Southeastern Environmental Law Journal

Volume 6 | Issue 1 Article 4

Summer 1997

A Study of Environmental Politics: The Sandy Island Fiasco

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A STUDY OF ENVIRONMENTAL POLITICS: THE SANDY ISLAND FIASCO

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I. Introduction

In the Summer of 1992, an environmental equivalent of A BONFIRE OF THE VANITIES erupted in South Carolina in the form of Sandy Island as environmental ideologies, political strategies, administrative bureaucracy, and even racial factors turned a seemingly routine bridge construction project into a political mess. At first blush, the issue was simple: "Could the owners of a small inland island construct a private two-lane bridge to the mainland?" However, the issue did not remain simple for long. Proponents and opponents of the project fueled the four-year controversy with contradicting facts and figures. In addition, multiple government agencies added to the quandary by shifting authority over permits and management plans. The controversy resulted in an enormous waste of state and federal resources and ended in a muddled compromise.

This article analyzes the conflict between landowners and conservationists over the fate of Sandy Island from the landowner's proposal to build a bridge in August of 1992 to the State's eventual purchase of the property in April of 1996. The Sandy Island permitting process also presents an interesting example of the interrelationship between federal and state agencies on a multifaceted project. First, a brief overview highlights the history of the island beginning with the American colony and plantation era. Second is a description of the physical and ecological characteristics of Sandy Island. This description is followed by background information on the private parties involved in the conflict. Next, the article describes the permitting process for a typical bridge construction project in South Carolina and lastly provides documentation of a step-by-step analysis of this particular conflict.

II. History of Sandy Island

Originally founded during early antebellum days, Sandy Island has an interesting history. During the mid-to-late 1700s, rice planters converted the island's unique freshwater marshes to rice fields.[1] Thereafter, planters maintained successful rice

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[1] Monte Paulsen, *A Different World on Sandy Island*, THE STATE, Feb. 19, 1995,

plantations on Sandy Island until reaching their peak between 1850 and 1860.[2] Two of the more prosperous plantations on Sandy Island included Mount Arena and Pipe Down, established by Dr. Edward Thomas Heriot (1793-1854) and Captain Thomas Petigru (1791-1857), respectively.[3] Heriot, unlike other plantation owners, lived at Mount Arena plantation, which became the hub of island life.[4] Mount Arena was also home to the 115 slaves owned by Heriot in 1850.[5] As was the custom of the day, plantation owners relied on slaves imported from Africa's rice-growing regions both for labor and agricultural knowledge.[6]

Trusted slaves who became leaders in the rice fields were known as "slave drivers." Overseers depended on the slave drivers to make the major decisions on the plantation, including supervision of the labor force and regulation of water flow in the fields.[7] Philip Washington (1807-1890) was a distinguished slave driver at Pipe Down, a 294-acre plantation just up the Waccamaw River from Mount Arena.[8] In March 1857, the owner of Pipe Down plantation, Captain Thomas Petigru, died. Fearing that the plantation would be abandoned and the slaves auctioned off, Philip Washington convinced Governor Robert F.W. Allston to buy the plantation.[9] In 1859, on the eve of the Civil War, Allston acquired the tract.

The Civil War left many of the plantation families on Sandy Island destitute. Families that managed to keep their land were forced to hire their former slaves.[10] During this period of Reconstruction, Philip Washington moved to Georgetown, South Carolina, where he prospered as a businessman. In 1878, Washington moved back to Sandy Island, purchased a portion of the island from the widow of Dr. Heriot, and founded an independent African-American community.[11] The community continued to thrive even after Washington's death in 1890 and, in fact, descendants of Washington continue to inhabit the island today.

After the rice-based economy collapsed between 1893 and 1911, wealthy North-

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at D1.

[2] GEORGE C. ROGERS, JR., THE HISTORY OF GEORGETOWN COUNTY, SOUTH CAROLINA 253 (1970).

[3] There were a total of nine plantations on Sandy Island in 1850. *Id.* at 253.

[4] *Id.* at 254.

[5] *Id.* at 256.

[6] CHARLES JOYNER, DOWN BY THE RIVERSIDE: A SOUTH CAROLINA SLAVE COMMUNITY 65 (1984).

[7] *Id.* at 65.

[8] *Id.* at 31-32, 67-68.

[9] *Id.* at 31.

[10] Paulsen, *supra* note 1, at D1.

[11] Paulsen, *supra* note 1, at D5.

erners began buying bankrupt plantations as vacation homes and status symbols.[12] Jesse Metcalf of Rhode Island purchased Sandy Island and many other South Carolina estates during this period.[13] Until his departure in 1936, Metcalf allowed island residents to grow rice and graze animals, and under Metcalf's ownership, no one developed the island. Surprisingly, the tract remained undeveloped as it passed through a series of owners during the next four-and-a-half decades.

During this period, agricultural activities ceased and the island reverted to its natural state. Even more remarkably, no one constructed a permanent bridge to connect Sandy Island to the mainland. Beginning in the 1940s, islanders used small motorboats to cross the river and a ferry to transfer supplies and household appliances. In 1981, Sandy Island Associates, a joint venture, purchased 8,000 of the island's 12,000 acres with the intention of harvesting timber in the next decade. Following the purchase, an unprecedented amount of environmental legislation was enacted in South Carolina and the United States.

III. Physical and Ecological Conditions of Sandy Island

Most islands in the United States are sea islands — land masses surrounded by ocean. Prominent sea islands in South Carolina include Hilton Head and Kiawah. In contrast, Sandy Island is an inland island, a land mass completely surrounded by rivers. Located in northern Georgetown County, three rivers surround Sandy Island: the Waccamaw River on the east, the Pee Dee River on the west, and Bull Creek on the north. The Waccamaw and Pee Dee Rivers converge to form the southern tip of Sandy Island.

The Waccamaw River separates the undeveloped island from the nearby resort towns of Pawleys Island, Litchfield Beach, and Murrells Inlet. Brookgreen Gardens, a nonprofit preservation organization and one of South Carolina's major tourist attractions, is also located near Sandy Island. Unlike other islands, Sandy Island remains untouched by major development along South Carolina's coast.

Sandy Island epitomizes ecological diversity, supporting longleaf pine forests, cypress swamps, and diverse flora and fauna. The island terrain is characterized by a rolling ridge and swale topography.[14] Sharp sand bluffs undulate across the island adding to its unique topography. The dune ridge system on Sandy Island ranges from a few feet above sea level to 75 feet above sea level — the highest point in Georgetown County.[15]

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[12] *Id.*

[13] ROGERS, *supra* note 2, at 491.

[14] Letter from Roger L. Banks, Field Supervisor, U.S. Fish & Wildlife Service, to John Winslow, U.S. Coast Guard 2 (Apr. 14, 1993).

[15] Jeff Miller, *What to do with Sandy Island? Owners Want Bridge; Others Wild-*

A wide range of plants thrive at the different elevations, whether in dry, sandy soil or cypress swamp.[16] Sandy Island uplands include the maritime sandhill scrub plant community which is dominated by live oak, longleaf pine, and loblolly pine.[17] In fact, Sandy Island is home to the only known Maritime Sandhills plant community in South Carolina.[18] Sandy Island also contains a xeric sandhill scrub plant community that is fire-dependent and dominated by turkey oak. Sandy Island also boasts one of the largest remaining stands of mature longleaf pine trees, which supports numerous colonies of endangered red-cockaded woodpeckers. Many of the longleaf pines are more than a century old.[19]

Sandy Island is comprised of numerous wetland formations that vary in size and configuration. Freshwater tidal wetlands, including both marsh and bald cypress-tupelo swamp, surround the island.[20] The island itself is scattered with an extensive network of inland isolated wetlands containing dense hardwood swamps along the rivers, herbaceous seepage bogs, and deciduous pocosin wetland depressions. Wetlands are also present in freshwater depression meadows, old rice field impoundments, and pond pine woodlands.[21] Two larger but separate wetland formations comprise the exterior of the island. The eastern wetlands formation is acidic due to the high degree of sediment found in the Waccamaw River. The other formation, along the Great Pee Dee River, has a neutral pH level. These wetlands are crucial to Sandy Island and the adjacent watershed because they perform significant biological functions, control natural drainage and groundwater recharge, and provide an overall support system for the surrounding habitat.

