Mrs. Renee Reddy due to a lack of standing. Importantly, Mrs. Reddy did not file a request for a contested case hearing in this matter. *See* S.C. Code Ann. § 48-6-30(D)(2) (Supp. 2024); S.C. Code Ann Regs. 30-8(F)(4) (2011) (providing that "[a]ny persons to whom an order is issued may appeal it pursuant to applicable law, including S.C. Code Title 48, Chapter 6; Title 1, Chapter 23; and Title 48, Chapter 39;" *see also* Rule 11(c), SCALCR (providing requests for contested case hearing must be filed and served within thirty (30) days after actual or constructive notice of the agency's final decision). In addition, the evidence did not show Mrs. Reddy was directly involved in the alleged violations. Indeed, Mrs. Reddy's name is not listed on the deed to the property at issue in this case nor is her name listed on the invoices for the construction of the activity discussed herein. Furthermore, Mrs. Reddy's removal from this contested case hearing will not prevent the Department from pursuing civil action against Mrs. Reddy. For these reasons, I find good cause for the removal of Mrs. Reddy from this matter.

Carolina Coastal Zone Management Act (Act) and the South Carolina Code of Regulations when he installed non-beach compatible materials and excavated substantial amounts of substrate with heavy machinery in the "beaches critical area" without a permit. As a result of these violations, the Department assessed a $289,000.00 civil penalty and requested that Respondent submit a Corrective Action Plan (CAP) and upon approval immediately remove all non-beach compatible materials and restore the affected area.

The Court conducted a hearing on the merits in Columbia, South Carolina from May 6-8 and 19-20, 2025. On October 23, 2025, a Final Order was issued. On November 3, 2025, the parties filed Motions for Reconsideration (Motions). On November 10, 2025, the Court rescinded its Final Order to give it more latitude to thoroughly consider and respond to the parties' Motions and responses.[3] Then, on November 13, 2025, the parties each filed Responses to the Motions. Petitioners then filed replies to Respondent's Response on November 20, 2025. The Court now issues this Amended Final Order.

## FINDINGS OF FACT

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

### Procedural Background

In September 2023, the Department became aware that Respondent, through his contractor BluTide Marine Construction (contractor), was intending to perform beachfront activities at his property without any Department review or authorization.[4] As a result, the Department sent a letter to Respondent notifying him that any unauthorized work within the State's critical areas, including the beach/dune system and beaches, would be a violation of the Act. Thereafter, the

[3] *See* Rule 29(D)(2), SCALCR (providing that "[i]f no action is taken by the administrative law judge within the applicable period [thirty days from the filing of a motion for reconsideration or following responses to such motion], the inaction shall be deemed a denial of the relief sought in the motion."); *see also* Rule 3(B), SCALCR ("For good cause shown, the administrative law judge may extend or shorten the time to take any action, except as otherwise provided by rule or law.").

[4] The Department's Beachfront Section Manager, Matthew Slagel, testified that it was his understanding that Respondent intended to place clay material within the beaches critical area. As Section Manager, Mr. Slagel reviews permit applications for activity along the beachfront, conducts site visits to ensure that proposed activity does not occur within the active beach or beaches critical area, and measures the location of the vegetation line.

Department met with Respondent on site to discuss his anticipated project objectives.[5] The parties discussed the Department's jurisdictional authority, specifically as it related to the location of the setback line for the beach/dune critical system and the fact that the beaches were landward of that line.[6] The Department informed Respondent that the placement of clay in that area or the active beach would not be considered beach-compatible.

Shortly thereafter, the Department determined that non-beach compatible materials were used at Respondent's property and, on October 20, 2023, it issued a Notice to Comply requiring Respondent to remove all non-beach compatible fill and other materials and marine debris that had been placed on the active beach and/or beaches critical area. The Department subsequently issued Cease and Desist orders on January 25, 2024 and February 2, 2024, seeking to enforce its determination. On February 9, 2024, the Department filed a Petition for Injunctive Relief and Motion for Temporary Restraining Order and Preliminary Injunction with this Court, citing public safety hazards and blocked access to beachgoers. A third Cease and Desist order was later issued on March 1, 2024. On May 22, 2024, the Department sent Respondent a Notice of Alleged Violation/Admission Letter (NOVAL), setting forth the facts and grounds of the alleged violations and providing notice of an enforcement conference. On June 7, 2024, Respondent submitted a response which the Department deemed insufficient to resolve the Department's concerns. As a result, the Department issued an Administrative Order on July 1, 2024.

The Department found Respondent violated subsections 48-39-130(A), (C) of the South Carolina Code (2008) and regulation 30-2(B) of the South Carolina Code of Regulations (2011 &

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[5] On September 19, 2023, Respondent requested a minor beach renourishment emergency order which was issued by the Department on September 21, 2023. This emergency order (EO) allowed Respondent to conduct minor renourishment, install sand fencing, and/or plant native dune species. It also prohibited the covering or burying of any portion of an erosion control structure and required that renourishment sand originate from an upland source approved by the Department as beach compatible. Notably, this EO had an expiration date of October 21, 2023. Nevertheless, it appears Respondent did not return a signed copy of the permit nor did he obtain approval from the Department for the placement of beach-compatible renourishment materials to the area of his property threatened by erosion. Accordingly, there is insufficient evidence before this Court to determine if the EO ever became effective.

[6] The Act restricts the use of the critical area absent a permit from the Department. S.C. Code Ann. § 48-39-130(A) (2008). Critical area means any of the following: coastal waters; tidelands; beaches; and beach/dune system which is "the area from the mean high-water mark to the setback line as determined in Section 48-39-280." S.C. Code Ann. § 48-39-10(J) (Supp. 2025). As will be discussed further in this Order, the Department asserts jurisdiction over Respondent's activity because it occurred in the beaches critical area. Although the critical area may mean beaches, the term "beaches critical area" does not exist as a specific term under the Act. This distinction is significant because the question before the Court is whether the statutory definition of beaches confers permitting jurisdiction, even though the beach may lie within an area for which a baseline and setback line has been established to designate a regulatory process for permitting for construction and reconstruction in the beach/dune system.

Supp. 2025) by installing non-beach-compatible materials in the beaches critical area without a permit. The Department further found Respondent violated subsection 48-39-130(D)(6) of the South Carolina Code (2008) because Respondent's repair of the hard structure was not an exempted activity nor was notice provided to the Department of Respondent's repair of the hard structure or alteration of the critical area. The Department also found that Respondent neither obtained prior approval nor used materials compatible in grain size and color with the native beach and, that materials used resulted in marine debris. In addition, the Department found Respondent violated the EO issued on September 21, 2023 when he covered an unauthorized erosion control structure and failed to ensure that his contractors were in direct consultation with the South Carolina Department of Natural Resources (SCDNR) concerning SCDNR's Marine Turtle Conservation Program. The Department further found Respondent violated regulation 30-13(N)(3)(c) of the South Carolina Code by strengthening the unauthorized concrete erosion control structure with metal screw piles, steel mending plates and associated bolts, and spray foam. Lastly, the Department found Respondent failed to follow directives set forth in the January, February and March 2024 Cease and Desist orders. As a result of these violations, the Department assessed a $289,000.00 civil penalty and directed that Respondent submit a Corrective Action Plan (CAP) and,[7] upon approval of the CAP, immediately remove non-beach compatible materials in the beaches critical area and restore the affected area.

Respondent did not factually contest that the hard structure was constructed with non-beach compatible materials. Rather, Respondent challenges: 1) whether the Department has jurisdiction over areas landward of the setback line; 2) whether the activity occurred in the beaches critical area; 3) whether the Department violated the Administrative Procedures Act (APA) when it took enforcement action based upon its interpretation of beaches critical area; and 4) whether the assessed civil penalty is reasonable. [8]

[7] The Department directed that the submission of the CAP was due within fifteen days, was to address plans for the removal of all unauthorized non-beach-compatible materials and the restoration of the beaches critical area, including submission of samples of sand material to be used. Upon approval of the CAP, Respondent was ordered to remove all unauthorized non-beach compatible materials within fifteen days and immediately restore the affected area with approved beach-compatible sand to the same elevation and slope of adjacent properties. Respondent was further directed to notify the Department of the scheduled commencement date and any changes, should they occur. Written notice of completion was due within three days of completion. Modifications to these timelines and standards were proposed as part of the Department's Motion for Reconsideration.

[8] In his request for a contested case hearing, Respondent also argued that the Department's actions amounted to a taking. Not only did Respondent not address this issue in his proposed order but more importantly this Court lacks

**Respondent's Ownership of the Property**

Respondent Rom Reddy purchased 118 Ocean Boulevard, Isle of Palms, Charleston County, SC (PID 5680900155) (property) on September 24, 2014.[9] The property is located in the coastal zone on the south end of Isle of Palms, approximately a half mile from Breach Inlet and northward of Wild Dunes. It is located in an unstabilized inlet zone,[10] adjacent to the beach, where the predominant wave direction occurs from the southeast.[11] Respondent's property line extends from Ocean Boulevard to the mean high-water line.

Nonetheless, the property is subject to easements, restrictions, reservations and conditions, including conditions of the Act.[12] Indeed, the plat reflects a twenty-foot no construction area immediately seaward of the house structure and disclosures that the property may not be buildable according to the South Carolina Coastal Council Regulations.[13] Additionally, because of the property's proximity to the Atlantic Ocean, the title to the property indicates that "depending on the location of the baseline and setback line, the construction, repair, reconstruction and modification of habitable structures improvements and erosion control devices may be prohibited or severely restricted." While Respondent construed the disclosure to imply that his property rights were bounded by the baseline and setback line, he contends the disclosure merely provides notice that his useful rights to the property are subject to limitations. Moreover, even if the baseline and

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jurisdiction to hear a takings' claim under either the South Carolina Constitution or the United States Constitution. Accordingly, this issue will not be addressed any further.

[9] The plat for the property is recorded in the Office of the RMC for Charleston County in Plat Book EC at page 209. Respondent's property is bounded by the mean high-water line as of October 1986 and it demarcates a setback and baseline and twenty (20) foot no construction area.

[10] Under the Act, there are three primary zones: standard erosion zones, unstabilized inlet zones, and stabilized inlet zones. In contrast to stabilized zones, unstabilized inlet zones are more susceptible to dynamic shoreline change. The baseline for unstabilized inlet zones is determined by the Department as the most landward point of erosion at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position. S.C. Code Ann. § 48-39-280(A)(2) (Supp. 2025).

[11] The Department measures beach profiles and elevations at survey monuments on an annual basis. The closest survey monuments to Respondent's property are 3105B and 3100B, each approximately 100 feet from Respondent's property. Beach profiles are used to compare coastline changes over time.

[12] Interestingly, the plat for Respondent's property includes a designation from the Isle of Palms of its strong opposition for future permitting of any kind of beach erosion control structure on the property.

[13] The South Carolina Coastal Council was the predecessor agency to the Department's Office of Ocean and Coastal Resource Management and was the regulatory agency responsible for administering and enforcing the Act. Later, the South Carolina Department of Health and Environmental Control (DHEC) assumed this regulatory responsibility. During the course of this case, DHEC was restructured, and its powers were transferred to DES. Act 60, 2023 S.C. Act 60; *see* S.C. Code Ann. § 1-30-140 (Supp. 2024). In the interest of clarity and convenience, the term "Department" may refer to DES or its predecessor agencies.

setback line established the outer limits of Respondent's right to construct, repair, and modify structural improvements and erosion control structures, the baseline and setback line shown on the plat has since been reestablished. *See* S.C. Code Ann. § 48-39-280(C) (Supp. 2025) (providing that baselines and setback lines remain in effect until reestablished).

