



South Carolina Bar

Continuing Legal Education Division

2019 SC BAR CONVENTION

Environment & Natural Resources Section/Administrative & Regulatory Law Committee

“A Day at the Beach: How to Survive
the Changing Tides of
Environmental Cases”

Thursday, January 17

SC Supreme Court Commission on CLE Course No. 190131

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**Environment & Natural Resources
Section/Administrative &
Regulatory Law Committee**

Thursday, January 17

**I'm Still Standing:
Standing in Environmental Cases**

*Dawn K. Miller
Michael S. Traynham*



Standing: Not as easy as it looks...

By: Michael Traynham & Dawn Miller





Disclaimer:

Any views expressed in this presentation are those of the speakers and do not necessarily reflect any view, policy, or position of the S.C. Department of Health and Environmental Control or any other agency of the State.

What is Standing:

A party's right to make a legal claim or seek judicial enforcement of a duty or right.

– Black's Law Dictionary (10th ed. 2014)



Federal

- **Basis for standing:**
 - Article III (constitutional) standing (*Lujan v. Defenders*)
 - Concrete and particularized, actual or imminent "injury in fact"
 - Causation – injury must be "fairly traceable" to challenged action
 - Must be "likely" that injury would be redressed by favorable decision
- **Origin:**
 - U.S. Const., Art. III, Sec. 2: "judicial power shall extend to all cases ... [and] controversies"

State

- **Bases for standing:**
 - Article III standing (*Lujan* and *Sea Pines Ass'n v. SCDNR*)
 - Statutory standing
 - APA, S.C. Code Section 44-1-60
 - Public importance exception
- **Origin:**
 - Constitutional?
 - Prudential?
 - Rule 17(a) of the S.C. Rules of Civil Procedure – actions must be filed by "real party in interest" (*Sea Pines Ass'n*)



South Carolina Department of Health and Environmental Control
Healthy People. **Healthy Communities.**

Federal case law

Sierra Club v. U.S. DOI, 899 F.3d 260 (4th Cir. 2018)

- Challenged a National Park Service (NPS) decision allowing a right of way for the Atlantic Coast Pipeline (ACP)
- Visual impact study concluded that the RoW construction would decrease scenic value
- NPS challenged Petitioners' standing, as well as the merits of the challenge



Sierra Club v. DOI (4th Cir)

- Several members of the environmental groups averred long use of the Parkway and the impacted overlook as well as planned future use, thus establishing a particularized injury.
- NPS averred that the injury was not “fairly traceable”
- 4th Cir. was not persuaded and found standing.

Roanoke River Basin Ass'n v. Duke Energy Progress, LLC

Nos. 1:17-cv-567 and -707 (M.D.N.C. 2018)

- EPA coal combustion residual (“CCR”) rule promulgated in 2015 under RCRA to regulate power plants’ disposal of coal ash
- Citizen suits alleged Duke Energy closure plans for two plants’ CCR impoundments/landfills violated rule’s requirements
 - Plaintiff RRBA is nonprofit org with members who “own property, fish, and enjoy other recreational activities in the Roanoke River Basin”
- Duke Energy moved to dismiss on standing grounds (among others)



Coal ash deposits along the Dan River (2014)



RRBA v. Duke Energy Progress, LLC – Standing claims fall flat...

Traditional standing claim

- RRBA: Members would be harmed by permanently unsafe storage of coal ash.
- Court: No – Insufficient causal connection. “[T]he diminished use and enjoyment of the [basin] ... is not directly linked to Duke Energy’s preparation of an initial closure plan that allegedly fails to comply with the CCR Rule’s requirements regarding its contents.”

Procedural injury

- RRBA: “[B]latantly defective” plan violated procedural right to lawful closure plan.
- Court: No – Insufficient causal connection. “[B]are procedural violation, divorced from any concrete harm,” is not enough. RRBA must allege concrete harm causally connected to alleged procedural violations of the CCR Rule.

Informational injury

- RRBA: Violation of CCR Rule deprived RRBA of information to which it was entitled.
- Court: No – Complaint and affidavits lacked allegations that RRBA sought and was denied access to required information, and that such denial caused concrete injury.



South Carolina Department of Health and Environmental Control
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State case law

Jowers v. S.C. DHEC

Facts of the Case:

- Plaintiffs challenged the registration procedures of the Surface Water Withdrawal Act. They raised issues of takings, due process and public trust claims.
- Circuit court found that the Plaintiffs lacked standing. Appeal followed.



Jowers v. S.C. DHEC

Public Importance Exception:

- This exception applies to the standing, not ripeness of an action.
 - Allows plaintiffs to stand in the shoes of someone actually injured
 - In this case, the owners claims, which attempted to fast-forward to a point in time when there might be a loss of trust assets if the state failed to protect those assets, were not ripe. Thus, the exception did not apply.
- *Jowers* clarifies this exception

Jowers v. S.C. DHEC

- Standing is not inflexible, and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance; however, the Supreme Court must be cautious with the exception lest it swallow the rule.
- Dissent: No better use of public importance exception than protection of the public trust.
 - Raised questions over whether the State's response tools discussed by the majority could be marshalled quickly enough to avoid harm.

S.C. Pub. Interest Found. and Sloan v. SCDOT **421 S.C. 110 (2017)**

Facts of the Case:

- Upon the request of a constituent, S.C. DOT inspected privately owned bridges.
- Petitioners sought declaratory judgment that DOT's inspection of private bridges violated the state constitution.
- Trial court granted summary judgment to Respondents on both on the merits and on standing and mootness grounds. Court of Appeals affirmed.
- S.C. Supreme Court reversed decisions below.

S.C. Pub. Interest Found. and Sloan v. SCDOT

- Article III standing
 - ❑ Court recaps three prongs of Article III standing
 - ❑ No showing of “concrete and particularized injury distinct from that shared by other taxpayers”
 - → No Article III standing based on mere taxpayer status.

S.C. Pub. Interest Found. and Sloan v. SCDOT

➤ Public importance standing

- States purpose to “[a]llow[] interested citizens a right of action ... when issues are of significant public importance to ensure[] ... accountability and the concomitant integrity of governmental action.”
- How do you know?
 - Balance competing policy concerns
 - Access to judicial process to address alleged injustices
 - Judicial economy and preventing frivolous lawsuits against public officials
 - Is it an issue of public importance?
 - Is there a need for future guidance?
 - This is the key.

S.C. Pub. Interest Found. and Sloan v. SCDOT

➤ Public importance standing

- ❑ Supreme Court says yes to public importance standing.
 - Issue involves conduct of government entity and expenditure of public funds
 - Decision on the merits may have “far-reaching” consequences for public safety
 - Future guidance needed because SCDOT may inspect this type of property in the future
- Court says it’s a “close call,” but balance weighs in favor of public importance, especially given statutory and constitutional issues.
- “A contrary holding would essentially render a law superfluous if we deem the conduct it prohibits too insignificant to ensure the law is enforced.”

S.C. Coastal Conserv. League v. S.C. DHEC and DBBO, LLC



- Concerned the standing of a petitioner challenging a DHEC permit for a replacement seawall.
- Does the Petitioner have standing based on their environmental and personal complaints the replacement seawall may cause to beach goers?

S.C. Coastal Conserv. League v. S.C. DHEC and DBBO, LLC

- This Court found that the Petitioner had a “mere interest in a problem” and that is not sufficient by itself to render the organization adversely affected or aggrieved within the meaning of the APA.
- This Court also discussed the meaning of an “affected person.”
 - Stating that they must be injuriously acted upon
 - The Court held that a “substantial, concrete grievance” is necessary
 - Mere participation in the administrative review processes is insufficient to establish standing.

Preservation Soc’y of Charleston v. SCDHEC

Unpublished Op. No. 2017-UP-403 (Ct. App. 2017)

- Challenge to DHEC-issued permit and coastal zone consistency certification required for construction of additional pilings necessary for relocation of a cruise passenger facility.
- Procedural Background:
 - ❑ ALC denied motion to dismiss on standing grounds; *but*
 - ❑ ALC granted Ports Authority’s motion for summary judgment based on lack of standing
 - Found that the petitioner did not meet the minimum *Lujan* standing requirements.
 - Petitioner did not meet the associational standing elements either.
 - Public importance exception did not apply.

Preservation Soc’y of Charleston v. SCDHEC

- Statutory standing
 - ❑ “Affected person” under Section 44-1-60 limited to **those persons “able to establish standing under the test set forth in *Lujan*.”**
- Constitutional injury-in-fact analysis
 - ❑ Claims of reduced quality of life “because of pollution, traffic congestion, and the visual disruption of Charleston’s historic integrity and aesthetic beauty”
 - Court: **Too generalized**, not personal and individualized injuries.
 - ❑ “Concerns” about effect on property values and businesses
 - Court: **Too speculative.**
- Public importance standing
 - ❑ Court: Insufficient explanation as to need for future guidance

Preservation Soc’y of Charleston v. SCDHEC

➤ Associational Standing

☐ Three part test requires:

- That an association’s members would otherwise have standing to sue in their own right;
- The interests at stake are germane to the organization’s purpose; and
- Neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.