Sandy Island is located in the heart of the Winyah Bay Task Force focus area, which was established by a treaty between the United States and Canada.[22] The purpose of the focus area is to re-establish 80,000 acres of waterfowl habitat. According to the Winyah Bay Task Force Chairman, Sandy Island is an important part of the focus area because it provides a habitat for migratory and local waterfowl, as well as South American birds that spend part of the year in the United States.[23] In addition to its overall importance as a waterfowl habitat, Sandy Island is also essential to the survival of several endangered species, including the Southern Bald Eagle,

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life Refuge, THE STATE, Oct. 10, 1993, at A1.

[16] *Id.*

[17] Letter from Roger Banks to John Winslow, *supra* note 14, at 2.

[18] Final Brief of Appellants at 4, *South Carolina Coastal Conservation League v. South Carolina Coastal Council*, C.A. No. 93-CP-10-4092 (S.C. Feb. 27, 1996).

[19] Letter from Roger Banks to John Winslow, *supra* note 14, at 2.

[20] *Id.*

[21] *Id.*

[22] Miller, *supra* note 15, at A1.

[23] *Id.* at A1.

the wood stork, and the red-cockaded woodpecker (RCW).[24] Other inhabitants prevalent on Sandy Island include white-tailed deer, fox squirrels, turkeys, osprey, and a variety of reptiles and amphibians.[25]

The red-cockaded woodpecker (Picoides borealis) is a small black and white bird that lives almost exclusively in pine forests throughout the southern regions of the United States.[26] One of approximately 200 species of woodpeckers in existence today, the RCW is nonmigratory and spends most of its life within a few hundred acres of its nesting site. In 1986, Francis Marion National Forest in South Carolina boasted the largest and healthiest population of red-cockaded woodpeckers in the United States.[27] However, Hurricane Hugo decimated this population in 1989, leaving the surviving woodpeckers on Sandy Island even more endangered.[28]

Sandy Island is particularly suited for the RCW since the longleaf pine forests of coastal South Carolina can include trees in excess of 100 feet tall. While the RCW can live in trees that are 30 years old, it prefers taller trees that range in age from roughly 60-120 years. The older trees on Sandy Island are more conducive to the RCW since they have softer wood which make for easier excavation. The red- cockaded woodpecker creates a highly specialized habitat by excavating a cavity in the softened heartwood of old growth pine trees.[29]

Each cavity may take four to seven years to construct and can be used by successive generations of the species.[30] Cavity loss occurs naturally through predation and more often through timber harvesting. The loss of a cavity is devastating to the red-cockaded woodpecker's chances of survival since this species of woodpecker can only survive by nesting within the tree. Individual cavity trees may contain several birds in "colonies." When the RCW create cavities, the resin flow in live pine trees forms around the cavity opening providing a protective barrier against predators. This structure lessens the chances that predators, such as snakes, owls, and other

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[24] The United States Fish and Wildlife Service determines threatened and endangered species in accordance with the Endangered Species Act of 1973 (ESA), 16 U.S.C.A. §§ 1541-1544 (West 1985 & Supp. I. 1997). *See* 50 C.F.R. § 17.11 (1996) for the current list of threatened and endangered species.

[25] Letter from Roger Banks to John Winslow, *supra* note 14, at 2.

[26] *Sierra Club v. Lyng*, 694 F. Supp. 1260, 1265 (E.D. Tex. 1988), *modified sub nom. Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991).

[27] Chuck D. Barlow, *The Proposed Management of the Red-Cockaded Woodpecker in the Southern National Forests: Analysis and Suggestions*, 17 U. ARK. LITTLE ROCK L.J. 727, 729 n.7 (1995).

[28] Hurricane Hugo killed approximately one-half of the RCW population in Francis Marion National Forest. *Id.* at n.35.

[29] Barlow, *supra* note 27, at 729.

[30] *Id.*

birds, will kill their young.[31]

The pine forests of Sandy Island are also important because RCWs do not feed on the ground. Instead, the woodpecker prefers to forage on insects, small fruits, and seeds in trees that are open and free of hardwood understory. The woodpecker's foraging range may include an area up to one mile across.

When considering the fragility of the RCW environment, silviculture operations require a structured multiple-use system to protect wildlife while simultaneously producing timber for industry.[32] The survival of the species has long been at risk, due to the dwindling range of the coastal Southern pine forests and the destruction of the species' natural habitat.[33] Infestation of the Southern pine beetle compounded the problem by reducing the number of old-growth pines.[34] The last remaining populations of red-cockaded woodpeckers are concentrated in the national forests since the old growth pines on private lands such as Sandy Island have largely been eliminated. Nevertheless, the red-cockaded woodpecker flourishes on Sandy Island due to its older stand of longleaf pine trees and the island's isolation from coastal development.

The effect that silviculture operations and potential development would have on the red-cockaded woodpecker was a serious point of contention among the private parties and government agencies.[35] The permit applicants and other interested parties also questioned the effect of continued silviculture operations on the bridge permitting process.

IV. The Private Parties Involved in the Conflict

A. Sandy Island Associates

Sandy Island Associates (SIA) is a partnership of the Milliken Company of Spartanburg, South Carolina, and Canal Industries of Myrtle Beach, South Carolina. In 1992, SIA owned the largest contiguous tract on Sandy Island, accounting for

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[31] *Lyng*, 694 F. Supp. at 1265.

[32] *Id.*

[33] *Yeutter*, 926 F.2d at 431.

[34] *Id.*

[35] As a consequence of the RCW's federal listing as an endangered species, the U.S. Fish and Wildlife Service (Wildlife Service) is charged with managing recovery of the species under 16 U.S.C.A. § 1533(f) (West 1997). All federal agencies must consult with the Wildlife Service to ensure that agency action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species. . . . " *See* 16 U.S.C.A. § 1536(a)(2) (West 1994).

approximately two thirds of the island. The partnership also owned smaller tracts throughout the island. According to a development plan prepared in 1990 at the request of the U.S. Fish & Wildlife Service, total Sandy Island acreage owned by the partnership was 9,164 acres.[36]

The Milliken Company, owned by textile billionaire Roger Milliken, is the managing partner of SIA. According to the partnership agreement on file in Georgetown County, the purpose of the partnership is "to engage in the timber business." The late E. Craig Wall, Jr., who inherited a forest products conglomerate from his father, E. Craig Wall, Sr., owned Canal Industries.[37] Through Canal Industries, Wall owned and harvested thousands of acres of timberland in North Carolina, South Carolina, and Georgia. In addition, Wall owned New South, Inc., a sawmill that cuts timber and wholesales the lumber, and Pelican Building Centers, which retails finished wood products.[38]

The valuable contiguous tract owned by SIA included most of the Pee Dee riverfront, the entire deepwater coast along the Bull Creek side of the island, and sections along the Waccamaw River. Wall and Milliken also owned tracts adjacent to Sandy Island through other companies including the Tip Top Peninsula, a 4,464-acre peninsula immediately to the north of Sandy Island.[39] Canal Land Limited Partnership also owned the 474-acre Longwood Island and the 2,774-acre Kaminski tract along the Horry and Georgetown county line.[40] By 1996, Wall owned the largest tracts of land in the paths of both the proposed Carolina Bays Parkway and the Conway Bypass.[41]

B. Residents of Sandy Island

Approximately 120 residents occupy only 200 of the 12,000 total acres of Sandy Island.[42] Most of the residents of Sandy Island work in the Georgetown and Myrtle Beach areas and commute from their homes by boat to the mainland.[43] Some inhabitants of the island are direct descendants of Philip Washington, the community's

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[36] Monte Paulsen, *A Handful of Powerful Families Holds Region's Fate*, THE STATE, Feb. 19, 1995, at A16.

[37] Monte Paulsen, *Wall Follows Father on "Path of Progress,"* THE STATE, Feb. 19, 1995, at A16.

[38] *Id.*

[39] Paulsen, *supra* note 36, at A16.

[40] *Id.*

[41] Paulsen, *supra* note 37, at A16.

[42] Paulsen, *supra* note 36, at A16.

[43] Brief of Respondent at 2, *South Carolina Coastal Conservation League v. South Carolina Coastal Council*, C.A. No. 93-CP-10-4092 (S.C. Feb. 27, 1996).

founder after the Civil War.