Prior to the erosive events discussed below, Respondent's property was protected by a "sacrificial dune," and his back yard was landscaped with vegetation including a palm plant.

**Baseline and Setback Line**

The General Assembly implemented the baseline and setback line as part of its creation of the management of the "beach/dune system" in 1988. *See* Act No. 634, 1988 S.C. Laws Act 634 (codified at S.C. Code Ann. §§ 48-39-270-360). The Department last established a baseline and setback line for Isle of Palms (City) in 2018. Significantly, Respondent's property is located in close proximity to the beach/dune system and, since 1991 the setback line and baseline for the City has gradually shifted seaward from the boundary reflected on Respondent's plat.[14] There is also no dispute between the parties that Respondent's hard structure was installed landward of the setback line.

**General Characteristics of the Isle of Palms Shoreline**

The area of the City at issue in this case has historically experienced dynamic shoreline movement. Aerial photographs illustrate that the beaches adjacent to Respondent's property have advanced and retreated through time. Still, the shoreline in the vicinity of Respondent's property is generally accretional in nature with vacillating periods of accretion and erosion lasting anywhere from one to several years. For instance, the Department's Coastal Services Section Manager, Ms. Jessica Boynton, commented that the area at issue has been in an erosional cycle since 2016 and Mr. Slagel indicated that as of September 2023, the beaches extended landward of the setback line. Yet, as highlighted by the Department's expert witness, Christopher P. Jones, P.E.,[15] the City's beaches have recently started to accrete.

[14] Notably, the vegetation/escarpment line along the City's coastline has also moved landward between 2006 and December 2023.

[15] Christopher P. Jones was qualified as an expert in coastal engineering, coastal processes and management with a focus on storm impacts and erosion control structures.

Episodic Events

The area surrounding Respondent's property as well as the adjacent shoreline has recently been impacted by a series of episodic events.[16] For instance, on May 18, 2023, a nor'easter hit the South Carolina coast, decimating the dune on the beaches adjacent to Respondent's property. Not long therafter, on August 30-31, 2023, Tropical Storm Idalia hit the South Carolina coastline, causing a 9.23-foot surge along the City.[17] Later that year, a third coastal storm impacted the City and produced the highest non-tropical tide of record, measuring 9.86 feet.

Erosion and Renourishment Efforts

Following the May 2023 nor'easter, Respondent contacted the Department to express concerns regarding erosion and the vulnerability of his property due to the loss of the "sacrificial" dune.[18] Indeed, photographic evidence showed that tidal and wave action swelled up to Respondent's property depositing wrack and dead marsh grass onto Respondent's yard. In an effort to protect the newly exposed escarpment,[19] Respondent removed most of the seaward line of vegetation on his property, with the exception of a palm plant, and draped artificial turf over the slope of the recently exposed escarpment. In addition, Respondent met with the Department to discuss other permittable activities he could take to further protect his property. At that time, the Department informed Respondent by email that "[h]ard erosion control structures such as seawalls, bulkheads, or revetments have been prohibited **seaward** of the [DES] OCRM setback line since 1988 with the passage of the S.C. Beachfront Management Act[]." (emphasis added). The Department further directed Respondent to the Department's jurisdictional line website for information on the current baseline and setback line which, it indicated, "do not change in between line review cycles."[20]

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[16] Episodic events include occasional or intermittent weather events and storm surges. Obviously, these events can affect shoreline change.

[17] Hurricane Idalia was classified as a category 4 hurricane on August 30, 2023. The hurricane made landfall near Keaton Beach, Florida but rapidly weakened and fell below hurricane strength. Nonetheless, the storm produced large areas of heavy rains and tropical-storm-force winds across southeastern Georgia and eastern portions of the Carolinas, including the City, from August 30-31, 2023.

[18] Initially, Respondent applied for a general permit on May 22, 2023. The Department subsequently withdrew Respondent's permit due to the subsequent issuance of a general permit to the City for minor beach renourishment.

[19] Later that summer, Respondent commissioned 3W Engineering & Surveying, LLC, for a professional survey of his property. Notably, the survey shows that the escarpment was landward of the setback line. An escarpment is the vertical cut into the beach from tidal and wave action.

[20] The Department's jurisdictional line website provides a GPS viewer where homeowners can view the location of

Shortly thereafter, on June 30, 2023, the Department issued a General Permit to the City to perform minor beach renourishment from 100 to 402 Ocean Boulevard, Isle of Palms, which includes Respondent's property. Renourishment efforts were to include placement of Department-approved beach-compatible sand along 3,400 linear feet of beachfront and construction of a six-foot dune with a fifteen-foot-wide dune crest and slope of 1:4.

On August 30, 2023, Tropical Storm Idalia ushered additional damage and erosion to Respondent's property. On September 1, 2024, Ms. Boynton and Mr. Slagel visited the shoreline near Respondent's property to assess damage and collect data on shoreline erosion.[21] In addition, the Department issued an EO to the City to address conditions arising from the storm. Specifically, the Department authorized the City to scrap no more than one foot of sand from the intertidal beach extending from 100 to 314 Ocean Boulevard and 11 Beachwood East, Isle of Palms, for placement against an eroded escarpment or, to replace an eroded dune seaward of a threatened structure. The EO restricted the dune height to no more than six-feet above grade or twenty-feet in width as measured from dune toe-to-dune toe and no sand was to be placed landward of an existing functional erosion control structure.[22] As a result of the City's efforts, a dune was fully constructed seaward of Respondent's property by September 11, 2023.[23]

**Installation of the First Concrete Structure[24]**

Despite receiving notification from the Department that "any unauthorized work within the State's critical area, which include the beach/dune system and beaches, will be considered a violation of the S.C. Coastal Tidelands and Wetlands Act," Respondent took action to protect his

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the "jurisdictional lines" in correlation to one's property.

[21] The Department used a Global Navigation Satellite System (GNSS) unit to demarcate the landward extent of erosion at that time. Data points for the location of the escarpment/vegetation line were collected manually, on site, using a handheld GPS. While GIS and GPS field collection, shoreline change, and feature identification may be important tools in the establishment of the escarpment/vegetation line, the Department's specialized knowledge is limited to the establishment of the baseline and setback line. §§ S.C. Code Ann. 48-6-30 (2018) & -39-280 (Supp. 2024)*;* S.C. Code Ann. § 1-23-330(4) (2005). After all, the Legislature has entrusted the Department with the responsibility to establish a baseline and setback line.

[22] An additional EO was issued on September 29, 2023 to address ongoing conditions associated with Tropical Storm Idalia and subsequent king tide events. Similar to the August EO, the September EO permitted the City to scrape sand from the intertidal beach between 100 and 314 Ocean Boulevard for placement against an eroded scarp or dune, seaward of threatened structures. An EO was also issued on September 21, 2023 for sand scraping yet it was limited to beaches facing the Atlantic Ocean at 130, 132, and 202 Ocean Blvd., Isle of Palms.

[23] By mid-October, the City had completed the construction of a continuous sand dune extending north and south of Respondent's property.

[24] Hereinafter, I will refer to this structure as ERC-1.

property. Specifically, he contracted for the removal and relocation of approximately 300 cubic yards of existing sand to the "critical line berm" and installation of approximately 410 cubic yards of approved clay up to the critical line. In addition, Respondent replaced the artificial turf that overlayed his yard, resulting in the repositioning of his tile pavers which led to the beach. Nonetheless, the artificial turf began to wrinkle. In an effort to stabilize the turf, Respondent, through his contractor, dug a 2' x 130' foot trench adjacent to the beach, approximately six feet deep. The trench was filled with concrete to form a ninety-two linear foot wide, four foot tall, two to three feet deep structure, consisting of woven geotextile fabric and wire mesh, with landward extending wing walls; materials which the Department witnesses asserted are non-compatible beach materials.

While Respondent did not offer evidence to dispute that ERC-1 was constructed with non-beach compatible materials, he maintains that it is not an erosion control structure because it was not engineered to withstand the forces of water.[25] Mr. Jones nevertheless explained that ERC-1 is an erosion control structure because it was designed to retain fill material and thus was a bulkhead.[26] Indeed, based upon Respondent's own accounting, ERC-1 was constructed to retain his yard, an outcome which he achieved by filling concrete approximately six feet below grade.

**Ongoing Erosion and Renourishment Efforts**

On November 15, 2023, the Department determined that conditions along the shoreline continued to expose and create an imminent threat to the City's beach front properties. The Department issued a fourth EO to the City to remove or maintain existing sandbags or place new sandbags on the beaches from 120 to 206 Ocean Blvd., Isle of Palms.

Thereafter, on December 17, 2023, a nor'easter hit, which further eroded the beaches and also left ERC-1 exposed to the surf. Following that storm, Respondent attempted to place half a million cubic yards of beach compatible sand in the area near ERC-1 in an effort to replenish the sand on the adjacent beach. However, while the fifth EO issued to the City authorized sand scraping from the intertidal beach between 112 to 308 Ocean Boulevard, Isle of Palms, it specifically excluded sand scraping seaward of 118 and 122 Ocean Boulevard, purportedly due to

[25] As will be discuss further below, Respondent subsequently modified ERC-1 to ensure that it would not fall as a result of exposure to tidal and wave action.

[26] *See* S.C. Code Ann. § 48-39-270(1)(b) (2008) (defining bulkhead as "a retaining wall designed to retain fill material but not to withstand wave forces on an exposed shoreline.").

the presence of "unauthorized erosion control structures." Accordingly, Respondents' efforts were halted by the City Administrator who informed Respondent that he was prohibited from placing additional sand and other non-beach compatible materials to cover up ERC-1.

Interestingly, Compliance and Enforcement Section Manager for the Department, Morgan Flake, acknowledged that she was the person who informed the City that sand could not be placed in front of ERC-1. Ms. Flake averred that these provisions were put in place because "covering up a violation does not compel compliance, [and], in this instance, it wouldn't allow the Department to further assess and really understand the extent of the structure that had been recently uncovered that was in the critical area." Nevertheless, I find her contentions to be questionable, in fact, the Department's directive appears to have further exposed 118 and 122 Ocean Boulevard to additional erosional forces as Ms. Flake acknowledged that the configuration across a dune must be contiguous. This was even more disconcerting because ERC-1 was starting to appear unstable. In fact, Respondent feared that "if this wall starts to move, there's no telling what it's going to do. … if there's a pet there, if there's a person there, it could kill them…."

Yet, the City's EO expressly prohibited sand scraping seaward of an erosion control structure unless it was proven that the erosion control structure was in danger of collapsing **and** within ten feet of the habitable structure. Therefore, although ERC-1 was in danger of collapsing and thus posing a threat to the public, the express terms of the City's EO precluded the City from sand scraping in front of Respondent's property since ERC-1 was more than ten feet from Respondent's home. Thus, to remediate the perceived hazard, Respondent aligned non-beach compatible rip-rap along the seaward edge of ERC-1. The Department nonetheless disagreed with his actions because the rip-rap could impact sea turtle nesting and public access and safety.

In sum, Respondent believed his actions were necessary because the Department prohibited him from protecting his property and mitigating safety concerns related to ERC-1.

