

STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON)

IN THE COURT OF COMMON PLEAS

South Carolina Coastal Conservation League,)
)
Plaintiff,)

Case No. 2003-CP-15-1137

vs.)

Thomas Dewey Wise and the South Carolina)
Department of Health and Environmental Control,)
Office of Ocean and Coastal Resource)
Management,)

Defendant.)

**ORDER GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

PATRICIA L. BROWN
COLLETON COUNTY
COMMON PLEAS
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This matter came before me for hearing of motions for summary judgment filed by the Defendant, Thomas Dewey Wise, and by the Plaintiff, South Carolina Coastal Conservation League. By consent, the hearing was held in the Charleston County Courthouse on January 10, 2007. The Plaintiff was represented by James S. Chandler, Jr. of Pawleys Island; the Defendant Wise was represented by David H. Haller of Mt. Pleasant, and the Defendant South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (DHEC) was represented by Leslie S. Riley of Charleston.

STATEMENT OF THE CASE

The Amended Complaint in this case alleges that the Defendant Thomas Dewey Wise violated the South Carolina Coastal Zone Management Act (hereinafter the "Act"), S.C. Code Ann. § 48-39-10 *et seq.*, by placing fill materials and structures into Colleton County waters and wetlands that are within the "critical areas" of the state's coastal zone without first obtaining the permits required by Section 48-39-130. The Plaintiff, a membership organization acting on

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behalf of its members, brings this action under S.C. Code Section 48-39-160, which states: "The circuit court of the county in which the affected critical area or any part thereof lies shall have jurisdiction to restrain a violation of this chapter at the suit of the department, the Attorney General or any person adversely affected." S.C. Code Ann. § 48-39-160.

The Amended Complaint also alleges that the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (DHEC/OCRM), after initiating administrative enforcement activities against Wise, failed to require compliance with the Coastal Zone Management Act and instead entered into an *ultra vires* agreement that is not within the agency's statutory authority, allowing Wise's illegal fill and structures to remain in the critical area without a permit.

The Amended Complaint seeks an order declaring that the alteration of critical area and placement of fill at South Fenwick Island by or on behalf of the Defendant Wise require a permit properly issued by DHEC/OCRM; declaring the Defendant does not have a permit for the alleged alterations; declaring that DHEC/OCRM has no legal authority to approve an alteration to or placement of fill in critical areas of the coastal zone except through compliance with the statutory and regulatory requirements for the issuance of a permit pursuant to S.C. Code Ann. §§ 1-23-130 and 1-23-150; declaring that the "Enforcement Settlement Agreement," an agreement entered into between Wise and DHEC, exceeds DHEC's regulatory authority, is *ultra vires*, is null and void and does not constitute a bar to plaintiff's maintenance of this action under S.C. Code Ann. § 48-39-160; restraining the Defendant Wise from further placement of fill or structures into the critical area; and requiring the Defendant Wise to remove the fill and structures he has placed or caused to be placed in the critical area, and requiring him to restore

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the area to its original environmentally desirable condition.

DHEC/OCRM filed an Amended Answer stating: "a critical area permit was not issued for the activity and was not authorized at the time the Defendant [Wise] commenced placement"; and "the placement of fill material in the critical area was not authorized by a critical area permit and that the enforcement process, which was utilized in connection with this matter, was improper." The DHEC/OCRM Amended Answer also states that "the Department dealt in good faith with Defendant Wise; however, after reviewing the record as a whole and the applicable law, it takes the position that the Enforcement Settlement Agreement was improperly entered into and not enforceable. The Department agrees with the Plaintiffs that Mr. Wise should apply for an after-the-fact permit for the alteration of the critical area in question."

The Defendant Wise's Amended Answer to Amended Complaint pleads as defenses: a general denial; lack of standing; lack of subject matter jurisdiction; unclean hands; laches; res judicata; collateral estoppel; separation of powers and due process; and failure to state a cause of action. Wise also filed motions to dismiss for lack of standing and pursuant to Rules 12(b)(6) and 12(b)(7), dated May 24, 2004 and February 13, 2004, respectively. These motions were denied by Judge Jack Gregory in a form order on June 23, 2004.

In response to DHEC/OCRM's Amended Answer, the Defendant Wise filed a pleading termed "Defendant Wise's Answer to Defendant SCDHEC's Cross-Claim and Cross-Claims Against SCDHEC" dated February 7, 2005, alleging against DHEC/OCRM causes of action for breach of contract accompanied by fraudulent act, constitutional taking and frivolous proceeding. DHEC filed an Answer to the Wise Cross-Claim dated March 1, 2005, generally denying the Wise cross-claims and requesting that they be stricken.

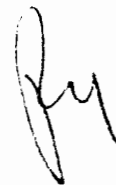


During the hearing on January 10, 2007, Wise and DHEC announced that they have filed a Stipulation of Dismissal dismissing all cross-claims, with prejudice.

THE MOTIONS FOR SUMMARY JUDGMENT

Defendant Wise filed his first motion for summary judgment on October 20, 2004. This motion states grounds for summary judgment to include lack of standing; lack of subject matter jurisdiction of the court to allow the Plaintiff "to collaterally attack a final decision of [DHEC/OCRM] in an enforcement matter;" lack of subject matter jurisdiction "because of the constitutional prohibition of *de novo* review, separation of powers and due process;" unclean hands and laches; and res judicata/collateral estoppel. Wise also filed an amended motion for summary judgment dated October 3, 2005, incorporating the grounds set forth in the 2004 motion and stating that, in addition, "defendant Wise may seek judgment on any and all of the constitutional, legal, equitable, and/or affirmative defenses set out in his Amended Answer dated October 19, 2004."

Plaintiff's Motion for Summary Judgment, dated October 14, 2005, seeks an order granting the relief requested in the Amended Complaint as outlined in the Statement of the Case above, on the basis that the pleadings, depositions, answers to interrogatories and affidavits show that there is no genuine issue of material fact and the plaintiff is entitled to judgment as a matter of law, in that the Defendant Wise has placed fill and structures into critical areas of the coastal zone; no permit for this work has been issued by DHEC/OCRM; the Defendant DHEC/OCRM has no authority to excuse the failure of the Defendant Wise to obtain a permit for fill of a critical area; the agreement cited by Defendant Wise as precluding this action and excusing his failure to obtain a permit in fact expressly requires that the Defendant Wise obtain a permit for



the fill placed in the critical area, and the agreement is also beyond the regulatory authority of the agency; the affidavits and deposition testimony establish the Plaintiff's standing to pursue this matter and the Defendants have presented no evidence contradicting same; the jurisdiction of this court, the pursuit of this action, and the relief requested by the complaint are expressly authorized by Section 48-39-160 of the Coastal Zone Management Act, S.C. Code Ann. § 48-39-160; and the affidavit of Dennis M. Allen, Ph.D., establishes that the placement of fill in the critical area has caused material environmental harm.

