

ISOLATED WETLANDS: REGULATION & PERMITTING DEFICIENCIES IN SOUTH CAROLINA

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Synopsis:

The following represents one perspective on the current status of wetlands regulation and permitting within the State of South Carolina as of March 10, 2003. It is not intended to be a definitive assessment but rather to illustrate several deficiencies which the author believes should be addressed by the South Carolina Legislature and Governor's Office. Recommendations are suggested to reform and streamline the permitting process.

Preface:

The following acronyms are used in the text:

SWANCC Decision: (*Solid Waste Agency of Northern Cook County v U.S. Army Corps of Engineers*)

USACE: U.S. Army Corps of Engineers

SCDHEC, OCRM: South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management

WMPG: OCRM Wetland Master Planning Guidelines

Until the Supreme Court ruling, now referred to as the SWANCC decision, isolated wetlands in the State of South Carolina have been jointly regulated by the USACE and the SCDHEC, OCRM. The basis for the State's authority was Section 401 of the Clean Water Act and the Coastal Zone Management Act. These two Acts require that any land development activity that requires a federal permit must meet all applicable state water quality standards and must be certified by the state. The permitting process for most projects requiring wetland impacts would typically involve a 45 to 300 day review period with multiple state and federal agencies reviewing a project and providing input to the USACE who would act as the lead agency. Under this program, the applicant was able to initiate the permitting process at the outset of the project once the land plan could be finalized and preliminary site engineering had been initiated.

In response to the high rate of development within the coastal counties of South Carolina and in an effort to streamline the permitting process, OCRM developed the WMPG with input from other state agencies. Further in 1995, the USACE and SCDHEC, OCRM jointly published the South Carolina Developer's Handbook for Freshwater Wetlands which provides a template for implementing

land development in South Carolina. The WMPG and the above referenced handbook basically defined what types of wetland impacts would be considered to be reasonable and minimal. The WMPG established the “rules of engagement” which have been utilized very successfully since their inception. The WMPG was based on wetland acreages which could be used for both large and small development tracts. Compensatory wetland mitigation was required by the State for any impacts greater than a tenth of an acre, and it established a significant penalty if a developer could not avoid impacting an isolated wetland area greater than one acre in size. Impacts to larger and/or contiguous wetlands were largely restricted to unavoidable impacts such as access roads, utility crossings. The overall net effect was to curtail impacts to the larger, environmentally significant wetland systems.

While the WMPG did not necessarily satisfy everyone, it did provide a uniform and relatively consistent framework that developers and business interests could work within to plan and forecast projects. The WMPG also removed some of the subjective nature of having projects rejected for other than pertinent, scientific reasons.

In the SWANCC decision, the Supreme Court determined that, when Congress promulgated the Clean Water Act, it was not their intent to have the USACE regulate isolated wetlands. In response to this decision, the USACE no longer regulates isolated wetlands; consequently, the State of South Carolina can no longer regulate or extend protection to isolated wetlands, which are common throughout the coastal plain through Section 401 of the Clean Water Act. SCDHEC, OCRM has elected to continue to regulate isolated wetland impacts through the storm water permitting program through emergency regulations. This is an assumption of authority which has not been specifically authorized or designated by the SC Legislature. This was the basis of Judge

Kemmerlin's ruling regarding the Myrtle Park Tract in southern Beaufort County. OCRM appealed this ruling to the SC Supreme Court. However, OCRM subsequently elected to settle out of court because a confirmation of the ruling by the SC Supreme Court would have effectively repealed OCRM's authority on a statewide basis. Further, it would have created an opportunity for developers to appeal many previously issued wetland permits involving isolated wetlands. OCRM has subsequently requested that the Supreme Court vacate Judge Kemmerlin's ruling. This request has not yet been granted.

Under the current situation, the applicant cannot apply for a wetland impact permit from SCDHEC, OCRM until the applicant is well into the design process. The applicant must apply for concurrence under the storm water regulations. This requires that the applicant invest significant time and resources before being able to apply for the necessary permits. By the time most development projects are ready to apply for a storm water permit the land plan is at a 95% stage and the civil engineering design is at a 70% complete stage. Consequently, if any changes are necessary based on input or objections from the regulatory agencies, it will result in a significant additional re-design and engineering costs to the applicant as well as a project schedule delay. This, in turn, creates an unstable business situation, in that the applicant cannot accurately forecast their permitting and/or development costs. It also hinders the opportunity for the developer and the state agencies to negotiate equitable wetland permit conditions.

