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**SOUTH CAROLINA SUPREME COURT EXPANDS DHEC'S REGULATORY AUTHORITY OVER ISOLATED WETLANDS THROUGHOUT THE STATE UNDER THE POLLUTION CONTROL ACT**

**August 23, 2011**

In the July 2011 decision *Georgetown County League of Women Voters v. Smith Land Co., Inc.*, the South Carolina Supreme Court held that the Department of Health and Environmental Control ("DHEC") has jurisdiction to regulate isolated wetlands under the South Carolina Pollution Control Act ("SCPCA" or "Act"), an expansion of DHEC's regulatory authority over isolated wetlands throughout the State, beyond the eight "coastal zone" counties governed by the coastal management program organized pursuant to the Coastal Zone Management Act ("CZMA").

In the decision, Smith Land Company (the "Developer") began developing a lot on Pawleys Island in 2007. At the time, there was roughly 0.19 acres of wetlands on the property, which included vegetation and a pond. The Developer notified the U.S. Army Corps of Engineers ("Corps") of its plans to fill the pond and surrounding wetlands and the property was delineated as "isolated wetlands" by the Corps. Relying on the United States Supreme Court's 2001 decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("SWANCC"), which held that the Corps' jurisdiction under the Clean Water Act did not extend to isolated wetlands (those bodies of water not adjacent to open water), the Developer notified DHEC of its plans, but did not seek or obtain a permit from the agency.

Thereafter, in 2009, the Georgetown County League of Women Voters ("League") filed suit against the Developer under the SCPCA, arguing that the Developer failed to comply with its legal obligations under the Act in failing to obtain a permit before filling the isolated wetlands on the property. The League sought a declaration from the lower court that the Developer had unlawfully filled the wetlands, and an injunction requiring it to perform certain restoration work.

The lower court dismissed the claim, ruling that, pursuant to the SWANCC decision, DHEC lacked jurisdiction over isolated wetlands under the SCPCA, and that the Developer was in compliance with all legal requirements when it performed the work. The Court also ruled that the SCPCA did not provide for a private right of action such that the League had standing to bring suit, reasoning that the legislature had intended that only government agencies, not private citizens, could bring suit under the Act against non-complying parties.

The League appealed to the South Carolina Supreme Court, which reversed the lower court's decision. By a unanimous decision, the Court expanded upon its 2010 decision in *Spectre, LLC v. South Carolina Dept. of Health and Environmental Control*, which held that DHEC's regulatory authority over wetlands pursuant to the coastal management program under the CZMA was not limited to wetlands linked with the downstream system of coastal rivers and creeks, nor was it affected by the limitations on federal authority over wetlands set forth in the SWANCC decision. Here, DHEC had jurisdiction to regulate isolated wetlands pursuant to the SCPCA,

which required the Developer to first obtain a permit before discharging fill material into wetlands. As such, the Court held that the Developer was in violation of the SCPCA for failing to obtain a permit from DHEC prior to development.

In a split decision, the Court also held that a private right of action exists under the SCPCA, inuring to “any person or persons damaged as the result of any such violation” of the Act. The Court found the damages alleged by the League – that its members were harmed by the filling of the wetlands because it destroyed bird and wildlife habitats, impacting the members’ ability to enjoy their recreational and aesthetic interests – were sufficient to maintain suit under the SCPCA.

While the broadening of private rights of action under the SCPCA will likely lead to increased litigation under the Act, the expansion of DHEC’s regulatory authority under the SCPCA over isolated wetlands beyond the coastal zone regions poses an immediate and significant concern to both property owners and developers throughout the State. The Court’s use of the SCPCA to require a permit prior to filling even isolated wetlands will necessitate a more thorough evaluation of permitting needs prior to the development of property, regardless of the region of the State in which development will take place.

### **Contact Information**

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