Prior to the dispute, most residents of the southern portion of Sandy Island initially urged both state and local governments to construct a bridge across the Waccamaw River, ultimately connecting to U.S. Highway 17. For instance, Sam Pyatt, who ran his boat across the Waccamaw River to help senior citizens, saw the potential benefits for residents, especially in emergency situations.[44] In addition, Othenia Elliot, a resident on Sandy Island, stated that at the age of 77, she needed automobile transportation to the mainland.[45] Hughey Walker, a ten-year representative of the island on the Georgetown City Council, stressed the need for the bridge, citing the difficulty in getting equipment and services to the island.[46] Walker stated that he had argued for years that the island needed a bridge. However, the residents' enthusiasm for the bridge quickly waned after the original bridge proposal by Sandy Island Associates.

Islanders that wanted to maintain the status quo quickly became concerned about the potential repercussions of the proposed bridge. Fearing that a bridge initially intended for timber harvesting would open the door for resort development, residents, at the prompting of others, officially declared their opposition to the project. The residents formed the Sandy Island Community Action Club and eventually brought a legal action against the bridge project.

Some residents expressed concerns that the company's long-range plans could drive up land values and force poorer island residents from their homes. Residents argued that a similar situation previously occurred in neighboring Daufuskie Island and Hilton Head. There, developers allegedly bought large parcels of land which they timbered before developing them as resort communities.

While depicted by environmentalists as "a unique sea island Gullah community," few, if any, residents of Sandy Island gain their subsistence from the island or surrounding waters.[47] According to state agencies that studied the history of the island, Gullah is a culture typically represented by language, customs and occupations which are totally absent in the residents of Sandy Island.[48] In fact, the State Department of Archives and History declined to recognize any distinct cultural characteristic in the residents of Sandy Island. The South Carolina Coastal Council (Coastal Council)

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[44] *Residents of Island Find Bridge Threatening*, THE STATE, Apr. 12, 1993, at B8.

[45] Jeff Miller, *A River Runs Around It, Sandy Islanders Don't Feel Cut Off, Despite Lack of Bridge*, THE STATE, Apr. 27, 1993, at A1.

[46] *Id.*

[47] Brief of Respondent, *supra* note 43, at 2 (citing Administrative Record at 496).

[48] *Id.* at 3. For an description of the Gullah language, *see* JOYNER, *supra* note 6, at chapter 7.

stated that "no information has been provided indicating what is unique about the families that live upon the island, other than that they are isolated."[49]

C. Environmentalist Organizations

Throughout the permitting process, a host of environmental groups and the local citizens association protested the proposed bridge to Sandy Island.[50] Specifically, the Southern Environmental Law Center and the South Carolina Coastal Conservation League contended that a bridge would be the first step toward residential and recreational development that would harm both the environment and the people on the island.

The Southern Environmental Law Center (SELC) is a non-profit legal organization which focuses on environmental matters in six southeastern states and maintains offices in Charlottesville, Virginia, and Chapel Hill, North Carolina.[51] The SELC received over $2 million from foundations and individual contributions in fiscal year 1995 and currently provides legal advocacy for a multitude of legal controversies in the South.[52] Major case involvement includes projects concerning public lands and forest protection; coastal and wetlands conservation; clean water, air pollution and energy efficiency; and growth management.

The South Carolina Coastal Conservation League (SCCCL) describes itself as "a local grass roots non-profit organization—backed by 3,000 members dedicated to protecting our state and coastal resources."[53] The COASTAL GUARDIAN, a bimonthly publication of the SCCCL, highlights environmental projects in South Carolina's coastal counties. With offices in Charleston and Beaufort, the SCCCL focuses on protection of the coastal environment by promoting legislation and keeping local residents informed of alterations to the environment.

V. The Bridge Permitting Process in South Carolina

To construct a bridge in South Carolina, a person must receive permission from the federal and state government in two forms: (1) a bridge construction permit from

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[49] Brief of Respondent at 2, *supra* note 43 (citing Administrative Record at 496).

[50] Opponents to the project included the South Carolina Coastal Conservation League, the Southern Environmental Law Center, the Sierra Club, and the League of Women Voters of Georgetown County.

[51] On behalf of coalition partners, SELC has undertaken legal projects in the following six states: Virginia, North Carolina, South Carolina, Tennessee, Georgia, and Alabama.

[52] Southern Environmental Law Center, ANNUAL REPORT, 12 (1995).

[53] THE COASTAL GUARDIAN, Mar.-May 1996, at 2.

the United States Coast Guard (Coast Guard), and (2) a navigable waters permit from the South Carolina Department of Health and Environmental Control-Bureau of Water Pollution Control (DHEC-BWPC). However, before the federal and state agencies can issue either permit, the applicant must receive a coastal zone consistency certification from DHEC's Office of Ocean and Coastal Resource Management(OCRM). [54]

A. Navigable Waters Permit

In South Carolina, any dredging, filling, or construction in, on, or over a navigable water requires a navigable waters permit.[55] State regulations define navigable waters as waters which are navigable, have been navigable, or can be made navigable by the removal of accidental obstructions, by rafts of lumber or timber or by small pleasure or sport fishing boats.[56] In tidal waters, navigable waters are below the mean high water line. In non-tidal waters, navigable waters are below the ordinary high water mark.[57] Since DHEC classifies Bull Creek as a navigable water, a navigable waters permit is a prerequisite to construction of any bridge over that waterway.

The specific steps in the navigable waters permitting process are set forth in DHEC guidelines:

> Upon receipt of an application, the Department issues a public notice of the proposed activity allowing a 30 day period for receipt of comments. The notice will be sent to other State agencies, interested individuals, and adjacent property owners. The applicant must publish a notice in a newspaper of general or local circulation in the county where the encroachment is sought. This notice will allow a 15 day period for receipt of comments.
> After close of all comment periods, the Department will evaluate the permit application, prepare a written staff assessment considering all information, and issue a Notice of Proposed Decision. This Notice of Proposed Decision is sent to the applicant, commenters on the project, and adjacent property owners and will allow a 15 day opportunity for appeal. If no appeals are received, the permit is issued or denied as proposed.[58]

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[54] OCRM was formerly the South Carolina Coastal Council (Coastal Council). In 1994, the Coastal Council merged with DHEC and became a separate division therein.

[55] 19 S.C. Code Regs. 450.1.A (Supp. 1996).

[56] 19 S.C. Code Regs. 450.2.C (Supp. 1996).

[57] 19 S.C. Code Regs. 450.2.D (Supp. 1996).

[58] South Carolina Department of Health and Environmental Control, A GENERAL

If a project requires a coastal zone consistency certification or 401 water quality certification, a separate navigable waters application is not necessary.[59] In this instance, DHEC coordinates program areas to insure that the applicant satisfies the permitting requirements of each program through appropriate permit conditions.[60]

Based on state environmental regulations, the navigable waters permitting process usually assesses (1) whether construction of a bridge will affect the navigability of the stream,[61] and (2) whether construction will have an adverse effect on either the water quality or the aquatic community.[62] In most instances, a fixed-span bridge which crosses a navigable water does not adversely affect either the water quality or the aquatic community. For small construction projects like the Sandy Island proposal, the major concern for the aquatic community involves the area in the direct vicinity of the proposed bridge, referred to as the "footprint" of the bridge. If the permittee can show that construction of the bridge will only negligibly affect the aquatic community, the focus of the permitting process shifts to how the proposed bridge will affect navigability. Generally, DHEC will issue a navigable waters permit if the project will not adversely affect navigability.

Navigable waters permits primarily focus on the effects of construction and operation of the bridge itself, but not the future development of the land surrounding the bridge. Therefore, the agency should limit itself to assessing direct environmental impact caused by construction of the bridge, not the potentially adverse impact as a *result* of the bridge. During the Sandy Island proposal, this difference was important as opponents of the project chose a point of attack.

GUIDE TO ENVIRONMENTAL PERMITTING IN SOUTH CAROLINA 34 (Nov. 1995).

[59] *Id.* In cases where both a coastal zone consistency certification and a water quality certification are necessary, the Office of Environmental Quality Control (EQC) issues a combination of the two in a "state certification." For state certification, an applicant must satisfy all EQC and OCRM requirements for certification.

[60] *Id.* 19 S.C. Code Regs. 450.5 (Supp. 1996) provides the application procedure to obtain a navigable waters permit.