OR





Contact Us

Dawn – MillerDK@dhec.sc.gov

Michael – Michael.Traynham@dhec.sc.gov

Office of General Counsel – (803) 898-3350



** Special thanks to our summer law clerk, Samantha Sanders, for her assistance with this presentation.

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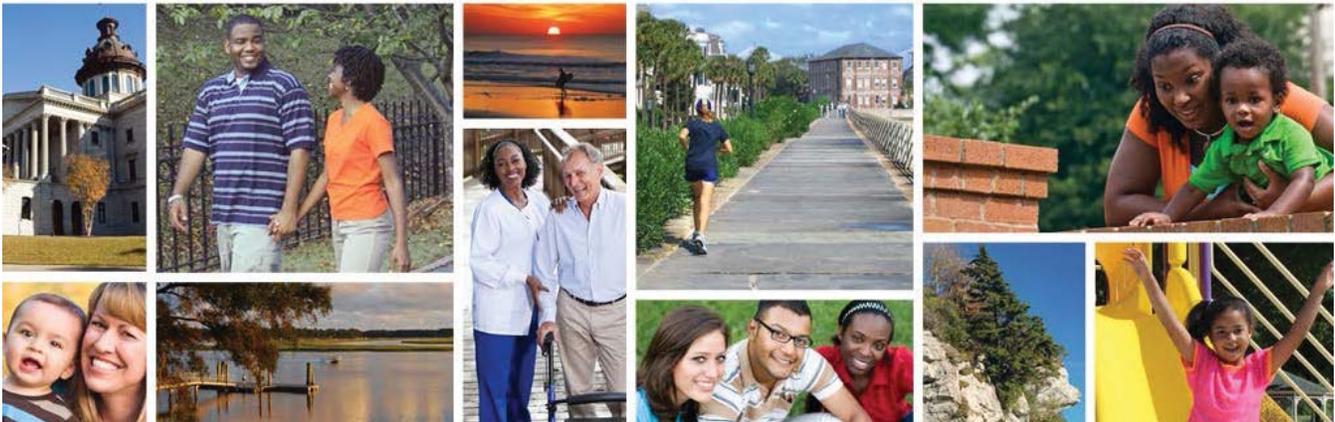
Thursday, January 17

**Give Me Just A Little More Time: Beachfront
Jurisdictional Lines – Legislation and Process**

*Jessica Boynton
Elizabeth von Kolnitz*



Beachfront Jurisdictional Line Review Process

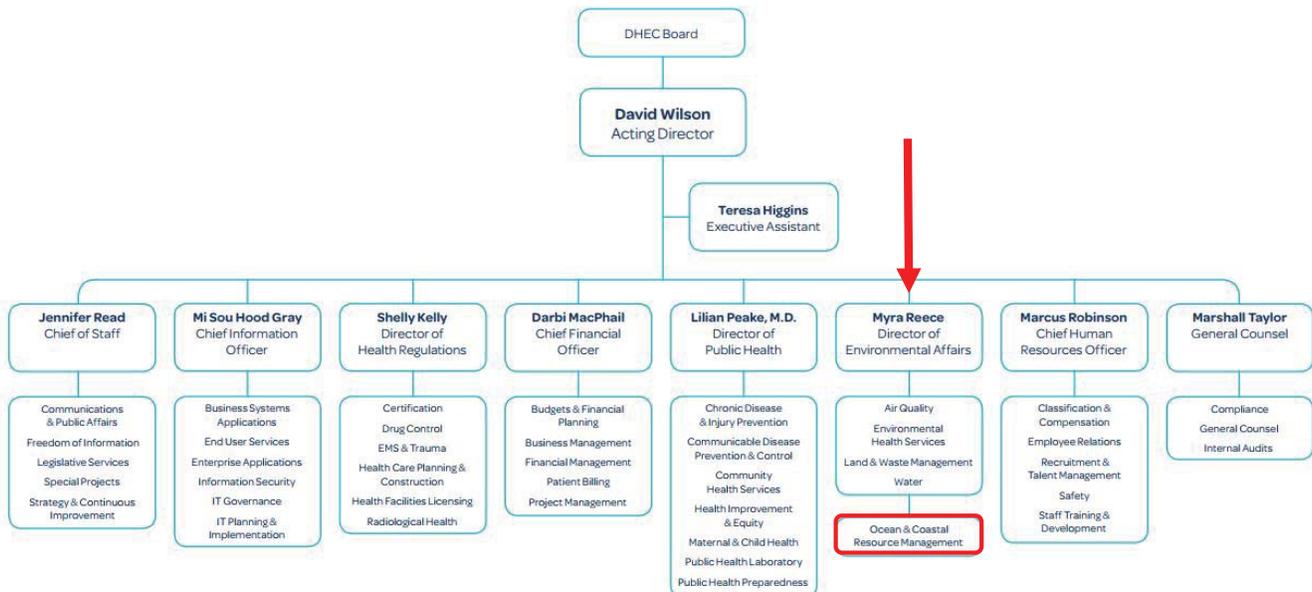


South Carolina Department of Health and Environmental Control
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Organizational Chart

January 12, 2018



Office of Ocean and Coastal Resource Management (OCRM)

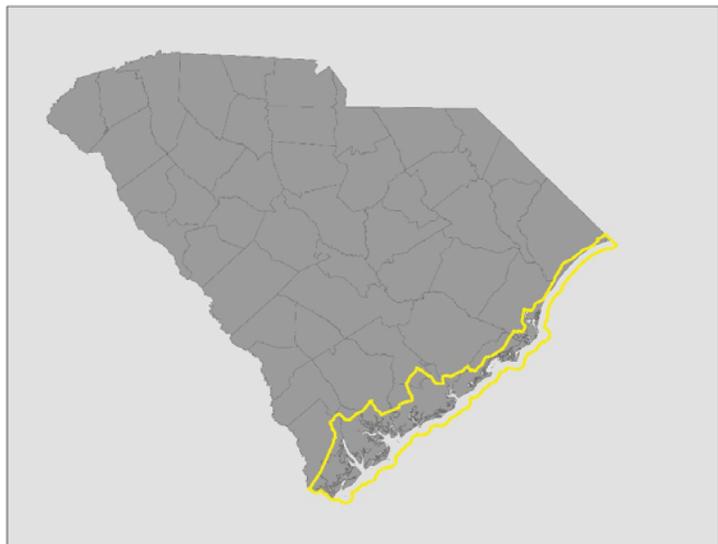
History

- **Federal:** Coastal Zone Management Act (1972) established guidelines for state Coastal Management Programs.
- **State:** SC Coastal Tidelands and Wetlands Act was passed in 1977.
- **Goal:** To achieve balance with the use, development, and conservation of coastal resources.

Office of Ocean and Coastal Resource Management (OCRM)

Overview

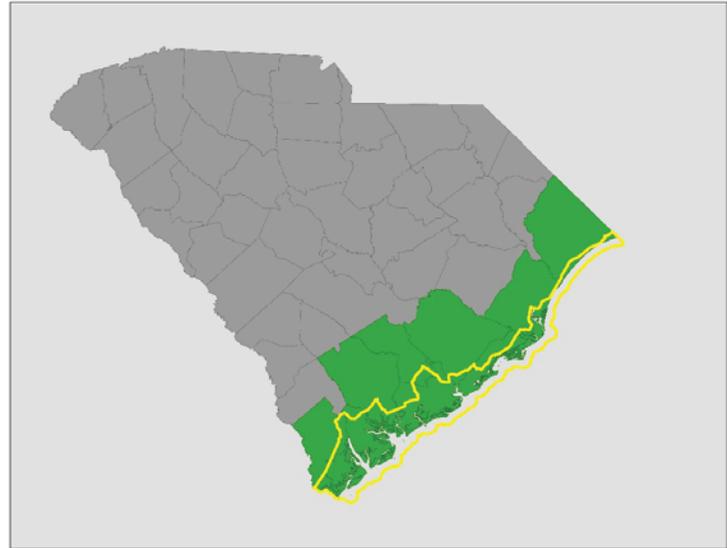
- Designated state coastal management agency
- Implements SC Coastal Management Program
- **Direct permitting authority with the critical areas**
 - Coastal Waters
 - Tidelands
 - Beaches
 - Beach Dune Systems



Office of Ocean and Coastal Resource Management (OCRM)

Overview

- **Indirect certification** authority over federal actions and state permit decisions **within the 8 coastal counties.**



History

SC Coastal Zone Management Act (CZMA) 1977-1988

- Limited beachfront jurisdiction.
- “Critical Line” set at the landward toe of the primary dune, or at the erosion scarp line for eroding beaches.
- No jurisdiction landward of this line.
- Seawalls routinely permitted.

History

1987 Blue Ribbon Committee

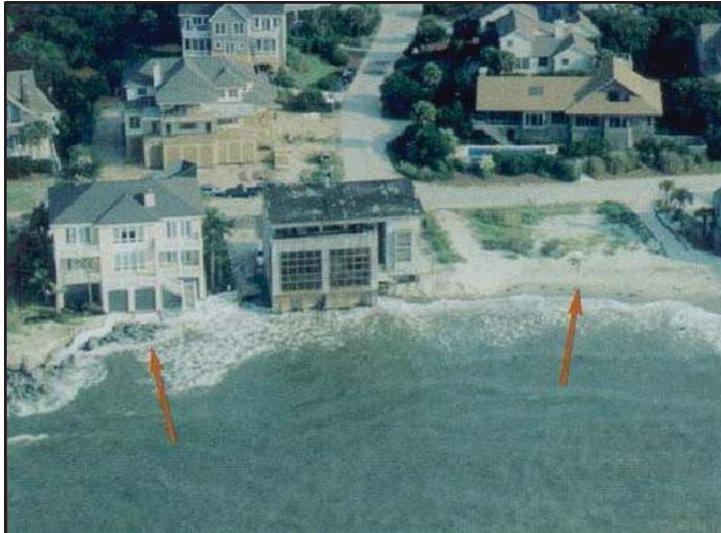
- Appointed by SC Coastal Council in 1987.
- Asked to propose long-term solutions to beach erosion issues, while balancing public and private interests.
- Studied the effects of unregulated development and the proliferation of seawalls.
- Recommended changes to the 1977 SC Coastal Tidelands and Wetlands Act, resulting in the **1988 Beachfront Management Act (BMA)**.

