THE SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT

REPORT

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This document is the fourth in a series of reports on current issues in South Carolina environmental law and policy. It was written by James S. Chandler, Jr., Director of the South Carolina Environmental Law Project.

Stono River Victory Extends Rights of Environmental Groups

Two of SCELP's clients have won a significant victory for public participation in the environmental permitting process. On June 24, 1991, the South Carolina Supreme Court reversed the Department of Health and Environmental Control's decision to issue a "401 Water Quality Certification" for the expansion of Buzzard's Roost Marina. The decision, rendered in an appeal filed by SCELP on behalf of the Stono River Environmental Protection Association and Sierra Club, strengthens environmental groups' constitutional rights to participate in environmental decision-making by state agencies.

The Buzzard's Roost Marina case involves the conflict between marinas and shellfish harvesting. The DHEC staff originally denied the water quality certification for the marina expansion, because the expansion would permanently close shellfish beds to harvesting for human consumption - DHEC regulations require a closed safety zone around all marinas. Buzzards Roost argued that the Stono River is already closed to shellfish harvesting, and thus the marina would not really change anything. The river is classified for shellfish harvesting, however, and DHEC is committed to a plan of cleaning it up, hoping to someday open up shellfish harvesting. If the marina is expanded, nearby shellfish could never be harvested even if water quality clean-up efforts are successful.

After the DHEC staff denied the certification, Buzzard's Roost filed an administrative appeal under the agency's "contested case" appeals rules. The Stono River EPA was allowed to intervene to oppose the appeal, and Sierra Club also filed a motion to intervene. Before the appeal could be heard, the SC Supreme Court in April, 1987, issued an opinion in another appeal of a

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HAZARDOUS WASTE INDUSTRY TARGETS SOUTH CAROLINA

Hazardous waste management may present the most serious group of environmental issues facing the State of South Carolina. Our state has become sensitive to the label "dumping ground of the nation," but so far little has been done to provide an effective remedy to this situation. With a large landfill and two incinerators, South Carolina imports hazardous waste for treatment and disposal at rates far exceeding the rate our state's industry is producing these wastes. The hazardous waste industry has targeted South Carolina for three more proposed incinerators. SCELP is helping citizens groups challenge permits for these facilities. SCELP is also representing environmental groups in proceedings involving permits for existing hazardous waste facilities, pushing to ensure that the facilities are operated in the safest manner possible, or to have them closed down if they are posing too large a risk to the state's natural resources and public health. While some facets of the state's hazardous waste problem need political solutions, the immediate challenges are in courtroom and administrative law proceedings, where legal representation for environmental groups is essential if environmental aspects of the problem are to be fully addressed.

ThermalKEM, the Hazardous Waste Treatment Council, and the DHEC "Needs Assessment" Regulation.

In a sweeping ruling issued in January, Federal Judge Matthew Perry struck down every law South Carolina has passed in the last three years in its attempts to deal with its hazardous waste problems. How did this happen, and what does it mean?

Background. The nation's hazardous waste laws are new and still rapidly evolving. The federal Resource Conservation and Recovery Act (RCRA) was passed in 1976; the South Carolina Hazardous Waste Management Act was passed in 1978. Before either of the laws could be fully implemented, the federal Environmental Protection Agency (EPA) and the SC Department of Health and Environmental Control (DHEC) had to spend several years developing detailed and voluminous regulations specifying the technical standards for treating, storing and disposing of the enormous variety of hazardous wastes produced by modern life. Existing hazardous waste facilities were allowed to remain operating under a limited set of interim rules. Once the technical standards had been enacted, concerned citizens and the DHEC staff realized the need for more generalized policies to guide regulators in their decision-making on permitting and other hazardous waste management matters.

In 1987, the DHEC Board established the Hazardous Waste Task Force, with members chosen from the hazardous waste industry, political offices, and environmental groups, and charged it with the task of recommending policies to guide the state's management of hazardous waste. In 1988, the Task Force presented its report, recommending a fairly

comprehensive set of measures to improve state hazardous waste policy.

