Mountains & Marshes

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Supreme Court Upholds Wetland Protections

Sam B. McQueen v. South Carolina Coastal Council

On April 28, 2003, the SC Supreme Court ruled that an unconstitutional "taking" did not occur when the SC Coastal Council (now OCRM) denied a permit to build a bulkhead and fill tidelands on two residential lots at Cherry Grove in North Myrtle Beach.

The SC Coastal Conservation League, Sierra Club, National Wildlife Federation, SC Wildlife Federation, and the League of Women Voters of Georgetown County had filed Amicus briefs in the case, urging this result.

The case, *Sam B. McQueen v. South Carolina Coastal Council,* involved two lots purchased by McQueen in the 1960s. He never built on the lots and they gradually washed away by natural forces including tidal action and storm water movement.

One of McQueen's vacant lots (note oval-shaped scarp line) in the center of this photo showing the effects of erosion. Also, see fully-bulkheaded lot at left center of photo.

By 1991, when he finally applied for a permit to build bulkheads to reclaim the lots, the lots had reverted to critical area salt marsh and mud flats (the lots were originally marsh but had been filled in during the 1950s). The Coastal Council denied the permit, citing regulations prohibiting filling of critical area wetlands for residential development. The state trial court upheld the denial of the permit, but ruled that the permit denial had "taken" McQueen's lots and ordered the agency to pay McQueen the current market value of the lots. The SC Court of Appeals affirmed this ruling in 1998.

The SC Supreme Court heard the case for the first time in 2000 and reversed the trial court and Court of Appeals decisions. The Supreme Court said that McQueen's neglect of his property demonstrated that he had no reasonable investment backed expectations as to development of the lots. In 2001, the US Supreme Court vacated the SC Supreme Court's ruling, without addressing the merits of the case, and remanded the case to the SC Supreme Court for reconsideration in light of the 2001 case of *Pallazzollo v. Rhode Island.*

The Supreme Court's new ruling maintains the same result as the 2000 ruling, but on different grounds.

The SC Supreme Court ruled that the public trust doctrine places "a restriction on McQueen's property rights inherent in the ownership of property bordering tidal water." The Court also said "Significantly, under South Carolina law, wetlands created by the encroachment of navigable tidal water belong to the State . . .

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"The tidelands included on McQueen's lots are public trust property subject to the control of the State. McQueen's ownership rights do not include the right to backfill or place bulkheads on public trust land and the State need not compensate him for the denial of permits to do what he cannot otherwise do . . . . Any taking McQueen suffered is not a taking effected by State regulation but by the forces of nature and McQueen's own lack of vigilance in protecting his property."

The full opinion is on the web at http://www.judicial.state.sc.us/opinions/displayOpinion.cfm?caseNo=25642.

The ruling is a critically important affirmation of public trust rights and of OCRM's regulatory authority.

Council on Coastal Futures

A review of 25 years of coastal zone management

SCELP's President Jimmy Chandler has been appointed a member of the Council on Coastal Futures as a representative of environmental interests. The Council is a nineteen member panel appointed by the South Carolina Department of Health and Environmental Control Board for the purpose of reviewing 25 years of the state's coastal management program and making recommendations for the future effectiveness and success of the program.

The Council on Coastal Futures has three functions:

1) to evaluate priority coastal issues;

2) receive and consider input from stakeholders and the public; and

3) to make recommendations required to address key issues.

The Council will meet the first Friday of every month (except July) through the spring of 2004, with meeting locations changing monthly. Information about the council and future meetings can be accessed at www.scdhec.com/ocrm/HTML/CCF.htm.

During its initial meetings, the Council has grouped the issues it is evaluating into three categories:

(1) concerns from the development community about the permitting and appeals processes and regulatory impacts on property rights;

(2) ways in which the coastal management program can better assist local governments with land use and environmental issues; and

(3) substantive coastal environmental issues and how they should be addressed.

The Council decided to address these three groups of issues in the order listed above, and through its May meeting has spent most of its time evaluating the first two groups of issues.

So far, the Council has heard mostly from development interests. The Council has endorsed increased use of mediation as a method of resolving permit appeals. It has declined to recommend any changes in the current deadlines for permit decisions, but has recommended improved public notices for stormwater permits where projects have impacts on freshwater wetlands.

Although general concerns have been expressed about property rights, no identification has been made of specific violations of property rights under the current coastal management program.

Criticisms of citizens' rights to appeal coastal zone permits have included complaints about delays caused by the appeals process and allegations of frivolous appeals. Proposed changes include allowing developers to build projects before appeals are decided, stricter limits on citizens' "standing" to appeal, and requirements that citizens who appeal must post bonds to pay for any financial detriment to a developer from the appeal.

At least one of the proposed changes to the appeals process, to eliminate the "automatic stay" that stops developments until an appeal is heard, has been the subject of legislation proposed in the South Carolina General Assembly.