History

1988 Beachfront Management Act (BMA)

- Created two new lines of beachfront jurisdiction:
 - **Baseline and setback line.**
- Initially, no new construction was allowed seaward of the baseline.
- Limited construction between the baseline and setback Line.
- No new seawalls allowed.
- Existing seawalls, if destroyed, could be replaced with sloping structures 10 feet from the building foundation.

History



Isle of Palms, Wild Dunes, 2 oceanfront lots

1990 Revisions to Beachfront Management Act, following Lucas case

- Construction seaward of the baseline could now be authorized under a "Special Permit" in certain circumstances
- Destroyed seawalls cannot be rebuilt

History

2007-2010 Shoreline Change Advisory Committee (SCAC)



2010-2013 Blue Ribbon Committee (BRC) on Shoreline Management

- SCAC reaffirmed policies of BMA and identified 4 broad goals and 13 recommendations for shoreline management.
- BRC considered SCAC work and developed 16 policy and regulatory recommendations for beachfront.
- DHEC initiated internal policy changes and promulgated regulations based on BRC recommendations.

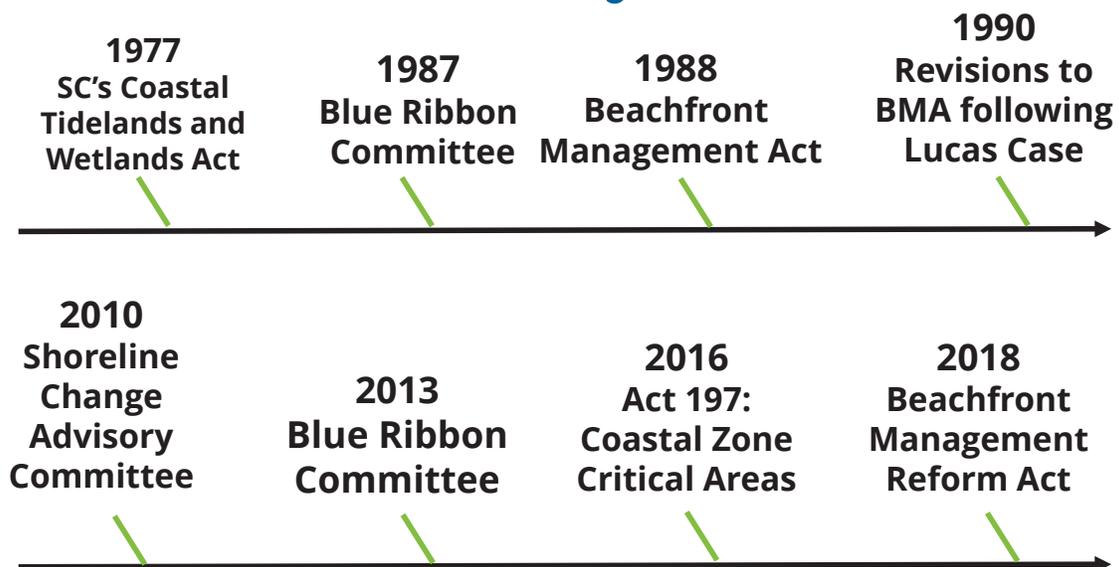
History

2016 Coastal zone critical areas (Act 197)

Statutory changes based on BRC recommendations:

- No seaward movement of baseline after December 31, 2017.
- Requires bonds for removal, prior to issuing sandbag Emergency Orders.

Timeline Summary



What are the beachfront jurisdictional lines?

Jurisdictional lines enable DHEC to implement laws and regulations that protect coastal resources and guide development away from dynamic shorelines.

There are two lines of beachfront jurisdiction:

- **Baseline** is the **more seaward** line
- **Setback Line** is the **more landward** line



Why does DHEC update these lines?

South Carolina law requires DHEC to establish and review the positions of the baseline and setback line every 7 to 10 years.

Reviews were conducted during the following years:

- 1990-1991
- 1999-2001
- 2008-2010
- 2016-2018

The law also requires DHEC to review the **average long-term shoreline change rate** (aka the “long-term erosion rate”) for all oceanfront land that is or potentially could be developed during this time.

What does the baseline mean for homes and pools?

- Homes may be repaired to pre-existing square and linear footage.
- New construction and reconstruction of homes damaged beyond repair may be allowed up to 5000 square feet through a special permit if certain criteria are met.
- Pools damaged or destroyed may be reconstructed, upon obtaining a permit, if they are located landward of an existing functional erosion control structure.
- No new pools can be permitted seaward of the baseline.

Special Permits: Construction seaward of the baseline

Key facts:

- A special permit is an individual critical area permit which is given additional consideration because it is seaward of the baseline.
- **Between 1990 and present day, there have been 72 special permit requests.**
- **The Department has issued 71 special permits.**

What does the setback line mean for homes and pools?

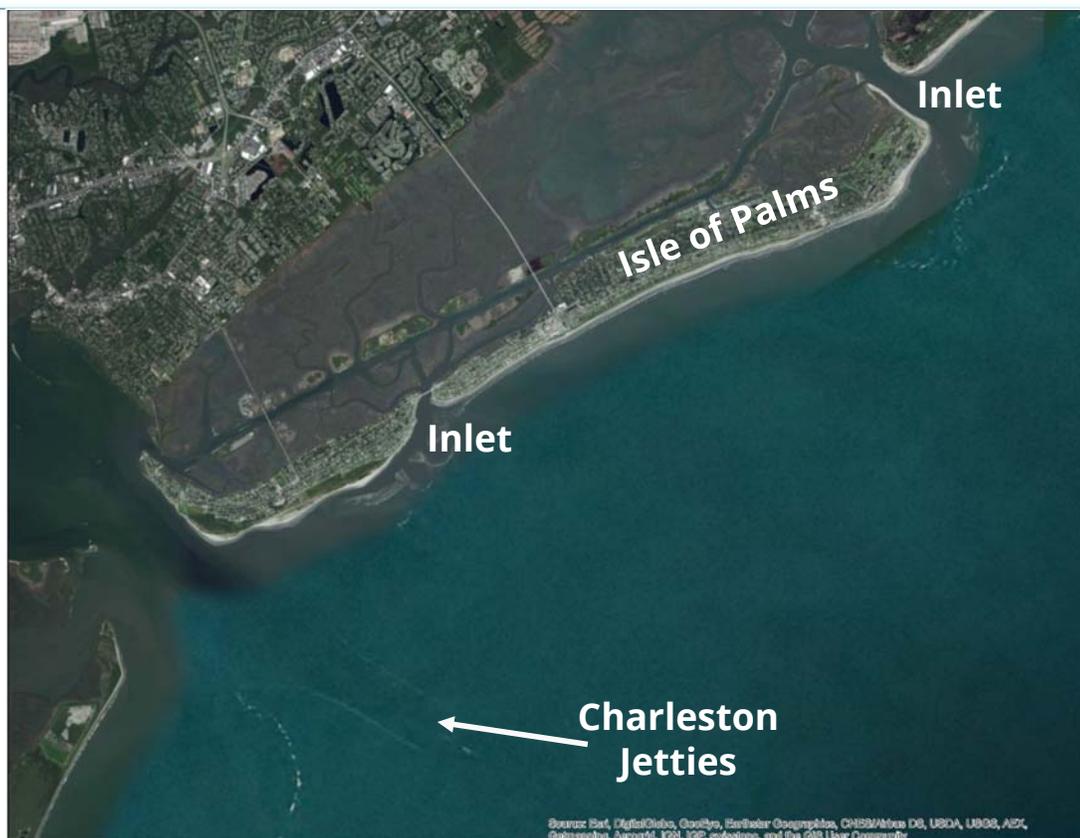
The setback area is NOT a “no-build” zone.

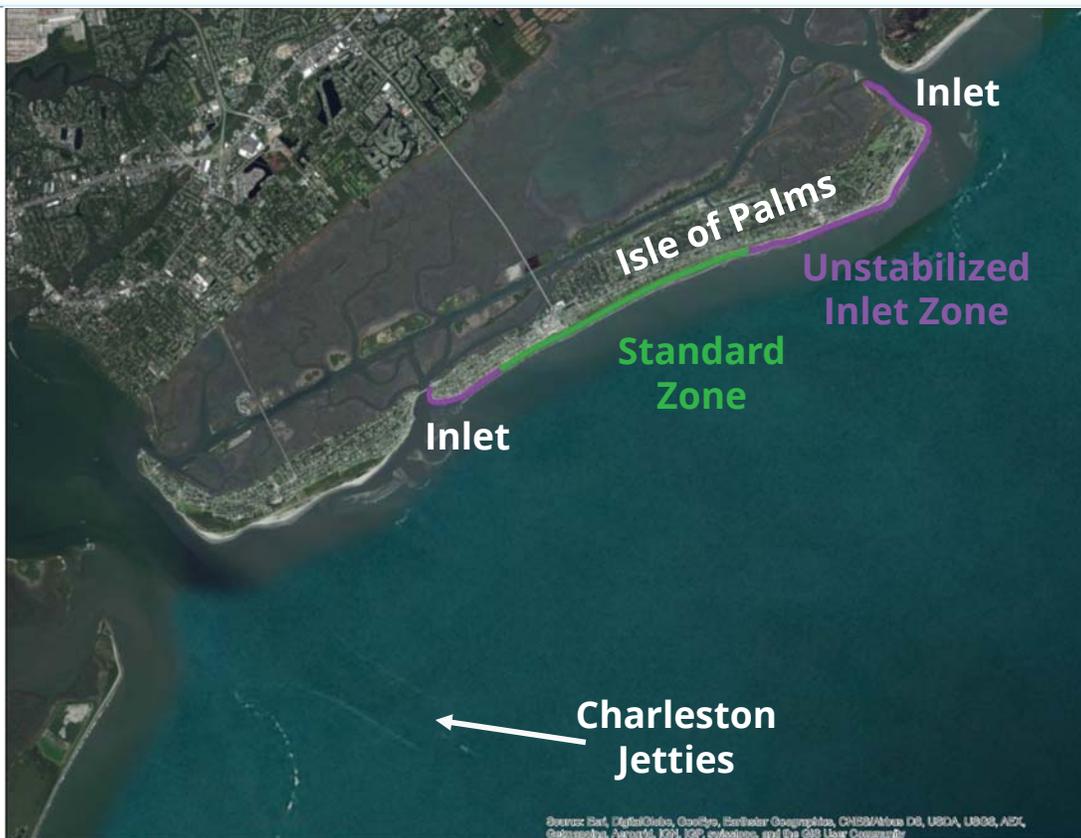
- Homes damaged beyond repair may be reconstructed up to the total square footage of the original structure.
- New homes may be constructed up to 5,000 square feet of heated space within the setback area.
- Construction and repair activities require notification to DHEC.
- Pools damaged or destroyed may be rebuilt to pre-existing dimensions with DHEC authorization.
- New pools are not permitted unless they are located landward of an existing functional erosion control structure, such as a seawall or revetment, and receive prior written approval from DHEC.