Unfortunately, most of the Task Force's recommendations have simply gathered dust. One key measure, however, made it into the law books as DHEC Regulation 61-99, the "needs assessment" regulation.

The "Needs Assessment Regulation". Regulation 61-99 requires an applicant for a new or expanded hazardous waste facility to demonstrate that the facility is needed to manage hazardous waste generated in South Carolina. Since South Carolina's three commercial hazardous waste facilities - the GSX landfill, the ThermalKEM incinerator, and the TOC incinerator - have capacities far exceeding the state's production of hazardous waste, the regulation effectively prevents the establishment of any new capacity for the foreseeable future.

Industry Challenges. The needs regulation faced challenges from the hazardous waste industry from the moment it was proposed.

Prior to passage of the needs regulation, all three commercial facilities in South Carolina had applied for permits to expand their operations by constructing new incinerators. The applications were submitted along with the applications for the permanent operating permits for the existing facilities, a requirement which had finally come into effect in 1986. Although the DHEC staff decided to issue permits for the existing operations, it stalled on making decisions on the expansion applications. When it became apparent that the DHEC staff intended to delay decisions until the needs regulation was in place, ThermalKEM in 1989 filed suit against DHEC, seeking an immediate decision and a judicial declaration that an emergency version of the needs regulation was invalid. Retired Chief Justice Bruce Littlejohn, sitting as a special circuit court judge, ruled in ThermalKEM's favor. On appeal, DHEC (and four environmental groups who had intervened in the case, represented by SCELP and Columbia attorney Bob Guild) first convinced the Supreme Court to allow it to delay its decision on the ThermalKEM permit until after the needs regulation became effective, then DHEC used the new regulation to deny the ThermalKEM expansion application. The SC Supreme Court later overturned ThermalKEM's lower court victory and sent ThermalKEM back to DHEC to pursue an administrative appeal of the permit denial. (For more on ThermalKEM's 1989 lawsuit, see SCELP *REPORT* No. 4, November 1989; the Supreme Court's order in the ThermalKEM case is unpublished; the case was disposed of prior to briefing and argument on the grounds that it was moot: DHEC had made a decision, and the emergency version of the needs regulation had expired).

Once DHEC denied the permit for ThermalKEM's second incinerator, ThermalKEM filed an administrative appeal. Before that appeal could be heard, however, ThermalKEM filed another suit in May, 1990, this time in federal court. The case alleges that the needs regulation discriminates against interstate commerce, in

violation of the United States Constitution's Commerce Clause. The suit also claims that the regulation violates several other state and federal laws, and includes charges that the DHEC Board illegally conspired to deny the ThermalKEM permit, and seeks money damages from the Board members.

The HWTC Suit. Soon after ThermalKEM's suit was filed, the Hazardous Waste Treatment Council (HWTC) filed a similar suit, also in federal court. The HWTC is an association of hazardous waste industry companies, including ThermalKEM and Laidlaw, the owner of the GSX landfill and the TOC incinerator. The HWTC suit challenges the DHEC needs assessment regulation, but also attacks state executive orders and statutes that ban the importation of some hazardous wastes, and a statute which reduces the amount of waste that can be landfilled each year.

Judge Perry's Rulings. SCELP filed motions in both the ThermalKEM and HWTC cases, seeking to intervene on behalf of Sierra Club, Energy Research Foundation, and three other groups involved in the ThermalKEM and GSX permit appeals.

Both cases were assigned to US District Court Judge Matthew J. Perry, who conducted initial hearings in each case in September, 1990. In January, 1991, Judge Perry issued rulings that denied the environmental groups' motion to intervene, declared the needs regulation and all other challenged laws to be unconstitutional, and enjoined DHEC and the State from enforcing any of these laws.

In Philadelphia v. New Jersey, 437 U.S. 617 (1978), the US Supreme Court ruled that the interstate transportation and disposal of solid waste (garbage, etc.) is interstate commerce, and struck down a New Jersey law which banned burial of out-of-state waste in New Jersey landfills. ThermalKEM and the HWTC argued, and Judge Perry ruled, that this precedent requires the challenged SC laws to be overturned.