**Construction of the Second Structure**

By mid-January, ERC-1 started to develop cracks and further tilt forward towards the beach. Respondent hired CNT to straighten and repair ERC-1. The contract described the scope of work to include:

> [i]nstall underpinning brackets in an inboard/outboard pattern, 6'on center of entirely existing wall. Brackets to be mechanically attached to wall all thread and epoxy. Bracket to be "pinned" through the t-pipe and pile connection and to prevent up lift. Piles to extend 10' below grade. Install steel mending plates (4) at each

> joint. Plate to be approximately 3' in length ¾' thick. Two plates bolted inboard of joint and two plates to be bolted outboard of joints. Anticipated 4 joints. Rent large excavator, move approximately 450 cubic yards of soil. Excavation to be to inboard plane of new wall. Contract with Penhall concrete cutting and section existing wall into manageable pieces. Attempt to right existing wall into a plumb postilion.

Additionally, expanding polyurethane structural foam was applied to fill the cracks in ERC-1. However, Respondent indicated that he was later informed by CNT that, notwithstanding the repairs, ERC-1 would not withstand the wave forces. Respondent thus amended the contract to provide for the installation of a "real wall" landward of ERC-1 as "it [was] very important to [him] that this thing does not fall down."[27] While the second structure was constructed landward of ERC-1, the April property survey shows that ERC-1 and the second structure form one contiguous hard structure.[28] Based upon Respondent's own accounting, the hard structure is a seawall,[29] which is also considered a hard erosion control structure, since the second structure was specifically installed to ensure that ERC-1 would not just retain Respondent's yard but also withstand normal wave forces.

**Regulation of the Erosion Control Structure**

*Utilization of the Critical Area*

The Department determined that it had the authority to enforce the provisions of the Act because Respondent installed non-beach compatible materials and excavated substantial amounts of substrate with heavy machinery in the "beaches critical area." The Department reached this conclusion based upon the Department's then acting Compliance Project Manager Jacques Prevost's observation that the hard structure was seaward of the observed vegetation at adjacent properties as well as the Department's June and September vegetative escarpment line.

Mr. Slagel explained that the beaches critical area is "where the sand and vegetation boundary exists … using that vegetation as an indicator for the periodic inundation that is

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[27] During the course of this work, Mr. Prevost visited the property several times, observing non-beach compatible materials including rip-rap debris, larger granite rocks, geo textile fabric, clay and marine debris scattered in the vicinity of the hard structure as well as along the adjacent beach. While Respondent did not deny the use of non-beach compatible materials to construct the hard structure, he disputed the allegation that the unauthorized materials scattered along the adjacent beach were attributable to his actions. Notably, the Department failed to convincingly establish a nexus between Respondent's actions and the non-compatible materials observed along the adjacent beach.

[28] Collectively referred to as a hard structure hereinafter.

[29] *See* S.C. Code Ann. § 48-39-270(1)(a) (defining seawall as "a special type of retaining wall that is designed specifically to withstand normal wave forces[.]").

occurring."[30] He further expounded that in instances where landscape has been heavily manipulated or vegetation has been removed, the Department looks for established vegetation at the adjacent properties.

At the time Ms. Boynton assessed the September 1, 2023 vegetative escarpment line,[31] a lone palm stood along the seaward edge of Respondent's property. Despite recognizing that the palm was "non littoral" vegetation, Ms. Boynton's disregarded Respondent's palm because she believed it was not in good health due to inundation.[32] As a result, the location of the vegetation/escarpment line was marked slightly landward of the location of Respondent's palm. Overlaying the location of ERC-1 on the September 1, 2023 vegetative escarpment line, Ms. Boynton averred that ERC-1 was approximately ten to twelve feet seaward of the vegetative escarpment line.

Respondent criticized Ms. Boynton's testimony, arguing that her demarcation of the vegetative escarpment was unduly subjective and based on arbitrary factors not encompassed within the statutory definition of beaches. However, Respondent overlooks that Ms. Boynton's consideration of the presence of vegetation on September 1, 2023 was for purpose of identifying the vegetative escarpment line or, in other words, the most landward point of erosion at any time in the last forty years. Nevertheless, the Department's reliance on the vegetation line to determine the location of the beaches critical area line is dubious. First, the Department collected the vegetative escarpment line the day after Tropical Storm Idalia and the Department's own expert witness acknowledged that through the definition of the beaches, the beaches critical area line could effectively change day-by-day based upon the category of a storm and its effects on the shoreline. Moreover, the Department marks the vegetative escarpment line using GPS vegetation line surveys, escarpment mapping, elevation data, tidal records, and comparison with adjacent

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[30] While the Department relies on the vegetation line to determine the most landward point of erosion, Ms. Boynton indicated that it also considers other indicators to discern the presence of inundation, including the presence of an escarpment line, accumulation of wrack, organic material and dead marsh grass indicators.

[31] While I found Ms. Boynton's testimony to be generally credible, I do not find her experience and specialization expands to the use of GIS, GPS field collection, shoreline change, or feature identification. Indeed, the Department has been entrusted to establish the baseline and setback line. While GIS and GPS field collection, shoreline change, and feature identification may be important tools in the establishment of these lines, Ms. Boynton's specialized knowledge is limited to the establishment of the baseline and setback line. §§ S.C. Code Ann. 48-6-30 (2018) & -39-280 (Supp. 2024)*;* S.C. Code Ann. § 1-23-330(4) (2005).

[32] Ms. Boynton indicated that when marking the vegetation line consideration is given to the existence of a root system and health of any observed vegetation since it "takes more than five minutes for a plant to die."

undisturbed properties where vegetation has not been obscured. While I find GPS units to be accurate, the Department's identification of the vegetation line in this case was subjective. Nevertheless, Ms. Boynton averred that the Department considers other indicators to discern the presence of inundation, including the accumulation of wrack, organic material and dead marsh grass indicators. However, the Department's isolated observations on September 1, 2023 do not establish that ERC-1 was subject to periodic inundation nor that it is in the statutorily defined beaches which again, requires evidence of a lack of nonlittoral vegetation.

Feature Analysis

To further show that ERC-1 was located in the beaches critical area, the Department conducted a feature analysis using aerial imagery from June, October, and November 2023.[33] Since only the June 2023 aerial image was georectified, Ms. Boynton relied on Respondent's tile pavers to establish a unit of measurement to gauge the location of ERC-1 during October and November 2023.[34] To account for any tile movement, Ms. Boynton used the fixed location of the pool at the adjacent property to establish a 2.7 foot average tile size and spatial unit of measurement. To ensure the accuracy of her estimated 2.7 foot unit of measurement, Ms. Boynton replicated this process on georectified imagery from January and March 2023 and September and February 2024. Notably, while three of the four images produced an average tile and spacing of 2.7 feet, the February 2024 image resulted in an average tile and spacing of 2.65 feet. Nonetheless, Ms. Boynton selected an average tile and spacing unit of 2.7 feet since she believed it produced a more "conservative estimate" of the location of ERC-1. Based upon the 2.7-foot unit of measurement, Ms. Boynton opined that during October and November 2023, ERC-1 protruded approximately four to five feet into the beaches critical area, a conclusion which Mr. Jones found to be reliable.

However, Respondent convincingly established the unreliability of the Department's feature study. The variation in the average tile and spacing corroborates Respondent's indication

[33] A feature analysis uses remotely sensed imagery to interpret the relationship between observable natural and man-made features and extrapolate measurements and form hypotheses therefrom. The June 2023 aerial image contains georectified spatial data, effectively giving the observed features real-world coordinates. While the October and November aerials were not georectified, Ms. Boynton used them since they depicted the area in question before and after the construction of ERC-1. Notably, the feature interpretation also incorporated Respondent's July survey data.

[34] Ms. Boynton explained that she selected the tile pavers because they were consistent in size and spacing and apparent in all three images.

that the tiles were moved after Tropical Storm Idalia. While Mr. Jones believed the feature analysis to provide a reliable indicator of the location of ERC-1, he did not provide a sufficient basis for his opinion, in fact he did not even visit the area in question. Furthermore, I am wary of Ms. Boynton "conservative" selection of the 2.7-foot unit of measurement. Although Ms. Boynton believed it to produce a conservative estimate, it seemed to position ERC-1 farther seaward, a result which is indisputably favorable to the Department's position in this case. As such, I find the probative value of the feature analysis is de minimis.

Expert Testimony

Both parties engaged experts to assist the Court in its consideration of the presence of periodic inundation for purpose of determining whether Respondent's hard erosion control structure was in the "beaches" as designated by statute. On behalf of the Department, Mr. Jones testified as an expert in coastal engineering, coastal processes and management, particularly on storm impacts and erosion control structures. Mr. Jones's work has been heavily concentrated on South Carolina coastal environments, and he convincingly described the effects of storms and erosion control structures on the City's beaches. Notwithstanding his work on the development of the State's interim baseline and involvement in drafting the City's 2008, 2017, and 2022 long-term beach management plan, he was, nevertheless, not qualified in coastal policies. Additionally, Mr. Jones has neither visited the property nor been to the City since 2018. Rather, Mr. Jones' opinion was founded upon his review of the Department's photographic evidence from May 2023 through October 2024. Based on that evidence, he opined that Respondent's hard structure was periodically inundated.[35] As such, he further opined that the structure was in the beaches critical area.

Nonetheless, Mr. Jones was unable to state with a reasonable degree of certainty the extent to which Respondent's hard structure encroaches into the beaches critical area. In fact, he indicated that the critical area has moved over time and that at some point in the future Respondent's hard structure may even cease to be in the beaches critical area. Even more

[35] Mr. Jones highlighted various characteristics captured between May 2023 and October 2024, including a vertical scarp, lack of nonlittoral vegetation on the scarp and base of the dune, accumulation of wrack and continued indication of water reaching the base and behind Respondent's hard structure. However, Mr. Jones also opined that the vegetation line is a "good indicator" of periodic inundation, particularly on an eroding shoreline. This opinion is not in keeping with the specificity of the statutory definition of a beaches which requires both periodic inundation and no non littoral vegetation.

disconcerting, Mr. Jones opined that due to the episodic nature of storms, the Department's jurisdiction could change day-by-day or storm-by-storm based upon the statutory definition of the beaches. In other words, neither the Court nor a landowner could consistently determine, with a reasonable degree of certainty, whether a permit is required. Yet still, the Department's witnesses averred that while the vegetation line is the biological indicator of the landward extent of regular inundation, it also considers other indicators such as the accumulation of dead marsh grass or an escarpment to discern whether periodic inundation is present.

On the other hand, Matthew Goodrich was qualified as an expert on periodic inundation, how its calculated, and its relationship to vegetation on behalf of Respondent. While he was qualified as an expert, it is nonetheless notable that Mr. Goodrich's work has been heavily concentrated on engineering projects on estuarine or riverine environments rather than open beaches and thus he lacks experience in coastal management and in the identification of vegetation and delineation of critical area lines along shorelines.

Mr. Goodrich opined that the establishment of vegetation is determined by the limit of periodic inundation, something which he averred is a factor of ground elevation. He opined that periodic inundation results from the periodic rising and falling of water, an occurrence which he believed to be caused by astronomical tides. Based upon these principles, he calculated that the maximum elevation of the tides at Respondent's property was a 5.5-foot elevation contour NAVD (North American Vertical Datum of 1988), an elevation which he further found to be insufficient to produce periodic inundation at the location of Respondent's hard structure.

