

# RESTORING REASON TO SOUTH CAROLINA'S ENVIRONMENTAL PERMITTING PROCESS

by  
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The saga begins with a single residential lot in a partially developed subdivision that backs up against an eight-acre pond. Smith Land Company purchased the lot and sought to construct a single family home. As part of that process, Smith Land Company needed to fill approximately 0.33 acres, of which 0.19 acres was an isolated wetland. Smith Land Company consulted with the U.S. Army Corps of Engineers (Corps) and the S.C. Department of Health and Environmental Control (DHEC), and both regulatory agencies determined that no permit was required. From the DHEC's perspective, the "trigger" for permit coverage was the disturbance of 0.5 acres, so this project fell well within a residential lot exemption. From the Corps' perspective, no permit was required because it was an isolated and non-jurisdictional (as opposed to a federal "jurisdictional") wetland.

The Georgetown County League of Women Voters (League) sued, claiming, among other things, that Smith Land Company was required to obtain a permit from DHEC pursuant to the S.C. Pollution Control Act (PCA). The PCA, first enacted in 1950 and amended in 1970, contains a provision stating: "It shall be unlawful for any person, directly or indirectly, to throw, drain, run, allow to seep or otherwise discharge into the environment of the State organic or inorganic matter, including sewage, industrial wastes and other wastes, except as in compliance with a permit issued by the Department." S.C. CODE ANN. § 48-1-90(a). The language has always been interpreted by DHEC as authorizing the implementation of permitting programs, but if a permitting program was not triggered or applicable to the activity, then no permit was required. Additionally, enforcement of the PCA has been left to the government—DHEC and the Attorney General, for instance—and private citizens had no right to file their own complaints.

The circuit court dismissed the case, reasoning that a private party (such as the League) could not bring a claim, as only the government could enforce the PCA. The circuit court's rationale was consistent with the implementation of the PCA throughout its history and several of its provisions, including the declaration of public policy charging DHEC with the responsibility for the "enforcement of" the PCA. S.C. CODE ANN. § 48-1-20. On appeal, the Supreme Court disagreed. In an opinion issued on July 11, 2011, it reversed the circuit court. *Georgetown County League of Women Voters v. Smith Land Co.*, 713 S.E.2d 287 (S.C. 2011).

The Court unanimously held that under the plain language of the statute, a permit was required for any fill, regardless of the amount or whether a permit program existed for the discharge. However, the Court split on whether a private party could enforce the provisions of the PCA. The three-justice majority found that a "private right of action" existed, giving a private party like the League a right to bring an action in court for an alleged violation of the PCA. Two justices dissented, arguing that the statute did not allow private citizens to enforce the PCA, leaving enforcement solely to the government (*i.e.*, DHEC).

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The opinion drastically reinterpreted the PCA and created confusion and chaos where none previously existed. The repercussions of the decision were not limited solely to isolated wetlands. Instead, one interpretation of the decision was to eliminate any permitting exemption or threshold criteria (including those found in federal law for the Clean Air and Clean Water Acts), requiring permits for *every* discharge into the environment. Further, under the opinion, a permit was required *even if the state agency had no permitting program to cover the activity*. In a mere five pages, the South Carolina Supreme Court opened Pandora's Box.

The implications were staggering. By inference, tailpipe emissions from motor vehicles, fugitive air emissions, and nonpoint source water discharges, among others, required a state permit. To paraphrase a DHEC representative, individuals now needed a state permit to exhale and discharge carbon dioxide into the state's environment.

To compound the problem, private citizens, and, namely, non-governmental organizations (NGOs) advocating against economic growth and development, now had a new weapon with which to attack business and industry through additional litigation. This was a complete reversal from the implementation and operation of the PCA since its enactment in 1950.

The situation was untenable, and legislative action was called for to repair the damage. In March 2012, H.4654 was introduced in the South Carolina General Assembly (with a companion bill filed in the Senate). The bill called for the restoration of the PCA's interpretation and operation to the status quo prior to the South Carolina Supreme Court's opinion. Specifically, the bill proposed to restore the threshold quantities for permitting, restore the regulatory exemptions from permitting, and codify the common sense proposition that if no permitting program applied to the activity then no permit was required. The bill also proposed to unambiguously clarify that no private right of action existed under the PCA, placing enforcement back in the exclusive hands of the government.

The NGOs attacked, claiming the bill was an assault on wetlands and a citizen's right to a clean environment. With their new found right under the Supreme Court's decision, new lawsuits were filed and old lawsuits amended. Interestingly, not a single one of the new lawsuits was based on the filling of isolated wetlands, which affirmed the breadth of the opinion and the dangers inherent in the change to the PCA. Additionally, the pending lawsuits showed that citizens already had adequate avenues to bring claims under the common law or under any one of the several citizen suit provisions in federal environmental law.

The business community rallied. All walks of South Carolina business, from sole proprietors to Fortune 500 companies, presented a united front to the legislators and worked hard to dispel the misinformation campaigns attacking these common sense restorative measures encompassed in the bill. The legislature correctly viewed the Supreme Court's opinion as a threat to existing business and industry and a significant deterrent to any expansion or growth. While small compromises were made during the back-and-forth inherent in any legislative initiative, the end result was that the two core principles remained fully intact.

The General Assembly passed the bill, restoring the regulatory exemptions, affirming that no permit is required if no permitting program exists and placing enforcement of the PCA in the exclusive hands of the government. The South Carolina legislature recognized the perils of having private citizens act as law enforcement officers, and its positive response is one that should set an example for other states facing similar situations.