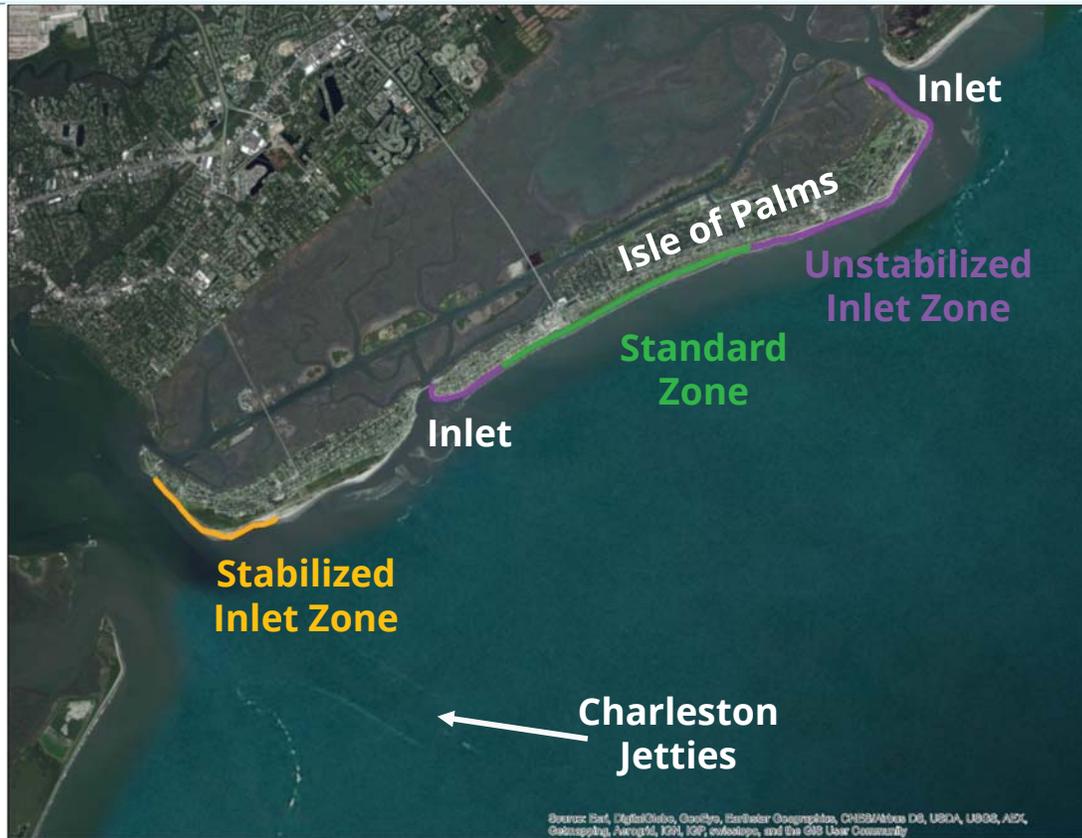
Baselines Set by Beach Zones

At a glance:

- There are three beach zones:
 - **Unstabilized inlet zone**
 - **Stabilized inlet zone**
 - **Standard zone**







UNSTABILIZED INLET ZONE
Capers Inlet

**Inlets that have NOT
been stabilized by
jetties, terminal
groins, or other
structures**





STANDARD ZONE
Myrtle Beach State Park

A segment of shoreline which is subject to essentially the same set of coastal processes, has a fairly constant range of profiles and sediment characteristics, and is not directly influenced by tidal inlets or associated inlet shoals



STABILIZED INLET ZONE
Charleston Harbor side of Sullivan's Island

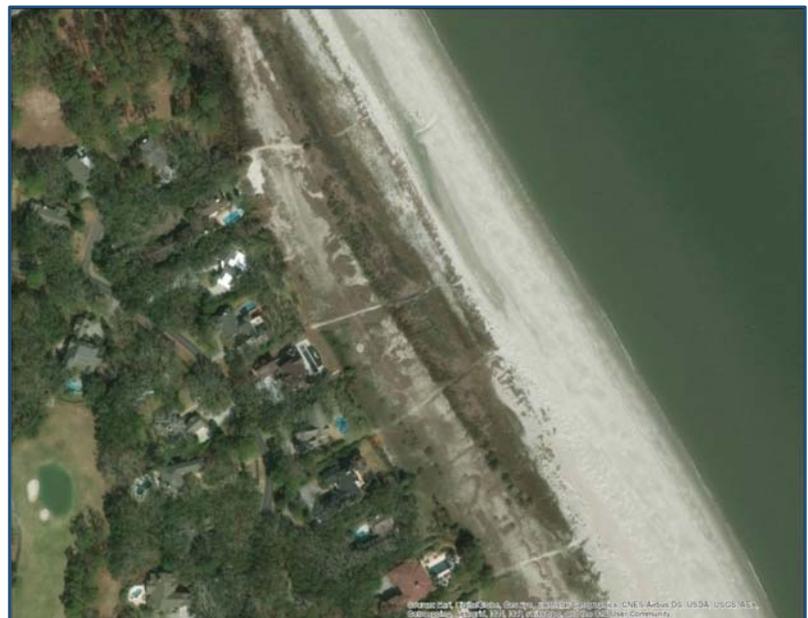
Inlets which have been stabilized by jetties, terminal groins, or other structures

How is the baseline set in Standard and Stabilized Inlet Zones?



How is the baseline set in an Unstabilized Inlet Zone?

- **The baseline is set at the most landward point of erosion at any time in the past 40 years.**



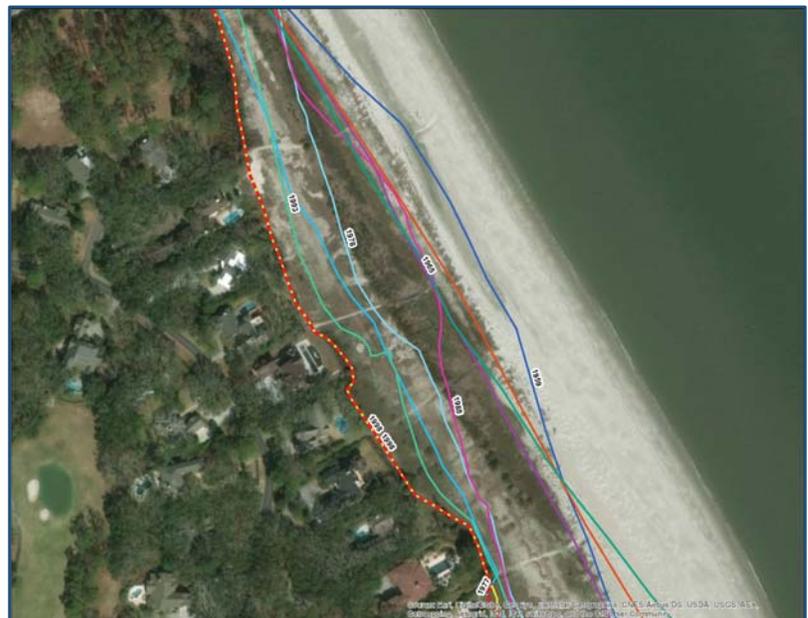
How is the baseline set in an Unstabilized Inlet Zone?

- Examine modern and historic shorelines to determine which was the most landward point of erosion at any time in the past 40 years.



How is the baseline set in an Unstabilized Inlet Zone?

- The baseline (shown here as a dashed red line) is set at the most landward point of erosion at any time in the past 40 years.



How is the baseline set in Standard and Stabilized Inlet Zones?

- **Points were collected at the seaward toe and crest of each dune.**



How is the baseline set in Standard and Stabilized Inlet Zones?