To arrive at his estimate, Mr. Goodrich considered available information from the National Oceanic and Atmospheric Administration (NOAA) on tidal water levels. However, Mr. Goodrich's conclusion unreasonably disregarded the effect of episodic events on the City's shoreline. Furthermore, Mr. Goodrich's simulated wave-run up calculation is unreliable as these calculations are highly variable depending on the selected model and inputs. Here, Mr. Goodrich relied on the equation extracted from the EurOtop manual and his calculations were a derivative of the average offshore waves at the Charleston House gauge and a uniform slope of a .03. However, this data is not representative of the limit of periodic inundation as reflected on the beach profiles near Respondent's property.[36] In addition, even were the Court to assume Mr. Goodrich's

[36] Notably, the beach profiles illustrate that the slope of the foreshore is not uniform and that the reach of periodic inundation ranges from six to 6.6-feet NAVD.

5.5-foot elevation contour NAVD to be accurate, periodic inundation would have overrun Respondent's hard structure considering that its highest elevation as measured by Respondent's surveyor was 3.9-feet NAVD. Thus, the data applied by Mr. Goodrich is not reflective of the maximum elevation of inundation at Respondent's property.

I also found that Mr. Goodrich too easily dismissed consideration of vegetation, particularly considering that he was unable to account for the thirty-four-foot variance between his theoretical estimate of the landward extent of periodic inundation and the vegetative escarpment line collected on September 1, 2023. In fact, Mr. Goodrich even acknowledged that the vegetation line can be an indicator of the landward extent of the water's reach where erosion has eroded the soil and removed vegetation. Therefore, while Mr. Goodrich testified in detail and with reasoning that made him persuasive in some areas, his theoretical approach was not an accurate reflection of conditions depicted, time and again, in the photographic evidence.

In sum, I did not find either expert to be entirely convincing. Therefore, I have made my factual analysis based upon the aspects of each expert's testimony I found convincing. *See Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 470, 494 S.E.2d 835, 846 (Ct. App. 1997) ("Where the expert's testimony is based upon facts sufficient to form the basis for an opinion, the trier of fact determines its probative value."); *see also Altama Delta Corp. v. Comm'r*, 104 T.C. 424, 465–66 (1995) ("We are not bound by the opinion of any expert witness, but will consider that opinion based on our analysis of the evidence in the record and applying our judgment in consideration of that evidence.") ("While we may choose to accept the opinion of one expert in its entirety, we may also be selective in the use of any portion of that opinion.").

Active Beach

Relatedly, "active beach" also has a regulatory function. It is the "area seaward of the escarpment or the first line of stable natural vegetation, whichever first occurs, measured from the ocean." S.C. Code Ann. § 48-39-270(13) (2008). Mr. Jones indicated that the active beach is a subset of the beaches critical area, specifically the area of the beaches which moves frequently.

Georectified Imagery from October 10, 2023 and Ortho Imagery on December 18, 2023 shows that the stable nature vegetation was considerably landward of ERC-1 and Respondent did not present any evidence to establish that the escarpment was seaward of the stable nature vegetation at that time. Likewise, site photographs from December 28, 2023 illustrate that the escarpment at the neighboring property was landward of ERC-1 and Respondent did not present

any evidence to show the presence of stable nature vegetation seaward of the escarpment or ERC-1. In addition, Mr. Jones testified that the Department's February 1, 2024 site photographs show that ERC-1 was on active beach. Moreover, Respondent's April 4, 2024 property survey displays segments of the hard structure on active beach as the hard structure is depicted seaward of the top of the bank which again is, the top of the escarpment and, significantly, Respondent did not produce any evidence to show the presence of nonlittoral vegetation seaward of the escarpment.[37] Nevertheless, as explained by Mr. Jones the active beach moves frequently—indeed, even man-made events such as sand scraping or minor renourishment projects can alter the location of the active beach.

Conclusion

The Department determined that it had the authority to enforce the provisions of the Act because Respondent engaged in activity in the beaches critical area without first obtaining a permit from the Department. Beaches are "those lands subject to periodic inundation by tidal and wave action so that no nonlittoral vegetation is established." S.C. Code Ann. § 48-39-10(H). Likewise, the expert testimony was centered upon whether ERC-1 and the hard structure were subject to periodic inundation and the existence of nonlittoral vegetation for purpose of determining whether Respondent's hard erosion control structure was in the "beaches" as designated by statute. Nevertheless, the dynamic nature of the shorelines manifests the difficulty in making a determination of the presence of periodic inundation under the facts of this case. Although "periodic" is not specifically defined under the Act, periodic inundation includes wave and tidal action that occurs from time to time. Yet, this term is difficult to quantify in the context of the coastal environment. Clearly, inundation resulting from regular tides that occur along the shoreline would be characterized as periodic. Conversely, since storms are episodic in nature and do not occur in a consistent and predictable cycle, the inundation from a singular storm would not be considered periodic; even though storms are nevertheless reoccurring. King tides, on the other hand, occur at irregular intervals yet they are a part of a consistent tidal pattern. Therefore, depending upon the frequency of their occurrence, they could certainly be characterized as

[37] The 3W's survey only portrays a segment of the hard structure seaward of the top of the bank. Nonetheless, at the time the survey was completed, portions of Respondent's hard structure were situated seaward of the top of the escarpment.

periodic. Indeed, while at one point ERC-1 and the hard structure may have encroached onto beaches, even the Department's own witness could not confirm where the "beaches" is now.

Nonetheless, I do not find it necessary to determine whether Respondent's structure is located in the statutorily defined "beaches" and thus whether the area where the unpermitted activity occurred was specifically subject to "periodic inundation." Yet still, all of the events addressed above are a regular and natural part of the coastal environment. In fact, they showcase the dynamic nature of the shoreline. Therefore, while episodic events and king tides are not necessarily determinative of what constitutes periodic inundation for purpose of identifying the beaches as designated by statute, these events are nevertheless a part of my consideration of the effects of Respondent's hard structure on the adjacent beach. In other words, in determining the adverse effects of Respondent's structure to the public beach, the nature of the inundation is inconsequential, rather it is the substantive effects of the tidal and wave action which present an adverse effect to the public beach.

**Adverse Effects of Hard Erosion Control Structures**

There is no dispute that the beach adjacent to Respondent's property is readily accessed and enjoyed by the public. Here, the evidence established that the land where Respondent constructed ERC-1 and the hard structure has been subject to subject to inundation. Indeed, the evidence shows water reaching Respondent's property at varying times throughout the Department's investigation.[38] For instance, the evidence of the accumulation of wrack and saturated sand at the base and around the wing walls of both ERC-1 and the hard structure reflected the structure has been exposed to tidal wave action. In fact, both experts agreed that the presence of wrack is suggestive of tidal and wave action having reached up to the location of the wrack. Furthermore, the April 4, 2024 survey of Respondent's property shows that portions of the hard structure are seaward of the top of bank and landward of the toe of the dune. The top of the bank marks the top of the escarpment, a feature which also indicates the occurrence of erosive forces such as wave and tidal action having reached the area in question. In addition, ERC-1 and the hard structure have been on the active beach and therefore were subject to inundation.[39]

[38] Although the Department presented evidence of water reaching Respondent's property at varying times, it is notable that most of this evidence was following episodic storm events and king tides.

[39] Importantly, the active beach moves frequently. Thus, while the active beach may be a subset of the beaches and therefore evince the exposure to tidal and wave action, the presence in the active beach does not establish that the inundation was periodic for purpose of determining whether an area in in the beaches as designated by statute.

The repeated interaction of tidal and wave action with Respondent's hard structure is significant because, it caused a "significant amount of erosion or scour" on the adjacent public beach. As a result, Respondent's hard structure has accelerated erosion of the adjacent beach and, in doing so, adversely affected the public. As explained by Mr. Jones, hard erosion control structures like Respondent's restrict the natural flow of sediment and induce scour onto adjacent properties, a fact which Respondent did not dispute. Naturally, this accelerated erosion contributes to increased deterioration of the adjacent beach; a loss, which adversely affects public access laterally along the beach adjacent to the structure.

Ms. Flake also averred the environmental impacts of the installation of the hard structure have been significant. Indeed, the photographic evidence shows that the footprint of Respondent's hard structure extends farther seaward into the adjacent beach than any neighboring structure and, as stated by Mr. Slagel, in cases such as here, where a beach continues to erode, hard structures like Respondent's cause a loss of dry sand in adjacent areas—a consequence which will result in further loss of public access laterally along the beach adjacent to Respondent's hard structure.

In addition, both experts agreed that episodic events are a natural part of the coastal environment. Those storm events have been commonplace in the City and it thus appears that they will persist in the future. Moreover, when a storm hits, Respondent's hard structure will have a further detrimental impact because it will cause scour and additional erosion to occur.

**Sanctions**

The Department determined a $289,000.00 civil penalty was appropriate based upon its Civil Penalty Assessment Guidelines. In support of that determination, Ms. Flake averred that Respondent's actions were the most egregious she has seen throughout her tenure with the Department's Compliance and Enforcement section. She indicated that each alteration of the hard structure amounted to its own violation. Ms. Flake further stated that a maximum penalty of $1,000 per day was assessed because, notwithstanding advice from the Department as to its jurisdiction over the area landward of the setback line, Respondent installed a structure to protect his property with non-beach compatible materials, without first obtaining Department approval. Ms. Flake also asserted that the purpose of assessing penalties is to deter future non-compliance and she believed that if the Department had not assessed a "meaningful penalty" for Respondent's actions, the "cumulative impacts of other people thinking that they can ignore Department []

directives and authority in the critical area … could lead to astronomical critical area impacts that negatively impact – affect all of South Carolina, all of the citizens, all the visitors of the state."

At the outset, the Department did not produce any credible evidence that it has historically required a permit for the construction of an erosion control structure landward of the setback line nor could it confirm whether it has assessed a civil penalty for activity landward of the setback line.[40] To the contrary, Respondent introduced evidence that the Department, at least on one occasion, did not require a critical area permit for construction of an erosion control structure landward of the setback line.[41] While Mr. Slagel professed that action "was a mistake by the Department," he nevertheless acknowledged that he informed the homeowners that no Department approval was required for the construction of a seawall landward of the setback line.[42]

It is also significant that Department initially informed Respondent by email that "[h]ard erosion control structures such as seawall, bulkheads, or revetments have been prohibited **seaward** of the [DES] OCRM setback line since 1988 with the passage of the S.C. Beachfront Management Act[]" and, in turn, directed Respondent to the Department's "jurisdictional line website" for information regarding the current baseline and setback line which, it declared, "do not change in between line review cycles." (emphasis added). Notably, this guidance appears consistent with the introductory section of the Department's Beachfront Jurisdictional Line Stakeholder Workgroup May 2019 Final Report and the Beachfront Jurisdictional Lines Background provided to the Senate Subcommittee (collectively referred to hereinafter as Reports), which also imply that the extent of the Department's direct permitting authority over beachfront activity is established by the location of baseline and setback lines.

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[40] Indeed, the Department's March 4, 2024, April 3, 2024, and June 6, 2024 photographs also show an escarpment line and accumulated wrack and/or organic material at the base and around the wings of Respondent's hard structure, evidence which clearly establishes that tidal and wave action reached the hard structure.

[41] This matter was repeatedly referenced as the Piping Plover case.

[42] Mr. Slagel testified that in the *Piping Plover* case there was internal Department miscommunication. Specifically, he stated that when he was assigned to the matter it was his understanding that the homeowners had been informed that erosion control structure could only be installed landward of both the setback line and the beaches critical area. Respondent attempted to impeach Mr. Slagel's testimony through prior testimony in the *Piping Plover* matter indicating that the Department does not distinguish between the beach/dune system and the beaches critical area. However, consistent with his prior testimony, Mr. Slagel explained that the beaches critical area is typically within the beach/dune system which is the area measured from the mean high-water mark to the setback line, as described in Section 48-39-280 of the Beachfront Management Act. Importantly, he further explained that while this is typically the case, there are areas of the beachfront where "those lands subject to periodic inundation by tidal and wave action so that no nonlittoral vegetation is established" are landward of the setback line.

