THE SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT

REPORT

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This document is the first of 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.

SOUTH CAROLINA FRESHWATER WETLANDS LAW

South Carolina's Freshwater Wetlands Need Protection

In 1988, South Carolina environmental groups won a series of highly publicized wetlands cases. In these cases, the Coastal Management Program was interpreted by the state Supreme Court and the Coastal Council as strongly favoring protection of wetlands, and requiring a heavy burden of proof of public benefits before wetlands can be altered.

INSIDE

3 - The Coastal Management Program - a Good Model

4 - Existing State Programs

5 - Coastal Council Certifications

7 - Water Resources Commission/Budget and Control Board Navigable Waters Permitting Program

7 - The DHEC 401 Certification Program

8 - About The SC Environmental Law Project

These cases may have left a general public impression that South Carolina has a strong wetlands protection program. The truth, however, is that 38 of South Carolina's 46 counties have no state wetlands protection program at all.

Only the 8 counties of the "coastal zone" are protected by the Coastal Council's Coastal Management Program, yet the 38 counties outside the coastal zone contain over two-thirds of South Carolina's wetlands. In these counties, the only program to protect wetlands is the "Section 404" permitting program managed by the U. S. Army Corps of Engineers. The 404 program only regulates direct filling of wetlands, however, and the program has been widely recognized as inadequate to deal with most wetland losses.

In the absence of a protection program, wetlands are constantly being lost. It is generally agreed that we have lost about half of the wetlands that existed in the contiguous United States when European settlement began.

Recognizing the problem, a number of groups have recommended new state and federal legislation. In November, 1988, the National Wetlands Policy Forum issued its Report calling for "a national wetlands protection policy to achieve no overall net loss of the nation's remaining wetland base." The Forum, chaired by New Jersey

Governor Thomas Kean, included South Carolina Governor Carroll Campbell (Vice-Chair), as well as representatives of development, farming, academia, government and environmental groups. Its report called for a new federal program to protect wetlands. Delegation of the new federal program to state agencies was among several dozen specific recommendations included in the Forum's Report.

Governor Campbell has announced plans to establish the Governor's Freshwater Wetlands Forum to recommend a state wetlands policy. To some observers, the Governor's Forum is unnecessary and may simply delay enactment of a state wetlands protection act. Several state agencies have already studied freshwater wetlands policy. The Department of Parks, Recreation and Tourism recently issued a comprehensive report on South Carolina freshwater wetlands, and the Water Resources Commission has prepared a proposed Freshwater Wetlands Protection Act. When Governor Campbell took office, he inherited a wetlands task force which had been meeting for a number of months since it was established under Governor Richard Riley. That task force has apparently been disbanded.

Two freshwater wetlands protection bills have been proposed in the General Assembly, by Sen. Doug Hinds (D-Georgetown) and Rep. Bubber Snow (D-Williamsburg-/Georgetown). The bills are versions of the Water Resources Commission bill, developed by a committee chaired by Sen. Hinds while he was a Commission member. The bills would establish a wetlands permitting program to be run by the Commission. The program would only protect wetlands adjacent to navigable streams and their tributaries with flows of over 5 cubic feet per second. Isolated wetlands and wetlands above the 5 cfs flow point would be exempted from the program, and, by implication, fair game for destruction. With the environmental committees busy with hazardous waste and beachfront issues, neither bill is expected to see much action until 1990.

The Sierra Club has drafted a proposed wetlands bill which is basically a broadened and strengthened version of the Water Resources Commission bill. The Sierra Club proposal would cover all wetlands, as defined by the US Environmental Protection Agency, and would require permit applicants to establish water-dependency, a lack of feasible alternatives, and an overriding public interest before receiving a permit to permanently alter wetlands. The Sierra Club's proposed standards are based on SC Coastal Management Program wetland policies, which have been cited by the SC Supreme Court in decisions which overturned wetlands permits. The Sierra Club's proposal also calls for the state to assume responsibility for the existing and any future federal wetlands permitting programs, and provides measures to streamline the permitting and appeals process.

Unfortunately, the calls for new wetlands protection laws, coupled with the success of environmental groups in coastal wetlands cases, have created a backlash - developers and others have organized a lobbying effort to defeat efforts to enact protection for non-coastal wetlands. A variety of rumors about the size and funding of this effort have been circulating among environmentalists, but no public announcements have revealed the extent of the effort or what type of wetlands laws would be acceptable to developers. Development lobbyists are evident at agency board meetings and legislative hearings concerning wetlands, however, and certainly the debate over wetlands is heating up.