DISCUSSION

The South Carolina Coastal Zone Management Act

The South Carolina Coastal Zone Management Act, S.C. Code. Ann. §§ 48-39-10 through 48-39-360, was enacted in 1977 to create a comprehensive coastal management program. S.C. Code Ann. §§ 48-39-20, 48-39-30, 48-39-80.

Section 48-39-130 of the Act makes it unlawful to use or to place fill or any structure in a "critical area" without a permit:

(A) Ninety days after July 1, 1977, 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.

...

(C) Ninety days after July 1, 1977 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). Subsection (D) of Section 130 sets forth a list of specifically defined exceptions to the permitting requirement.

Section 48-39-160 of the Coastal Zone Management Act expressly authorizes suits to

enforce the provisions of the Act:

SECTION 48-39-160. Violations; jurisdiction of courts.

The circuit court of the county in which the affected critical area or any part thereof lies shall have jurisdiction to restrain a violation of this chapter at the suit of the department, the Attorney General or any person adversely affected. In the event the affected critical area lies in more than one county, jurisdiction shall be in the circuit court of any county in which any part of the area lies. In the same action the circuit court having jurisdiction over the affected area may require such area to be restored to its original condition, if possible, and environmentally desirable. In the alternative, the department may complete the restoration at the expense of the person altering the area in which case suit for recovery of the amount so expended may be brought in any court having jurisdiction to restrain a violation. No bond shall be required as a condition of the granting of a temporary restraining order under this section, except that the court may in its discretion require that a reasonable bond be posted by any person requesting the court to restrain a violation of this chapter.

S.C. Code Ann. § 48-39-160.

The Evidence Before the Court

In support of his motion, Defendant Wise submitted several exhibits:

A - Plaintiff's Response to Defendant Wise's First Request for Admissions

B - SCDHEC/OCRM's Answers to Defendant Wise's Second Requests for

Admissions

C - Enforcement Settlement Agreement dated May 28, 2002

D - Letters to Wise from DHEC/OCRM dated January 29, 2003, February 6, 2003, and February 18, 2003

E - South Carolina Coastal Council Permit Number CC-85-152 issued to Thomas D. Wise, dated July 3, 1985

F - Affidavit of Anthony Maglione with attached biographical information

The Plaintiff submitted the deposition of the Defendant Wise, and its associated exhibits;

the deposition of Richard Chinnis, DHEC/OCRM's Director of Regulatory Programs, and its associated exhibits; the deposition of Dana Beach, executive director of the SC Coastal Conservation League; affidavits of members of the League: Lewis Hay, Margaret P. Blackmer, Mayo Read, David Maybank, Jr., and Alexander M. Sanders, Jr.; the affidavit of Dennis M. Allen, Ph.D., a marine biologist employed as the Director of the University of South Carolina's Baruch Marine Field Laboratory and as a Research Professor, with numerous photographs of the site at issue; and several additional photographs submitted without objection at the hearing.

DHEC presented no evidence and indicated at the hearing that it is taking no position beyond that stated in its Amended Answer.

All parties agree that the material facts are undisputed, and that the resolution of this case requires simply a determination of the conclusions to be drawn from those facts.

The Facts

Thomas Dewey Wise is the owner of around 400 acres of land on Fenwick Island in Colleton County. The island lies between the South Edisto and Ashepoo Rivers, and was divided into North and South Fenwick Islands when the Intracoastal Waterway was created in the early 1900s. Access to the island is by boat, and there are no habitable dwellings presently on the island. (Wise depo, p. 10, line 15 to p. 11, line 18).

In 1985, the South Carolina Coastal Council (now DHEC/OCRM) issued a permit to Wise authorizing the construction of a timber bridge to span a break in an old causeway. (Ex. 1 to Wise Depo). The permit states on page one: "DESCRIPTION OF PROJECT: BRIDGE." On page 4 of the permit, the following statement is made under the heading "ATTACHMENT 1:"

The plans submitted by you, attached hereto, show the proposed work to consist of constructing a 20' long bridge to span across a gap in the existing



causeway. The purpose of the proposed work is to provide access from one side of the property to the other. These plans are approved as submitted.

The attachment to the permit consists of three sheets bearing the name of Thomas & Hutton Engineering Co., dated February, 1985. The first sheet, listed as Sheet 2 of 3 but also has a handwritten notation indicating that it is page 5 of 7 of the permit is entitled "SITE PLAN" and contains the notation "PURPOSE: CONSTRUCT TIMBER BRIDGE ACROSS GAP IN EXISTING CAUSEWAY." The site plan is a map of a portion of Fenwick Island, the adjacent marsh, and Fish Creek and its tributaries. It shows an "EXIST. EARTH CAUSEWAY." An arrow points to "PROPOSED BRIDGE TO BE LOCATED @ GAP IN CAUSEWAY."

The next page of the permit, containing the handwritten notation 6 of 7 and the designation Sheet 3 of 3, contains three drawings labeled "BRIDGE PLAN," "PARTIAL ELEVATION," and "SECTION 'A'-'A.'" The Bridge Plan shows the causeway to be approximately 30 feet in width and the "TREATED TIMBER BRIDGE" is depicted as about half the width of the causeway. It shows the gap in the causeway to be approximately 20 feet, and the drawing shows a "TREATED TIMBER BULKHEAD FOR SCOUR PROTECTION" to be built below the bridge and roughly parallel to the gap in the causeway. The Partial Elevation and Section "A"-"A" are other views of the bridge, and contain a line with the notation "M.H.W. EL. 3.10." The final attached page, with the handwritten notation 7 of 7 and the printed Sheet 1 of 3, is a map of Seabrook Island and the surrounding area with a circle pointing out the "Project Site."

The permit also contains the following statement in capital letters:

THE PERMITTEE, BY ACCEPTANCE OF THIS PERMIT AGREES TO ABIDE BY THE TERMS AND CONDITIONS CONTAINED HEREIN (ATTACHMENT 1) AND TO PERFORM THE WORK IN STRICT ACCORDANCE WITH THE PLANS AND SPECIFICATIONS ATTACHED HERETO AND MADE A PART HEREOF. ANY DEVIATION FROM THESE



CONDITIONS, TERMS, PLANS, AND SPECIFICATIONS SHALL BE
GROUNDS FOR REVOCATION, SUSPENSION OR MODIFICATION OF
THIS PERMIT AND THE INSTITUTION OF SUCH LEGAL PROCEEDINGS
AT THE COASTAL COUNCIL MAY CONSIDER APPROPRIATE.

The bridge spanned an area described by Wise as “a small break in the dike . . . you could call it a creek, you could call it a ditch.” (Wise depo, p. 21, lines 1-2). Later in his deposition he called it a “creek.” (Wise depo, p. 24, lines 2-16). An aerial photograph of the site placed into evidence by the Plaintiff shows a portion of Fenwick Island and the site of the bridge authorized by the 1985 permit. This photograph shows a distinct channel of a tributary creek running from Fish Creek to the bridge site and beyond, into the marsh area upstream of the bridge and its associated causeway. (Plaintiff’s Ex. 1).

