

3719 Library

The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE: 803-734-3970
FACSIMILE: 803-253-6283

September 20, 1989

William A. McInnis, Secretary
State Budget and Control Board
State of South Carolina
Post Office Box 12444
Columbia, South Carolina 29211

Dear Mr. McInnis:

You have asked what agency, either the Budget and Control Board or Coastal Council, has jurisdiction "to authorize previously unauthorized work in an area designated as a 'critical area' under the Coastal Zone Management Act." More specifically, the State Ports Authority proposes to perform different work at the same location at which the Authority already possesses a Budget and Control Board permit. The Authority now seeks to extend the existing wharf (at Wando Terminal) approximately 1,373 feet in a northeast direction with approximately 20 acres of wetlands to be filled. It is our understanding that this new work will be confined to the 561 acres for which the original permit was granted. As we understand it, the Ports Authority has submitted a "petition to amend" the original permit to the Water Resources Commission, which is the agency designated by the Budget and Control Board to review the petition. The South Carolina Coastal Council, the Water Resources Commission and General Services have expressed the view that jurisdiction to entertain the Ports Authority petition lies with the Coastal Council.

A brief background of the Coastal Zone Management Act, interpretations thereof and this particular permit is helpful. Prior to the creation of the Coastal Council by the Coastal Zone Management Act, see, Section 48-39-10 et seq, Code of Laws of South Carolina (1976), the Budget and Control Board possessed jurisdiction regarding the issuance of permits for certain activities and constriction in navigable tidal waterways.

William A. McInnis, Secretary
Page 2
September 20, 1989

Previous to passage of the Coastal Zone Management Act, the Budget and Control Board issued a permit to the South Carolina State Ports Authority to construct a marine terminal facility on the Wando River. This permit has now been extended by the Board until 1994.

On July 1, 1977, the Coastal Zone Management Act became effective. Section 48-39-130(E) of the Act provides as follows:

Ninety days after July 1, 1977, no person shall fill, remove, dredge, drain or erect any structure as or in any way alter any critical area without first obtaining a permit from the Council. Provided, however, that a person who has legally commenced a use such as those evidenced by a state permit, as issued by the Budget and Control Board... may continue such use without obtaining a permit.... (emphasis added).

It is this provision of the Act which is applicable here. If indeed the Ports Authority has in this instance "legally commenced a use" for purposes of Section 48-39-130(C), then no permit issued by the Coastal Council is required. It is our opinion that the Ports Authority has "commenced a use" and, in this instance, modification of the existing permit must be a matter for the Budget and Control Board to consider.

In South Carolina State Ports Authority v. South Carolina Coastal Council, 270 S.C. 320, 242 S.E.2d 225 (1978) this provision of the Coastal Zone Management Act was interpreted by our Supreme Court. Involved in that case was this very same permit issued to the Ports Authority for the construction of Wando Terminal. In this action, the Coastal Council contended that the exemption contained in Section 48-39-130(C) applied only "to those projects that had actually broken ground on or before September 28, 1977." However, the Supreme Court rejected this argument and adopted the reasoning of the lower court. The lower court had concluded:

...Nothing in the Act undertakes to cancel state permits issued by the Budget and Control Board. In fact, Sections 13 and 21 [Section 48-39-130 and Section 48-39-210] granted to the Budget and Control Board yet an additional 90 days to issue permits. It would have been inconsistent for the General Assembly to grant the additional time to issue the Budget and Control permits if they [the permits] were to be void and of no consequence unless construction started under the permits.

William A. McInnis, Secretary
Page 3
September 20, 1989

This act is prospective. I cannot accept the contention of the Coastal Council that they are authorized to review all of the State permits previously issued by the Budget and Control Board. The statute does not provide it, and it would be disruptive and prohibitively retroactive for the Coastal Council to reopen these past valid State actions. The act contemplated that normal development would continue while the permitting authority shifted [from the Budget and Control to the Coastal Council] and the planning program evolved.

...I conclude that the Ports Authority had legally commenced a use and is entitled to an exception. Therefore, the Ports Authority may continue such use without a permit from the Coastal Council.

270 S.C. at 325. Significantly, the Supreme Court affirmed the lower court's holding that "the Wando River project was exempt from Coastal Council's permit-issuing jurisdiction." (emphasis added). Supra at 322. Thus, it is evident that the Court has already determined that the permitting authority with regard to the Wando Terminal project properly lies in the jurisdiction of the Budget and Control Board.