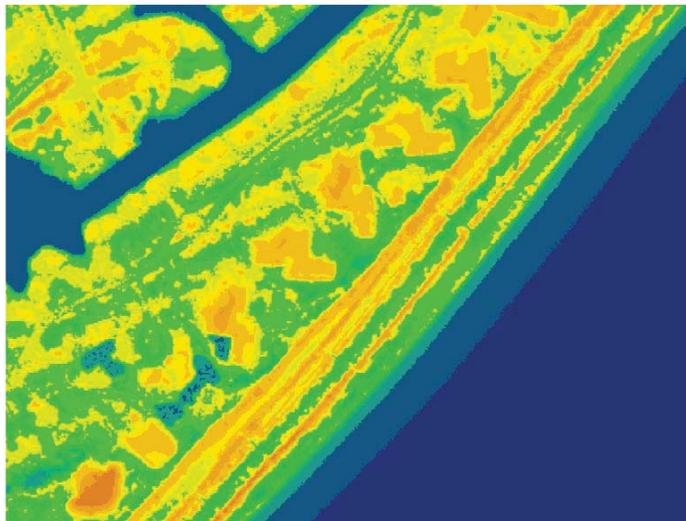


- **Field data were collected** by agency experts **using a** Trimble R6 RTK **GPS unit** and the **South Carolina Real Time Network.**



How is the baseline set in Standard and Stabilized Inlet Zones?

- This elevation data was used in conjunction with LiDAR to **determine the location of the primary dune.**
- **LiDAR** is a remote sensing data collection method that **uses an airborne system to generate high-resolution elevation data.**



How is the setback line created?

- **Setback line is a distance landward from the baseline.**
 - **40 * LTER (long term erosion rate).**
- **The setback line is a minimum of 20 feet landward of the baseline.**

How is the shoreline change analysis performed?

- **Analysis examined modern and historic wet/dry shorelines**, which capture the high tide mark on the beachfront.
- **Data ranges covered 164 years**, from 1851 to 2015.
- **No Post-Matthew or Post-Irma data were included.**



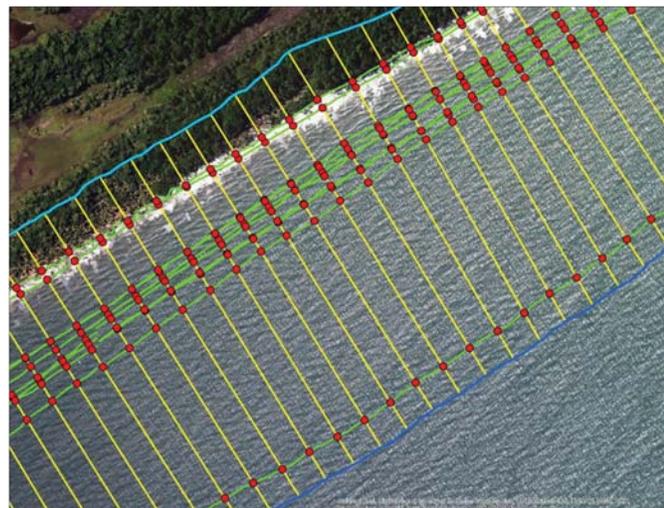
How is the shoreline change analysis performed?

- Analysis is performed using a shoreline change tool called **AMBUR**.
- This tool analyzes the wet/dry shorelines and **produces average annual shoreline change rates**.
- The tool **draws a line every 200 feet** across the shorelines.



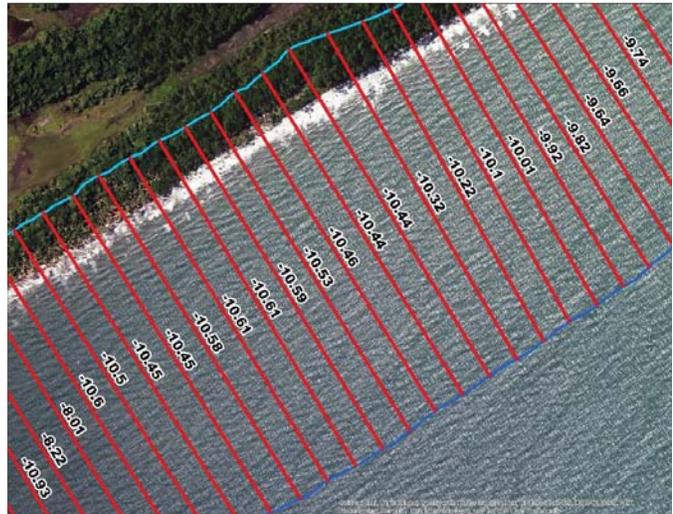
How is the shoreline change analysis performed?

- The tool captures the **intersection points** between the lines and wet/dry shorelines.



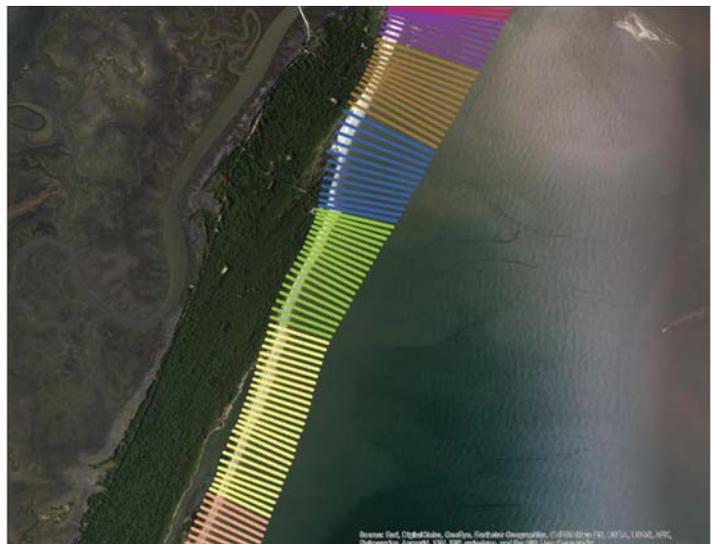
How is the shoreline change analysis performed?

- An annual shoreline change rate is produced for each line.



How is the shoreline change analysis performed?

- A **spatial statistical tool groups the lines together** based on similar shoreline change rates.
- The **rate values within each group are averaged to obtain the average annual shoreline change rate** for each area.



How is the shoreline change analysis performed?

- The **average annual shoreline change rate is then multiplied by 40 to generate the distance from the baseline.**
- This distance **establishes the setback line.**
- The setback line is a **minimum of 20 feet landward of the baseline.**

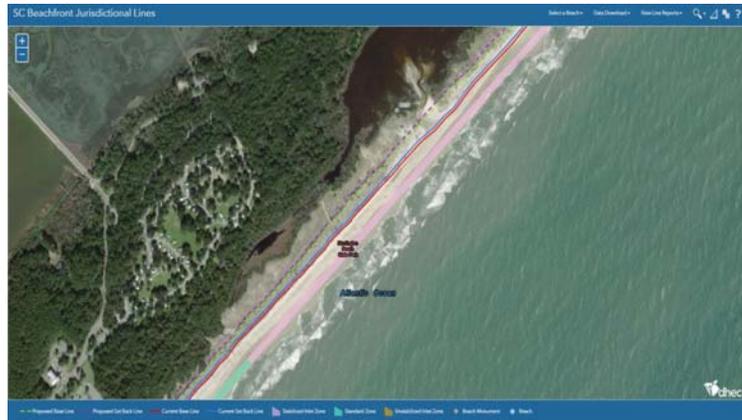


Timeline

- Between 2007 – 2013, the Shoreline Change Advisory Committee and the Blue Ribbon Committee on Shoreline Management developed statutory and regulatory recommendations to guide the stewardship of SC beachfront.
- **No seaward movement of the baseline.**
- In **June 2016**, legislation went into effect that prohibited the seaward movement of the jurisdictional baseline from its position on December 31, 2017.
- In order to allow any seaward movement of the lines, **DHEC completed the review process prior to this December 31 legislative deadline.**

Timeline

- DHEC published proposed jurisdictional baselines and setback lines on October 6, 2017 for 30-day public comment period.
- Proposed and existing jurisdictional lines available for public to view online.
- Regional Public Hearings were held October 2017
 - Beaufort
 - Charleston
 - Myrtle Beach



Timeline

- On November 3, 2017, DHEC extended the public comment period until April 6, 2018 based on public comments received.
- Delay in adoption of baselines after December 31, 2017 affected properties where the baseline was proposed to move seaward of the existing line.
- General Assembly introduced legislation on January 2018 to amend the BMA.
- On May 3rd, 2018, Act 173, the Beachfront Management Reform Act, was signed by Governor Henry McMaster.

Present

2018 Beachfront Management Reform Act (Act 173)

- 2008-2010 beach lines vs proposed 2017 lines:
 - Most-seaward baseline and most-seaward setback line must be used.
 - Lines will be re-evaluated no earlier than January 1, 2024.
- Replaced “retreat policy” with “beach preservation policy”.
- Restricts seaward movement of baseline.
- Administrative timelines and public input requirements.
- Data from within 18 months following “extraordinary erosion” can’t be used to set the baseline.
- Required promulgation of “Primary Oceanfront Sand Dune” definition.

Present

Beachfront Jurisdictional Line Stakeholder Workgroup

- DHEC convened stakeholder workgroup to initiate input into promulgation process.
- 13 representative stakeholders
6 meetings from October 2018 – January 2019
- Charge to workgroup:
“Through a consensus-driven process, this workgroup will provide recommendations to clarify the regulatory definition for primary oceanfront sand dunes, and develop strategies to qualify and measure “extraordinary erosion” as referenced in S.C. Code of Laws §48-39-280(E)(4).”



Present

Beachfront Jurisdictional Line Stakeholder Workgroup

- Final recommendations will assist DHEC with formulating regulations.
- DHEC will provide notice to public of formal regulatory development process including opportunities for public input.
- Process information and resources available on DHEC website.