[61] 19 S.C. Code Regs. 450.4.A lists ten non-exclusive conditions that one must satisfy prior to issuance of a permit. 19 S.C. Code Regs. 450.4.A(7) states that "[t]he permitted activities shall not block or obstruct navigation or the flow of any waters unless specifically authorized herein; no attempt shall be made by the permittee to prevent the full and free use by the public of all navigable waters at or adjacent to the work authorized by permits. . . . "

[62] 19 S.C. Code Regs. 450.4.A(8) states that "[t]he permittee shall make every reasonable effort to perform the authorized work in a manner to minimize adverse impact on fish, wildlife, or water quality and shall maintain any authorized structure in good condition in accordance with approved plans and specifications."

B. Bridge Permit

The Coast Guard has been a part of the Department of Transportation (DOT) since it was transferred to the newly formed department in 1967. It is the Coast Guard's duty to approve the construction of private and public bridges.[63] Two acts delineate the Coast Guard's authority to issue bridge permits: the Rivers and Harbors Act of 1899 (as amended),[64] and the General Bridge Act of 1946 (as amended).[65] The purpose of these Acts is to preserve the public right of navigation and to prevent interference with interstate and foreign commerce. The Acts accomplish this goal by placing the navigable waters of the United States under the exclusive control of the United States Government.

The Coast Guard's mission under the General Bridge Act of 1946 is to implement the Bridge Administration Program by approving the locations and plans for bridges and causeways and by imposing any necessary conditions relating to the construction, maintenance, and operation of bridges in the interest of public navigation.[66] The General Bridge Act of 1946 requires approval for the location of the bridge and the construction plan, prior to the start of construction.[67] Failure to obtain a permit before commencing bridge construction or modification is a federal offense, punishable by civil and criminal penalties. The General Bridge Act also requires bridge construction permits for individuals, partnerships, corporations, and federal or state agencies planning to construct or modify a bridge or causeway across a navigable waterway of the United States.[68]

Guidelines issued by the Coast Guard set forth the overall purpose of the Bridge Administration Program:

> The intent of Congress in the enactment of the bridge statutes was to retain exclusive jurisdiction over navigable waters for such matters in the United States. These statutes are intended to maintain freedom of navigation on the navigable waters of the United States and prevent their impairment as navigable streams. It is the duty, and responsibility, of the Coast Guard under the authorities delegat-

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[63] U.S. Department of Transportation-United States Coast Guard, BRIDGE PERMIT APPLICATION GUIDE, COMDTPUB P16591.3A, at 2 (Sept. 15, 1994) (hereinafter PERMIT APPLICATION GUIDE).

[64] 33 U.S.C.A. § 401 (West 1994).

[65] 33 U.S.C.A. § 525 (West 1994).

[66] PERMIT APPLICATION GUIDE, *supra* note 63, at 2.

[67] 33 U.S.C.A. § 525 (West 1994).

[68] 33 C.F.R. pts. 114-115 (1996) (setting forth the rules and regulations governing the Coast Guard bridge permit program).

> ed to the Commandant, to preserve the public right of navigation. Bridges across the navigable waters of the United States are obstructions to navigation permitted only so long as they serve the needs of land transportation. While the public right of navigation is paramount to land transportation it is not absolute and may be diminished to benefit land transportation provided the REASONABLE needs of navigation are not impaired.[69]

Under the Bridge Administration Program, the Coast Guard balances three factors before issuing bridge permits: (1) navigational needs, (2) land transportation (including highways and the rail system), and (3) environmental impact. The Coast Guard should accommodate all modes of transportation when deciding whether to issue a permit. In addition, the bridge statutes and their subsequent court interpretations require that bridges provide for the *reasonable* needs of navigation, not for *all* the needs of navigation. "The decision as to whether a bridge permit . . . will be issued . . . must rest primarily upon the effect of the proposed action on navigation to assure that the action provides the reasonable needs of navigation after full consideration of the effect of the proposed action on the human environment."[70]

Title 33 of the Code of Federal Regulations sets forth the requirements for a bridge permit application and the procedures by which the Coast Guard processes the application:

> When an application is received, the District Commander verifies the authority for construction of the bridge, reviews the application and plans for sufficiency, ascertains the views of local authorities and other interested parties, and ensures that the application complies with relevant environmental laws, regulations, and orders . . . .[71]

The Coast Guard will hold public hearings when there are substantial issues concerning any effect the proposed bridge will have on the reasonable needs of navigation.[72] At the close of the comment period and after any public hearings, the District Commander prepares a detailed statement of findings, conclusions, and recommendations based on all available information.[73]

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[69] U.S. Department of Transportation-United States Coast Guard, BRIDGE ADMINISTRATION MANUAL, COMDTINST M16590.5A, at 2-1 (June 4, 1994).

[70] 33 C.F.R. § 114.10 (1996).

[71] 72 33 C.F.R. § 115.60(a) (1996).

[72] *Id.*

[73] 33 C.F.R. § 115.60(b) (1996).

All bridge administration actions also require compliance with the National Environmental Policy Act (NEPA) of 1969[74] and the Council on Environmental Quality (CEQ) Regulations, which implements NEPA[75]:

> NEPA jurisdiction is not limited to the narrow issue facing an agency, as for example, the bridge and approaches of a highway project. The Coast Guard must address other impacts as well. Our environmental considerations extend beyond the bridge and approaches to include the causally related primary and secondary environmental impacts of the proposed bridge project. Where the Coast Guard is the Federal lead agency in a project involving a bridge, our NEPA jurisdiction extends to the logical termini on both sides of the bridge or the bridge and road sections that have independent utility.[76]

Therefore, the Coast Guard must consider foreseeable environmental impacts of the bridge prior to issuance of a bridge permit. Additionally, activities with existing environmental impacts at the time of permitting may limit the scope of the Coast Guard's inquiry.

C. Coastal Zone Consistency Certification

Before federal and state agencies can issue a permit in South Carolina, the applicant must receive a coastal zone consistency certification from DHEC's Office of Ocean and Coastal Resource Management (OCRM).[77] Any project, including direct federal activities and federally licensed or funded projects, taking place in the eight coastal counties of South Carolina which require state or federal permits, must receive a coastal zone consistency certification.[78] The Coastal Zone Management Act

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[74] 42 U.S.C.A. § 4321 (West 1996).

[75] 40 C.F.R. §§ 1500-1508 (1996).

[76] BRIDGE ADMINISTRATION MANUAL, *supra* note 69, at 2-1.

[77] The South Carolina Coastal Zone Management Act is found at S.C. Code Ann. § 48-39-10 to -220 (1976). For a policy statement by the OCRM on the coastal zone management program and permitting process, *see* 30 S.C. Code Regs. § 1 (Supp. 1996).

[78] S.C. Department of Health and Environmental Control, A GENERAL GUIDE TO ENVIRONMENTAL PERMITTING IN SOUTH CAROLINA, 65 (Nov. 1995) (hereinafter ENVIRONMENTAL PERMITTING IN SOUTH CAROLINA).

of 1972, as amended,[79] and its implementing instructions[80] require that all projects located within the designated coastal zone of a state are consistent with the state's federally approved Coastal Zone Management Plan (CZMP).[81] Basically, the OCRM will issue certification if the project is consistent with the CZMP Document.

The CZMP Document is a guideline document issued by DHEC that sets forth certain goals and objectives for coastal management. The program is intended to "achieve a rational balance between economic development and environmental conservation of natural resources in the coastal zone of South Carolina."[82] The CZMP Document recognizes the importance of coastal forests, their competing uses, and the need to balance economic development against environmental conservation. The Program seeks to achieve the wise commercial development of waterways for trade and commerce.[83] General requirements for certification are set forth in guidelines issued by OCRM:

> OCRM must certify that new development in the coastal zone is consistent with the policies of the coastal zone management program. This is accomplished through the review and certification of all projects requiring State and Federal permits. . . . The specific requirements for coastal zone consistency certification are by type of activity (e.g. residential development, highway construction, etc.) and are based upon performance standards. Policies also address wetland master plans, dock master plans, stormwater management, and mitigation requirements. Special categories of coastal resources are identified as Geographical Areas of Particular Concern (GAPC) and receive a higher level of protection.[84]

GAPCs are areas within South Carolina's coastal zone, identified in the State's Coastal Management Program as being of such importance as to merit special con-

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[79] 16 U.S.C.A. § 1451-1465 (West 1994).