The Appeals. The State and DHEC have appealed Judge Perry's rulings, and SCELP has appealed the intervention order. The appeals were argued before the US Fourth Circuit Court of Appeals on May 6, 1991. A decision on the appeal has not been rendered.

The State's appeal contends that the needs regulation and other challenged laws were authorized by provisions in RCRA and in the Superfund law, officially titled the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). Section 104 of CERCLA was amended in 1986 to require each state to certify to the President that it had provided adequate facilities, or had entered into agreements with other states which would provide facilities, to handle all hazardous wastes projected to be generated within the state during the next 20 years. The Act says that the penalty for failing to provide this capacity will be the loss of the state's share of the federal Superfund money.

RCRA says that hazardous waste management is primarily a state responsibility, and that states, while they must meet certain minimum federal standards, may enact waste laws that are more stringent than the federal laws. RCRA also

allows EPA to turn RCRA permitting over to the states; EPA has authorized DHEC to handle RCRA permitting for facilities in this state.

The needs regulation does not ban out-of-state waste, but it does require DHEC to deny permits for facilities that are not needed to handle SC waste. The challenged executive orders and statutes: (1) ban disposal in SC of wastes that are banned in the state in which they are generated; (2) reserve capacity within SC facilities for wastes generated within SC; and (3) reduce the annual volume of wastes disposed of at the GSX landfill from 135,000 tons/year to 120,000 tons/year.

In seeking to intervene in the ThermalKEM and HWTC cases, SCELP has argued only on behalf of the needs regulation. The needs regulation is a key issue in the DHEC administrative appeals involving ThermalKEM and GSX; the other laws are not involved in the permit proceedings.

In his rulings, Judge Perry lumped the needs regulation in with the other laws and declared them all unconstitutional without making a detailed examination of each separate law. His order also said that the environmental groups did not need to intervene, because the State would adequately represent their interests, and that their participation would only cause needless delays in the trial.

SCELP's appeal argues that the environmental groups represent interests that are quite distinct from the State's interest, and charges that the State cannot adequately represent those interests. The State has done little to distinguish the needs assessment from the other challenged laws, and this failure is at the heart of the argument that the environmental groups' interests are not being adequately protected by the State.

In fact, the needs regulation operates quite differently from the other challenged laws. The needs regulation is the only one of the challenged laws to have undergone the thorough process of public hearings, DHEC staff and Board review, as well as General Assembly review. The other laws all started out as executive orders and were bold, popular political moves. The lead attorney for the State must pursue a strategy designed to defend all of the executive orders, statutes and the needs regulation. To effectively distinguish the needs regulation makes the executive orders look bad in the comparison. While SCELP feels that the State has made compelling arguments and has generally done a good job in handling the case, its strategy unfortunately risks leaving the needs regulation to rise or fall with the other laws.

While the federal court battle continues, ThermalKEM has also continued to push for its permit in the DHEC administrative proceeding. ThermalKEM first tried to have the environmental groups dismissed as parties to the permit hearings, claiming that they had no standing to participate. When the DHEC Hearing Officer ruled that the groups have standing, ThermalKEM went to state court trying to get him reversed. Circuit Judge Tom Hughston upheld the DHEC Hearing Officer.

When Judge Perry declared the needs regulation

unconstitutional, ThermalKEM filed a motion asking the DHEC Hearing Officer to summarily order DHEC to grant a permit. That motion is pending.

ThermalKEM has also amended its federal court suit to add a challenge to DHEC's new "siting" regulations for hazardous waste facilities.

Will South Carolina Get Three New Incinerators? DHEC staff members have stated (wrongly, we think) that without the needs regulation, there is no basis upon which to deny a permit for ThermalKEM's proposed new incinerator. If the needs regulation is declared invalid after all appeals, DHEC may issue permits which could dramatically increase the flow of hazardous waste into this state.

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The GSX Hazardous Waste Landfill - Permit Update.