In his deposition, Wise testified that the bridge was built as permitted soon after the 1985 permit was issued, but that by 2002, “it was deteriorating. The bulkhead system under it primarily was what was deteriorating.” (Wise depo, p. 21, lines 19-23). As a result, he had the bridge removed.

At the site where the bridge had been, Wise placed fill dirt. (Wise depo, p. 27, line 11 to p. 28, line 10).

After Wise put this fill dirt in place, he received a call from the Corps of Engineers and an inspection by the South Carolina Department of Natural Resources. (Wise depo, p. 24, line 17 to p. 25, line 16). DHEC/OCRM also inspected the site, and thereafter issued a Notice of Violation. (Ex. 2, Wise depo).

Following receipt of the Notice of Violation, Wise hired an attorney and on May 28, 2002, Wise signed a document entitled “Enforcement Settlement Agreement,” which was also signed by Richard Chinnis for DHEC/OCRM. (Ex. 6, Wise depo). The Enforcement Settlement

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Agreement recites Wise's ownership of land on South Fenwick Island, the issuance of the 1985 permit, and that "a dispute has arisen between Wise and [DHEC/OCRM] which resulted in this enforcement action," and then states:

WHEREAS, based on review of the circumstances surrounding the critical area disturbance and input from engineers on behalf of Wise and SCDHEC/OCRM, the parties agree as follows:

1. The critical area fill will be removed to the extent necessary to facilitate the placement of three 24 inch pipes side by side. These pipes will be adequate to facilitate the flow of water between Fish Creek and the waters of the former impoundment.
2. The pipes shall be laid at the elevation of the creek and impoundment bottom.
3. Prior to the installation of the pipes and creating the dike road, SCDHEC/OCRM shall be notified so that the site can be inspected and proper placement of the pipes verified.
4. The resulting roadway shall be no wider than the former bridge and the side slopes shall be no greater than that of the existing dikes on either side.
5. Upon completion of the above and payment of a civil fine in the amount of two hundred fifty (\$250.00) dollars, the enforcement action is dismissed and the permit in place will be modified to incorporate these changes.

(Wise Ex. C; Ex. 6, Wise depo). Following the signing of this agreement, Wise installed the three 24 inch pipes and paid the \$250 fine.

At some point between May 2002 and January 2003, Wise caused a "trunk" to be installed at a location about 75 feet from the site of the fill. He also installed "standpipes" (also known as a "flashboard riser structure") on the three 24 inch pipes. (Wise depo, p. 21, line 13 to p. 27, line 2). On January 29, 2003, DHEC/OCRM issued a second Notice of Violation to Wise, citing the installation of the trunk and standpipes as violations of the critical area permit

requirements. (Ex. 8, Wise depo; Wise Ex. D). On February 6, 2003, DHEC/OCRM sent an "Admissions Letter" to Wise, noting that "the unauthorized installation of a rice trunk assembly and the unauthorized construction of a flashboard riser structure onto three 24" pipes in the tidelands critical of your property located on and adjacent to the Fish Creek on South Fenwick Island, Colleton County, South Carolina, has not been permitted or otherwise legally authorized in its current location by OCRM." (Ex. 9, Wise depo; Wise Ex. D). On February 18, 2003, DHEC/OCRM again wrote to Wise, this time stating that the rice trunk assembly and the flashboard riser structures did not violate the Coastal Management Act, and that the enforcement matter has been closed. (Ex. 12, Wise depo; Wise Ex. D).

Dewey Wise described a "trunk" as "a heavy wooden structure that you can get in various sizes," (Wise depo, p. 22, lines 3-4), and Richard Chinnis described it as "a wooden type of box, historically and presently used as a water control structure within the intact impoundment. A structure that allows for either an exchange in the tidal system or to prohibit any kind of tidal exchange. It is a water management structure." (Chinnis depo, p. 58, line 23 to p. 59, line 8).

The League then commenced this action on December 22, 2003.

The affidavit of Dr. Dennis M. Allen provides an overview of his 30-year career in estuarine ecological research in tidal salt waters along the South Carolina coast. Dr. Allen visited the Wise site on January 27, 2005. Seventy-eight photographs taken during his visit were attached to his affidavit.

These photographs, taken at ground level at the project site, show the fill placed at the original bridge site, the pipes and standpipes placed within and adjacent to this fill, the bulkhead

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constructed along the edge of the fill, and the “trunk” installed at a nearby portion of the causeway. *See* Exhibits A-1 through A-24 and Exhibits B-1 through B-54 attached to the Affidavit of Dennis M. Allen, Ph.D.; *see also*, Plaintiff’s Exs. 2-5 submitted at the January 10, 2007 hearing. For example, Exhibit B-8 to the Allen deposition shows the standpipes, a portion of the fill and bulkhead, and also the creek and marsh upstream from the fill site. Exhibits B-13 through B-17 show the downstream side of the fill and bulkhead, and the creek on this side of the fill. Exhibits B-23 through B-30 and B-33 through B-35 show the “trunk” place in another portion of the causeway.

Photographs of the fill area taken by OCRM in 2002 and 2003 show the filled area without bulkheads, a sloped fill area. The January 2005 photos of the standpipe side of the fill show the bulkheads, and evidence that the bulkhead is failing and caving in.

Dr. Allen said that the site at South Fenwick Island includes tidal saline waters and marshes that are part of a larger estuarine system generally known as the ACE Basin. He offered the following information and opinions:

Marshes and other tidally influenced areas adjacent to the open water portions of estuaries provide ecological services that are essential to the continued well-being of these productive ecosystems. Although individual sites vary in their size, structure, and hydrographical connection with the deeper portions of the estuary, all are biologically active and provide important ecosystem functions including the production and export of organic material and provision of essential fish, shrimp, and crab habitat.

Many studies have demonstrated major differences between marshes with open and restricted connections to open water. Net movements of dissolved and particulate materials and organisms are related to the frequency, rate, and volume of water exchange. In general, smaller flows and flows that are not in synchrony with local tides result in less material exchange and connectivity with the core of the estuary. From the standpoint of an ecologist who recognizes the importance of tidal marshes as sites that: (1) produce much of the organic material that supports the estuarine food web and (2) provide forage and refuge habitat to aquatic

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animals including many of economic importance, significant reductions in the magnitude of tidal exchange represent adverse impacts to an estuary.