[80] 15 C.F.R. § 930 (1997).

[81] After the management plan of a coastal state has been approved, federal agencies cannot take action until they have received written certification from the applicant and the appropriate state agency signifying that the applicant's proposed project is consistent with the state's coastal zone management plan. *See* 16 U.S.C.A. § 1456(c)(3)(B) (West 1994).

[82] S.C. Department of Health and Environmental Control-Office of Ocean and Coastal Resource Management, COASTAL ZONE MANAGEMENT PROGRAM DOCUMENT III-1 (1995).

[83] Id.

[84] ENVIRONMENTAL PERMITTING IN SOUTH CAROLINA, *supra* note 78, at 66.

sideration during the Department review of permit applications.[85] GAPCs consist of: (1) areas of unique natural resource value; (2) areas where activities, development, or facilities depend on proximity to coastal waters, in terms of use or access; and (3) areas of special historical, archeological or cultural significance.[86] GAPCs include "sites in the Heritage Trust Program, State wildlife preserves, States parks, scenic rivers, marine and estuarine sanctuaries, shellfish areas, groundwater resources, threatened or endangered species habitat, State ports and navigation channels, mining operations, and areas of special historical, archeological or cultural significance."[87] Classification of GAPCs are of critical importance to permitees since OCRM will not approve or certify applications that significantly impact a GAPC unless there are no feasible alternatives or there exists an overriding public interest and any substantial environmental impact is minimized.[88]

Finally, OCRM may consult with an appropriate state or federal agency when addressing issues concerning GAPCs. If the OCRM objects to consistency certification, the agency must describe how the proposed activity is inconsistent with specific elements of the Management Program. OCRM also requires the agency to specify any alternative measures which would permit the proposed activity to be conducted in a manner consistent with the Management Program.[89]

VI. Recent Developments And The Sandy Island Permitting Process

In 1981, Sandy Island Associates (SIA) purchased approximately 8,000 of the 12,000 acres that comprise Sandy Island, with the intention of harvesting timber off the island. However, the only existing means of transporting timber off the island was by ferry or cabling operations.

To alleviate the problem, SIA asked the State of South Carolina to build a bridge as part of a four-lane connecting highway to the Litchfield Beach area in December 1989. Initially designed to link U.S. Highway 701 with U.S. Highway 17, the proposed highway would have cut across Sandy Island. U.S. Highway 17 runs along the South Carolina coast and U.S. Highway 701 runs parallel to the Pee Dee River.

SIA presented its plan for the Sandy Island Connector to then-Governor Carroll Campbell after receiving the support of the Waccamaw Regional Planning and Development Council.[90] Since highway development funds were not available to fi-

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[85] S.C. Code Regs. § 30-1.C(7) (Supp. 1996).

[86] *Id.*

[87] ENVIRONMENTAL PERMITTING IN SOUTH CAROLINA, *supra* note 78, at 73.

[88] COASTAL ZONE MANAGEMENT PROGRAM DOCUMENT, *supra* note 82, at III-14.

[89] *See* 15 C.F.R. § 930.64(b) (1997).

[90] Monte Paulsen, *The Quiet Battle for Bull Creek: Sandy Island Owners*

nance the project, the state rejected the four-lane facility project. Without the state's support, SIA pursued construction of a smaller road connecting Sandy Island with U.S. Highway 701 and the construction of a private two-lane bridge across Bull Creek.[91]

SIA submitted a preliminary application with the South Carolina Water Resource Commission (Commission) in August 1992.[92] The partnership sought permission from the Commission to build a private bridge that would connect Sandy Island to the mainland. The scope of this project and the location of the proposed bridge was different than the original proposal to the State. The landowners stated in the application that the proposed bridge would cross Bull Creek and that the sole purpose of the bridge was for the management of timber on the island. Approximately 2,000 acres were proposed to be involved in the silviculture operations.

The original application requested permission to construct a two-lane concrete bridge about 400 feet east of the confluence of Little Bull Creek and Bull Creek. The fixed-span bridge would be approximately 750 feet long, 36 feet wide, and have two 12-foot lanes constructed of pre-cast concrete.[93] The bridge would also provide a vertical clearance of 25 feet above mean high water and a horizontal clearance of 90 feet across Bull Creek, a public waterway.[94]

The proposed bridge construction would not involve the fill of wetlands, but would require limited wetlands clearance for construction areas. SIA prepared three supplemental documents for the project including a Timber Management Plan, a Wetlands Characterization, and an Environmental Investigation.[95] SIA prepared these documents in an effort to determine potential impacts of the proposed bridge. Since the bridge would span navigable waters, the project required a navigable waters permit from the Commission and a bridge permit from the U.S. Coast Guard. The coastal zone consistency certification was a prerequisite to obtaining either permit.

Early in the permitting process, both sides accused the other of manipulating federal environmental laws to their own advantage as they battled over the proposal

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Envision Bridge; Would Bulldozers Follow?, THE STATE, Feb. 19, 1995, at A1.

[91] *Id.*

[92] On July 1, 1994, the S.C. Water Resource Commission merged with the S.C. Department of Health and Environmental Control, Office of Environmental Quality Control (EQC). The Bureau of Water Pollution Control (BWPC) within the EQC is now responsible for navigable waters permitting.

[93] Pre-Trial Brief of Defendant South Carolina Coastal Council at 2, *South Carolina Coastal Conservation League v. South Carolina Coastal Council*, C.A. No. 93-CP-10-4092 (S.C. Mar. 1, 1995).

[94] *Id.*

[95] *Id.*

to connect Sandy Island to the mainland. Early disputes centered on issues relating to the National Environmental Policy Act (NEPA) and the Clean Water Act (CWA). These issues threatened to arise again during the issuance of the coastal zone consistency certification.

A. National Environmental Policy Act

NEPA, a procedural statute, contains a requirement that federal agencies prepare an environmental impact statement (EIS) for "major federal actions that significantly affect the quality of the human environment."[96] NEPA was applicable to the Sandy Island project since a federal agency, the Coast Guard, would issue one of the necessary permits. As lead agency, the Coast Guard had the primary responsibility for complying with NEPA and preparing an EIS, if necessary.[97] The issuance of a bridge permit constitutes a federal action and is sufficient to trigger compliance with the requirements of NEPA.

Section 102 of NEPA requires federal agencies to make decisions that clearly evaluate environmental consequences. NEPA requires consideration of both present and future environmental issues when granting or denying a federal permit. NEPA does not mandate that environmental concerns are the only issues considered. Rather, NEPA requires that these concerns at least be a factor in determining whether to grant the permit. Thus, NEPA merely prohibits uninformed—rather than unwise—agency action.[98] Conflicts involving NEPA usually center on whether an agency performed enough investigation and enough scrutiny before the issuing agency granted the permit. The Sandy Island process was no different.

The first step in the NEPA process is to determine whether the action is subject to a statutory exemption.[99] No exemptions from NEPA were applicable to the Sandy Island project. The second step in NEPA involves preparation of an environmental assessment (EA). An EA is a concise document that describes the proposal and contains information, including a limited discussion of alternatives, that aid the agency in deciding whether a full EIS is necessary.[100] In determining whether an

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[96] 42 U.S.C.A. § 4332(c) (West 1994).

[97] 40 C.F.R. § 1508.16 (1996).

[98] *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

[99] Categorical exemptions from NEPA include (1) certain military programs whereby the military must follow NEPA but where the military does not have to disclose the results to the public and (2) certain actions by the EPA that provide for the functional equivalent of NEPA. 42 U.S.C.A. § 4334 (West 1994) provides a statutory exemption from NEPA for agency actions that conflict with "specific statutory obligations."

[100] 40 C.F.R. § 1508.9 (1996).

EIS is necessary, a federal agency must (1) take a "hard look" at the problem, and (2) identify relevant areas of environmental concern at the environmental assessment stage.[101] Factors in this "hard look" doctrine include whether the agency established that it studied the problem by task force or qualified investigation.

Based on the EA, the Coast Guard will produce either a finding of no significant impact (FONSI), whereby the agency determines that an EIS is not necessary, or determines that an EIS is indeed necessary.[102] Normally, the party seeking the permit is responsible for producing the EIS. In the Sandy Island conflict, the private parties and at least two federal agencies disagreed adamantly over whether SIA should prepare an EIS.