Since the late 1970s, a hazardous waste landfill has been operating near the headwaters of the Santee Cooper lake system near the town of Pinewood. The landfill is run by a company known as GSX of South Carolina, Inc., a subsidiary of Laidlaw Environmental Services, Inc. Administrative proceedings over the operating permit for the landfill are pending before DHEC.

Under state and federal hazardous waste permitting regulations, the landfill must demonstrate, among other things, that it has enough insurance or financial strength to pay for any damage that could occur from accidents at the facility. In 1985, a DHEC report recommended that the landfill be required to maintain at least $100 million in corporate guarantees to meet this requirement. After DHEC made a deal to accept a $30 million insurance policy instead, appeals were filed by several environmental groups. As a result of those appeals, the DHEC staff was directed to reassess the financial responsibility requirements. The DHEC staff hired Peat Marwick, an international accounting firm, to assess the risk of the landfill and make a recommendation as to financial responsibility.

The Peat Marwick report was issued in 1989. It recommends that the landfill maintain the $30 million insurance policy, but also recommends that the landfill establish a cash trust fund of at least $114 million. Peat Marwick said that GSX was essentially insolvent, and predicted that it would simply declare bankruptcy and walk away from any big accident at the landfill. If that happens, SC taxpayers could be stuck with huge clean up costs.

When the DHEC staff in 1989 announced its decision to issue an operating permit to the GSX landfill, the proposed permit included a long list of special conditions. GSX filed an appeal of the staff decision, to challenge the special conditions, one of which limited the term of the permit to just three years. Two environmental groups, Citizens Asking for a Safe Environment (CASE) and Environmentalists, Inc., also filed appeals, contending that the permit should be denied.

Because DHEC has treated the issuance of the permit for the landfill separate from its decision on the financial responsibility requirements,

the proposed GSX permit requires only the minimum $6 million coverage. Energy Research Foundation (ERF) and Sierra Club, represented by SCELP, filed a limited appeal to contest these permit conditions.

DHEC in July, 1989, announced a draft decision to require $30 million in insurance and a $114 million trust fund. The trust fund, however, would be accumulated over a period of ten years. During the three years of the permit, only about $34 million would go into the fund. A public hearing was held on June 27, 1990, for comments on the draft decision. The final DHEC staff decision, the final stage before administrative appeals, remains pending.

On SCELP's motion, the DHEC Hearing Officer, Columbia attorney David W. Robinson, II, consolidated the permit appeals with the financial responsibility proceeding. Since the DHEC staff was still assessing the financial responsibility issue, Robinson delayed the permit appeal hearings until the financial responsibility proceeding reaches the appeal stage.

For more on the GSX landfill and the Peat Marwick report, see SCELP Report No. 2, April, 1989).

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DIOXIN THREATENS WINYAH BAY

Dioxin, described by scientists as one of the most toxic substances on earth, is suspected of causing cancer, birth defects, and other adverse effects on humans.

In the mid-1980's, the US Environmental Protection Agency (EPA) learned that some paper mills were discharging dioxin into streams with the mills' wastewater. Dioxin was being formed as a by-product of the process of bleaching paper with chlorine.

In 1988, EPA conducted a comprehensive study of the effluent of all 104 of the nation's bleached-paper mills. The study found that the International Paper Company mill at Georgetown was discharging as much or more dioxin than any other mill in the country. Fish tissue samples found dioxin in the fish throughout the Sampit River, where the mill effluent is dumped, as well as in Winyah Bay, into which the Sampit flows about a mile or two downstream from the IP discharge pipe.

Although some states have banned fishing in areas with fish dioxin levels below that found in the Sampit River and Winyah Bay, DHEC officials only issued a "fish consumption advisory" warning Georgetown residents that they might want to limit the amount of fish they eat from the River, or to "consult your physician."

The initial testing of IP's effluent found dioxin concentrations of about 600 parts per quadrillion (ppq). The dioxin levels in fish were higher because fish tend to bioaccumulate the toxin in their body tissues at rates of at least 5000 times that of the water concentration.

Under Section 304(l) of the federal Clean Water Act, DHEC was required to place the Sampit River on its list of "toxic hot spots" and to put in place a strategy for