Based on my understanding of present and former conditions at the Fenwick Island site and my familiarity with the open and impounded marsh systems especially in the Winyah Bay Estuary, the alteration of the Fenwick dike B by the removal of the bridge and its replacement with fill and three pipes B has reduced the magnitude of tidal water exchange and thus likely reduced the ecological contribution of that the interior marsh to the adjacent estuary. A reduction in the cross-sectional area of water flow certainly occurred in replacing the bridge with buried culverts. Water exchange could be further restricted as sediment and other materials accumulate in pipes and near the points of discharge.

It is also likely that the reduced volume of tidal exchange and changes in associated physical features, including current velocities, water level, lateral mixing, salinity, and sediment dynamics have changed patterns of access and utilization by tidal migratory animals. Multiple studies have demonstrated reduced levels of use of flow-restricted areas especially by transient fish and invertebrate species that require intertidal habitat to complete their life cycles. We might expect that reductions in the volume of exchange would reduce opportunities to enter and exit the system according to their ecological needs (e.g. escape degraded water quality, select preferred salinity or temperature, avoid predators, make timely migrations) and thus jeopardize survival. Restricted passage may also result in some species' avoidance of discharged water with altered quality (e.g. dissolved oxygen, turbidity, velocity and turbulence) or, conversely, attraction to areas that might threaten the animals' health.

The pipes allow some tidal exchange, and thus I would characterize the area upstream of the fill at issue as a partially impounded system. My examination of the site led me to conclude that the pipes at the old bridge site do not allow full tidal flow to the upstream area.

Previous studies that have compared open tidal and impounded systems have demonstrated that the extent of tidal exchange is the fundamental factor controlling water quality within interior marsh waterways. One frequently observed characteristic of partially impounded systems is the accumulation of nutrients from rainfall, runoff, and the degradation of organic material. Increased nutrients in these situations often lead to algae blooms and the degradation of water quality through eutrophication. Increased accumulations of organic material in relatively slow moving or static water bodies usually lead to decreased dissolved oxygen levels. Low levels of dissolved oxygen (hypoxia or anoxia) are known to reduce aquatic fauna diversity and abundance. Fish kills have been documented in South Carolina impoundments. More recently, scientists have become concerned about such systems becoming reservoirs for toxic algal and

microbial blooms that could impact internal and adjacent tidal systems.

Researchers involved with studies comparing tidal and partially impounded marshes in South Carolina have shown fundamental differences in the way these systems process nutrients and in the composition of plants, plankton, benthos, and nekton. They attributed these differences to transfer effects and suggested that increasing tidal exchange in systems with restricted flow would likely result in improved water quality and habitat value for estuarine organisms. Based on these studies and my independent experience as a research scientist, I conclude that the reestablishment of a greater level of tidal exchange would result in an increase in the ecological value of the tidally-restricted system to the estuary.

(Affidavit of Dennis M. Allen, Ph.D., pp. 3-4).

Richard Chinnis was the DHEC official who signed the “Enforcement Settlement Agreement” in 2002, allowing Wise to keep the fill at the bridge site. In his deposition, Chinnis testified that he would define a “bridge” as “a pile supported structure adjoining two points of high ground.” (Chinnis depo. p. 23, lines 11-16). He said that bridge permits are governed by the “transportation” standards of the OCRM regulations and the “access to small islands” section. (Chinnis depo. p. 23, line 20 to p. 24, line 5). The Coastal Zone Management Act defines “filling” as “either the displacement of saline waters by the depositing into critical areas of soil, sand, gravel, shells or other material or the artificial alteration of water levels or water currents by physical structure, drainage ditches or otherwise.” S.C. Code Ann. § 48-39-10(P); (Chinnis depo, p. 27, line 10 through p. 28, line 17). Chinnis defines “causeway” as “an embankment consisting of earth and fill used for transportation purposes,” and said that a causeway is distinguished from a bridge: “a fill, an earthen embankment versus a pile supported structure or a clear span type of structure.” (Chinnis depo, p. 29, line 16, through p. 30, line 10).

Chinnis also said that DHEC/OCRM “basically prohibits fill for new causeways.” (Chinnis depo, p. 30, lines 11-19). Chinnis said that, absent an emergency, a permit would be



required to fill a creek to close a gap in a causeway. (Chinnis Depo, p. 53, lines 3-11). He said that he had never heard of an amendment to a permit that allowed filling of critical area without having the amendment go through the public notice process. (Chinnis Depo, p. 26, lines 4-10). Chinnis said that normal maintenance and repair of permitted structures is allowed, but there are limits: "A structure must be generally intact – in order to be eligible for maintenance and repairs, it must be generally intact and functional in the work. It cannot exceed the original dimensions. You cannot make it bigger." (Chinnis depo, p. 57, lines 10-22).

As noted above, paragraph 5 of the Enforcement Settlement Agreement states that "the permit in place will be modified to incorporate [the] changes" at the site. (Wise Ex. C). Chinnis testified that the agency "did not do that. We did not modify the permit." (Chinnis depo, p. 86, lines 9-25). He said that in order to modify the permit, the public notice process would have to take place. (Chinnis depo, p. 87, lines 4-16).

Chinnis said he did not know what amount of space the old bridge had allowed for the flow of water, and did not know whether a person or vessel could walk or travel under the bridge. (Chinnis depo, p. 89, line 15 through p. 95, line 17). He had no information about the functions and values of the upstream critical area, the tidal range at the site, the type of nursery habitat the critical area provides, or the volume of water exchanged at the bridge site during a tidal cycle. (Chinnis depo, p. 46, line 18 to p. 48, line 10). Chinnis was also uncertain of when the filling had occurred, whether it was intentional, or the chronology of events. (Chinnis depo, p. 63, line 4 to p. 68, line 4).

Chinnis testified that the placement of a standpipe in a critical area would constitute an alteration that would require a permit. (Chinnis depo, p. 97, lines 3-23). He also said:



Q. Okay. In 1985 Dewey Wise had a bridge permit.

A. Yes.

Q. What does he have now?

A. He has got a dike with pipes in it.

Q. In making the decision to allow him to have [a] dike with pipes in it, which regulations did you use?

A. What I was focusing on was maintenance of the existing tidal flow, taking into account that there was a permit that he had - that the agency had permitted a bridge structure to provide access across that causeway.

Q. Does he still have a bridge; is he still operating under that bridge permit?

A. (No response.)

Q. Do you know?

A. I think he is operating under the enforcement settlement agreement.

Q. Does Mr. Wise have an impoundment now?

A. He is supposed to have a structure in place that allows the same amount of tidal flow that was going in and out that existed when he had the bridge permit.

Q. Okay. If a member of the general public had been able to walk under this bridge to get to the critical area upstream of the bridge prior to the year 2002, is that member of the public able to get into this critical area above this structure now without trespassing on Mr. Wise's land?

A. No.

(Chinnis depo, p. 97, line 24 through p. 99, line 17). He said that the enforcement settlement agreement is not a permit. (Chinnis depo, p. 87, lines 17-19).