We are also governed in this regard by a previous opinion of this Office, dated May 31, 1988. In that opinion, state permits issued by the Budget and Control Board had expired and were no longer in effect. We thus concluded that because none of the permits issued by the Budget and Control Board [were] still in effect... if any State agency has any authority over these matters, that agency would be the Coastal Council." However, in that opinion we also noted that "the Coastal Council would not have had jurisdiction in instances in which a permit issued by the Budget and Control Board was still in effect." We stated that the "Coastal Council could not reopen a permit which had been validly granted by the Budget and Control Board."

That is precisely the situation here. The Ports Authority seeks authority to perform work on property which is already part of the original acreage over which the Budget and Control Board has exercised permitting authority. Even though the work now contemplated is not the same as originally envisioned, it is the same "Wando River project" which the Supreme Court in the original Ports Authority case has already concluded is "exempt from Coastal Council permit-issuing jurisdiction."

William A. McInnis, Secretary
Page 4
September 20, 1989

Also significant is the fact that the Budget and Control Board has repeatedly exercised jurisdiction over this project since its inception and the Coastal Council has specifically declined in the past to exercise its authority. For example, in January of 1979, the Board extended the permit until December 31, 1980 because of construction delays caused by the previous litigation. On April 8, 1980, the Budget and Control Board approved the Corps of Engineers' extension of the permit until March 31, 1982. A modification of the permit was approved by the Budget and Control Board on December 13, 1982. Finally, during the spring of this year, on March 15, 1989, the Board approved an extension of the permit until 1994. It is apparent from these actions by the Budget and Control Board over the years that all parties and agencies have viewed the Wando Terminal project as being subject to the jurisdiction of the Budget and Control Board in accord with the Supreme Court's ruling in the Ports Authority case.

We are aware of the argument that this proposed action by the Ports Authority is not merely a modification of an existing permit, but a substantive change in plan, thereby requiring a new permit, which must now be issued by the Coastal Council in accord with the Coastal Zone Management Act. While this argument may have appeal, we do not think it comports with the Ports Authority case or our earlier opinion of May 31, 1988. The thrust of both of these precedents is that a permit issued by the Budget and Control Board which remains in effect cannot be altered. Since the proposed work relates to the same property covered by the original permit and is part of the Wando Terminal project, we believe the better reasoning is that the Budget and Control Board retains authority over the proposed project.

Nor do we view an opinion issued on February 15, 1978 to be controlling. Admittedly, this opinion states that "the Budget and Control Board is without authority to consider permit revisions or modifications now that the Coastal Council has complete permitting authority in this regard." However, the opinion was rendered prior to the Ports Authority case, which specifically dealt with the Wando Terminal project. Thus, we do not view the 1978 opinion as dispositive of this issue, particularly in light of the subsequent May 31, 1988 opinion which contained the above referenced language regarding permits issued by the Budget and Control Board still in effect.

In summary, it is our opinion that the Budget and Control Board has the legal responsibility to render a final decision regarding amendment of the Wando project. We stress, however, that such jurisdiction by the Board does not preclude review of the proposed amendment by the South Carolina Coastal Council. Section 48-39-80(B)(11)

William A. McInnis, Secretary
Page 5
September 20, 1989

provides that any and all state or federal permit applications in the Coastal Zone must be reviewed under a system developed by the Council. Further, the Council has, pursuant to 48-39-80 through 48-39-100, developed its Coastal Zone Management Plan. Under the terms of that Plan, this amendment will be reviewed by the Coastal Council and the Council must certify that the proposed amendment does not contravene the Management Plan. Therefore, pursuant to the referenced Code Sections, the Coastal Zone Management Plan, and the practice of the Council, this amendment will be reviewed by the South Carolina Coastal Council.

Because the proposed amendment is the legal responsibility of the Budget and Control Board, and the workload of responsibility has been devolved on the Water Resources Commission, and because Water Resources has expressed doubts as to the availability of manpower and resources in this instance and the Coastal Council, pursuant to the above authorities will review the application, the Budget and Control Board may consider having the Coastal Council, as a part of its certification review, actually handle the staff work on this proposed amendment. Such an arrangement could be accomplished merely by written direction of the Board. If the matter is handled in such a fashion, the concerns of the Water Resources Commission will be met, the legal questions will be obviated, and the ultimate decision on the permit amendment could be rendered expeditiously.

If we can be of further assistance, please let us know.

Very truly yours,



Robert D. Cook
Executive Assistant for Opinions