Contact Us

Ocean and Coastal Resource Management

1362 McMillan Avenue, Suite 400
Charleston, SC 29405
(843) 953-0200
www.scdhec.gov



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S.C. Department of Health and Environmental Control





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**Who'll Stop the Rain: The Automatic Stay in
Environmental Cases**

Stacy K. Taylor

No Materials Available



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Thursday, January 17

Something Old, Something New: Administrative
Law Court Tips and Case Law Update

The Honorable Ralph King “Trip” Anderson, III

Case Law Update:
Recent Supreme Court and Court of Appeals Cases from the ALC and Recent ALC Cases

The Honorable Ralph K. “Tripp” Anderson, III
Chief Administrative Law Judge

South Carolina Administrative Law Court:

South Carolina Coastal Conservation League and South Carolina Wildlife Federation v. S.C. Dep’t of Health and Env’tl. Control and Horry County Public Works, 15-ALJ-07-0404-CC (July 7, 2016):

In this case, DHEC issued a Notice of Department Decision on the proposed issuance of a Section 401 Water Quality Certification and a Coastal Zone Consistency Determination (CZC) to Horry County Public Works. Horry sought authorization from the Army Corps of Engineers to impact 24.19 acres of freshwater wetlands for expansion and paving of an existing 5.6 mile unimproved dirt road known as International Drive in Horry County. The property in question abuts a Heritage Trust property known as the Lewis Ocean Bay (LOB) Heritage Preserve. The South Carolina Department of Natural Resources (DNR) owns and manages the property as a habitat for the red-cockaded woodpecker and several game species, including the black bear, and to protect a number of wetlands on the property known as Carolina Bays.

Because the population in the area has grown rapidly in recent years, Horry sought an agreement with DNR for a right of way to allow expansion of International Drive in order to alleviate traffic congestion in the area. Horry and DNR entered into a right-of-way agreement in June 2013 allowing the expansion and requiring Horry to take a number of steps to minimize the impact on LOB. In November 2013, Horry submitted a Joint Notice and Application to DHEC and to the Corps, requesting a federal permit to fill wetlands for the proposed project. As part of the federal permitting process, Horry was required to apply for a 401 Certification and a CZC from DHEC. After a public comment period, DHEC issued Horry the 401 Certification and CZC on June 25, 2015, conditioned upon Horry’s implementation of Best Management Practices (BMPs) designed to minimize any impacts on water quality. Thereafter, Petitioners requested a contested case hearing before the ALC.

- The Court found that Petitioners failed to produce sufficient evidence that water quality impacts from the project would mandate denial of the 401 Certification, and that, with the implementation of the BMPs required by the Certification, any water quality impacts would be temporary and would not violate any water quality standards. Therefore, DHEC’s issuance of the 401 Certification was proper.
- Petitioners argued that the possibility of future development of the private property abutting International Drive warranted the denial of the 401 and CZC certifications. However, the Court found that any future development impacting the wetlands on the private property would require the same permitting as the International Drive project, and any residential or commercial development would have to satisfy the standard of demonstrating an overriding public interest, and the mitigation costs connected with such

a project would be cost prohibitive. Accordingly, future development of the property would be highly unlikely.

- The Court considered all the alternatives analysis submitted by Horry and found that none of the possible alternatives to the proposed project would be superior to the project as designed. The proposed project met the public needs for alleviation of traffic in the vicinity, including improved access for emergency vehicles. At the same time, the project presented the least impact to wetlands. Moreover, the Petitioners offered no evidence to establish that there were any feasible alternatives to the proposed project. Accordingly, the Court found the proposed project was the only alternative that both satisfied the public need for the project and minimized environmental impacts.
- With respect to the CZC analysis, the Court determined that the proposed project was consistent with the management plan of LOB and the Heritage Trust Program. Contrary to Petitioners' assertions, the project would not impact any Carolina Bays in LOB. Furthermore, there were no feasible alternatives to the project, and Petitioners presented no quantifiable evidence that the project would significantly degrade the wetlands in the vicinity. Finally, there was insufficient evidence that the proposed project would pose a significant risk to the black bear population in the area. Petitioners failed to adequately establish that bear tunnels under the roadway would be effective in protecting black bears, or that the proposed highway fencing and lower speed limits would fail to provide the same or similar protections.
- Therefore, the Court approved the 401 Water Quality Certification and Coastal Zone Consistency Certification for the proposed project.

On reconsideration, the Court clarified that two sections of the CMP raised by Petitioners in the Motion for Reconsideration were satisfied.

This case was appealed to the South Carolina Court of Appeals but later withdrawn by the appellants and dismissed by the Court.

Keyserling, et al. v. S.C. Dep't of Health and Env'tl. Control and Spectrum Geo Inc., 15-ALJ-07-0319-CC (April 19, 2016):

In this case, Petitioners (the Cities of Beaufort, Charleston, Folly Beach, Sullivan's Island and their mayors; South Carolina Coastal Conservation League; and South Carolina Wildlife Federation) challenged proposed seismic surveying activities by Spectrum Geo, Inc. in federal waters off the South Carolina coast. Since the permit was for activity in federal waters, it was governed by federal law. Spectrum applied for a permit to conduct seismic surveys to the Bureau of Ocean Energy Management (BOEM). DHEC requested that the National Oceanic and Atmospheric Administration (NOAA) allow it to review Spectrum's application for consistency with the Coastal Zone Management Program (CZMP). NOAA granted the request, and Spectrum submitted Coastal Zone Consistency (CZC) certifications to DHEC. DHEC issued a conditional consistency concurrence, placing two conditions that would protect sea turtles and commercial fishing. Petitioners challenged the DHEC staff decision to issue the conditional consistency concurrence before the DHEC Board, which declined Petitioners' request for a final review. Petitioners then filed a request for a contested case hearing before the ALC, along with two other contested cases

challenging seismic surveying activities by other companies (*Keyserling, et al. v. DHEC and GX Technology Corp.*, 15-ALJ-07-0380-CC, and *Keyserling, et al. v. DHEC and CGG Services, Inc.*, 15-ALJ-07-0379-CC). Both Spectrum and DHEC moved to dismiss the case, as well as the two other contested cases, asserting that Petitioners lacked standing to bring a suit in the matter. The Court held a single hearing on the Motions to Dismiss in all three cases.

- Spectrum and DHEC argued that Petitioners lacked standing to bring suit. The Court first noted that South Carolina law provides three ways in which a party can acquire standing: by statute; through what is called “constitutional standing”; and under the public importance exception. The public importance exception was not raised by any of the parties. With respect to constitutional standing, South Carolina has adopted the three-prong constitutional standing test established by the U.S. Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)—an “injury in fact”; a causal connection between the injury and the conduct complained of; and the likelihood that the injury will be redressed by a favorable decision.
- Petitioners argued that they had statutory standing under S.C. Code Ann. § 44-1-60(F)(2)(G), because they were “affected persons” who engaged in the permit review process, citing *S.C. Coastal Conservation League v. S.C. Dep’t of Health and Env’tl. Control*, 390 S.C. 418, 702 S.E.2d 24 (2010). The Court noted that in that case the South Carolina Supreme Court did not establish a standard for determining an “affected person” under Section 44-1-60. Rather, the Supreme Court specifically declined to set forth such a test, but decided that under the facts of the case, the Coastal Conservation League was an “affected person.” The ALC held that in order to be an “affected person” under Section 44-1-60, a party must have been, or will be, adversely affected by DHEC’s decision—the same requirements as a person suffering an injury in fact caused by the conduct at issue (the first two prongs of the *Lujan* test for constitutional standing). The Court further noted that in any case before any court, there must be a justiciable controversy for which the court can provide relief.
- The Court found that Petitioners lacked standing based upon a lack of redressability. Once DHEC issued its concurrence, South Carolina’s role in the federal permitting process was over and the concurrence could not be withdrawn under applicable federal law. Thus, if the Court issued a decision favorable to Petitioners, it would simply result in BOEM’s review of the permit application without DHEC’s recommended mitigation measures, and it would not have any effect in addressing Petitioners’ injury. Therefore, the injury was not redressable by the ALC.
- Finally, the Court held that there was no need to apply the agency deference doctrine to NOAA’s interpretation of its regulations and granted the Motion to Dismiss.

Keyserling, et al. v. DHEC and CGG Services, Inc., 15-ALJ-07-0379-CC (April 19, 2016):

In the second of three cases involving proposed seismic surveying activity, the Court granted CGG’s Motion to Dismiss, finding that Petitioners’ injury was not redressable by the ALC, for the same reasons set forth in the *Spectrum Geo* decision discussed above.

Keyserling, et al. v. DHEC and GX Technology Corp., 15-ALJ-07-0380-CC (April 19, 2016):

The Court granted GXT's Motion to Dismiss in a third case involving proposed seismic surveying activity off the South Carolina Coast.

- First, the Court determined that it lacked subject matter jurisdiction to hear the case. Since DHEC's participation in the permitting process was limited by federal law to the issuance of a conditional consistency concurrence which had no binding consequences upon the ultimate issuance of the federal permit, the DHEC concurrence was not a final agency determination. Accordingly, this case was not properly a contested case before the ALC. Furthermore, the issuance of a concurrence by DHEC was not a prerequisite to the issuance of the federal permit, since if DHEC had issued no concurrence prior to the deadline its concurrence would have been conclusively presumed. Federal law did not provide DHEC with any authority to enforce the concurrence, and the permitting decision was made by BOEM and NOAA, with review by the United States Secretary of Commerce and the federal courts. Finally, contrary to Petitioners' arguments, the ALC has the inherent power to determine its own jurisdiction, even when the case involves questions of federal law.
- The Court further held that the case was moot because any decision by the ALC could have no impact on South Carolina's role in the federal permitting process. Under applicable federal law, once a concurrence has been issued by a state, the state has no further authority and the concurrence stands regardless of any subsequent state administrative action. The Court concluded that Petitioners lacked standing based on a lack of redressability.