Lastly, Ms. Flake further indicated that Respondent's installation of the second structure after issuance of the first cease and desist order and construction of that structure during the night evidenced Respondent's deceptive conduct. Yet, the Department failed to corroborate this allegation with any direct evidence of work having been performed at night or Respondent placing sand atop of either of his hard structure.

## ISSUES

1. Does the Department have jurisdiction over the critical area where the beaches have eroded landward of the beach/dune system?

2. Is the Department precluded from enforcing its jurisdiction because it failed to promulgate a regulation amending its long-standing policies in areas landward of the setback line?

3. Whether the activity occurred in the Beaches Critical Area?

4. Whether the proposed sanctions are arbitrary and capricious?

## CONCLUSIONS OF LAW

### Standard of Review

Pursuant to the Administrative Procedures Act, the ALC conducts its review *de novo*. *Engaging & Guarding Laurens Cnty. Env't (EAGLE) v. S.C. Dep't of Health & Env't Control*, 407 S.C. 334, 344, 755 S.E.2d 444, 449 (2014); *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. at 54, 766 S.E.2d at 728 (2014) ("The General Assembly specifically granted ALCs the significant right to render final decisions based on *de novo* review."). Therefore, in contested cases such as here, the ALC serves as the sole finder of fact and considers the matter anew, freely substituting its own judgment as if no trial whatsoever had been had in the first instance. *S.C. Dep't of Revenue v. Sandalwood Soc. Club*, 399 S.C. 267, 731 S.E.2d 330 (Ct. App. 2012). Consequently, this Court may exercise its own independent judgment as to both the law and the facts on the evidence presented to it and the record made before it.

Furthermore, the burden of proof in a contested case hearing is by the preponderance of the evidence. *Nat'l Health Corp. v. S.C. Dep't of Health & Env't Control*, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989). "In general, the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of proof." *Sierra Club v. S.C. Dep't of Health & Env't Control*, 426 S.C. 236, 257, 826 S.E.2d 595, 67 (2019) (citation omitted); Rule 29(B), SCALCR ("In matters involving the assessment of civil penalties, the imposition of sanctions, or the

enforcement of administrative orders, the agency shall have the burden of proof."). When applicable, the Court "shall give consideration to the provisions of § 1-23-330 with regards to the Department's specialized knowledge." S.C. Code Ann. § 44-1-60(F)(2); *see also* S.C. Code Ann. § 48-6-30.

Additionally, "[t]he qualification of a witness as an expert in a particular field is within the sound discretion of the trial judge." *Risher v. S.C. Dep't of Health & Env't Control,* 393 S.C. 198, 206, 712 S.E.2d 428, 432 (2011). 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. *Bass v. S.C. Dep't of Soc. Servs*., 414 S.C. 558, 780 S.E.2d 252 (2015). Furthermore, the trier of fact is not compelled to accept an expert's testimony, but he may give it the weight and credibility he determines it deserves. *Florence County Dep't of Soc. Servs. 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. S. Bell Tel. and Tel. Co.*, 308 S.C. 216, 417 S. E.2d 586 (1992).

Here, there is no dispute between the parties that Respondent constructed a hard structure without first obtaining a permit from the Department nor that he used non-beach compatible materials. Rather, at the heart of this case is a disagreement between the parties as to the scope of the Department's jurisdictional authority under the Act. In the alternative, Respondent argues that even if the Department has jurisdiction, it has failed to meet its burden to show that the hard structure is in the "beaches" critical area. Lastly, Respondent contends that the assessed civil penalty imposed is unreasonable.

**Department's Jurisdiction over the Beaches in Coastal Zone**

Statutory Framework

In 1977, the South Carolina General Assembly enacted the Coastal Zone Management Act (Act) to "protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone." S.C. Code Ann. § 48-39-30(A) (2008). Among other things, the Act provided that "no person shall fill, remove, dredge, drain or erect any structure on or in any way alter any critical area without first obtaining a permit from the department." S.C. Code Ann. § 48-39-130(C). The Act originally defined "critical area" to mean "coastal waters, tidelands, beaches, and primary ocean front sand dunes." S.C. Code Ann. 48-39-10(J) (1977). Previously, "[p]rimary oceanfront sand dunes" was defined in the Act as "those dunes which constitute the front row of dunes adjacent to the Atlantic Ocean." S.C. Code Ann. 48-39-10(I) (1977), amended

by Act No. 634 § 4, 1988 S.C. Laws Act 634. "Beaches," however, was, and remains, defined in the Act as "those lands subject to periodic inundation by tidal and wave action so that no nonlittoral vegetation is established." S.C. Code Ann. § 48-39-10(H) (1977) (curent version at S.C. Code Ann. § 48-39-10 (Supp. 2025)).

In 1988, the General Assembly adopted the Beachfront Management Act (BMA), based, in part, on a finding that the Act did "not provide adequate jurisdiction to the [Department] to enable it to effectively protect the integrity of the beach/dune system." Act No. 634, § 1 (1988), 1988 S.C. Laws Act 634. The BMA amended the definition of "critical area" by replacing "primary oceanfront sand dune" with the "beach/dune system," which is designated as "the area from the mean high-water mark to the setback line as determined in Section 48-39-280." *Id*. at § 4 (codified as amended at S.C. Code Ann. § 48-39-10(J)) (1988)). In turn, the BMA called for the creation of baselines and setback lines on portions of the shoreline, depending on whether they are in a "standard erosion zone" or an "inlet erosion zone." *Id*. at § 3 (codified as amended at S.C. Code Ann. § 48-39-280(A) (1988)). The Department is required to establish the baseline based on the "best available information and data," and the setback is to be landward of the baseline at a distance of forty times the annual erosion rate as determined by historical and other scientific evidence. *Id*. Importantly, the BMA recognizes the dynamic nature of shorelines and thus provides for the periodic revision of these lines.[43] *Id*.

The BMA further added section 48-39-330 of the South Carolina Code (1988), which requires that any contract of sale and any deed with respect to transfers of real property located in whole or in part seaward of the setback line disclose the following:

> [A] contract of sale or transfer of real property located in whole or in part seaward of the setback line or the jurisdictional line must contain a disclosure statement that the property is or may be affected by the setback line, baseline, and the seaward corners of all habitable structures referenced to the South Carolina State Plane Coordinate System (N.A.D.-1983) and include the local erosion rate most recently

[43] As originally enacted, the baseline and setback line were to be revised no less than five years nor more than ten years from the reset date. The frequency of revision of the baseline and setback line was subsequently amended and today provides for reestablishment every seven to ten years. S.C. Code Ann. § 48-39-280(C) (1988), amended by Act No. 173, § 4, 2018 S.C. Laws Act 173. The BMA also created a right for affected landowners to contest the Department's establishment of the setback line, baseline, or erosion rate. Act No. 634 § 3 (1988), 1988 S.C. Laws Act 634. (codified as amended at S.C. Code Ann. § 48-39-280(E)). Thereafter, in 2018, the General Assembly enacted the Beachfront Management Reform Act (the "BRMA"), which added detailed procedures under which adversely affected landowners could request review of the establishment of the baseline and setback line, including the right to request a contested case hearing before the Administrative Law Court. Act No. 173, § 4, 2018 S.C. Laws Act 173 (codified as amended at S.C. Code Ann. § 48-39-280(F)).

> made available by the department for that particular standard zone or inlet zone as applicable. Language reasonably calculated to call attention to the existence of baselines, setback lines, jurisdiction lines, and the seaward corners of all habitable structures and the erosion rate complies with this section.

S.C. Code Ann. § 48-39-330 (2008).

Lastly, the BMA pronounced a policy of strictly discouraging new construction of "new erosion control devices" in proximity to the beach/dune system. Act No. 634, §§ 1, 2, 3 (1988), 1988 S.C. Laws Act 634.

Parties Contentions

SCCCL and the Department contend that the Department has jurisdiction to enforce the July 1, 2024 administrative order against Respondent because it has permitting authority over the beaches critical area. Specifically, they argue that the plain language of subsection 48-39-10(J) of the South Carolina Code (Supp. 2025) classifies "beaches" and "beach/dune system" as separate critical areas. Therefore, they contend the Department has jurisdiction over "beaches" even if it is within the area for which a setback line has been statutory prescribed. In other words, it is the Department's position that even though the BMA added the "beach/dune system" to the Act and further established a regulatory process for determining a baseline and setback line to effectuate a regulatory process to provide for beach protection, it nonetheless has jurisdiction landward of the "beach/dune system," if it can demonstrate that the area meets the statutory definition of beaches.[44]

[44] Interestingly, under the standard of review set forth in its proposed order, the Department cites case law on agency deference. Presumably, the Department believes it's interpretation of the scope of its regulatory authority over the beaches critical area is entitled to agency deference. Indeed, the South Carolina Supreme Court has repeatedly found that "where 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." *E.g., Charleston Cty. Assessor v. Univ. Ventures, LLC*, 427 S.C. 273, 289, 831 S.E.2d 412, 420 (2019) (internal quotation and citation omitted) (emphasis added); *see also Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 140, 694 S.E.2d 525, 526 (2010) (agency's long-standing interpretation is usually entitled to deference). Nevertheless, this deference has its limits.

Here, we see not only the limits of agency deference but the need to circumscribe its application. As readily apparent from the evidence introduced in this case, the Department has previously informed other homeowners that no Department approval is required for the construction of an erosion control structure landward of the setback line. While the Department maintains this was an isolated oversight by the Department, the Department's Reports correspond with the indication that the baseline and setback line represent the extent of the Department's jurisdiction. Although the Department's witnesses maintain that it has always exercised jurisdiction based upon the statutory definition of "beaches," the Department failed to substantiate the adoption of a formal interpretation or longstanding policy. After all, it is the uniform interpretation adopted by the agency, not its staff, that is entitled to a degree of deference. *See also S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005) ("The Panel, not OCRM staff, is entitled to deference from the courts."). Indeed, this case displays the Department's blind indifference to the legal principles from which agency deference sounds. *Charleston Cty. Assessor v. Univ. Ventures, LLC*, 427 S.C. at 289, 831 S.E.2d at 420; s*ee e.g.*, *Harry v. S.C. Dep't of Health and*

*See* S.C. Code Ann. §§ 48-39-10(H), (J); *see also* -280-90. In accordance with that interpretation of its jurisdiction, the Department contends Respondent is in violation of the Act because permits are required to alter or utilize any critical area. S.C. Code Ann. §§ 48-39-130(A) (providing that "no person shall utilize a critical area for a use other than the use the critical area was devoted to on such date unless he has first obtained a permit from the department."), -210(A) (2008) (providing "department is the only state agency with authority to permit or deny any alteration or utilization within the critical area").

To the contrary, Respondent contends that since the "beach/dune system," which encompasses both beaches and dunes, is a specifically defined term in the Act, the Department's jurisdiction is limited to areas seaward of the setback line as provided under section 48-39-290 of the South Carolina Code (2008 & Supp. 2025). More specifically, Respondent asserts that the Department lacks the authority to regulate any activity which occurs landward of the setback line because the Department's jurisdiction over the "beaches" is limited by the statutorily designated boundaries of the "beach/dune system," which is the area between the mean high-water mark to the setback line. He argues that his interpretation is supported by the General Assembly's disuse of the term "means" to define "beach/dune system." According to Respondent, by failing to use "means" in designating the "beach/dune system," the General Assembly did not attempt to define that term but rather intended to establish the "geographic scope of the Department's jurisdiction over beaches and dunes and their associated system."