See following article. This proposal is under debate by the Council.

Legislation Proposed to Limit Citizen Appeals Rights

Two almost identical bills introduced to eliminate "automatic stay"

Bills have been introduced in the SC General Assembly to free developers from the burdens of citizen appeals of environmental permits and to make it more difficult for a citizen to challenge harmful development.

Senator John Land and Representative Jim Harrison have introduced nearly identical bills to eliminate the "automatic stay" provision of DHEC permitting regulations. The House bill has been endorsed by a subcommittee of the Judiciary Committee.

The South Carolina Tourism Council, a group of coastal developers including Burroughs & Chapin, the Myrtle Beach development giant, is pushing this legislation and has actively promoted it before the Council on Coastal Futures.

Removing the stay would allow developers to proceed with permitted activities that could cause damage to the environment before concerned citizens are given a full hearing to challenge the permit. Under current law, DHEC permits are not effective until all administrative appeals have been completed.

The proposed change would dramatically reduce the ability of environmental groups and concerned citizens to effectively challenge bad environmental permitting decisions. If adopted, the only way a concerned citizen could stop a harmful project during an appeal would be to make a rapid legal demonstration of a likelihood of success on the merits, irreparable harm if an injunction is not granted, lack of harm to the developer from delay, and that an injunction is in the public interest. Such a speedy demonstration would be difficult and costly. Then, if a challenger is able to meet this high standard for a preliminary injunction, he or she must post a bond to insure against any losses the developer might sustain.

SCELP believes that the existing DHEC rules, in place for over 25 years, are fully justified on constitutional, statutory and fundamental fairness grounds. Clearly, the only way to prevent potentially illegal harm from occurring is to afford interested persons a meaningful opportunity to challenge the validity of a permit before construction begins by keeping the automatic stay in place.

YOU CAN HELP! Please notify your legislators and tell them you oppose any attempt to eliminate the automatic stay.

Erosion of Citizen Appeals Rights

Administrative Law Judge Division making erroneous rulings regarding "standing"

In a series of recent cases, several Administrative Law Judge (ALJ) decisions have taken what SCELP believes is an erroneous new view of the issue of "standing" in environmental cases. The decisions have dismissed permit appeals on the grounds that the people filing the appeals have no standing and thus are not entitled to a hearing. SCELP believes that these decisions, unless challenged and reversed, present a real threat to citizens' rights to challenge bad environmental permitting decisions.

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Since 1972, the rule for standing has required a person to demonstrate that he or she uses the natural resources that are being harmed or threatened with harm and that the harm to the resource would lessen the aesthetic and recreational values of the resource. Under the recent ALJ decisions, judges are requiring a strong demonstration of direct harm, creating a burden that is much more stringent, and markedly departing from the fairly lenient standard set over years of rulings on standing by the US Supreme Court, federal courts of appeals, and state courts.

In one case, a man who walks on the beach every day was held to lack standing to appeal a permit allowing the excavation of sand from the public beach and the moving of sand to protect private property. A man who regularly walks along a stream was held to lack standing to appeal a storm water permit that would have negative impacts on the stream ecosystem. A group whose member uses a small tidal creek was held to lack standing to challenge a permit for a dock that would block navigation on the stream. All of these cases were dismissed without even an evidentiary hearing on the issue of standing.

These cases are on appeal and we expect our appellate courts to correct these erroneous decisions. Not all ALJ's have imposed these more stringent standing rules.

Under the rulings of some of our ALJ's, some of our most important environmental cases might never have been addressed on the merits – the citizens and groups would likely have been dismissed as lacking standing. Until these recent rulings can be addressed by appellate courts, the citizens of South Carolina may have more difficulty in challenging illegal environmental permitting decisions.

Challenge to Public Trust Doctrine?

Perrone v. State of South Carolina

SCELP, representing the SC Coastal Conservation League and Sierra Club, has filed a motion to intervene in a lawsuit filed by two Horry County residents against the South Carolina Department of Health and Environmental Control (DHEC). The suit claims that the plaintiffs own a large portion of the marshes and creeks in Cherry Grove.

Gloria N. Perrone and Joel E. Perrone have sued DHEC in Horry County state court, asking the court to declare them the owners of a substantial portion of the marshes and creeks in Cherry Grove. They also ask the court to enjoin DHEC from issuing any permits for docks or other structures in this marsh. They appear to be laying the groundwork for taking legal action against everyone who has built a dock in "their" tidelands. They have asked the State to prevent others from using "their" tidelands.

So far, nothing filed in the lawsuit clearly defines the extent of the areas claimed by the Perrones. The Perrone's attorney has said informally that the claim covers all areas of the marsh at Cherry Grove.