All three ***Keyserling*** cases were appealed to the Court of Appeals, and the appeals were later withdrawn by the appellants and dismissed by the Court.

Blackmon and South Carolinians for Responsible Agricultural Practices v. S.C. Dep't of Health and Env'tl. Control and David Coggins Broilers, 17-ALJ-07-0041-CC; ***Blackmon and South Carolinians for Responsible Agricultural Practices v. S.C. Dep't of Health and Env'tl. Control and Heath Coggins Broilers***, 17-ALJ-07-0041-CC; and ***Blackmon and South Carolinians for Responsible Agricultural Practices v. S.C. Dep't of Health and Env'tl. Control and Jim Young Broilers***, 17-ALJ-07-0039-CC (November 30, 2017):

These were three agricultural permitting cases for the construction and operation of three new poultry farms in Laurens County, South Carolina. DHEC issued the permits for all three facilities as "no-discharge" permits which prohibited the discharge of pollutants into surface waters and groundwater. Petitioners challenged the decisions by filing requests for contested cases before the ALC.

- First, Petitioners asserted that the Respondents were required to obtain an NPDES permit for discharges or potential discharges, and that DHEC failed to follow correct procedure for determining whether the facilities had no potential to discharge. The Court granted Respondents' Motion for Partial Summary Judgment, finding that an NPDES permit was not required for the proposed facilities and that DHEC was not required to determine whether the farms have "no potential to discharge." The Court gave deference to DHEC's interpretation and application of Reg. 61-43 Part 200, in which DHEC's issuance of an

agricultural permit under that regulation also constitutes a determination under Reg. 61-9.122.23(d)(2) that the facility has no potential to discharge into the waters of the State. Thus, under the facts of this case, DHEC was not required to issue a separate “no potential to discharge” determination and Respondents were not required to obtain an NPDES permit as a matter of law.

As to the merits of the permit applications, the Petitioners raised a number of objections.

- They first argued that the projects would hinder their ability to discharge weapons while hunting on portions of their property or on property on which they have hunting rights. In response, Respondents stipulated to the modification of the permits to include a special condition allowing landowners and their guests to discharge guns or weapons within 900 feet of the poultry houses. The Court found the permits should be modified to contain the special condition.
- Petitioners contended that the proposed facilities would create offensive odors. The Court held that there was insufficient evidence to establish any inadequacies in the odor abatement plans for the facilities. The plans were reasonable and in compliance with the regulations.
- The Court found that Petitioners had failed to establish that the projects would have negative impacts on the health of area residents or that additional requirements for the projects were necessary to address health concerns.
- Petitioners argued that DHEC failed to adequately consider and evaluate the potential impacts of the project to the waters of the State. Specifically, they asserted that DHEC did not consider pollution from other poultry facilities or the grading and stormwater runoff issues associated with the project sites. The Court determined that Petitioners’ evidence regarding other poultry facilities were not relevant to DHEC’s consideration of the Respondents’ applications and their compliance with applicable regulations. With regard to concerns about stormwater runoff, the Court found that each of the projects were sited to exceed the minimum setback requirements. Moreover, Petitioners’ evidence concerning runoff related to runoff of sediment rather than pollutants. As such, under DHEC’s interpretation of its regulations, the issues concerning runoff are appropriately addressed not in the evaluation of these permits, but in the context of a stormwater permit application. The Court further determined that an accommodation previously made by the parties to move the facilities farther away from a proposed building site on a neighboring property resulted in the facilities being located closer to a river in the area. The Court concluded that the evidence supported locating the barns farther away from the river, as originally proposed, thus alleviating concerns about water impacts. The Court ordered that the permits should be amended to reflect the new location of the barns, and that the permits should be conditioned upon each respondent obtaining a stormwater permit.
- Finally, with respect to air quality, the Court found that DHEC properly considered the impact of the projects on air quality and that the projects would not negatively impact air quality in the surrounding area.
- The Court found the permits should be issued, with the modifications concerning discharge of weapons, the location of the barns, and the requirement that the respondents obtain

stormwater permits that address whether the setback limitations should exceed minimum requirements.

These cases are currently on appeal to the South Carolina Court of Appeals.

S.C. Dep't of Health and Env'tl. Control v. Keith Hewitt, 16-ALJ-07-0248-CC (April 7, 2017):

In this case, DHEC issued an Administrative Order requiring Hewitt to remove three unpermitted structures from his dock and imposing a penalty of \$3,000. Hewitt requested a contested case hearing before the ALC to contest the Order. The Order had found that Hewitt had installed a JetDock, a HydroHoist, and a canvas-roof tent structure on his dock without obtaining a permit; and that Hewitt's dock violated regulations because it exceeded the 600 square feet of total allowable square footage for a dock.

- At the hearing, Hewitt stated that he was giving the HydroHoist away and that he would seek a permit for the canvas-roof tent structure. Therefore, the Court did not address those issues in the Final Order.
- With respect to the JetDock structures, the Court found that Hewitt did not believe he needed to obtain permits. The dealer who sold him the first JetDock informed him that a permit was not required for the structure. When Hewitt purchased the second structure, he sought advice from the General Counsel of South Carolina Coastal Council (OCRM's predecessor), who advised him no permit was necessary for floating structures as long as they were not permanently attached to the dock. Because of this belief, Hewitt did not notify OCRM of the existence of the JetDocks when he submitted a permit application to increase the size of his pierhead in 1998. Further, over the years Hewitt openly and continuously used the JetDocks at the current location. Based upon these facts, the Court concluded that Hewitt did not knowingly or intentionally conceal or withhold information relating to the alleged violation. Since there was no evidence that Hewitt's failure to apply for the required permit was knowingly done or intentional, the three-year statute of limitations in Section 8-39-170(C) applied. The Department did not assert the violation at issue until June 16, 2014, well beyond three years of the date of Hewitt's violation. Thus, the Court held the Department's enforcement action was untimely and invalid.
- Upon Motion for Reconsideration, the Court required that Hewitt remove the canvas-roof tent structure from his dock within two weeks, pending Hewitt's application for an after-the fact permit. The Court further found that Hewitt failed to remove the HydroHoist from the dock, contrary to his earlier representations that it had been removed. The Court ordered Hewitt to remove the HydroHoist from the dock within two weeks, and imposed a \$1,500 fine, payable to DHEC. Further, if Hewitt failed to remove the structures in question within two weeks, he would be held in contempt and ordered to pay a fine to the Court of \$3,000.

Schweirs v. DHEC and Stewart W. Heath, 15-ALJ-07-0580-CC (September 23, 2016):

This case involved a decision by OCRM to issue an amended permit authorizing the modification of a private use dock by installing a boat lift and shifting an existing dock four feet. Petitioner, an adjacent property owner, challenged the issuance of the permit.

- The Court found that, although there was no evidence the modifications would impede navigation or adversely affect wildlife in the area, the proposed construction would take place almost entirely on the Petitioner's side of the extended property lines and would interfere with the value and enjoyment of Petitioner's property and her ability to use her own dock. The Court further found that DHEC did not adequately evaluate the application in light of Petitioner's objections.
- The Court determined that allowance of the modifications would cause material harm to the policies of the Coastal Zone Management Act, both because of the proximity of the proposed boatlift to Petitioner's dock and because the boatlift would impede Petitioner's ability to swim, kayak and fish from her dock. Furthermore, there was nothing before the Court to suggest that similarly situated persons were receiving disparate treatment. The Court denied the amendment to the permit.

This case is currently on appeal to the South Carolina Court of Appeals.

South Carolina Supreme Court:

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center v. S.C. Dep't of Health and Env'tl. Control and The Charlotte-Mecklenburg Hospital Auth., d/b/a Carolinas Medical Center-Fort Mill, 423 S.C. 50, 813 S.E.2d 719 (2018):

In this case, DHEC granted a certificate of need (CON) to Amisub to construct and operate an acute care hospital in Fort Mill, South Carolina, but denied a CON to the Charlotte-Mecklenburg Hospital Authority (Carolinas) and two other hospitals. DHEC's decision to award the CON to Amisub was based in part on its interpretation of the South Carolina Health Plan that only existing health care providers in York County were eligible for additional hospital beds. Carolinas filed a contested case with the ALC, contending DHEC had erroneously interpreted the Health Plan. In the alternative, Carolinas argued that even if DHEC's interpretation was correct, the Health Plan violated the Dormant Commerce Clause because it improperly restricted interstate commerce. The ALC remanded the case to DHEC, holding that DHEC's interpretation of the Health Plan was incorrect. The ALC did not reach the Dormant Commerce Clause claim. On remand, DHEC granted a CON to Carolinas and denied a CON to Amisub and the others. Amisub filed a contested case with the ALC, which reversed DHEC's decision and ordered that a CON be issued to Amisub and denied to Carolinas. The Court of Appeals affirmed, finding that Carolinas' Dormant Commerce Clause argument in the second contested case was unpreserved for appellate review.

- The Supreme Court reversed and remanded the case to the Court of Appeals. It held that the Dormant Commerce Clause issues arising from the language of the Health Plan were resolved in Carolinas' favor in the first contested case. Therefore, Carolinas had no reason to raise the Dormant Commerce Clause challenge in the second contested case until the ALC issued its order. At that point, Carolinas raised the challenge in its motion for reconsideration before the ALC. Therefore, the Supreme Court determined that the Dormant Commerce Clause issue was preserved for review and remanded the case for a ruling on the merits of the issue.