The conflict hinged on whether silviculture operations were on-going on Sandy Island at the time of application. If silviculture operations were on-going at the time of application, then the propsed bridge could not have caused that already-existing activity. On the other hand, if silviculture operations were not on-going at the time of application, then an EIS might have been required to access the potential impact that the bridge and all foreseeable operations would have on the island.

In its permit application to the Coast Guard, SIA reported that silviculture operations were on-going on Sandy Island. The United States Environmental Protection Agency (EPA) confirmed this assertion through an inspection of Sandy Island. Therefore, the Coast Guard correctly limited its scope, relating to the effect that the bridge would have on endangered species and wetlands, to the "footprint" of the bridge. The lead agency reasoned that as long as silviculture operations were in existence at the time of the bridge permit, the method by which SIA transported the timber to the mainland was not determinative. However, the Wildlife Service did not share this belief.

In a letter dated April 14, 1993, the Wildlife Service recommended "that an Environmental Impact Statement (EIS) be prepared."[103] While acknowledging that "the direct impacts of the proposed bridge . . . would have minimal adverse effects on the forested floodplain of Bull Creek," the Wildlife Service nevertheless recommended preparation of an EIS. The Wildlife Service indicated that SIA should prepare an EIS focusing on the effects that timber-harvesting would have on the biodiversity, wetland resources, fish and wildlife habitat, and federally protected plant and animal species on Sandy Island. The Wildlife Service also stated that SIA should survey for endangered species at the bridge site and at the access roads to the bridge and mainland in accordance with the Endangered Species Act.

On the contrary, in granting the FONSI, the Coast Guard stated that the effect of timber harvesting on Sandy Island was outside the scope of the bridge permit pro-

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[101] *Robertson*, 490 U.S. at 350.

[102] 40 C.F.R. §§ 1508.11, 1508.13 (1996).

[103] Letter from Roger Banks to John Winslow, *supra* note 14, at 5.

cess. If silviculture operations were existing at the time of permitting, then the *mode* of transportation would not affect the ecology. Any method of transporting the timber, whether by barging, cabling, or trucking, would adversely affect the ecology of the island in a similar manner.

The SELC claimed that, due to possible future development on the island, the law required the preparation of an EIS. The SELC contended that development of the island was a foreseeable consequence of the bridge, especially since possible development plans had been drafted by an SIA consultant. However, during the preliminary discussions, the Wildlife Service and the Army Corps of Engineers instructed SIA that, irrespective of the absence of any plan or intent by SIA to develop the property, it must include a conceptual development plan with any permit application.[104]

Conversely, the Chief of the Bridges Section for the Coast Guard's Seventh District in Miami stated that an EIS was not necessary if there was no intent to proceed with development of the island. According to the official, the Coast Guard would issue a FONSI if the bridge were only used for silviculture operations, a determination verified by Region V of the Environmental Protection Agency (EPA) in Atlanta, Georgia. Furthermore, the Coast Guard contended that absent proof of a fraudulent application by SIA, the lead agency was compelled to issue the permit based on the intended use of the island.

The Wildlife Service objected, asserting that "the U.S. Coast Guard is incorrect in limiting its scope of review of the project to the footprint of the bridge and approaches."[105] In subsequent correspondence to the Coast Guard, the Wildlife Service asserted that "there is evidence that an apparent disparity exists between the applicant's intended project purpose and the purpose advertised in the public notice."[106] However, the Wildlife Service never actually produced evidence of an ulterior motive by SIA.

SIA maintained that timber harvesting was its only purpose in building the bridge. According to the landowners, they created the development plans only because the Wildlife Service and the Corps, not the Coast Guard, required them to do so. In fact, the Coast Guard never required the submission of a development plan. The landowners also responded with a bad faith claim by asserting that the Wildlife Service attempted to "hang" the landowners on the agency's own requirement for the development plan. According to SIA, the Wildlife Service first required the landowners to submit a development plan regardless of its intended purpose, and then demanded that an EIS was necessary because of that same plan. The Wildlife Service pointed to the general purpose of an EIS to justify its position:

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[104] Brief of Respondent, *supra* note 43, at 3.

[105] Letter from Roger Banks to John Winslow (Mar. 7, 1995).

[106] Letter from Roger Banks to John Winslow, (Mar. 21, 1994).

> The primary purpose of an EIS is to serve as an action forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the federal government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.[107]

However, the opponents' purpose in requiring an EIS was clear. If the special interest groups could make SIA spend a million dollars to develop an EIS before the project's approval, bridge construction would stop before it ever started. On this count, the landowners claimed the environmentalists were unethically manipulating the federal laws to their own ends. To appreciate the expense involved in the preparation of an EIS, one must the consider the extensive requirements of the statement itself.

An EIS must include the following: (1) the environmental impact of the proposed action, (2) any adverse environmental effects which cannot be avoided if the proposal is implemented, (3) alternatives to the proposed action, (4) short-term use versus long-term productivity, and (5) any irreversible or irretrievable commitments of resources.[108] A "rule of reason" governs the scope of alternatives and effects that one must analyze. Therefore, an EIS must identify and analyze only *reasonable* alternatives. However, at a minimum an EIS must include (1) the "no action" alternative, (2) reasonable alternatives that would eliminate or minimize the need for the proposed action, and (3) alternatives that would mitigate the environmental impact of the proposal. The EIS must also address the environmental effects of the proposed action. "The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration."[109]

The landowners, environmentalists, and state government were vitally interested in the Coast Guard's determination of the necessity of an EIS. An EIS alone can cost millions of dollars. Since the coastal zone consistency certification took the forefront during judicial review, the NEPA issues were not addressed during litigation. However, all parties were aware that NEPA concerns would surface if the conditional certification granted by the Coastal Council was sustained by the South Carolina Supreme Court. Another point of contention between the permit applicants and envi-

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[107] 40 C.F.R. § 1502.1 (1996).
[108] 42 U.S.C.A. § 4332(c) (West 1994).
[109] 40 C.F.R. § 1502.15 (1996).

ronmentalists involved wetlands permitting.

B. Clean Water Act

The private parties and federal agencies also disagreed on the scope of wetlands permitting. Section 404 of the Clean Water Act (CWA) requires persons seeking to dredge material out of a wetland or place fill material into a wetland to obtain a permit from the Army Corps of Engineers.[110] Wetlands are "areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."[111] Thus, wetlands hinge on vegetation that needs a certain amount of water to survive and generally include swamps, marshes, bogs and similar areas.[112] Approximately half of the 12,000 acres that comprise Sandy Island meet the classification of wetlands.

Section 404(f) of the CWA provides specific exemptions to the "dredge and fill" permitting requirements. If an exemption applies to the proposed activity, the discharge of dredged or fill material is not prohibited by or subject to regulation under section 404.[113] Exemptions under section 404(f)(1) include "normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices . . . ."[114] However, if a party changes the existing use of land, thereby "bringing an area of the navigable waters into a use to which it was not previously subject," the CWA does not require a section 404 permit.[115]

The proposed bridge construction project on Sandy Island did not involve dredging or filling of wetlands, but would have required limited wetlands clearing for construction areas. The Wetlands Characterization prepared by SIA described the impact to wetlands due to construction as minimal. If the wetlands inquiry was limited to the area directly surrounding the proposed bridge site, these concerns were relatively minor. However, if the wetlands inquiry included other portions of the island, SIA would have to address the potential damages to those wetlands as well.

The scope of the federal permitting process requires the Coast Guard to consider the impact of construction and any foreseeable environmental consequences, including the loss of wetlands due to future construction activities on the island. Consequently, the intent of the applicant was critical in making this determination. For in-

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[110] 33 U.S.C.A. § 1344 (West 1994).
[111] 33 C.F.R. § 323.2(c) (1996).
[112] *Id.*
[113] 33 U.S.C.A. § 1344(f)(1) (West 1994).
[114] 33 U.S.C.A. § 1344(f)(1)(A) (West 1994).
[115] 33 U.S.C.A. § 1344(f)(2) (West 1994).

stance, if the landowners intended to build a bridge as a step in future residential development, the bridge permit application must address damage to wetlands caused by the residential development. But if the landowners intended to use the bridge solely to conduct silviculture activities, an exemption protects these areas from wetlands scrutiny.