Chinnis said that when the agency issues permits, the permits are based on plans and

specifications, and that any alteration beyond those plans and specifications will require an amendment to the permit. (Chinnis depo, p. 102, line 17 to p. 103, line 9). He said that the agency has no plans or specifications regarding the work Wise has done at this site since 2002. (Chinnis depo, p. 103, lines 10-13).

Chinnis said that his decision to allow the fill to remain in place with three pipes was based on maintaining the same tidal flow as there had been with the bridge. (Chinnis depo, p. 81, line 16 to p. 82, line 6; p. 98, lines 6-15). He said he had no documents showing the amount of flow with the bridge versus the amount of flow with the three pipes. (Chinnis depo, p. 99, line 23 through p. 100, line 7).

THE ISSUES

Based on the undisputed evidence and facts, I have reached the following conclusions on the issues:

1. The Plaintiff Has Standing.

The League has demonstrated by affidavits that it has members who use and enjoy the waters and wetlands of Fish Creek at South Fenwick Island for recreational and aesthetic purposes, by boating, fishing, shrimping, and viewing wildlife on a regular basis, and that their use and enjoyment of the waters and wetlands have been and will be harmed by the activity at issue, which allows the filling and subsequent impairment of critical area coastal tidelands and wetlands. Accordingly, the League is "adversely affected" by the Defendant's alteration of the critical area and thus has standing to contest pursue this case.

In environmental cases, a three-part test is applied to determine whether a plaintiff has standing:

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1. First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.

2. Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.

3. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Sea Pines Association for the Protection of Wildlife, Inc. v. S.C. Department of Natural Resources, 345 S.C. 594, 550 S.E. 2d 287 (2001); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-561, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992); *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.* 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000).

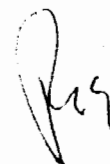
Where a membership organization asserts standing, the organization must have members who can demonstrate facts sufficient to establish standing. In this case, the League has provided affidavits from five members: Margaret P. Blackmun, Lewis Hay, David Maybank, Jr., Mayo Read, and Alexander M. Sanders. These affidavits show (1) that League members regularly use the creek at issue in this case for recreational purposes, including boating, fishing, and wildlife viewing; (2) that they are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity - the Defendant's filling and alteration of critical area; (3) that the fill at issue would damage the aesthetic quality and estuarine productivity of the area; (4) that the fill has lowered and will continue to lower their enjoyment of this area for recreational purposes; (5) that there is a causal connection between the injury to their aesthetic and

recreational interests and the conduct complained of; and (6) that the injury can be redressed by a favorable decision - removal of the fill to restore the coastal tidelands and wetlands to their unimpaired state.

The Defendant Wise has not submitted any evidence in response to these affidavits.

In *South Carolina Wildlife Federation v. South Carolina Coastal Council*, 296 S.C. 187, 371 S.E.2d 521 (1988), it was held that where parties “alleged an individualized injury in the adverse effect of a specific decision of the Coastal Council on their members’ use and enjoyment of the fish and wildlife of the wetlands” that would be affected by a Coastal Council certification, “these allegations are sufficient to show standing.” 296 S.C. 187, 190, 371 S.E.2d 521, 523.

While all of the affiant League members will experience negative impacts to their regular recreational and aesthetic use and enjoyment of Fish Creek at South Fenwick Island, each affected league member can point to specific injury. Margaret P. Blackmun regularly utilizes the area for photography projects. The placement of fill at fish creek will impact the productivity of fish and other wildlife in the area and thus negatively affect her use and enjoyment of the area.. Member Lewis Hay uses the area for shrimping activities that will be adversely affected by the reduced water flow caused by the causeway. Member David Maybank Jr. owns property upstream from the Defendant’s fill, and believes that the Fish Creek causeway will impede access to his home as well as lower the value of his property. Member Mayo Read regularly uses the Fish Creek area for fishing and bird watching. The negative impacts of the filled critical area will impede the estuarine functions of the area, thus making it less attractive to birds and other wildlife and adversely affecting Mr. Mayo’s use and enjoyment of the area. Alexander M.

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Sanders, Jr., states that his enjoyment of Fish Creek for fishing, boating, and enjoyment of the scenic beauty will be negatively impacted by the fill.

The affidavit of Dennis M. Allen, Ph.D., supports the view that the fill, even with the pipes, will lower the ecological value of this area.

These facts are sufficient to give the League standing in this case. *Sea Pines Association for the Protection of Wildlife, Inc. v. S.C. Department of Natural Resources*, 345 S.C. 594, 550 S.E. 2d 287 (2001); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-561, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992); *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.* 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). This demonstration fully complies with the law of standing as stated by the South Carolina Supreme Court, the South Carolina Court of Appeals, and by the federal courts. *See also, Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.* 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000); *Pye v. United States*, 269 F.3d 459 (4th Cir. 2001); *American Canoe Assn. v. Murphy Farms*, 326 F.2d 505 (4th Cir. 2003); *Friends of the Earth, Inc. v. Gaston Copper*, 204 F.3d 149 (4th Cir. 2000). In addition to injuries to the League's environmental, recreational and aesthetic interests, the League asserts an injury to its constitutional and statutory rights of participation in the state permitting process. Under the Coastal Zone Management Act, a statutory framework created a regulatory program that expressly recognizes the rights of affected citizens to comment upon and appeal permit decisions. Under Section 48-39-150(B), OCRM must consider the views of interested parties in making permit decisions. S.C. Code Ann. § 48-39-150(B). Under Section 48-39-150(D), any person adversely affected by the granting of a permit has the right of appeal. S.C. Code Ann. § 48-39-150(D). The right of citizens to participate in this process has been

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recognized as a constitutional due process right. *League of Women Voters of Georgetown County v. Litchfield-by-the-Sea*, 305 S.C. 424, 409 S.E.2d 378 (1991); *Stono River Environmental Protection Association v. South Carolina Department of Health and Environmental Control*, 305 S.C. 90, 406 S.E.2d 340 (1991); *Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision)*, 332 S.C. 551, 505 S.E.2d 598 (Ct.App. 1998); S.C. Constitution, Article I, Section.

Accordingly, I conclude that the Plaintiff has standing in this case.

2. The Plaintiff Is Not Precluded From Pursuing This Action Under Section 48-39-

160.

Defendant Wise asserts that DHEC/OCRM has already pursued and completed enforcement actions covering the alleged violations of the Act, and thus Plaintiff may not maintain this action under Section 48-39-160. Wise argues that because Section 160 authorizes a “suit of the department, the Attorney General, or any person adversely affected,” the enforcement activities of the department now preclude this suit.

The evidence submitted indicates that neither the department nor the Attorney General has filed suit under Section 160. All enforcement activity by DHEC has been administrative actions that were resolved informally without any hearings, findings of fact or conclusions of law. I therefore conclude that because the League has demonstrated that it is a “person adversely affected” by the activities in the critical area, the League has a right to pursue this action.