Respondent further contends that the inclusion of "beaches" as a separate critical area is not rendered meaningless since the Act provides for regulation of areas of the coastal zone for which a baseline or setback line is not established. Said differently, it is Respondent's contention that it was the Legislature's intent to retain "beaches" as a separate critical area to ensure that the Department would retain jurisdiction in the areas of the coastal zone that are exempted from the "beach/dune system" regulation. *See* S.C. Code Ann. § 48-39-280(E)(3) (Supp. 2025) (providing that the department may exempt specifically described portions of the coastline from monumented and controlled survey points requirements).

Moreover, Respondent contends the Court should find that his interpretation is consistent with the Legislature's intent because it is congruent with the Department's practice for the past

*Env't Control*, Docket No. 09-ALJ-07-0255-CC (July 15, 2010) (setting forth the hazard of errantly granting agency deference).

twenty-five years and is also supported by the General Assembly's inclusion of the term "beach" in "beach/dune system." He also argues his interpretation was favorably viewed in *Braden's Folly, LLC v. City of Folly Beach*, 439 S.C. 171, 886 S.E.2d 674 (2023).

Yet still, Respondent argues that the rules of statutory interpretation also support the conclusion that the Department's jurisdiction is limited to the geographic bounds of the "beach/dune system." Specifically, he contends his interpretation is consistent with Act's general goal of balancing economic and social development of the coastal zone with preservation of this State's coastal resources as it advances general notice and due process requirements, it avoids regulatory takings and is consistent with the State's adoption of a policy of beach renourishment and increased public access to South Carolina beaches. Lastly, Respondent argues indication of the General Assembly's intent can be gleamed from statutory provisions which establish procedures for claims to land seaward of the baseline or setback line and requirements for disclosure of the setback line and baseline on contracts of sale or transfer of property.

Analysis

The facts of this case reveal a unique factual circumstance in which the beaches adjacent to Respondent's property extend landward of the setback line. In that light, the question presented to this Court by the parties is whether the laws establishing the setback line preclude the Department from exercising its permitting authority landward of that line even if the area meets the statutory definition of "beaches." In reviewing that question the Court is faced with determining the implication that the Act sets forth separate definitions for "beaches" and the "beach/dune system" yet also defines each to mean a critical area that is irrefutably subject to the Department's regulation.

In addressing this issue, the Court first notes that Respondent misreads the reach of the Supreme Court's opinion in *Braden's Folly*.[45] In that case, the Supreme Court considered whether Folly Beach's enactment of a property merger ordinance amounted to an unconstitutional regulatory taking. Importantly, in setting forth the background of the case, the Court explained that the General Assembly exempted Folly Beach from part of the requirements set forth under the BMA and it granted Folly Beach the authority to act in the State's stead when protecting the beach. Importantly, the Supreme Court recognized that since no setback line was established for Folly

[45] 439 S.C. 171, 886 S.E.2d 674

Beach, the City had the sole discretion to allow for all types of development that would otherwise be precluded under section 48-39-290 of the South Carolina Code. The Supreme Court did not, however, consider the Department's jurisdiction in areas other than those strictly regulated under sections 48-39-280 and 48-39-290 of the South Carolina code from which Folly Beach was explicitly exempted.

Furthermore, regarding Respondent's contention that this Court should adopt his interpretation of the Department's jurisdictional authority because it is consistent with the Department's prior practice of only regulating areas seaward of the setback line, I find that the Department's past regulatory practice is immaterial to this Court's consideration of Department's jurisdictional authority. Indeed, the Department cannot create jurisdiction. *Trident Med. Ctr., LLC v. S.C. Dep't of Health & Env't Control*, 438 S.C. 391, 397, 882 S.E.2d 878, 882 (Ct. App. 2022) (citing *SGM-Moonglo, Inc. v. South Carolina Department of Revenue*, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (Ct. App. 2008). ("An administrative agency has only the powers conferred on it by law and must act within the authority created for that purpose."). Rather, it is the Legislature that confers powers onto the Department. *City of Rock Hill v. S.C. Dep't of Health & Env't Control*, 302 S.C. 161, 165, 394 S.E.2d 327, 330 (1990) (citing *City of Columbia v. Board of Health and Env't Control,* 292 S.C. 199, 355 S.E.2d 536 (1987)).

Turning to SCCCL and the Department's claims, the Court initially notes that as a creature of statute, regulatory bodies such as the Department possess only those powers which are specifically delineated. *Id*. In implementing those laws, agencies must consider the policies the General Assembly has set forth as undergirding the law. *See S.C. State Highway Dep't v. Harbin*, 226 S.C. 585, 86 S.E.2d 466 (1955) (citing *State v. Stoddard*, 126 Conn. 623, 13 A.2d 586, 588) (administrative bodies must conform with statutes which declare legislative policies). Admittedly, the policies which underlie the Act may arguably be viewed as supporting Petitioners' contention that the Department has permitting jurisdiction over the beaches critical area. Indeed, subsection 48-39-250(8) of the South Carolina Code (2008) sets forth that "[i]t is in the state's best interest to protect and to promote increased public access to South Carolina's beaches for out-of-state tourists and South Carolina residents alike." S.C. Code Ann. § 48-39-250(8). Coastal Zones are defined as "all coastal waters and submerged lands seaward to the state's jurisdictional limits and all lands and waters in the counties of the State which contain any one or more of the critical areas." S.C. Code Ann. § 48-39-10(B) (Supp. 2025). It is therefore reasonable to assume that if the challenged

activity occurred in the area statutorily defined as "beaches," it is in keeping with this State's policy that the Department has permitting authority since it could not otherwise protect the entirety of the coastal zone if it were unable to exercise regulatory authority over the beaches, irrespective of the location of the setback line.[46]

Nevertheless, the Court cannot ignore that there must have been a legislative purpose for the establishment of the baseline and setback line. *See* S.C. Code Ann. § 48-39-280. While the BMA does not specifically set forth the purpose of the baseline and setback lines, its purpose is apparent from an analysis of the law. The baseline and setback lines are statutorily established and are subject to a required review of their continued application after a specific period of time. S.C. Code Ann. § 48-39-290(C). In light of the establishment and review cycles, it can be reasonably inferred that the lines exist to establish consistency in coastal zone regulation. Interpreting the BMA as establishing a limit to the Department's jurisdiction landward of the setback line would logically achieve that legislative purpose. Indeed, the Court's understanding of the reasonableness of a landward limitation was revealed from the Department's own evidence. For instance, as acknowledged by the Department's own expert witness, the beaches critical area changes significantly from month-to-month or storm-by-storm and the extent of the change could be minor or significant depending upon the intensity of the storm. Undeniably, if there is no consistent delineation of the Department's permitting authority along the shoreline, permissive use or alteration of the critical area will be constantly in a state of flux. This would create an undesirable result, leaving the Department's permitting authority ever changing with no certainty to either landowners' or this Court as to whether a permit is required.[47] Presumably, the legislature recognized the importance of avoiding such uncertainty when it established the baseline and setback line.

Additionally, the BMA established a public notice and participation process as a necessary component to the establishment of the baseline and setback line under section 48-39-280 of the South Carolina Code. Surely, this review provides the public with not only an understanding of the location where construction or reconstruction is permittable but also an opportunity to challenge the Department's proposed baseline and setback line when adversely effected by their

[46] It is nonetheless important to recognize that in this case, the Department's expert was uncertain whether the structure was still in the "beaches" critical area at the time of trial.

[47] Notably, Mr. Jones opined that there should be at least one growing season before vegetation is considered.

establishment. *See* S.C. Code Ann. § 48-39-280(F) (Supp. 2025). Consistent with the BMA's notice provision, the Act also requires that any contract of sale or transfer of real property "located in whole or in part seaward of the setback line or jurisdictional line" contain a disclosure that the property is or may be effected by the baseline and setback line determination and notice of the local erosion rate which, could presumably effect the locations of the baseline and setback line. S.C. Code Ann. § 48-39-330. The BMA did not, however, require disclosure that the property may also be subject to the Department's determination of beaches critical area. The fact that the General Assembly did not require such a disclosure could reflect that it did not intend for the Department's jurisdiction to extend landward of the setback line.

Although these considerations present a challenge in determining whether the General Assembly intended to generally limit the Department's permitting authority to areas seaward of the setback line, the Department's request for an order to remove Respondent's hard structure and restore the affected area must be viewed within the broader context of the "basic state policy" to "protect the quality of the coastal environment" and likewise, the use of erosion control structures. S.C. Code Ann. § 48-39-30(A) & -250-60. In other words, the policies and findings regarding the regulation of the coastal zone and the laws concerning erosion control structures necessitate that this Court consider whether Respondent's placement of the erosion control structures in the coastal zone is consistent with the policies and laws codified by the Act. Indeed, this Court has in the past found that the Department was precluded from regulating the construction of erosion control structures outside of the critical area. *S.C. Coastal Conservation League v. South Carolina Department of Health & Environmental Control*, 15-ALJ-07-0369-CC, 2018 WL 4854113 (S.C. Admin. Law Ct. Sept. 24, 2018). However, the South Carolina Supreme Court disagreed with that interpretation in *South Carolina Coastal Conservation League v. South Carolina Department of Health & Environmental Control*, holding that consideration must be given to the impact an erosion control structure will have on the critical area, even when built outside of the critical area.[48] 434 S.C. 1, 862 S.E.2d 72 (2021). Certainly, this holding confirms that the policies undergirding the Act must be a central part of the Court's analysis of the facts presented. Therefore, the Court now turns to an examination of the policies and law regarding erosion control devices.

[48] The Legislature's decision to repeal section 48-39-200 from the Act reflects the Department currently has regulatory authority over the entirety of the coastal zone, even if activity occurs outside of the critical area. S.C. Code Ann. § 48-39-200 (*repealed by* 1993, Act No. 181, § 1235, effective from and after July 1, 1994).

**Regulation of Erosion Control Structures**

Erosion Control Structures

The Department has the power to enforce the Act and compel compliance with each of its provisions, including those related to erosion control structures. S.C. Code Ann. § 48-39-50(I). Pursuant to the Act, erosion control structures include:

(a) seawall: a special type of retaining wall that is designed specifically to withstand normal wave forces;

(b) bulkhead: a retaining wall designed to retain fill material but not to withstand wave forces on an exposed shoreline;

(c) revetment: a sloping structure built along an escarpment or in front of a bulkhead to protect the shoreline or bulkhead from erosion.

S.C. Code Ann. § 48-39-270(1). Initially, Respondent argues that neither ERC-1 nor the hard structure are erosion control structures. Nevertheless, he agreed that ERC-1 was originally designed to retain material and, as such, it is a bulkhead which is defined under subsection 48-39-270(1)(b) of the South Carolina Code (2008) as an erosion control structure. Moreover, Respondent attested that the second structure was installed for the purpose of reinforcing ERC-1 so that it could remain water-facing. As such, based on Respondent's own testimony, I conclude that the addition of the second structure augmented ERC-1, transforming it into a seawall since its enhanced design was not only to retain Respondent's yard but to withstand normal wave forces. *See* S.C. Code Ann. § 48-39-270(1)(a) (2008). In sum, the structures constructed by Respondent are hard erosion control structures.[49] *See* S.C. Code Ann. § 48-39-270(1) (2008).

