

Feb. 8, 2010

Wetlands to stay wet



State wetlands protection policies were the focus in *Spectre, LLC v. S.C. Department of Health and Environmental Control, et al.* as the parties disputed the issue of whether DHEC properly denied a stormwater/land disturbance permit Spectre sought in connection with this tract in Horry County. Timber operations on the property were not at issue, said Stanley E. Barnett, a lawyer for Spectre. Photo provided by S.C. Environmental Law Project

Ruling bars developer from filling marshes

By FRED HORLBECK, Senior Staff Writer
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A company that challenged the state's Coastal Management Plan won't be getting environmental regulators' OK for a plan to fill about 32 acres of Horry County freshwater wetlands, the S.C. Supreme Court has ruled.

The plaintiff, Spectre, LLC, had filed for a Department of Health and Environmental Control permit to fill the wetlands as part of preparing about 63 acres for commercial use.

After the department denied the permit request, the state Administrative Law Court ruled that DHEC had to issue the permit as a matter of law.

But the Supreme Court reversed, saying DHEC acted properly under

See opinion digest for *Spectre, LLC v. S.C. Department of Health and Environmental Control, et al.* on page 11.

the Coastal Zone Management Act.

Spectre had argued that the Coastal Management Plan, promulgated under the act, was unenforceable because the General Assembly didn't approve it under the S.C. Administrative Procedures Act.

Stanley Barnett of Mount Pleasant, a lawyer for Spectre, said he was disappointed with the Feb. 1 ruling.

"The issue is whether or not the policies which are contained in the Coastal Management Program



Roberts



Chandler

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document can be applied as regulations even though they were not promulgated under the Administrative Procedures Act," Barnett said.

"All the precedent before was that you could not ever have a binding norm or a regulation unless it was promulgated as a regulation under the Administrative Procedures Act," he told South Carolina Lawyers Weekly.

Carlisle Roberts, general counsel for DHEC, hailed the decision.

"We consider this a big win, a significant victory," he said.

"There were two parts to the decision. Part 2 said the coastal program document is valid. And part 1 said that the document by its own terms applies not just to federal jurisdictional wetlands but to all wetlands in the coastal zone.

"Both of those issues are significant. The document is a key aspect of our regulatory program in the coastal zone. Without it, regulation would have been much more difficult," Roberts said.

Spectre also contended that the CMP, even if enforceable, didn't apply to the wetlands at issue. The high court disagreed.

"We find that the ALC erred in finding that the CMP, by its own terms, does not apply to the property in question and in finding that the CMP is not enforceable," Justice Costa M. Pleicones wrote for a unanimous court. "Consequently, the ALC erred in finding that the ... permit must issue by operation of law."

The case is *Spectre, LLC v. S.C. Department of Health and Environmental Control, et al.* (South Carolina Lawyers Weekly No. 010-009-10, 11 pages).

The case drew amici curiae briefs from the S.C. Tourism & Land Council, the Waccamaw Riverkeeper, the S.C. Landowners Association, the Home Builders Association of South Carolina and the S.C. Association of Realtors.

Pawleys Island lawyer Jimmy Chandler of the S.C. Environmental Law Project, which represented the League of Women Voters of South Carolina and other groups as intervenors, said he had waited seven or eight years for a chance to challenge the argument against the CMP's enforceability.

"What has happened is that in the meantime a lot of developers have come in with applications to fill wetlands and negotiated compromises based on a threat to make this suit and to raise this issue," Chandler said.

"They don't have that argument anymore," he said.

Background

Spectre applied to DHEC for a stormwater/land disturbance permit under S.C. Code Ann. §§ 48-14-10, et seq., and S.C. Reg. 72-305. Spectre filed the request in 2006, Chandler said.

DHEC denied the request, saying it violated CMP provisions, including one that mandated denial of commercial



These wetlands on the Spectre property, creeks, fell within the state's Coastal Management Act. Photo provided by the S.C. Environmental

requests to fill freshwater wetlands unless the proposed development was "water-dependent" and there were no feasible alternatives. The DHEC board affirmed.

On appeal, the ALC ruled that DHEC should grant the permit. Its reasons: The wetlands at issue didn't fall within the CMP because they were isolated and the CMP covered only wetlands connected to saltwater. Also, it found the CMP was unenforceable because it was passed in accordance with the Administrative Procedures Act.

The case went to the state Court of Appeals, but the Supreme Court took jurisdiction on a motion by DHEC.

Isolated wetlands included

The Supreme Court found the lower court erred because the wetlands, even though isolated, fell within the CMP.