3. Allowing the Plaintiff to Pursue this Case Does Not Violate Wise’s Constitutional Rights.

Wise argues that allowing the League to pursue this action would violate his rights to substantive due process of law, claiming that “[a]llowing both the department and a private



citizen the right to enforce the Coastal Zone Management Act and regulations bears no rationale (sic) relationship to the government's interest." (Defendant Wise's Memorandum, p. 7).

The problem with this argument is that the Act plainly authorizes private citizens who are "adversely affected" to pursue an action for a violation of the Act. S.C. Code Ann. § 48-39-160. The Defendant Wise has not demonstrated that this action would deprive him of property without due process of law. The Defendant has been given proper notice and full opportunity to present evidence and arguments in this Court, and thus his due process rights have been protected.

Pursuit of this action by a private citizen under Section 48-39-160 is fully consistent with other provisions of the Act. Private citizens are given public notice of permit applications and are allowed full opportunity to submit comments and obtain public hearings before a permit can be granted. S.C. Code Ann. § 48-39-140(C). If a permit is granted by the agency, private citizens may challenge the permit and obtain a contested case hearing before an Administrative Law Judge and judicial review in the Courts of this state. S.C. Code Ann. §§ 48-39-150(D), 48-39-180; S.C. Code Ann. § 1-23-380; S.C. Constitution, Art. I, Section 22. The overall statutory framework makes it clear that private citizens may challenge actions of the agency through administrative and judicial proceedings.

In this case, no public notice was given related to Wise's alteration of the critical area or the agency's disposition of its enforcement decisions. No public comment period was provided. No one was afforded a right to a contested case hearing. To the extent that judicial review is available, it is available through this present proceeding. The agency is a party to this proceeding, so that the final result of this case will not result in any "multiple [or] inconsistent

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findings of what is required of him.”

I conclude that this action does not violate Wise’s constitutional rights.

4. This Action Does Not Violate the Separation of Powers Doctrine.

The Defendant Wise argues that if this Court should grant the relief sought by the Plaintiff, it would be a violation of the separation of powers doctrine as a substitution of judicial discretion for that of an executive body. His brief cites *Sheppard v. State*, 357 S.C. 646, 594 S.E.2d 462 (2004). The Court finds nothing in *Sheppard*, however, that supports Wise’s claim. Under the Separation of Powers Doctrine, judicial review of executive agency decisions is a fundamental part of the checks and balances system that is created by the Constitution’s separation of government into three separate but equal branches. Article I, Section 22 of the South Carolina Constitution explicitly gives all citizens the right of judicial review of agency actions.

5. The Alterations to the Critical Area Are Outside the Scope of Wise’s 1985 Bridge Permit.

Once the plaintiff’s standing and authority have been decided and Wise’s constitutional arguments are resolved, this case boils down to the issue of whether the critical area alterations done by Wise since 2002 were authorized by the permit issued to Wise by the South Carolina Coastal Council in 1985, Permit Number CC-85-152. The issue of what alterations were allowed under the permit appears to be a mixed question of fact and law. Here, the parties agree that there is no genuine issue of material fact regarding the alterations that were made; they agree that Wise: (1) placed fill in critical area at the old bridge site to create a roadway; (2) placed three 24" pipes within this fill, also within the critical area; (3) added “standpipes” to the three 24"

pipes, within the critical area, sometime in late 2002 or early 2003; (4) replaced a "trunk" in the causeway near the old bridge site, and this work also involved alteration of the critical area; and (5) built a bulkhead along the edge of the fill that had been placed in the critical area. The parties have submitted numerous photographs of all of this work and have also submitted depositions and affidavits describing the work. There is no dispute over the terms of the 1985 permit. No party has identified any factual issue that requires the submission of additional testimony or evidence. Accordingly, the issue of whether these alterations were authorized by the 1985 permit has been reduced to a question of law appropriate for summary judgment.

As a creature of statute, DHEC/OCRM possesses only those powers which are specifically delineated in the authorizing statute. *City of Columbia v. DHEC*, 292 S.C. 199, 355 S.E.2d 536 (1987). Section 48-39-130 plainly states 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." S.C. Code Ann. § 48-39-130(C). Section 48-39-150 sets forth a detailed description of the process the agency must follow in determining whether a permit should be issued, and this process includes public notice, consideration of public comments and comments from other interested agencies and local governments. S.C. Code Ann. § 48-39-150. Any person adversely affected by the decision on a permit application may obtain review through a contested case proceeding, and thereafter may obtain judicial review. S.C. Code Ann. § 48-39-150(D) and § 48-39-180.

The statement of powers and duties of the department authorize the agency to enforce the Act and to institute or cause to be instituted in courts of competent jurisdiction of legal proceedings to compel compliance with the provisions of the Act. S.C. Code Ann. § 48-39-50(1).

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The department's authority to enforce the Act is spelled out in Section 48-39-170(C):

Whenever the department determines that any person is in violation of any permit, regulation, standard, or requirement under this chapter, 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; in addition, the department may bring a civil enforcement action under this section as well as seeking an appropriate injunctive relief under Section 48-39-160.

S.C. Code Ann. § 48-39-170(C). In the enforcement provisions of the DHEC/OCRM

Regulations, the agency states:

B. Cease and Desist Directive: When any person is found altering a critical area without a permit and such activity is not exempted by Section 48-39-130(D), or is in violation of the terms and/or conditions of a permit, the Department may issue a cease and desist directive. This directive shall inform the person that he is in violation of the Act and shall cease the unauthorized activity. The Department may then order the person to restore the area to its original condition. If the person responsible for the unauthorized activity refuses to comply with the Department directive, the Department may then file suit in the appropriate circuit court as outlined in Section 48-39-160.

C. Arrest Warrants: When a person is found altering a critical area without a permit and such activity is not exempted by Section 48-39-130(D), has not been authorized by a permit, or is in violation of the terms and/or conditions of a Department permit, the Department may cause to be issued a warrant for the arrest of the violator.

D. Penalties: As stated in Section 48-39-170 any person found guilty of violation of the Act shall be punished by imprisonment of not more than six months or by a fine of not more than five thousand dollars, or both for the first offense; and by imprisonment of not more than one year or by a fine of not more than ten thousand dollars, or both, for each subsequent offense.

E. Judicial Enforcement: Section 48-39-160 provides the Department, the Attorney General or any person adversely affected with a remedy to restrain violations of the Act.

F. Enforcement Orders and Enforcement Process: Pursuant to Section 48-39-170, the Department may issue administrative orders requiring persons to comply with any permit, regulation, standard, or requirement under the Act and to restore the environment when deemed appropriate. Prior to issuance of an



enforcement order and appeal, the Department shall initiate the following process:

(1) If no acceptable resolution of a violation is reached, the Department shall send an Admission Letter setting forth all facts and grounds for violation.