Action on the federal level may override the South Carolina wetlands debate. President Bush has endorsed the

"no net loss" goal recommended by the National Wetlands Policy Forum, and has appointed William Reilly to head the Environmental Protection Agency. Reilly was formerly President of The Conservation Foundation, a respected group which convened the wetlands Forum. The EPA has issued a plan to implement the Forum's recommendations to the extent possible within the agency's existing authority. Several of the Forum participants, including the National Audubon Society and the National Wildlife Federation, are preparing a federal legislative proposal based on the Forum report. The Sierra Club recently established a national wetlands task force, which is preparing a Club response to the Forum report and plans to add its support to the movement to enact new federal legislation. These activities make it likely that at least some type of federal wetlands act will be passed in 1989 or 1990.

The Coastal Management Program Provides a Good Model for a Freshwater Wetlands Program.

Following its creation in 1977, the Coastal Council prepared a set of permitting regulations and the Coastal Management Program. These regulatory policies generally require an applicant to show that there is a lack of feasible alternatives and/or an overriding public interest before a permit can be issued for wetlands alterations. The policies cover a wide variety of projects with potential wetlands impacts, and the state has over ten years experience applying these policies. Some of the policies cover freshwater wetlands similar to those existing in the 38 counties not covered by the Coastal Management Act. The policies have also been strenuously applied by the South Carolina Supreme Court.

In the first Coastal Council wetlands case to reach the state Supreme Court, Carter v. Coastal Council, 281 S.C. 201, 314 S.E.2d 327 (1984), the court ruled that the Council's denial of a permit to fill wetlands above the mean high water mark was within its authority under the Coastal Management Act. In responding to Carter's claim that the permit denial was a "taking" of his property, the Court said: "While unquestionably [the] wetland would have greater value . . . if it were filled, '[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.'"

In 1986, the Supreme Court unanimously reversed a permit issued to C. E. Graham Reeves which would have allowed the construction of dikes to impound 600 acres of wetlands, in a case styled State ex Rel. Medlock v. SC Coastal Council, 289 S.C. 445, 346 S.E.2d 716 (1986). The opinion of the court set forth two independent bases of its decision: (1) that the dikes would have blocked navigable waterways in violation of the South Carolina Constitution, and (2) that neither aquaculture nor duck hunting, Reeves' planned uses of the impoundments, constitute an "overriding public interest" to justify destruction of wetlands.

In 1988, the Supreme Court again unanimously reversed a wetlands permit approval that had been issued by the Coastal Council, in a case captioned SC Wildlife Federation v. SC Coastal Council, (Opinion No. 22897, August 8, 1988). In that case, Litchfield-by-the-Sea had applied for permits to dredge canals through wetlands adjacent to the Waccamaw River, to provide river access to residential lots in Litchfield's resort development known as Willbrook Plantation. Because the project was located in a freshwater area, it was not covered by Coastal Council's permitting jurisdiction. However, under

the Coastal Management Act, the Coastal Council must review all state and federal permits for activities in the Coastal zone and certify whether those permits are consistent with the Coastal Management Program. The Coastal Council voted to issue a certification for the Willbrook canals, which the developer had attempted to justify by pointing to the jobs, personal income and tax revenues that would result from the development. In reversing the Coastal Council certification, the Supreme Court held that "evidence of purely economic benefit is insufficient as a matter of law to establish an overriding public interest."

The state's experience with the Coastal Management Program suggests that broadening its coverage to all state wetlands would be a simple and effective way of protecting freshwater wetlands. Rather than presenting state agencies, developers, and environmental groups with a new set of rules to understand and argue over, extending the coastal program statewide would place the state's wetlands under a unified system which is increasingly well understood.

Existing State Programs Could Be Strengthened to Protect Freshwater Wetlands.

The Coastal Council permitting program only covers salt and brackish water wetlands - the so-called "critical areas" of the coastal zone. In freshwater areas of the coastal zone, the Coastal Council implements the Coastal Management Program through its "certification" program. Other state agencies involved in the regulation of freshwater wetlands include the Water Resources Commission and the Department of Health and Environmental Control. The WRC indirectly protects wetlands adjacent to navigable streams through a permitting program it manages under the direction of the State Budget and Control Board. DHEC gets involved through a certification program created by Section 401 of the federal Clean Water Act.