Citing a provision in § XII of the CMP, the lower court had ruled that the state coastal management zone included wetlands connected to the system of coastal rivers and creeks. The Spectre wetlands weren't connected, it said.

But the high court ruled that holding didn't mesh with the program's broad scope. For one thing, Horry County was one of eight counties constituting the zone, according to the opinion.

"Though the particular portion cited by the ALC seems to address only wetlands linked to the downstream system, there is nothing to indicate that it is meant to overrule the broader language used earlier in the CMP. ... The best reading of § XII is that the policies were meant to complement, rather than limit, policies set out earlier in the CMP," Justice Pleicones wrote.

The lower court also had said the Spectre wetlands weren't part of the management zone because they fell outside the jurisdiction of the Army Corps of Engineers under 1993 amendments to the CMP. The justices disagreed.

At issue was CMP language that said



though isolated from coastal rivers and
ment Program, the state Supreme Court
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the state would manage wetlands "once
delineated by the Corps of Engineers."

Spectre contended that the phrasing
meant its property wasn't subject to the
program because Corps jurisdiction was
limited to wetlands adjacent to coastal
waters.

But the high court said "delineate"
referred to mapping and that the Corps
had indeed delineated a wetland on
Spectre's property.

"Again, we find nothing to overrule
the broad language regarding jurisdic-
tion set forth in the original version of
the CMP," the opinion stated.

CMP's enforceability

The justices also found the CMP was
enforceable because "there is no require-
ment that the CMP be promulgated as
an [Administrative Procedures Act] reg-
ulation."

That's because the Coastal Zone
Management Act, codified in §§ 48-39-
10, et seq., required DHEC to develop the
program and permit-application-review pro-
cedures and submit them to the General
Assembly and the governor for approval.

The lower court had said § 48-39-
80(B)(11) envisioned DHEC's develop-
ment of review process regulations
under the Administrative Procedures Act
rather than under the CMP.

"In our view, the language of § 48-
39-80 supports DHEC's view that the
General Assembly meant the CMP poli-
cies themselves to be enforceable in the
consistency review of state and federal
permits," Pleicones wrote.

The lower court also ruled that the
CMP policies should have been promul-
gated under the Administrative Procedures
Act because DHEC enforced them as reg-
ulations. The Supreme Court disagreed.

"The General Assembly created a
separate and more rigorous procedure
for promulgation of the CMP and,
because DHEC acted in accordance with
the specified procedure, the plan is
valid," Pleicones wrote.

OPINION BRIEF

Case name: *Spectre, LLC v. S.C.
Department of Health and
Environmental Control, et al.*

Court: S.C. Supreme Court

Judge: Justice Costa M. Pleicones

Attorneys: For appellant S.C.
Department of Health and
Environmental Control: Chief
Counsel Elizabeth Applegate Dieck
and Staff Attorney Davis Whitfield-
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(Florence); and David E. Shipley
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lant League of Women Voters of
South Carolina et al.: James S.
Chandler and Amy E. Armstrong,
both of the S.C. Environmental
Law Project, (Pawleys Island). For
respondent: Ellison D. Smith IV
and Stanley E. Barnett, both of
Smith, Bundy, Bybee & Barnett
(Mount Pleasant); and James B.
Richardson Jr. (Columbia). For
amici curiae: Christopher Holmes
(Mount Pleasant) for the S.C.
Tourism & Land Council;
Christopher Kaltman DeScherer of
the Southern Environmental Law
Center (Charleston) for Waccamaw
Riverkeeper; and Kerry L. Murphy
of Mays, Foster, Gunter & Murphy
(Columbia) for the S.C.
Landowners Association, Home
Builders Association of South
Carolina and the S.C. Association
of Realtors.

Issue: Was the Coastal
Management Program enforceable
despite being promulgated under
the S.C. Code Ann. §§ 48-39-10,
et seq. rather than the S.C.
Administrative Procedures Act, and
were isolated freshwater wetlands
subject to the CMP policies?

Holding: Yes on both counts. The
court said the program's policies
were enforceable because they
were promulgated through a sepa-
rate procedure under §§ 48-39-10,
et seq., as the state General
Assembly intended, and because
DHEC acted in accordance with
the specified procedure. The fresh-
water wetlands, though isolated
from coastal rivers and creeks and
other coastal waters, fell within the
broad scope of the CMP, the court
said.

Potential impact: The ruling
removes the potential for future
lawsuits throwing the CMP's
enforceability into question based
on the argument that CMP policies
lacked regulatory force because
they weren't promulgated under the
Administrative Procedures Act.

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