- On remand, the Court of Appeals held that the ALC’s application of the State Certificate of Need and Health Facility Licensure Act did not violate the Dormant Commerce Clause. See *Amisub of S.C., Inc. v. S.C. Dep’t of Health and Env’tl. Control*, 424 S.C. 80, 817 S.E.2d 633 (Ct. App. 2018), discussed later in these materials.

Kiawah Development Partners, II, v. S.C. Dep’t of Health and Env’tl. Control, 422 S.C. 632, 813 S.E.2d 691 (2018):

This case is the second Supreme Court decision involving the installation of an erosion control structure along the shoreline of the Kiawah River on Captain Sam’s Spit. Kiawah Development Partners, II (KDP) applied for a permit to build an erosion control structure consisting of a bulkhead and revetment along the Kiawah River on Captain Sam’s Spit to facilitate residential development of the upland property. DHEC denied the majority of the permit and granted a 270-foot portion to protect public access to Beachwalker Park. KDP and the South Carolina Coastal Conservation League (League) both requested a contested case hearing before the ALC. The ALC held in favor of KDP, ordering the installation of the bulkhead and revetment structure running 2,783 feet along the shoreline. DHEC and the League appealed, and the Supreme Court reversed and remanded the case to the ALC. On remand, the ALC reconsidered the evidence and authorized the installation of a 270-foot bulkhead and revetment adjacent to the parking lot of Beachwalker Park, plus a vertical bulkhead only that spanned an additional 2,513 feet along the shoreline of Captain Sam’s Spit. On appeal, DHEC argued the ALC erred in approving the structure other than the 270 feet providing access to Beachwalker Park, while the League contested the entirety of the structure.

- The Supreme Court held that the construction of 2,513 feet of vertical bulkhead, without a revetment, was not supported by substantial evidence. The testimony indicated that the revetment and bulkhead were designed to work together and that neither structure alone would accomplish the desired results; instead, the bulkhead alone would accelerate erosion. The ALC impermissibly authorized an entirely distinct structure from that applied for, and there was no evidence to support authorization of the bulkhead alone. The Court declined to amend the ALC’s order to authorize a revetment to complement the bulkhead because the extended bulkhead and revetment would not benefit the public. Instead, the Court modified the ALC’s order to authorize only the 270-foot bulkhead and revetment along the Beachwalker Park access area. That structure was supported by substantial evidence and benefited the public by protecting access to public lands.
- With respect to the League’s additional claims regarding the 270-foot structure, the Court held that the evidence and the benefit to the public supported the authorization of that structure, while the impacts on the public trust lands from the structure would be minimal. The Court further held that the ALC did not err in its interpretation of Regulation 30-11(C)(1) and that there was no reversible error in the ALC’s analysis of feasible alternatives pursuant to Regulation 30-12(C).
- The ALC’s order was affirmed as modified.

South Carolina Court of Appeals:

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center v. S.C. Dep't of Health and Envtl. Control and The Charlotte-Mecklenburg Hospital Auth., d/b/a Carolinas Medical Center-Fort Mill, 424 S.C. 80, 817 S.E.2d 633(Ct. App. 2018):

This case was before the Court of Appeals on remand from the Supreme Court pursuant to the decision in ***Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center v. S.C. Dep't of Health and Envtl. Control and The Charlotte-Mecklenburg Hospital Auth., d/b/a Carolinas Medical Center-Fort Mill***, 423 S.C. 50, 813 S.E.2d 719 (2018), discussed above. The Supreme Court ordered the Court of Appeals to address the Dormant Commerce Clause argument raised by The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill (Carolinas).

- Carolinas argued that the purpose and effect of the ALC's application of the CON Act, the 204-2005 State Health Plan, and the Project Review Criteria was to protect Piedmont from out-of-state competition, which violated the Dormant Commerce Clause. Under Dormant Commerce Clause jurisprudence, state regulations may not discriminate against interstate commerce or impose undue burdens on interstate commerce.
- The Court held that the ALC properly applied the provisions of the CON Act, the State Health Plan, and the Project Review Criteria in considering the needs of residence in all areas of York County, and therefore did not violate the Dormant Commerce Clause. The Court evaluated the ALC's application of the Project Review Criteria and held that the ALC's adverse impact analysis was not discriminatory. The ALC properly considered both the potential impact on Piedmont's provision of specialty services and the potential impact on specialty physicians in the service area. Moreover, the ALC recognized that the loss or reduction of specialty services would have an adverse impact on citizens of York County, especially those in the western, more rural part of the county farther away from Carolinas' specialty facilities in North Carolina. The Court found that the ALC's order as a whole reflected proper balancing of the impact of Carolinas' proposed facility on Piedmont's existing facility against the increased accessibility offered by Carolinas' proposed facility, and concluded that the ALC applied the adverse impact criteria without any discriminatory purpose. Further, there was nothing in the record showing that the ALC's application of these criteria placed an undue burden on interstate commerce.
- With respect to the criteria addressing need, the Court found that the ALC's application of those criteria did not discriminate against or burden interstate commerce. The ALC properly considered the goal of reducing patient outmigration to North Carolina, because that goal reflects a legitimate concern regarding patient travel time. The primary concern of CON analysis is to evaluate the effect on participation in South Carolina's healthcare market. The ALC found that Piedmont's proposed facility better strengthened the capacity of existing York County providers to meet the needs of all County residents. This finding was supported by the evidence and reflected the ALC's concern for York County residents, rather than being motivated by a desire to protect Piedmont. Accordingly, the ALC properly applied the need criteria without any discriminatory purpose or effect on interstate commerce.

- Finally, regarding the criteria addressing efficiency by avoiding duplication of services, the Court found no discriminatory purpose in the ALC's application of those criteria. Carolinas argued that Piedmont was given an unfair advantage because it was able to transfer existing beds from its Rock Hill facility to the proposed facility. However, in addition to concluding that Piedmont's transfer of 100 beds to the new facility spread costs over a greater number of beds and was thus more efficient, the ALC also found that Piedmont's proposed facility was better designed for expansion than Carolinas' proposed facility. This latter finding was alone enough to support the ALC's conclusion that Piedmont best met the efficiency criteria.
- The Court affirmed the ALC's order, finding no discriminatory purpose or discriminatory effect on interstate commerce.

Abel v. S.C. Dep't of Health and Envtl. Control, 419 S.C. 434, 798 S.E.2d 445 (Ct. App. 2017):

In this case, Pawleys Island Baptist Church filed an application for a coastal zone consistency certification to permit it to fill in wetlands during the construction of a new sanctuary in 2000. DHEC issued the certification, and Appellants (neighboring landowners) challenged the decision before the ALC. The parties reached a settlement agreement which was memorialized in a consent order on January 8, 2001. The order stated the Church's agreement that the wetlands preserved by the Order were to remain in their natural state. In 2012, the Church applied for a new consistency certification to permit it to fill additional wetlands. The Church requested that the ALC modify the 2001 consent order. Appellants opposed the modified consent order, and the ALC dismissed the Church's request because DHEC had not issued a final decision on the certification. After DHEC approved the new certification, Appellants requested a contested case before the ALC, arguing that the 2001 consent order prohibited DHEC from issuing the new certification. The ALC found that the 2001 order was a valid and enforceable contract, but that it was effective only during the pendency of the project authorized in 2001 and did not apply to the second case. Appellants filed an appeal with the Court of Appeals.

- The Court held that the ALC erred in placing a temporal limitation on the part of the contract stating, "The church agrees that the wetland preserved by this Consent Order shall remain in its natural state." The Court noted that the opening paragraph to the consent order, which was relied upon by the ALC in reaching its conclusion, did not create a temporal restriction on the remaining clauses in the order. Moreover, other clauses in the order contained restrictions that would of necessity survive the completion of the initial construction project. Therefore, the Court reversed the ALC's decision and remanded the case for the court to consider the Appellants' request for an injunction.

Non-DHEC appellate cases involving ALC decisions:

South Carolina Supreme Court:

Spalt v. S.C. Dep't of Motor Vehicles, 4223 S.C. 576, 816 S.E.2d 579(2018): Involved a motorist's appeal from the suspension of her driver's license.

South Carolina Court of Appeals:

Kan Enterprises, Inc. v. S.C. Dep't of Revenue, 420 S.C. 596, 803 S.E.2d 882 (Ct. App. 2017): Involved the renewal of a permit to sell beer and wine for off-premises consumption.

Davis v. S.C. Dep't of Motor Vehicles, 420 S.C. 98, 800 S.E.2d 493 (Ct. App. 2017): Case involving an appeal from the ALC's decision to reinstate a motorist's driver's license.

DIRECTV v. S.C. Dep't of Revenue, 421 S.C. 59, 804 S.E.2d 633 (Ct. App. 2017), *cert. denied* (May 2, 2018): A state tax matter involving whether the taxpayer was required to include its subscription receipts from South Carolina customers in the numerator of the gross receipts ratio, for corporate income tax purposes.

Charleston County Assessor v. University Ventures, LLC, 421 S.C. 194, 805 S.E.2d 216 (Ct. App. 2017), *cert. granted* (June 27, 2018): This was a county tax matter involving the assessment of real property.

Hock RH, LLC v. S.C. Dep't of Revenue, 423 S.C. 208, 813 S.E.2d 540 (Ct. App. 2018): This property tax case involved the statutory exemption to charter schools from state and local taxation.

S.C. Dep't of Motor Vehicles v. Dover, 423 S.C. 153, 813 S.E.2d 532 (Ct. App. 2018): This was a case involving whether an out-of-state reckless driving conviction constituted a major violation requiring the suspension of a motorist's driver's license under the habitual offender statute.