Isolated wetlands represent a significant natural resource in the State of South Carolina, which all but the most "short-sited" individuals would agree need to have some form of legal protection. Over the last year SCDHEC and OCRM have collectively been attempting to implement isolated wetland regulation through the land disturbance permit program which has been successfully

challenged on several fronts as being in violation of the State of South Carolina's Administrative Procedures Act. This has created an unnecessary and unreasonable situation in which individuals with the time and means to challenge the agencies in court are prevailing; however, other business interests cannot afford the delay and must either submit to what amounts to an illegal permit or abandon the project.

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Presently, the **SC House Committee on Agriculture, Natural Resources, Environmental Affairs** is drafting legislation that proposes to protect isolated wetlands using a system that will be based on some form of qualitative assessment as yet to be determined. Presumably, this assessment system will be developed by SCDHEC, OCRM. A qualitative wetland evaluation system sounds good in theory; however, it is subjective in nature and may result in agency personnel making decisions based on their own personal bias. Further, it will take time and resources to develop. Presumably, in the course of assigning SCDHEC, OCRM the mission of developing a new permitting program it will be necessary to provide sufficient time and additional funding. The opportunity will also exist for some lobbying interests to exert pressure to allow exemptions and exceptions which are favorable to special interests groups and allow further subjectivity into the process which is already too convoluted.

Conclusion:

Given the present political makeup in the SC Legislature and the Governor's office combined with the present budget limitations in South Carolina, it appears that there is an opportunity to effect some changes that will: 1) Provide stability for the development/business community; 2) Provide isolated wetland protection that will be politically viable and; 3) Will avoid another financial burden to the state that will prevent the support of a fiscally conservative legislature or Governor's office.

A bill should be drafted which involves the following elements:

- 1) Restores the authority of SCDHEC, OCRM to regulate federally defined "non-jurisdictional" wetlands (ie: isolated wetlands meeting the federal definition).
- 2) Requires delineation of isolated wetlands using the 1987 Corps of Engineers Wetland Delineation Manual and associated guideline documents. (To prevent a situation such as Florida where there are different regulatory limits between state agencies, federal authorities and Water Management Districts, which subsequently necessitates three different wetland permit applications.)
- 3) Requires rules on exemptions analogous to current and /or future Clean Water Act exemptions.
- 4) Incorporates the existing OCRM Wetland Master Planning Guidelines and the policies found in the SC Developer's Handbook for Freshwater Wetlands.
- 5) Grants SCDHEC, OCRM inspection authority for non-federal/ isolated wetland cases.
- 6) Requires that SCDHEC, OCRM review applications for completeness within 30 days, and that the department issue its decision within 90 days of the receipt of a complete application.

- 7) Provide for SCDHEC, OCRM to issue General Water Quality Certification for groups of activities that have minimal individual and cumulative environmental impact.
- 8) Grants SCDHEC, OCRM, through the SC Attorney General's Office, enforcement authority over violations. Some level of minimum and maximum forfeitures should be established. SCDHEC, OCRM should also be allowed to seek restoration or abatement as a remedy in addition to punitive forfeitures.

In South Carolina, the OCRM Wetland Master Planning Guidelines already have stood the test of time in that they provide a consistent approach in protecting isolated wetlands. This document also provides a consistent and reasonable approach to land planning and site development standards. Incorporation of the WMPG also will serve to blunt and/ or limit the effect of potential challenges in court that normally occur when new legislation is enacted. Further, incorporation of the WMPG will not require that new standards be promulgated. The only present limitation is that OCRM's jurisdiction only extends to the eight coastal counties. However, the legislature can renew what has been the existing system and apply it to the rest of the state.

About the Author



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Mr. Edwards develops and leads natural resource investigations specific to wetlands and water quality issues, producing wetlands delineations, endangered species surveys, wetlands mitigation design, and other work related to natural resources. He is knowledgeable concerning the Clean Water Act and is familiar with water quality permitting requirements for the southeastern states. Mr. Edwards conducts and coordinates environmental studies and participates in regulatory negotiations for clients. He serves as Senior Scientist and Project Coordinator for the Natural Resource department. Mr. Edwards has conducted endangered species investigations on numerous sites within the southeast United States. As a biologist and wetlands scientist he leads the environmental consulting efforts for the company, including Environmental Impact Statements, wetlands permitting, endangered species surveys, wetlands mitigation design, wetlands delineations, and other work related to natural resources. Mr. Edwards resides in Bluffton, South Carolina.

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