SIA's intent in the application process, which was intensely contested by both sides, became crucial to the scope of the wetlands permitting process. If the lead agency believed that SIA intended to conduct silviculture activities exclusively, the landowners were exempt from the "dredge and fill" permit requirements. Conversely, if opponents to the project could show that the landowners intended to change the existing use of the island, CWA section 404 would apply in full force.

The Coast Guard relies on the good-faith intent of applicants when evaluating an application. SIA claimed that it was exempt under section 404 because timber harvesting would be the only activity it conducted on Sandy Island, and therefore, the Coast Guard did not need to evaluate the possible destruction of wetlands beyond the footprint of the bridge site. Opponents of the project, fearing possible residential development of Sandy Island and the ensuing destruction of wetlands, argued that the Coast Guard must address these issues before it issued the bridge construction permit. Environmentalists contended that there was clear evidence that SIA intended to develop the island as soon as the bridge was constructed and the silviculture operations were completed. Like NEPA, a section 404 permit would have increased the scope and cost of the project dramatically.

There are three parts to the section 404 permit process: (1) compliance with guidelines issued pursuant to CWA section 404(b)(1), (2) a public interest review process, and (3) compliance with NEPA. In light of the monumental requirements of this process, opponents to the project made a strategic decision by insisting that SIA complete a wetlands assessment for the entire island prior to construction of the bridge.

Under section 404(b)(1) of the Clean Water Act, the EPA and the Army Corps of Engineers developed a comprehensive scheme of regulations to evaluate section 404 permit applications.[116] The Guidelines identify a full range of factors in determining the environmental acceptability of a proposed project and attempt to set standards for permit decisionmaking.[117] The Guidelines further identify specific requirements that applicants must meet in order to receive a permit. In addition, the Guidelines create a rebuttable presumption against discharges in wetlands for all "non-water-dependent" activities.[118] Therefore, the key to a Guideline's analysis is

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[116] 40 C.F.R. §§ 230.1-230.80 (1996).

[117] Robert E. Steinberg & Michael G. Dowd, *Economic Considerations in the Section 404 Wetland Permit Process*, 7 VA. J. NAT. RES. L. 277, 279 (1988).

[118] *Id.* at 280.

on whether the proposed project is dependent on water.

If the project *is not* dependent on water, there is a rebuttable presumption that a practicable alternative to the project existed at the time the applicant started looking for a site. Under this test, if any practicable alternative to the proposed project would have a less adverse impact on the ecosystem, the permit is denied. An alternative is practicable if it is available and capable of fulfilling the project's overall purpose.[119]

If the project *is* dependent on water, a balancing test is used to weigh the benefits versus the adverse environmental impact. Benefits include economic and beneficial public interests. The applicant has the burden of showing that a project is water-dependent. Therefore, the Guidelines mandate that the agency should deny a section 404 permit if the proposed discharge will have "significantly adverse effects" on affected aquatic ecosystems.[120]

The centerpiece of the section 404 permit program is the public interest review process that the Corps developed under its own regulations.[121] In a public interest review, the Corps conducts a balancing test between the protection and the use of natural resources:

> The benefit which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriment. ... All factors which may be relevant to the proposal must be considered; among those are conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production, and in general, the needs and welfare of the people. No permit will be granted unless its issuance is found to be in the public interest.[122]

In evaluating all section 404 permits, the Corps must also fulfill its responsibilities under NEPA. NEPA requires that an applicant prepare an EIS for all federal activities that significantly affect the quality of the human environment. The Corps promulgated its own set of NEPA regulations in conformity with those of CEQ.[123] An EIS plays a significant role in the Corps public interest review and section 401(b)(1) guidelines analysis, although NEPA offers no substantive environ-

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[119] 40 C.F.R. § 230.10(a)(2) (1996).

[120] 40 C.F.R. § 230.10(c) (1996).

[121] *See* Steinberg & Dowd, *supra* note 117, at 282.

[122] 33 C.F.R. § 320.4(a)(1) (1996).

[123] Steinberg & Dowd, *supra* note 117, at 287-88.

mental standards.[124] Finally, the EPA has veto power over the Corps decision to issue a wetlands permit pursuant to section 404. Like NEPA, wetlands issues promised to emerge if the coastal zone consistency certification was issued.

C. Coastal Zone Consistency Certification

Applications for federal and state permits require coastal zone consistency certification by the appropriate state agency. For this project, the South Carolina Coastal Council was required to review both the federal and state permit applications to determine if the proposed activity was consistent with the policies set forth in the Coastal Zone Management Program Document.

Pursuant to the procedure in place at that time, SIA presented the application to the Management Committee of the Coastal Council. On June 17-18, 1993, the three-person Management Committee held meetings to discuss development plans for Sandy Island. After considering presentations by interested parties, the Management Committee found the project inconsistent with the policies set forth in the Coastal Zone Management Program Document. Specifically, the Committee was concerned about the long-range cumulative impacts on state and federal endangered species, and the existence of archaeological and historical sites potentially eligible for the National Register of Historical Places.[125]

Nevertheless, the Management Committee found that SIA could make the project consistent with the Coastal Zone Management Program by (1) the preparation of a Threatened and Endangered Species Management Plan approved by both the South Carolina Wildlife and Marine Resources Department and the Wildlife Service, and (2) the execution of a Memorandum of Agreement with the South Carolina Department of Archives and History regarding sites identified for eligibility in the National Register of Historic Places.[126] The Management Committee required these studies to focus on whether certain historical artifacts and endangered species would be protected during and after construction of the bridge. The historical inquiry focused on whether remnants of 19th century rice plantations could qualify for inclusion in

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[124] *Id.* at 288.

[125] The Coastal Council identified three GAPCs for the Sandy Island project: (1) a threatened or endangered species habitat, (2) areas of historical significance, and (3) a waterway within the coastal zone which met the legal standards for navigability (Bull Creek). *See* Pre-Trial Brief of South Carolina Coastal Council at 7, 10-11, *South Carolina Coastal Conservation League v. South Carolina Coastal Council*, C.A. No. 93-CP-10-4092 (S.C. Mar. 1, 1995).

[126] Final Brief of Respondent South Carolina Coastal Council at 3, n.2, *South Carolina Coastal Conservation League v. South Carolina Coastal Council*, C.A. No. 93-CP-10-4092 (Feb. 28, 1996).

the National Register of Historic Places. The environmental studies concerned any effects the bridge construction might have on endangered species, namely the red-cockaded woodpecker. OCRM determined that the plan must identify all threatened and endangered species and provide details for management of their habitat.

Obtaining approval of the Threatened and Endangered Species Management Plan from the Wildlife Service proved difficult. In April 1993, the Wildlife Service made it clear that the Coast Guard, as lead agency of the project, should have required an environmental impact statement.[127] The Wildlife Service made this determination prior to the Management Committee's decision on June 18, 1993, to issue the coastal zone consistency certification only after approval of the Management Plan by the Wildlife Service.

The Wildlife Service recommended that SIA prepare an EIS evaluating the potentially adverse effects of the bridge on endangered species based on the belief "that the documentation provided with the permit application does not provide a thorough or entirely accurate representation of the proposed project's potential impact on the natural environment."[128] After the Management Committee granted approval authority to the Wildlife Service, the federal agency no longer felt the need to demand an EIS. Thereafter, the Wildlife Service suspended the project indefinitely by asserting that the Management Plan prepared by SIA was inadequate.

The Wildlife Service continued to deny approval of the Management Plan which was required by the Coastal Council for coastal zone consistency certification. The Wildlife Service officially rejected the Management Plan because the landowners refused to provide survey information about endangered species beyond the construction site. In a letter dated June 22, 1995, the Wildlife Service stated that an endangered species survey should include "the bridge site, the area associated with the proposed silviculture operation, and any reasonably foreseeable potential development areas of the island resultant from bridge construction."[129] Based on this purported inadequacy, the Wildlife Service denied approval of the Management Plan.

On August 31, 1995, the Wildlife Service denied approval of a revised management plan citing the need for a "comprehensive survey identifying details of the project impacts, timber stand composition, and specific locations of Federally listed plant and animal species from on-site surveys" as the reason for the denial.[130] Un-

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[127] Letter from Roger Banks to John Winslow, *supra* note 14, at 5.

[128] *Id.* at 4.