(2) Within 15 days from receipt of the Admission Letter the responsible party must either admit the contents to be true or send the Department their version of the facts setting forth why the Department's facts are incorrect. Failure to respond shall result in a conclusion by the Department that the contents of letter are true.

(3) If no response is timely made to the Admission Letter, or if the response fails to resolve the Department's concerns, an Enforcement Order shall be issued based on the facts as stated by the Department in the Admission letter.

(4) Once the Enforcement Order is issued the responsible party has 15 days to appeal the Order to the Administrative Law Judge Division pursuant to R.30-6. Failure to act within 15 days will result in the Department seeking enforcement of the order in Circuit Court.

S.C. Code Ann. Regs. § R.30-8.B. through R.30-8.F.

Nowhere in the Act or regulations is the agency given authority to allow the filling or other alteration of the critical area through the enforcement process or any other means without a permit.

A. The Initial Fill and the Three 24" Pipes.

The evidence indicates that the filling of wetlands to create a roadway is routinely treated differently than the construction of bridges to connect two areas of high ground separated by a creek or marsh. Richard Chinnis easily distinguished filling for a causeway from the construction of a bridge, and testified that different regulations would apply. Chinnis also testified that any maintenance work that enlarges a structure beyond its permitted dimensions requires modification of a permit. Even Dewey Wise testified that he understood that paragraph 5 of the Enforcement Settlement Agreement called for modification of his permit. (Wise depo, p. 32 to p.



33, line 2).

As noted earlier, DHEC/OCRM's Richard Chinnis defined "bridge" as "a pile supported structure adjoining two points of high ground." (Chinnis depo, p. 23, lines 11-15). The dictionary definition of a "bridge" is "a structure carrying a road, path, railroad or canal across a river, ravine, road, railroad, or other obstacle." New Oxford American Dictionary, Oxford University Press, 2001, p. 213. It is plain that what the Defendant Wise has now is not a bridge, but a causeway: "a raised road or track across low or wet ground," *Id.*, p. 273, or "an embankment consisting of earth and fill used for transportation purposes." (Chinnis depo, p. 29, line 16 to p. 30, line 10).

By the express terms of the 1985 bridge permit, approval was given to a "bridge" structure, based on the plans and specifications shown on the permit drawings. Richard Chinnis testified that bridges are reviewed under the agency's standards for transportation projects and for bridges to small islands. The transportation standards include the following statements:

(b) The location and design of public and private transportation projects must avoid the critical areas to the maximum extent feasible. Where coastal waters and tidelands cannot be avoided, bridging rather than filling of these areas will be required to the maximum extent feasible;

...

(d) To the maximum extent feasible, transportation structures must be designed so as not to alter the natural water flow and circulation regimes or create excessive shoaling or erosion. Where applicable, adequate clearance for commercial and pleasure craft must be provided;

S.C. Code Ann. Regs. § R.30-12.F.(2)(b) and (d).

Since this project does not involve access to an island, it does not appear that the "bridges to small islands" standards apply, but the standards may be instructive. The standards in effect before 2006 include this statement: "To prevent inappropriate access to small islands, permanent



filling for access is prohibited, except for the expansion of existing usable causeways.” S.C.

Code Ann. § R.30-12.N. (2005). The 2006 amendments to these standards include this provision:

(8) Causeways.

(a) Permanent filling of critical areas for access to coastal islands is prohibited, except for fill associated with existing useable causeways.

(b) Existing useable causeways are defined as those causeways that have a drivable lane above the critical area.

(i) Permits for fill associated with existing usable causeways shall be granted only for minor fills that are minimized by use of containment structures to limit to the maximum extent feasible the square footage of fill, and where the fill would cause less damage to the critical area than would be caused by construction of a new bridge or other access structure.

(ii) Mitigation for critical area fill at a ratio of 2:1 will be required for fill associated with existing usable causeways.

S.C. Code § R.30-12.N. (As amended 2006).

The regulations indicate that bridges are viewed by the agency in a different manner than filling for causeways. There is nothing in this case indicating that the 1985 bridge permit was issued to authorize anything other than the construction of a bridge built to the plans and specifications shown in the permit.

The filling also cannot be considered “normal maintenance and repair” of the bridge. Defendant Wise testified that the bridge was completely removed prior to any fill. (Wise depo, p. 21, lines 13-21. The OCRM Regulations define “normal maintenance and repair” as “work performed on any structure within the critical area as part of a routine and ongoing program to maintain the integrity of the structure provided that the structure is still generally intact and functional in its present condition and the work only extends to the original dimensions of the structure.” S.C. Code Ann. Regs. § R.30-1.D.(35). The bridge was neither intact nor functional at

the time the fill was placed in the critical area, and the fill was not placed in the critical area "to maintain the integrity of" the bridge.

The wording of Section 48-39-130 also indicates that "fill" is an activity distinct from "erect[ing a] structure:"

(C) Ninety days after July 1, 1977, 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)(Emphasis added). "Filling" is defined in the Act as "either the displacement of saline waters by the depositing into critical areas of soil, sand, gravel, shells or other material or the artificial alteration of water levels or water currents by physical structure, drainage ditches or otherwise." S.C. Code Ann. § 48-39-10(P).

At his deposition, Wise did not claim that the work was authorized by the 1985 permit:

Q. Going back to the bridge site a minute, is it your position that the bridge permit gave you broad enough authority to come back and replace the bridge with the fill that was placed in there?

A. No, that's not my position.

Q. What do you say gave you authority to place fill at the bridge site?

A. My position that was -- is that under the law as I understand it, trunks are commonly used to transport water, and my intention was to replace a deteriorating bulkhead system with a trunk that conveyed the water through the area better than it was being conveyed earlier. I was interrupted and stopped in the middle of that process. I was then instructed to install three 24-foot -- 24-inch pipes there. That was done. And from the standpoint of the environment, they're -- the flushing action going in and out of that impoundment area is greater today than it was prior to all of this occurring. And -- and -- and, you know, that's what my position is. I see nothing wrong with -- with what was done.

(Wise depo, p. 36, line 9 to p. 37, line 5).

I conclude that the filling of critical area at the original site of the bridge permitted in

1985 was not authorized by the 1985 permit, with or without the three 24 inch pipes.

Accordingly, the filling of the critical area violates Section 48-39-130 of the South Carolina Coastal Zone Management Act.

B. The Standpipes.

The “standpipes” placed on the upstream end of the three 24" pipes were not approved under the 2002 Enforcement Settlement Agreement. These standpipes clearly are “structures” that were added to the project, and they are structures that were placed in the critical areas that affect the flow of the tidal waters. While DHEC/OCRM issued a letter in 2003 stating that the standpipes, or “flashboard riser structures” as they are described in the letter, did not violate the Coastal Management Program, there is no evidence supporting this statement.

Accordingly, I conclude that the standpipes were not authorized by the 1985 bridge permit.