A Perrone relative, C. D. Nixon, was the developer who did the dredging and filling of marsh that created most of the lots in what is now Cherry Grove. His dredging and filling was stopped in the mid-1960s by a suit filed by the Attorney General. A judge ruled that Nixon had a Kings Grant that allowed him total dominion over this area. The Attorney General appealed to the SC Supreme Court. Before the appeal was decided, the case was settled. The settlement drew a line through the marshes and creeks and divided it up between Nixon and the public.

The ownership and related Public Trust doctrine issues are complex. SCELP believes that there are sound defenses to the claims now raised by the Perrones.

The State and DHEC have agreed to a Consent Order under which the agency will not issue any permits for docks, bulkheads or other structures in the area claimed by Perrone, nor "permit any parties access" to these areas. This agreement has already led to problems for holders of and applicants for critical area permits.

Our effort to intervene in this case seeks to help defend the public trust nature of these marshes and waters. Other citizens who own property bordering on the areas claimed by the Perrones, or who use the waters and marshes for fishing or other recreational uses, could also intervene.

The case is important because it potentially affects the future of dozens, if not hundreds, of acres of salt marsh. Cherry Grove's estuary was dramatically impacted by CD Nixon's old dredge and fill operation, and the Perrone claims could lead to destruction of some of the remaining natural marsh and creeks, affect property values, the ability to build docks and recreational uses of the marshes and creeks.

Update on Attacks to Coastal Laws

We've made substantial progress on the three cases featured on the cover of our December 2002 newsletter. We update them for you here.

Developer Withdraws All Claims In Freshwater Wetlands Case

A year ago, Beaufort County Judge Thomas Kemmerlin ruled that the SC Coastal Management Program is invalid, that DHEC/OCRM has no authority to regulate isolated freshwater wetlands, that DHEC/OCRM has no authority to require a property owner to preserve isolated wetlands or to require mitigation for destroyed wetlands, and that the agency could not consider wetland impacts at all in its analysis of the developer's storm water management plan.

We filed a strong appeal brief on behalf of SC Coastal Conservation League, Sierra Club, SC Wildlife Federation and the League of Women Voters of Georgetown County, and DHEC/OCRM signed on to our brief. We were optimistic and looking forward to the Supreme Court hearing.

As the date for hearing our appeal in the SC Supreme Court neared, the developer dropped all of its claims in this case. The developer worked out an agreement with SCDHEC/OCRM under which the agency granted a stormwater permit and coastal zone consistency certification, allowing the developer to fill a portion of the wetlands. In return, the developer agreed to drop all claims, to ask the South Carolina Supreme Court to vacate, or nullify, the ruling of Judge Kemmerlin, to preserve some wetlands and provide upland buffers, and to mitigate for filled wetlands.

After the developer withdrew all of its claims, the appeal was then dismissed, and Judge Kemmerlin's order was vacated -- nullified in its legal effect.

We believe that our strong appeal led to the developer's decision to withdraw its claims. While the controversy over isolated freshwater wetlands continues, the threat posed by this case has been removed.

Beaufort County Dock Ordinance Upheld

The lawsuit challenging the validity of the Beaufort County dock ordinance has ended with a settlement that keeps the dock ordinance in place. The parties agreed to live with the trial court's ruling -- that the ordinance is valid but that the Bull Point development has vested rights to docks -- and to forego any appeals.

The outcome of this case may encourage other local governments to enact stronger dock regulations to protect coastal waters and wetlands.

For more case updates, go to **www.scelp.org**

Intervention Allowed in Daufuskie Seawall Case

Our motion to intervene in this case on behalf of the SC Coastal Conservation League has been granted. The case involves a challenge to the legality of the SC Beachfront Management Act's ban on seawalls. Prior to our intervention, the plaintiffs, a group of Daufuskie Island beach property owners, obtained an order allowing the first beach seawall in SC in 15 years. DHEC/OCRM's appeal of that order is pending in the SC Court of Appeals. The order allowing the seawall was only a preliminary ruling, and does not bind the trial court.

We believe that the order allowing the seawall was erroneous and that we will ultimately prevail on the merits.

South Carolina Environmental Law Project, Inc.

SCELP is a 501c3 tax exempt non-profit corporation. Our mission is **to protect the natural environment of South Carolina by providing legal services and advice to environmental organizations and concerned citizens and by improving the state's system of environmental regulation.** SCELP's cases have saved wetlands, improved water quality, reduced hazardous waste risks, protected other natural resources, and helped enforce penalties against those who have violated our environmental laws. SCELP's clients have included local state and national groups. We also provide continuing legal advice to concerned citizens and promote environmental law education.

James S. (Jimmy) Chandler, Jr., is President and General Counsel of SCELP. Staff members are **Amy Armstrong**, Equal Justice Works Fellow and staff attorney, and **Kathy Thomas**, Assistant to the President. Our Board members are:

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