Adverse Effects

The Act specifically provides that the Department has "the authority to remove all erosion control structures which have an adverse effect on the public interest." S.C. Code Ann. § 48-39-120(C) (2008). Yet, Respondent argues in his Motion for Reconsideration that this statutory provision does not apply in this case since there is nothing to suggest that the General Assembly intended to expand the Department's jurisdiction over erosion control structures beyond the critical areas. Specifically, Respondent contends that through the enactment of the BMA, the Legislature amended the Department's "prior authority" over erosion control structures and implemented specific provisions for the removal and repair of erosion control structures through the

[49] As stated earlier in this Order, the second structure and ERC-1 are conterminous, thus, forming one hard erosion control structure.

promulgation of subsection 48-39-290(B)(2) of the South Carolina Code (2008 & Supp. 2025) limited the Department's authority over erosion control structures to areas seaward of the setback line. I disagree.

In implementing the Act, the General Assembly declared that it is the "basic state policy … to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people in the State." S.C. Code Ann. § 48-39-30(A). The General Assembly then set forth specific state policies to protect the State's coastal zone, including "to protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations[]." S.C. Code Ann. § 48-39-30(B)(2) (2008). The General Assembly later amended the Act, declaring that:

> (3) Many miles of South Carolina's **beaches have been identified as critically eroding**.
>
> * * *
>
> (5) The use of armoring in the form of hard erosion control devices such as **seawalls, bulkheads,** and rip-rap to protect erosion-threatened structures **adjacent to the beach has not proven effective.** These armoring devices have given a false sense of security to beachfront property owners. In reality, these hard erosion control structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves while **contributing to the deterioration and loss of the dry sand beach** which is so important to the tourism industry.
>
> (6) **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.**
>
> * * *
>
> (8) It is in **the state's best interest to protect and to promote increased public access to South Carolina's beaches** for out-of-state tourists and South Carolina residents alike.

S.C. Code Ann. § 48-39-250 (1976) (amended by Act No. 607, § 1, 1990 S.C. Acts) (emphasis added).

In recognition of these policies, the General Assembly outlined specific state policies pertaining to the use of hard erosion control structures, stating in part that the Department must:

> (3) **severely restrict the use of hard erosion control devices** to armor the beach/dune system and to encourage the replacement of hard erosion control devices with soft technologies as approved by the department which will provide for the protection of the shoreline without long-term adverse effects;

> (4) **encourage the use of erosion-inhibiting techniques which do not adversely impact the long-term well-being of the beach/dune system. . . .**

S.C. Code Ann. § 48-39-260 (2008) (emphasis added). While subsection 48-39-290(B) of the South Carolina Code sets forth specific restrictions on the "construction, reconstruction, or alterations between the baseline and the setback line" of erosion control structures, subsection 48-39-290(B)(2)(d) of the South Carolina Code provides that "[t]he provisions of [48-39-290(B)(2)(d)] **do not affect or modify the provisions of Section 48-39-120(C)**." (emphasis added).

Nonetheless, Respondent argues that the Department failed to show that his hard erosion control structure has or will adversely affect the public's interest. I respectfully disagree. It is undisputed that Respondent's property is in the coastal zone. S.C. Code Ann. § 48-39-10(B). In fact, Respondent's property is situated in a highly dynamic area where the beach has historically undergone cyclical periods of extensive erosion. Generally, the General Assembly has declared that it is in the public's interest to protect natural processes like cyclical erosion. S.C. Code Ann. § 48-39-250(6). And here, while the City's beaches may have recently entered an accretional cycle, the dynamic nature of the shoreline suggests that it is only a matter of time before the shoreline is further scoured as a result of the presence of Respondent's hard structure.

As to Respondent's structure, the policies and findings under the Act set forth that hard erosion control devices are commonly regarded in this State as harmful to the coastal environment, particularly when placed in close proximity and/or adjacent to the beach. In this case, the evidence unequivocally shows that Respondent's hard structure is adjacent to the beaches. In fact, Respondent's hard structure protrudes farther seaward into the adjacent beach than any neighboring structure. Importantly, the General Assembly also found that hard erosion control structures like Respondent's are not only ineffective when placed adjacent to the beach but that they create a "significant" erosion problem. S.C. Code Ann. § 48-39-250(5), (6). Correspondingly, Mr. Jones explained that hard erosion control structures restrict natural processes as they impede sediment flow and produce scour. Indeed, this likelihood was demonstrated by the photographic evidence which shows that the tidal and wave action reaching Respondent's hard structure has induced erosion and scouring on the adjacent beach.

The impacts of Respondent's structure must also be viewed in light of the State's policies. Specifically, the General Assembly has pronounced that "[i]t is in the state's best interest to protect and to promote increased public access to South Carolina's beaches for out-of-state tourists and

South Carolina residents alike." S.C. Code Ann. § 48-39-250(8). It is undisputed that the beach adjacent to Respondent's hard structure is a well-used destination for public recreation. Moreover, based on the uncontroverted testimony, during future erosive cycles, the public's access to the adjacent beach will continue to deteriorate because of a loss of dry sand laterally along the beach past the structure.

This Court is also well aware of the Supreme Court's emphasis in considering the public's interest and its predilection toward denying erosion control structures when balancing economic and social development in the coastal zone. In *Kiawah Development Partners, II v. S.C. Department of Health & Environmental Control*, the Supreme Court held that "**the public's interest must be the lodestar** which guides our legal analysis in regard to the State's tidelands." 411 S.C. 16, 29, 766 S.E.2d 707, 715 (2014) (emphasis added). Later in in *South Carolina Coastal Conservation League v. South Carolina. Department of Health & Environmental Control*, the court addressed this ALC's approval of a permit to KDP to construct an erosion control device outside of the critical area. Notwithstanding the fact that the structure was outside of the critical area, the Supreme Court again held that, in light of the overarching policy to protect the coastal zone, the ALC erred in upholding the Department's issuance of a permit because the erosion control device would ultimately have an impact on the critical area. 434 S.C. 1, 862 S.E.2d 72, *reh'g denied*, (September 1, 2021) (2021).

Furthermore, the Department presented credible evidence to show that the hard structure has been on active beach. Active beach is specifically defined as "that area seaward of the escarpment or the first line of stable natural vegetation, whichever first occurs, measured from the ocean." S.C. Code Ann. § 48-39-270. Respondent's April 4, 2024 property survey shows that segments of the hard structure were situated seaward of the top of the bank which again is, the top of the escarpment and, significantly, Respondent did not produce any evidence to show the presence of stable natural vegetation seaward of the escarpment. The fact that the hard structure has been on active beach is noteworthy to this Court considering that the General Assembly circumscribed stringent restrictions against construction and reconstruction in this area. S.C. Code Ann. § 48-39-290. Specifically, subsection 48-39-290(D)(1) of the South Carolina Code (2008) sets forth that:

> [i]f an applicant requests a permit to build or rebuild a structure other than an erosion control structure or device seaward of the baseline that is not allowed otherwise pursuant to Sections 48-39-250 through 48-39-360, **the department**

> **may issue a special permit to the applicant authorizing the construction or reconstruction if the structure is not constructed or reconstructed on a primary oceanfront sand dune or on the active beach and, if the beach erodes to the extent the permitted structure becomes situated on the active beach, the permittee agrees to remove the structure from the active beach if the department orders the removal**. However, the use of the property authorized under this provision, in the determination of the department, must not be detrimental to the public health, safety, or welfare.

(emphasis added). Therefore, a landowner cannot even obtain a special permit to build a structure if it is "on a primary oceanfront sand dune or on the active beach." In fact, the Department even has the authority to order the removal of a structure "if the beach erodes to the extent the permitted structure [later] becomes situated on the active beach." S.C. Code Ann. § 48-39-290(D)(1). Furthermore, even when construction is generally permittable under subsection 48-39-290(D)(1), it is not authorized if it would be detrimental to the public welfare. *Cf. S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control*, 354 S.C. 585, 589, 582 S.E.2d 410, 413 (2003) (holding "BMA authorized OCRM to issue groin permits in furtherance of the State's policy of encouraging certain types of erosion-inhibiting techniques and promoting beach renourishment **where appropriate**.") (emphasis added). The Legislature's admonishment against issuance of special permits for structures on "primary oceanfront sand dune or on the active beach" further informs my consideration of the adverse effects of Respondent's hard structure.

In sum, reverberating throughout the Act is the fundamental responsibility of the Department, and therefore this Court, to protect the public's interests in the coastal zone even if that protection may be detrimental to the property owner's interest. Significantly, in this case, since Respondent installed the structure without any review by the Department, there has been no analysis as to whether soft solutions referenced in the law would be viable to protect his property. Moreover, Respondent did not refute the legislative findings discussed above. *See also Bauer v. S.C. State Hous. Auth.*, 271 S.C. 219, 229, 246 S.E.2d 869, 875 (1978) (citing *Velishka v. Nashua*, 99 N.H. 161, 106 A.2d 571, 573, 44 A.L.R.2d 1406, 1411 (1954)) ( "[L]egislative findings and declarations have no magical quality to make valid that which is invalid but they are entitled to weight…."). Thus, taking into consideration the findings codified by the General Assembly and evidence regarding the adverse effect of Respondent's hard structure on the public interest—specifically, the threat of accelerated erosion, intrusion on the natural erosive cycle, and the reduction in public access to the beaches, I conclude that the preponderance of the evidence establishes that the public interests protected by the Act override Respondent's interest to retain

the hard structure. S.C. Code Ann. §§ 48-39-30 & -260. As such, I conclude that the hard structure must be removed. S.C. Code Ann. § 48-39-120(C).

In addition, in exercising the authority to order the removal of the hard structure, the Court recognizes that the Department, and therefore this Court, has been granted the power to "exercise all incidental powers necessary to carry out the provisions of this chapter." S.C. Code Ann. § 48-39-50(O) (2008). Accordingly, the Court finds it necessary to order that Respondent submit a CAP consistent with the schedule set forth in this Order for the removal of the hard structure and restoration of the affected area. *See also* S.C. Code Ann. § 48-39-30(B)(2) (providing that it is this state's policy "to protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations).

**The Department's Proposed Sanctions**

Parties Contentions

Respondent contends that the Department failed to establish that the proposed penalties are fair, consistent, and reasonable under the circumstances of this case. Respondent interprets the Act to confine the Department's jurisdictional authority to areas landward of the setback line. He maintains his construction of the Act is supported by the Department's inaction for at least twenty-five years against structures built landward of the setback line. Respondent also argues that the assessed penalty is significantly harsher than that which was imposed for a similar offense in the *Piping Plover* matter and that the Department failed to provide any evidence of comparable fines for similar enforcement matters. Respondent further contends that while he may disagree with the Department's interpretation of the Act, his discord cannot be construed as a disregard for the Department's jurisdiction, nor does it justify the imposition of a $289,000 fine.

Conversely, the Department asserts that it adhered to its uniform enforcement policy and civil penalty assessment guidelines and that the assessed penalties are reasonable in light of Respondent's willful conduct and the extent of the multiple unpermitted alterations he made in the beaches critical area without a permit. Specifically, the Department contends Respondent disregarded its guidance and advice regarding allowable activity in the critical areas and instead, installed two substantial structures and other non-beach compatible material which interfered with the public's use and enjoyment of the beach and exacerbated erosional conditions.