Coastal Council Certifications.

Under the South Carolina Coastal Management Program, no federal or state agency can issue a permit for an activity in the coastal zone unless the Coastal Council first certifies that the activity would not contravene the policies of the Coastal Management Program. The certification requirement is the mechanism for enforcement of the Coastal Management Program in areas outside the "critical areas" which are managed through the Coastal Council permitting program.

In August, 1988, the South Carolina Wildlife Federation, Sierra Club and the League of Women Voters of Georgetown County won a South Carolina Supreme Court decision which upheld their right to enforce the Coastal Management Program policies in certification cases. South Carolina Wildlife Federation, et al. v. South Carolina Coastal Council and Litchfield-by-the-Sea, (Opinion No. 22897, August 8, 1988). Following that decision, the South Carolina Environmental Law Project began a review of the certification procedures currently utilized by the Coastal Council, as well as an examination of some of the projects being certified. In November, 1988, the Project submitted two Petitions to Coastal Council, on behalf of Sierra Club and the League of Women Voters of Georgetown County, challenging two certifications that were alleged to have been issued without public notice and in violation of wetlands protection policies of the Coastal Management Program.

One of the challenged certifications was issued for the same development, Willbrook Plantation, that had been under review in the Supreme Court decision. In its decision, the Supreme Court threw out a Coastal Council certification

for a canal that would have altered 7 acres of wetlands. While that case was pending, the developer made alterations to over 70 acres of wetlands, including excavations and bulkheading, without first obtaining a Coastal Council certification. In the second case, the Brays Island Company applied for certification of a residential development plan which included dredging out a 5 acre wetland to create a pond adjacent to a golf course clubhouse.

Neither case was placed on public notice prior to issuance of the certifications. In the Brays Island Company case, the certification was approved by the Coastal Council Management Committee after a hearing at which the Council staff recommended denial of the certification, and the Sierra Club objected to the hearing because no notice of the hearing had been given. In the Willbrook case, no hearing was held and the certification was issued by the Council staff.

In the Petitions challenging these certifications, the groups asked Coastal Council to suspend the approvals, and either start a new certification process with a public notice and opportunity for public comment, or provide the groups with an administrative appeal process to challenge the approvals. The Coastal Council voted at its December, 1988, meeting to deny the Petitions, stating that it lacked authority to grant such Petitions, and that there is no provision in the Coastal Management Program requiring public notice, a public hearing or any appeals process. The Willbrook case has been appealed to state Circuit Court by the League of Women Voters.

In January 1989 case, the Coastal Council's Management Committee approved a plan to excavate 1.2 acres of wetlands to create a golf course pond which would receive a development's stormwater runoff. Again, no public notice was given and no public comment period was provided. In another case, a North Myrtle Beach residential development project known as Ocean Inlet Plantation & Golf Club, several acres of wetlands were altered without a certification. A certification application is now pending, but no hearing before the Management Committee has been scheduled so far.

These cases indicate that the certification process is not operating in the manner intended by the statutes passed by the General Assembly. The certification process fails to provide procedural rights - public notice and a hearing - mandated by the South Carolina Administrative Procedures Act (the APA), and even if the APA is not applicable to the certification program, the certification process fails to provide due process of law, in violation of state and federal constitutional rights.

The Coastal Management Program is flawed in that it does not explicitly require public notices or hearings on certifications of state agency permits, even though notice and opportunity for hearing is required for certifications of <u>federal</u> permits. In a 1978 decision, the South Carolina Supreme Court held that basic due process rights apply to a state agency's issuance or transfer of a certificate. <u>Smith & Smith v. SC Public Service Commission</u>, 271 S.C. 405, 247 S.E.2d 677 (1978).

In addition, the Coastal Management Program's wetlands policies do not appear to be understood by developers and their consultants, and the Coastal Council has not consistently applied and enforced those policies. As a result of these deficiencies, wetland resources in the coastal zone are being destroyed and degraded in violation of Coastal Management Program policies.

SCELP is working on recommendations to close the loopholes and procedural deficiencies of the certification process. In

addition, developers and consultants should be educated about the certification policies and procedures, and the Council should take action to prevent wetlands alterations which occur without certifications. In making certification decisions, the Council should carefully consider the policies of the Coastal Management Program, as interpreted by the Supreme Court's Willbrook decision. If these steps are taken, the certification program could be an effective protector of coastal zone freshwater wetlands.