[129] Letter from Roger L. Banks, Field Supervisor, U.S. Fish & Wildlife Service, to Stephen Snyder, Director, Coastal Zone Management Division, DHEC-OCRM 2 (June 22, 1995).

[130] Letter from Roger L. Banks, Field Supervisor, U.S. Fish & Wildlife Service, to Stephen Snyder, Director, Coastal Zone Management Division, DHEC-OCRM 2 (Aug. 31, 1995).

der the revised plan, the Wildlife Service also requested the applicant to prepare a narrative describing the effects of the proposed project on federally protected species.[131]

SIA, in turn, claimed that the requirements were beyond the scope intended by the Management Committee of the Coastal Council in 1993. The landowners also alleged that the Wildlife Service's motive in denying the bridge permit was to force them to sell the island to the government as part of a proposed wildlife refuge in Winyah Bay. Consistent with this allegation, SIA attempted to have a Wildlife Service field specialist removed from the review process claiming there was a possible conflict of interest with the refuge proposal. However, the Regional Director of the Wildlife Service refused to remove the specialist from the project.[132]

In a letter to the Coast Guard dated December 11, 1995, the OCRM informed the federal agency that it would not take further action on the project. The state agency explained that the project was at an impasse due to the conflict between the Wildlife Service and the landowners. The Wildlife Service refused to approve the applicant's Threatened and Endangered Species Management Plan since it provided an assessment of endangered species only in the "footprint" of the proposed bridge.

While negotiations between the landowners, OCRM, and the Wildlife Service floundered, opponents to the project appealed the Management Committee's denial of certification to the full Coastal Council pursuant to the agency's appeal process of certification decisions. After the Coastal Council affirmed the Management Committee's decision, the opponents filed an action in Circuit Court, seeking review of the final agency decision.

D. The Judicial Review Process

On September 30, 1993, opponents of the bridge project commenced an action against the South Carolina Coastal Council and Sandy Island Associates by filing a Summons and Complaint in the Circuit Court of Charleston County.[133] The Complaint sought declaratory and injunctive relief, appealing the final agency action of the Coastal Council. At trial, the plaintiffs alleged that the Coastal Council failed to apply the policies of the CZMA statute and its own regulations. Specifically, plaintiffs alleged four errors by the Coastal Council: (1) failure to address long-range cumulative effects of the project, (2) failure to apply standards applicable to Geo-

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[131] *Id.*

[132] Letter from James W. Pulliam, Jr., Regional Director, U.S. Fish & Wildlife Service, to Christopher McG. Holmes, Attorney at Law 1 (June 29, 1994).

[133] Plaintiffs in the lawsuit consisted of the South Carolina Coastal Conservation League, the Sierra Club, the League of Women Voters of Georgetown County, and the Sandy Island Community Action Club.

graphical Areas of Particular Concern (GAPCs), (3) improper conditional certification, and (4) denial of due process.

Following pretrial discovery, the Honorable David H. Maring, Sr., presiding judge for the Ninth Judicial Circuit, heard the matter on March 1, 1995. On May 23, 1995, Judge Maring issued an order affirming the action of the Coastal Council and denying the relief requested in the Complaint. Appellants timely filed and served Notice of Appeal to the South Carolina Supreme Court on June 13, 1995.

On appeal, Appellants asserted that the trial court erred in not requiring the Coastal Council to consider either the long-range impacts of the bridge or feasible alternatives to the bridge for timbering. The appeal also asserted that the trial court erred in not requiring the Coastal Council to comply with the GAPC priority use standards for Bull Creek. However, the appellants voluntarily dismissed the suit before the appeal reached the Supreme Court's docket.

E. Resolution

The South Carolina Supreme Court never heard the appeal. In March 1996, the South Carolina Department of Transportation (SCDOT) and the Nature Conservancy purchased 16,864 acres of land, including most of Sandy Island, for $12.9 million.[134] SCDOT paid for the bulk of the purchase, $11.9 million, while the Nature Conservancy contributed only $1 million. Not included in the purchase of Sandy Island were approximately 3,000 acres, consisting of residential property and the private sculpture garden near Murrells Inlet, Brookgreen Gardens. Even this solution displeased many tax-paying South Carolinians after accessing the quid pro quo.

For example, in 1995, Georgetown County assessed the value of the Wall/Milliken land on Sandy Island at only $2.4 million. Although the island's value would certainly increase if a bridge was built to the mainland, many claimed that the $11 million paid to SIA for its portion was unreasonable. In addition to the 9,164 acres purchased from SIA, the SCDOT purchased 7,700 acres of nearby wetlands from Georgia Pacific for $1.9 million. Many questioned the rationale behind paying $1,200/acre for Sandy Island while SCDOT purchased identical property from Georgia Pacific for only $247/acre. This criticism was especially pertinent in light of SCDOT's own justification for the purchase.

The Chairman of the State Transportation Commission, stated that the properties would serve as a "mitigation bank." As South Carolina needs to destroy wetlands to build highways in the future, it will simply "withdraw" land from the "bank" to mitigate damage done elsewhere. When the state withdraws the entire mitigation acreage, the ownership of the Sandy Island property will revert to the Nature Conservancy, a private conservation organization based in Washington, D.C., which attempts to pro-

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[134] The purchase of SIA's portion of Sandy Island closed on December 16, 1996.

mote business enterprises while helping to preserve the environment.

However, only 5,675 acres of the 9,164 total acres purchased from Sandy Island Associates are wetlands. This disparity considerably reduces the value of the mitigation bank for SCDOT. Many considered the purchase a ruse since the Nature Conservancy who stands to "inherit" the 16,800 acres contributed only $1 million to the purchase in spite of its $323.4 million in revenues in 1995. Of course, a mitigation bank created by the government is, by itself, a misnomer in light of the current U.S. policy of "zero wetlands loss." By purchasing 5,675 acres of wetlands, SCDOT now has a right to destroy that same number of wetlands in South Carolina without replacing them. In reality, the State of South Carolina purchased 5,675 acres of wetlands on Sandy Island that it will simply destroy elsewhere.

VII. Conclusion

The Sandy Island permitting process is the type of governmental failure that Ayn Rand loved to critique. Rand defined government as "an institution that holds the exclusive power to enforce certain rules of social conduct in a given geographical area."[135] However, the system of government breaks down when its laws are not objective and objectively justifiable.[136] This was precisely the problem with the Sandy Island permitting process—the laws were not objective. Rather, the regulations of some agencies were ambiguous in substance and subjectively applied in procedure.

More ominous is the appearance that certain agencies went beyond the scope of their jurisdictional bounds in halting the bridge project. For instance, the Wildlife Service demanded that SIA perform an EIS in connection with the Coast Guard application. But how would an EIS protect endangered species and wetlands on Sandy Island if silviculture operations were on-going at the time of the bridge permitting process?

Our regulatory system will constantly break down if we allow agencies to endlessly pass a project from one division to the next. Nine government agencies involved in the project could not make a simple decision on whether private landowners could construct a two-lane fixed-span bridge across Bull Creek.[137] In fact, it took four years just to reach the impasse. Most disturbing is the fact that the final

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[135] AYN RAND, *The Nature of Government*, THE VIRTUE OF SELFISHNESS 107 (1964).

[136] *Id.* at 110.

[137] Agencies involved included the DHEC-BWPC, DHEC-OCRM, U.S. Coast Guard, U.S. Fish & Wildlife Service, U.S. EPA, S.C. Wildlife and Marine Resource Dept., the S.C. Dept. of Archives and History, the Army Corps of Engineers, and the SCDOT.

agency decision to deny certification was not made on the merits. Rather, the final decision rested on the inability of federal and state agencies to agree on the scope of an endangered and threatened species management plan.

The Sandy Island purchase left more questions than answers. What did the four year permitting process accomplish? Has our system of government broken down when multiple agencies are at a standstill for over a year? Were the landowners given too much or too little for the land? Should South Carolina taxpayers receive more value from the purchase? Should South Carolina taxpayers pay for the purchase at all? How many acres of wetlands did the SCDOT really save by the purchase?

Conservation is an important goal in South Carolina. The government and private interest groups should be encouraged to purchase certain properties to protect ecologically sensitive areas. But in the future, governmental agencies must make these decisions with more candor and accountability. Government agencies cannot sit behind a veil of ignorance when deciding complex environmental issues. The Sandy Island fiasco is a lesson that state and federal agencies must make future environmental decisions on the merits.