The Department further contends Respondent has been on notice of restrictions regarding erosional control structures since the purchase of his property, yet he installed two hard structures,

willfully concealed his activities from the Department and disregarded its communications to cease and desist. In addition, the Department argues Respondent violated its September 21, 2023 Emergency Order directing him not to place sand on the beach to cover or bury any portion of an erosion control structure.

The Department also asserts that the assessed penalty is neither retaliatory nor inequitable. The Department contends that it has not changed its practice and that the *Piping Plover* matter is distinguishable from this case because the activity in *Piping Plover* occurred in a standard erosion zone, public access was not an issue, and the homeowners cooperated during the enforcement action. Furthermore, the Department argues Respondent has not received disparate treatment as it imposed a far higher penalty against the Ocean Club condominium for similar violations, specifically Ocean Club's unpermitted construction in a critical area, despite its heightened awareness of the Department's jurisdiction.

Lastly, SCCCL argues that the Administrative Order is enforceable against Ms. Reddy. SCCCL assets Ms. Reddy was a named addressee of the Administrative Order, and that she actively participated in, financed, and directed unpermitted activities in the beaches critical area. SCCCL argues the Administrative Order is final and immediately enforceable against Ms. Reddy because she did not file a timely request for a contested case. SCCCL further contends that Ms. Reddy's lack of title to the property is no shield against the Department's order to remove the unauthorized structure, restore the affected critical area, and pay the assessed civil penalties.

## Analysis

"Inherent in and fundamental to the powers of an Administrative Law Judge, as the trier of fact in contested cases under the Administrative Procedures Act, is the authority to decide the appropriate sanction when such is disputed." *Walker v. South Carolina Alcoholic Beverage Control Comm'n*, 305 S.C. 209, 407 S.E.2d 633 (1991); *Berry v. S.C. Dep't of Health & Env't Control*, 402 S.C. 358, 364, 742 S.E.2d 2, 5 (2013) ("[R]eview of the agency's enforcement order and its imposition of civil fine is an administrative matter that falls squarely within the ambit of a contested case as defined in the APA."). In assessing a penalty for violation of environmental statutes, each fine must be analyzed individually to determine if it is appropriate under the circumstances. *Midlands Utility, Inc. v. S.C. Dep't of Health and Env't Control*, 313 S.C. 210, 212, 437 S.E.2d 120, 121 (1993). Subsection 48-39-170(C) of the South Carolina Code (Supp. 2024) provides that "[a]ny person who is determined to be in violation of any provision of this

chapter by the department shall be liable for, and may be assessed by the department for, a civil penalty of not less than one hundred dollars nor more than one thousand dollars per day of violation." *See* S.C. Code Regs. Ann. 30-8(D) (2011); *see also Midlands Util., Inc. v. S.C. Dep't of Health & Env't Control*, 313 S.C. 210, 212, 437 S.E.2d 120, 121 (Ct. App. 1993) (civil penalties are intended to deter future non-compliance). In addition, the Department may issue an order requiring such person to comply with such permit, regulation, standard, or requirement, including an order requiring restoration when deemed environmentally appropriate by the department. S.C. Code Ann. § 48-39-170(C); S.C. Code Ann Regs. 30-8(F) (2011).

Considering the disposition of this matter, it is questionable whether the penalty provisions apply. Indeed, I have not found that Respondent is in direct violation of any permit, nor have I found that he violated a regulation, standard, or requirement under the Act. Nonetheless, even if I were to assume Respondent was in violation of a provision of the Act, I conclude that the Department's assessment of a $289,000 penalty is not appropriate under the facts of this case.

Here, the Department's imposition of a civil penalty was predicated on three prongs. The Department first contends Respondent willfully disregarded the Department's directives. Unquestionably, Respondent's actions contravene guidance provided by Department staff. Yet, Respondent's actions must be considered in light of the ambiguity in the Act regarding whether the General Assembly intended to confine the Department's permitting authority to areas seaward of the setback line. In addition, the guidance provided to Respondent in this case, appears to contradict the Department's Reports and the Department's representation of the jurisdictional line website, each of which seem to convey that the purpose of the baseline and setback line are to delineate **the extent of the Department's direct permitting authority** for activities within the defined beaches and beach/dune system critical areas. Moreover, although the Department's witnesses testified that the coastal environment has changed and erosion has increased causing the setback line to no longer represent the most landward jurisdictional line, the regulations in effect at the time enforcement action was pursued against Respondent seem consistent with the representations set forth in the Reports.[50] *E.g*, S.C. Regs. Ann. 30-21(H)(3) (providing jurisdiction

[50] The Department's regulations were amended in 1999 to add the beaches to the regulatory definition of the critical areas. For purpose of determining the boundaries of the "Beaches and Beach/Dune System," regulation 30-10(B) of the South Carolina Code of Regulations (2011) provides that "the Department will be guided by Section 48-39-270, Section 48-39-280 and Section 48-39-360" or, in other words, the statues establishing the baseline and setback lines. While the Department's regulations are not determinative of the Department's jurisdiction, a review of the regulatory history alludes to the bounds of the Department's jurisdiction limits.

on beaches is determined by the location of the setback line) (2011); S.C. Code Ann. Regs. 30-13(N)(3)(a) (listing project standards for erosion control structures or devices) (amended by SCSR 48-5 Doc. No. 5200, 2024 SC Reg Text 636980, eff May 24, 2024). Thus, while the Department may not have expressly stated that the baseline and setback line define the scope of the Department's permitting authority, Respondent's inference that it was limited to the area seaward of the setback line is understandable, especially in light of the ambiguity in the Act, as discussed above.

In addition, while described as an oversight by the Department, Mr. Slagel nevertheless acknowledged that he informed the homeowners in the *Piping Plover* that **no Department approval was required for the construction of a seawall landward of the setback line**. Furthermore, Ms. Flake was unable to identify one instance in the last twenty-five years where the Department imposed a civil penalty for activity landward of the setback line. Considering these facts, the assessment of a $289,000 fine certainly does not appear to be fair.

The Department also contends the penalty is warranted considering Respondent's deceptive conduct. However, the Department's characterization of Respondent's actions is based upon the allegation that he took steps to conceal the installation of the second structure by conducting work into the night. Nonetheless, the Department did not present any evidence of personal observations of work being conducted at night nor Respondent placing sand atop of the hard structure. In fact, the evidence shows that Respondent has been responsive to the Department. Indeed, Respondent halted his efforts to place sand in front of ERC-1 when directed. Moreover, although Respondent did not agree with the Department's directives, he responded to each cease and desist order, albeit consistently stating his position that the construction activity did not occur within the critical area. Furthermore, the September 21, 2023 Emergency Order was never fully executed and thus, any requirements or restrictions set forth therein are not enforceable against Respondent.

In addition, I do not find the assessment of penalties in either the Ocean Club or the *Piping Plover* matters to be instructive. In contrast to the matter before this Court, there is no evidence to suggest that the activity occurred landward of the setback line. In addition, as explained by Mr. Stout, the *Piping Plover* enforcement matter was handled by the Department's Bureau of Water who has a different process and policy for assessment of penalties.

The Department also contends the penalty is appropriate in light of the egregious nature of the alterations to the beaches critical area. As discussed above, the construction of the hard structure has disrupted the equilibrium of the adjacent beach and has adversely affected the public's use and enjoyment of the beach and exacerbated erosional conditions. Although the impact of Respondent's hard structure on the adjacent beach is significant, removal of the hard structure and restoration of the affected area eliminates the impact on the coastal zone.

For the foregoing reasons, I conclude that the assessment of a civil penalty is not appropriate.

**Other Issues**

In the alternative, Respondent argues that the Department failed to meet its burden of proof to show that the hard structure was built in the beaches critical area because the Department failed to prove that inundation reached the property and that nonlittoral vegetation had been well established for an extended period prior to September 1, 2023.

Respondent also argues that to the extent that the Act could be interpreted as ambiguous, the Department failed to promulgate regulations through the APA process. Specifically, Respondent asserts that the Department did not comply with the rulemaking process required under the APA when it abandoned its apparent long-standing policy of not asserting jurisdiction landward of the setback line and took enforcement action against Respondent. In support of his argument, Respondent stressed the Department's inability to identify a case, since 1999, where it exercised permitting authority landward of the setback line. In addition, Respondent points to the Department inaction in the *Piping Plover* matter wherein the Department did not require homeowners to obtain a permit for the construction of a seawall landward of the setback line in beaches critical area.

Respondent further argues that the Department's exercise of jurisdiction landward of the setback line is also inexplicable because it is inconsistent with the City's 2017 Local Comprehensive Beach Management Plan and Department regulations in effect at the time enforcement action was taken in this case. Specifically, Respondent asserts that the combined heading of "Beaches and "Beach/Dune System" and the singular use of "critical area" in regulation 30-10(B) of the South Carolina Code of Regulations (2011) imply that the Department construed "beaches" and "beach/dune system" as a single critical area. Likewise, Respondent asserts that regulation 30-21(H) of the South Carolina Code of Regulations (2011) belies the Department's

current jurisdictional policy as it provides that the Department's "permitting jurisdiction on beaches is determined by the location of the setback line." As such, Respondent contends the Department should be precluded from enforcing its jurisdiction in this case.

However, I need not consider these issues because the Department, and thus this Court, has the authority to order the removal of hard structures in the coastal zone whether or not they are in the beaches critical area or landward of the setback line.

Finally, as stated in my findings of fact, Ms. Reddy did not file a request for a contested case hearing in this matter. *See* S.C. Code Ann. § 48-6-30(D)(2) (Supp. 2024). Therefore, since she is not a party to the underlying matter this Court lacks the authority to determine the status of the July 1 Administrative Order on Mrs. Reddy.

**ORDER**

Based upon the above Findings of Fact and Conclusions of Law:

**IT IS THEREFORE ORDERED** that within sixty (60) days of the issuance of this Order, Respondent shall submit a Corrective Action Plan (CAP) to the Department for the removal of the hard structure, including all unauthorized materials that were used for its construction, and the restoration of that affected area once excavation/removal is complete.

**IT IS FURTHER ORDERED** that the Corrective Action Plan shall include a plan for the removal of the hard structure and any non-beach compatible materials that may have been used for its construction. The CAP must include a schedule for the completion of the removal of the hard structure and non-beach compatible materials and the methods that will be used to ensure beach stabilization during removal to minimize further beach impacts. It must also include the source of beach compatible materials that will be utilized to restore the affected area once excavation/removal of the hard structure is complete.

**IT IS FURTHER ORDERED** that the sand used in the restoration of the affected area must be compatible in size and grain color, from an upland source.

**IT IS FURTHER ORDERED** that the scheduled activities must comply with the South Carolina Department of Natural Resources Marine Turtle Conservation Program.

**IT IS FURTHER ORDERED** that within ninety (90) days of Department's approval of the CAP and sand sample, Respondent shall commence implementation of removal of the hard structure and all non-beach compatible that were for its construction and restoration of the affected

area with approved beach-compatible materials. Respondent shall complete the scope of work outlined in the approved CAP within thirty (30) days from the commencement of the work.

**IT IS FURTHER ORDERED** that Department shall provide a liaison for the Respondent to contact should he or his representative have questions or concerns during this process to assist him in obtaining the information needed to address the questions or concerns and to arrange meetings between the Department and Respondent or his representative to discuss the CAP and associated work, as appropriate.

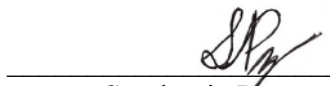
**AND IT IS SO ORDERED**.

Ralph King Anderson, III
Chief Administrative Law Judge

December 30, 2025
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

December 30, 2025
Columbia, South Carolina