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## Defense Counsel For the South

*From Alabama to Virginia, the attorneys of Rick Middleton's Southern Environmental Law Center are fighting in the courts — and building consensus in capitols and agencies — to save an endangered region*



The South is different. Not just a different history but a different culture, a different economy, its own way of doing business. Thomas Jefferson once noted these variances, lamenting the circumstances that “may have occasioned in Virginia a transplantation of a particular vice foreign to its climate.” He was speaking of the personal traits of each region’s citizens, but with a little license, and broadening the scope to the entire area, examples of “foreign” vices from today might include building a new coal-burning power plant to send electricity out of state, or clearcutting forests for the nation’s housing boom, or polluting coastal waters and wetlands to put bacon and eggs on America’s breakfast table. And in recent years, all of the above, to supply its own burgeoning economy, too. In one respect, the South is becoming more like the rest of the country — the severity of its environmental problems, most now home grown.

The person who may have the best handle on the special nature of the region’s environmental challenges is Frederick S. Middleton III. Rick Middleton is a true scion of the South and also a member of the first generation of environmental attorneys, who spread out from law school starting in the late 1960s to right wrongs nationwide. In practice, their efforts focused on the Northeast and the West Coast. But Middleton, a native of Birmingham, Alabama, who graduated from Yale Law School in 1971, saw a need in the South and instead returned home. After 15 years of public and private practice, he founded the Southern Environmental Law Center, headquartered in Charlottesville, Virginia, within site of Monticello. It was there that he sat for a recent interview. As it happens, our meeting was just hours after the Supreme Court announced the 9–0 vote in the Duke Energy case, which closed a loophole in EPA’s regulations for power plants lacking modern air pollution controls. SELC, along with Washington and Lee law professor Sean Donahue, handled the litigation for the plaintiff.

*Environmental Defense, et al., v. Duke Energy Corp. et al.*, is “part of a twenty-year argument between environmental organizations and utilities about whether we will get rid of older power plants,” Middleton says, referring to the ancient generators that were grandfathered by the Clean Air Act as long as they do not increase emissions by upgrading their units. Duke Energy argued that running a plant for more hours, as opposed to increasing the percentage of pollution in the effluent stream, does not constitute an increase under the act. Middleton, who had just received the opinion at the time of our interview, wasn’t able to comment on the details of the decision, though he pointed out an interesting feature of the litigation: The Bush administration dropped out of the enforcement action following a defeat in the Richmond-based Fourth Circuit. But the Department of Justice

decided to rejoin the case after SELC was successful in its petition for certiorari. The same day, in another clean air case, the administration suffered a major defeat, the 5-4 decision declaring that carbon dioxide is a pollutant within the meaning of the act. While the case won't force the administration to cut back emissions, it will require the government to provide a reasonable basis for not regulating.

Which decision is more important? "They are both huge," Middleton responds. "Now that EPA has the authority to regulate CO<sub>2</sub>, that will shift the focus of the federal government. But it will take several years to move through the regulatory process. The most im-

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mediate, direct step in addressing global warming is replacing old plants that use dirty, outdated technology; our case sets the stage for retiring them. Utilities will now have to decide. Are they going to spend millions to upgrade their pollution controls so they can generate more, or are they going to do what Congress originally intended: phase out these old plants and get a newer, cleaner generation online? As a result of the two decisions, utilities now know they will have to

reduce greenhouse emissions, and they know in which direction they need to take their plants to get there."

**M**iddleton's environmental background is a story too good to be true. His great grandfather founded a company that eventually became a part of U.S. Steel, and his grandfather followed in those footsteps. The company, which used open hearth furnaces, was the biggest polluter in the state when Middleton grew up. When he returned to Birmingham following his legal education and a brief stint in an Atlanta firm, he went to work for a crusading state attorney general. The first case Middleton drew was an action to compel U.S. Steel to clean up its furnaces in the state by a 1975 deadline in the Air Act. "It was a big deal in Birmingham. Everyone took sides."

Middleton won, forcing the company to comply. Soon after, he faced off against the federally owned and operated Tennessee Valley Authority, the biggest air polluter in the country. Although he lost in the U.S. Supreme Court on TVA's argument of sovereign immunity, he ultimately forced the authority to clean up its coal-burning power plants. Today, Birmingham has shed its image as a dirty industrial city and supports a thriving medical and health industry.

The irony of discussing these more than three decades old cases on the same day as the two big Supreme Court clean air decisions was not lost on Middleton. "We've come full circle. When I started my career, the mood of the country supported rapid cleanups. We were very successful in enforcing deadlines. Cases were simpler. Now everything is complex, everything gets lawyered to death." The Duke Energy case, as an example, took five years and generated more than a million pages in the record. "There is so much emphasis on every shade of gray, every word in a statute. What we really need is judges who say, Let's get to the bottom of this. How can we get the job done?"

Middleton left in 1979 to join the Washington office of the Sierra Club Legal Defense Fund (now Earthjustice). That experience, for all its benefits, highlighted the bicoastal viewpoint of the nascent profession. Meanwhile, when he looked homeward, he saw the things that make the South special were being destroyed to feed a rapidly growing national economy. It was also experiencing the beginning of the Sun Belt migration, as millions of Americans moved to the area, in large part to experience its natural wonders, putting pressure on the very same ecological systems.

