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Developers' claim gets hard look

S.C. chief justice questions assertion wetlands protection law is invalid

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Thousands of acres of coastal wetlands could lose protection from development if the S.C. Supreme Court sides with a company that plans a commercial project on 62 acres near Murrells Inlet.

But the court seemed in no hurry Wednesday to take away those protections during a hearing in Columbia.

In what many agree is a landmark environmental case, a development company wants the court to declare invalid the state's coastal management program for protection of isolated wetlands.

The case is important because the federal government backed away from regulating isolated freshwater wetlands as a result of a U.S. Supreme Court ruling in 2001. That left states like South Carolina as the only regulator of development involving isolated wetlands. That is done through the coastal management program in South Carolina.

Lawyers for Spectre LLC told the court South Carolina used an inappropriate procedure to establish the program, meaning the program can't be used to deny permits to develop in isolated wetlands. The challenge does not extend to state protection of salt marshes. But it is significant nonetheless because isolated wetlands pockmark the coast like craters on the moon.

South Carolina has an estimated 300,000 to 400,000 acres of isolated wetlands, most of which are in the state's coastal plain. These soggy depressions are not linked directly to rivers, lakes, creeks or the ocean. They include wildlife-rich Carolina bays, seasonal wetlands found almost exclusively in the two Carolinas.

Chief Justice Jean Toal questioned how Spectre could say the state coastal management program is not valid when it has been used for decades to oversee development. The state coastal management program has been in effect for about 30 years - and Toal, a former lawmaker, said the program was approved by the Legislature after a full discussion.

"Why would the Legislature create such a thing when it's not an enforceable policy?"

Toal asked Spectre lawyer Stan Barnett. "What possible purpose would it have served to go through all those public hearings and ... all that debate? Why engage in all of that process if it doesn't mean anything?"

Barnett said the program isn't enforceable because coastal management rules were adopted using a different process than is used to develop most regulations in South Carolina.

His clients want to develop all or part of the 62 acres near the Horry-Georgetown county line. Of that land, about half contains isolated wetlands. In 2006, the state Department of Health and Environmental Control denied a storm-water permit for the project because the work would affect isolated wetlands. That was considered inconsistent with the state's coastal management program.

Spectre then appealed the case, and an administrative judge agreed with the company's arguments. That judge's 2008 order said DHEC did not have the authority to deny the storm-water permit by using a policy to protect isolated wetlands.

University of Georgia law professor David Shipley and Amy Armstrong, a lawyer representing many of the state's conservation groups, disputed that. They told the Supreme Court the Legislature's approval of the coastal management program was legal. Shipley, retained to represent DHEC, is an expert on South Carolina administrative law and a former USC professor.

It isn't known when the court will rule on Wednesday's arguments, but attorneys for conservation groups and DHEC said a verdict in Spectre's favor could severely damage South Carolina's effort to protect isolated freshwater wetlands along the coast.

"This is one of the most important cases we've had in some time as far as protecting our resources," said Carl Roberts, an attorney for DHEC.

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