C. The Bulkheads.

Sometime between 2002 and January 2005, wooden bulkheads were added to the causeway at the site of the fill. From the photographs in evidence, and from the words of the Enforcement Settlement Agreement, it is plainly apparent that these bulkheads were not contemplated at the time of the 2002 agreement. Nor were they authorized by the 1985 bridge permit. The bulkheads were obviously constructed within the critical area.

Accordingly, I conclude that the bulkheads were not authorized by the 1985 bridge permit.

D. The “Trunk.”

It is undisputed that the Defendant Wise caused a “trunk” to be placed in his causeway at

a site about 75 feet from the fill placed at the old bridge site. (Wise Depo, p. 26, line 10 to p. 27, line 2). The trunk connects the critical area on either side of the causeway, and the photographs plainly show that the trunk has tidal waters at its edge and flowing through it, and show that the critical area was altered to install the trunk. Defendant Wise testified that the old trunk at the site had “totally deteriorated” and that “it was a small trunk to begin with.” (Wise depo, p. 24, lines 2-12). He also said that the new trunk he installed was “an extra large one.” (Wise depo, p. 22, lines 2-8). Richard Chinnis testified that DHEC/OCRM generally allows replacement of trunks to be done as “maintenance and repair” but he also said that such work cannot exceed the original dimensions.

As noted, the DHEC/OCRM Regulations define “normal maintenance and repair” as “work performed on any structure within the critical area as part of a routine and ongoing program to maintain the integrity of the structure provided that the structure is still generally intact and functional in its present condition and the work only extends to the original dimensions of the structure.” S.C. Code Ann. Regs. § R.30-1.D.(35). The old trunk, by Wise’s admission, was not functional. The new trunk was not installed as part of a program to maintain the integrity of the original trunk structure; instead, it was a wholly new replacement structure installed beside the original structure. Since Wise by his own terms replaced a “small” trunk with an “extra large one,” the replacement was not within the original dimensions of the old trunk.

Accordingly, I conclude that the installation of the trunk was also a violation of the Act.

The testimony of the Defendant Wise shows that all of this work was done intentionally. At best, the Defendant Wise had a mistaken interpretation of the Act and regulations. But Wise also had special knowledge of the Act and regulations. He has been a member of the South

Carolina Bar since 1964 and an active practitioner for over 35 years. (Wise depo, p. 6, lines 1-24). He was a member of the South Carolina Senate when the Act was enacted in 1977, and was a co-sponsor of the bill. (Wise depo, p. 7, line 6 through p. 8, line 13). He served as a member of the original Coastal Council, from 1977 through 1981. (Wise depo, p. 8, lines 14-24). In his law practice, Mr. Wise handled 12 to 15 cases involving the Coastal Zone Management Act, "everything from dock permits to beachfront issues." (Wise depo, p. 9, lines 8-25). *See also, Sierra Club v. Kiawah Resort Associates*, 318 S.C. 119, 456 S.E.2d 397 (1995) (Thomas Dewey Wise, et al., for the Respondent Kiawah Resort Associates).

ORDER

For the foregoing reasons, the motions for summary judgment filed by the Defendant, Thomas Dewey Wise, are DENIED; the motion for summary judgment filed by the Plaintiff, South Carolina Coastal Conservation League, is GRANTED.

IT IS, THEREFORE, HEREBY ORDERED, ADJUDGED AND DECREED:

(1) The Plaintiff is granted the following declaratory judgment:

(a) The alteration of critical area and placement of fill at South Fenwick Island by or on behalf of the Defendant, Thomas Dewey Wise, and more particularly, the placement of fill material at the site of the bridge authorized by South Carolina Coastal Council Permit No. CC-85-152, the installation of pipes, "stand-pipes" or "flashboard riser structures" and bulkheads at the same site, and the installation of a new "trunk" at a nearby site, were all activities that require a permit properly issued by the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, in order to be in compliance with the South Carolina Coastal Zone Management Act, S.C. Code Ann. §§ 48-39-10, *et seq.*

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(b) The alterations of critical area and the placement of fill and structures at South Fenwick Island by or on behalf of the Defendant, Thomas Dewey Wise, as described in paragraph (a) above, were all done without a duly authorized permit issued by the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management.

(c) The South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management has no legal authority to approve an alteration to or placement of fill in critical areas of the coastal zone except through compliance with the statutory and regulatory requirements for the issuance of a permit pursuant to S.C. Code Ann. §§ 1-23-130 and 1-23-150.

(d) The “Enforcement Settlement Agreement,” an agreement entered into between Wise and DHEC, exceeds DHEC’s regulatory authority, is *ultra vires*, is null and void and does not constitute a bar to plaintiff’s maintenance of this action under S.C. Code Ann. § 48-39-160.

(2) The Defendant, Thomas Dewey Wise, is hereby permanently restrained and enjoined from further placement of fill or structures into the critical area without first obtaining all appropriate permits.

(3) The Defendant, Thomas Dewey Wise, is hereby ordered and directed to remove the fill, the three 24-inch pipes, the “standpipes” and the bulkhead he has placed or caused to be placed in the critical area at the site of the old bridge, and to restore the site and the surrounding area to its original environmentally desirable condition, within sixty days of the date of this order, and in accordance with a work plan submitted to and approved by DHEC/OCRM (with copy to counsel for the Plaintiff).

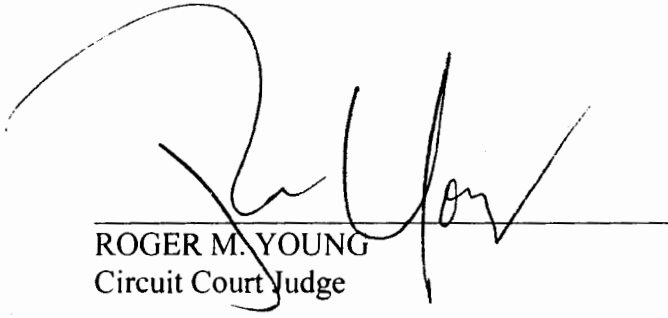
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(4) The Defendant, Thomas Dewey Wise, is hereby ordered and directed to either remove the new "trunk" within sixty days from the date of this order, or, in the alternative, to submit to DHEC/OCRM a proper application for a permit for the trunk within this time period; if the Defendant Wise chooses to submit a permit application, he shall comply with all terms and conditions of the permit as finally determined after full opportunity for hearing, administrative review, and judicial review.

(5) The Defendant DHEC/OCRM is hereby ordered and directed to supervise the removal of the fill and structures at the bridge site and restoration of the area, and to submit a report and photographs of the site to this Court and counsel for the Plaintiff within 30 days of the completion of all removal and restoration work.

(6) The Defendants are ordered and directed to pay the Plaintiff's costs of this action as provided by statute.

AND IT IS SO ORDERED.



ROGER M. YOUNG
Circuit Court Judge

Charleston, South Carolina

2/20, 2007