Water Resources Commission/ Budget and Control Board Navigable Waters Permitting Program.

The State Budget and Control Board (BCB) has created a permitting program for projects on navigable waterways, and has delegated primary responsibility for administration of the program to the Water Resources Commission (WRC). SC Code Ann. Reg. 19-450. The program may be on somewhat shaky legal grounds since no statutes specifically authorize the regulations which created this program. To date no legal challenge to the program has been ruled on by the courts.

In reviewing permit applications, the regulations require the BCB/WRC to consider the total impact of the project, including impacts on natural resources. Nothing in the regulations, however, expressly provides specific protection for wetlands. Under this permitting program, the WRC and BCB approved a permit for the Willbrook canal which was later overturned by the state Supreme Court. If the Water Resources Commission desires to protect wetlands, which its proposed bill suggests, its existing permit program would be a good place to start.

The DHEC 401 Certification Program and Wetlands.

Section 401 of the federal Clean Water Act, 33 U.S.C. 1341, requires applicants for federal permits for projects with impacts to waters of the United States to first obtain a certification from the appropriate state agency, that the project would not violate state water quality standards. In addition, the navigable waters permitting program of the State Budget and Control Board requires a water quality certification as a prerequisite to its permit. Some Coastal Council permits also require water quality certifications. In South Carolina, the Department of Health and Environmental Control (DHEC) manages the water quality certification program. The certification is commonly known as a "401 Certification."

Despite the fact that Section 401 of the Clean Water Act, passed in 1972, directs states to develop procedures for public notice and hearings for 401 Certifications, DHEC has never promulgated such procedures. In addition, DHEC has no regulations specifically stating the standards to be applied in 401 Certification decisions. DHEC simply uses the regulations developed for NPDES (wastewater discharge) permits, DHEC Regulation 61-68.

In 1988, the DHEC Board issued a 401 Certification for the Willbrook canal project, stating that the certification decision does not include consideration of impacts on wetlands. Since wetlands are considered to be important to maintenance of water quality, the Board's decision seems questionable. An appeal of this decision was rendered moot by the Supreme Court's decision on the Coastal Council's certification.

In May of 1988, the United States Environmental Protection Agency (EPA) issued a draft report calling for the use of the 401 Certification program to protect wetlands. The report noted that several states consider wetlands impacts in their 401 decisions, and that wetlands are generally

considered to be "waters" of the state.

In the fall of 1988, DHEC finally issued a set of draft regulations for the 401 program. The draft regulations recognize wetlands as waters of the state, and include provisions which would require the agency to take wetlands impacts into consideration when assessing 401 applications. At a public hearing on the draft regs in January, 1989, there were no objections to the wetlands provisions. After the hearing, a final draft of the proposed regulations was submitted to the DHEC Board for approval at the Board's February 1989 meeting. Action on the regulations was deferred until March with no reason stated and no discussion. A lobbyist for developers has been heard to brag that he derailed the new regulations, but at this writing the regs are scheduled to be considered at the March 16 Board meeting.

In January, the DHEC Board approved proposed changes in the water quality standards, Regulation 61-68, which include new wetlands protection measures. These new measures, however, are limited to prohibiting the dredging or filling of wetlands unless the project "will result in enhancement of classified uses with no significant degradation to the aquatic ecosystem or water quality." The proposed changes have been submitted to the General Assembly and will become effective if neither the House nor the Senate rejects them before adjournment.

If the 401 Regulations are approved by the DHEC Board, and if neither the 401 Regs nor the water standards amendments are rejected by the General Assembly, DHEC's protection of wetlands should be substantially improved.

Questions, comments, and/or requests for additional copies of this report should be directed to SCELP at the address listed below.

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About The South Carolina Environmental Law Project.

The South Carolina Environmental Law Project (SCELP) is a project of Energy Research Foundation (ERF). ERF is a private operating foundation with offices in Columbia, SC, and is active in SC energy and natural resource policy. Frances Close Hart is Chairwoman of ERF.

SCELP was formed in 1987 with the purpose of providing legal services to SC environmental groups and protecting SC natural resources through vigorous legal advocacy. SCELP is funded by grants from ERF, the Mary Reynolds Babcock Foundation, and the SC Chapter of Sierra Club. SCELP is currently seeking additional sponsors to enable it to continue its work for a third year. Donations to SCELP should be made payable to Energy Research Foundation and marked "For SCELP." For more information write to James S. Chandler, Jr., SCELP Director, at the following address:

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