In 1986 Middleton moved to Charlottesville, where he had done his undergraduate work in economics at the University of Virginia, to found the Southern Environmental Law Center. "Twenty years ago, this special region needed a champion," he says today, "an organization capable of taking on the big issues, strong and smart enough to challenge the toughest opponents and get the job done." Today SELC has 62 employees in five offices, with 100 active projects. "In every major environmental issue affecting the region, we are there, playing a central role."

Middleton has emphasized a place-based approach, working on the local level to help people protect their communities and their surroundings. The organization's actions nonetheless have national repercussions. "SELC concentrates its efforts in six states," says the local weekly, *C-Ville*, "but it is known for winning cases that affect environmental policy across the United States" — as the Duke Energy case shows. Even opponents have praise. "When you meet with them, you know they know exactly what they are talking about," says the executive vice president for public affairs of Dominion Virginia Power, Eva Teig Hardy. "They're coming at problems not with a pie-in-the-sky approach. It's grounded in realism and practical knowledge. But that doesn't mean they aren't tough. They're very tough."

The problems the South faces are legion. More timber is cut there than the entire rest of the country. On some days air quality in the Smokies is worse than Los Angeles. The South is blessed with more river miles than any other region, and more aquatic species, but

also suffers some of the worst water pollution and threatened ecosystems.

"We pull the lever that works. We work with all three branches of government. But the heart of our model is legal action: standing up in court against the government and some of the country's most powerful industries." Recently SELC has not only been facing off with Duke Energy and the Southern Company, but also has been preventing the Navy from arbitrarily putting a jet landing field in one of the most important spots for migratory waterfowl in the continent. That's in addition to keeping big developers from running roughshod over the region's coastal marshes and wildlife. "We have created an effective, multi-faceted model — the best, I think, in the country," says Middleton. "SELC takes on big problems and big opponents." And by all accounts, they usually win.

**M**iddleton is personally modest and softspoken — a Southern gentleman of the old school — but he is clearly proud of his organization and his colleagues. "From the very beginning, we set out to find the best lawyers who shared an appreciation for this region and a vision for its future," he says today. He soon had nine attorneys on staff, every one of whom is still with the organization, creating national-level expertise in wetlands, forestry, pollution, and transportation law and policy.

"My first hire was a young lawyer ready to go toe-to-toe with the Forest Service," he says. "In one year David Carr slashed logging and reduced road building by 50 percent in the Jefferson National Forest. A year later, Lark Hayes opened our second office, in Chapel Hill, and began changing Forest Service behavior in the Grand Pisgah and Nantahala National Forests. Lark and her colleagues virtually eliminated clear cutting in North Carolina." SELC has helped secure added protection for two million acres of public forestland, and logging throughout the Southern Appalachian national forests has dropped by 80 percent.

As the organization fights to preserve "the rural landscapes and overall quality of life that we cherish," to use Middleton's phrase, water quality has emerged as a major concern. Runoff from construction sites, streets, and parking lots is the number one source of water pollution throughout the region. It's a problem not only in cities, but also on the rapidly growing coast, where polluted runoff is jeopardizing estuaries and shellfish waters. SELC is reforming state-level policies and using targeted legal action to strengthen stormwater controls.

The region's wetlands are suffering, too. When SELC started, the South was losing wetlands faster

than any other area. Middleton hired Derb Carter, who "crafted a strategy to close two major loopholes in federal law that had allowed the massive conversion of wetlands to tree farms." SELC legal action strengthened federal protection for 8 million acres, and Carter is now a nationally recognized wetlands authority. "We have a region-wide wetland team, capable of forging a strategy to protect an entire state's coastline, as we are setting out to do in Georgia."

The number one problem the South faces is growth, which drives the others. Middleton notes that the very qualities that have attracted people to the region are being destroyed. "The South is the fastest growing area in the country. It is changing dramatically. The nature of that change over the next decade or two will determine the quality of our lives, and the quality of our environment, for generations to come."

A related concern is region-wide air quality, driven by sprawl and aged infrastructure. "In nearly every major city in the Southeast, the air is unhealthy," the result of too many cars and dated power plants. The organization's vision "is nothing less than clean, healthy air for every citizen in the region," Middleton says. Two more of the original nine, Rick Parrish and Jeff Gleason, "began by using a provision of federal law to reduce the pollution damaging Shenandoah National Park. This success laid the groundwork for Dominion Virginia Power to cut emissions from all its dirtiest plants." In 2002 SELC and others helped to pass the North Carolina Clean Smokestacks Act, reducing pollution equal to taking 4.5 million cars off the road. The group is now using the Clean Air Act's Section 126 petition process to require 13 upwind states to reduce their emissions as well.

Asked for his vision of the future, Middleton says, "SELC believes there is simply no reason we cannot have economic prosperity, a beautiful and healthy environment, and attractive, vibrant, and liveable communities." Achieving that won't be easy, however, as the organization confirmed during a recent strategic planning exercise. "We considered the upcoming threats, and the opportunities. What we saw was a bit frightening: explosive growth trends threaten to overwhelm the natural resources that we have worked so hard to protect. It was a sobering experience, and reaffirmed to ourselves that there is simply no other organization positioned to mount a comprehensive defense of this region. SELC must accept this challenge. And we invite others who care about this region to join us." — *S.R.D.*

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