

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Case No. 15-ALJ-07-0404-CC

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NOV 17 2016

SC Court of Appeals

South Carolina Department of Health and Environmental Control
and Horry County Public Works Respondents,

vs.

South Carolina Coastal Conservation League and South Carolina
Wildlife Federation..... Appellants.

HORRY COUNTY PUBLIC WORKS' RETURN TO APPELLANTS' PETITION FOR
WRIT OF SUPERSEDEAS

INTRODUCTION

This case is not a challenge by Appellants as they describe it, to a challenge “to SCDHEC’s authorization of 24.19 acres of wetland destruction for construction of International Drive.” (Petition, p. 6). The case filed by Respondents was solely a challenge of two certifications issued by SCDHEC required by federal law as conditions allowing the issuance of a permit by the US Army Corps of Engineers of a permit to fill “waters of the United States”, in this case some wetlands. The purpose of the fill is to facilitate the construction of International Drive, a roadway in Horry County. No state permits are at issue in the case. The Administrative Law Court issued an Order on July 7, 2016 finding that both the 40 I Water Quality Certification and the Coastal Zone Certification (CZM) issued by DHEC were properly issued. In its July 26, 2016 Order, the Court addressed the policies Appellants noted in their Motion to Alter or Amend which had not been specifically addressed and again found that the CZM certification was properly issued by DHEC.

Petitioners also asked the Administrative Law Court to stay the effect of its orders in order to “preserve the status quo.” The Court denied that motion, holding that the status quo is that the Corps of Engineers has properly issued its permit, the only permit needed by the County to build the road. The efficacy of that permit, the Court held, is not a matter of state law. Therefore, the Court held that staying its Orders would not have any effect on the status quo. As a matter of federal law, the Court noted, Horry County is authorized to proceed with the road project including the filling of wetlands now permitted by the Corps of Engineers. Citing the

Supremacy Clause of the U.S. Constitution, the Court held that a State court lacked jurisdiction to interfere with performance of activities authorized by a federal permit. The Appellants' challenge to the two SCDHEC certifications, was, therefore, moot.

THE CERTIFICATION REQUIREMENT

The application by Horry County to the Corps of Engineers for a permit to fill wetlands pursuant to Section 404 of the Clean Water Act, 33 U.S.C. Sec. 1344, in order to construct International Drive triggered two certification requirements created by two federal statutes.

Section 401 of the Clean Water Act provides at 1341 (a)(1):

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title...

If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be. (Emphasis supplied).

A similar requirement is created by the federal Coastal Zone Management Act, 16

U.S.C. Sec. 1456(c) which provides:

After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. Each coastal state shall establish

procedures for public notice in the case of all such certifications and, to the extent it deems appropriate, procedures for public hearings in connection therewith. At the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. *If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed.* No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security. (Emphasis supplied).

In summary, these statutes prohibit the Corps from issuing a Section 404 permit, like that sought by Horry County for International Drive if the state denies either of these certifications *within the prescribed time periods set by the Congress.* If the state issues the certifications or if the state fails to act within the specified time periods – one year for a 401 Water Quality Certification and six months for a CZM certification -the Corps may issue the permit. The certifications are not themselves permits.

For instance, if Horry County had ignored the requirements of Section 404 and commenced work without a permit from the Corps, this would not have constituted a violation of state law; it would only constitute a violation of federal law. The lack of either certification would not empower the state to enjoin the action under state law. Similarly, if the Corps had decided that no wetlands within the jurisdiction of Section 404 of the Clean Water Act were being filled and, thus, did not require a Section 404 permit, the same thing would be true. The County's work would not be subject to a requirement for either certification. The only role of these two certifications is to comply with federal law. They do not constitute independent enforceable state law requirements.

THE TIME LIMITS FOR BOTH CERTIFICATIONS HAS PASSED

Regulations promulgated by the Corps of Engineers designate the date of DHEC's receipt of

requests for its certifications as the date for calculating both time periods. 33 C.F.R. Part 325(b). In this case, DHEC received the requests for both certifications on December 11, 2013. SCDHEC Trial Exhibit No. 11, page 1. The time period for the 401 Water Quality Certification ran out on December 11, 2014. The time period for the CZM certification ran out on June 11, 2014. From those dates, the Corps of Engineers was not obliged to defer to the state as to either certification decision. The Corps, as has been its practice, however, exercised its discretion to wait not only until these certifications were issued, but until this Court made its decision. The Corps issued its Section 404 permit on July 22, 2016. At that point, Horry County was free, as a matter of federal law, to proceed with construction of the road pursuant to the plans and all conditions of the Corps' permit. The county has undertaken that construction. Petitioners have filed and are pursuing an action in U.S. District Court challenging the Corps' issuance of the Section 404 permit. This action is premised on the federal Administrative Procedures Act, 5 U.S.C. 701-706, and the National Environmental Policy Act, 42 U.S.C. 4321. It is not premised on their claims that either of the SCDHEC certifications were improvidently issued.

PASSAGE OF THE DEADLINES FOR BOTH CERTIFICATIONS RENDER
ANY CHALLENGE TO THEM MOOT

Where the state certification process for final issuance of required certifications continues past the deadlines imposed by Congress, the state loses the power to "veto" a Corps permit and becomes "an interested bystander." Puerto Rico Sun Oil Co. v. USEPA, 8 F.3d 73, 78-80 (1st Cir. 1993), upholding EPA's position that a final 401 Water Quality Certification issued past the one year deadline could be ignored or adopted by EPA in its discretion. In this case, the Corps was free to wait beyond the certification deadlines, to accept part of the DHEC certification or accept all of DHEC's certification conditions or to accept none of the certification conditions. The Corps was also free to deny the permit outright.

Once the Corps issued its 404 permit, the question of whether the two DHEC certifications were issued properly became moot as no decision concerning that question, at that point, could have any practical legal effect on the existing controversy. Duke Energy Carolinas, LLC v. SCDHEC, 404 S.C. 119, 744 S.E.2d 194 (Ct. App. 2012). Only the Corps can impose new restrictions on the work it has permitted and only the Corps can suspend the effectiveness of its permit. Whether the Corps properly issued the permit is a matter of federal law subject to enforcement by a federal court. A stay of the Administrative Law Court's Orders will not, therefore, have any practical effect on the controversy over construction of International Drive.

The General Assembly could have created independent permitting requirements for the wetland fill necessary for construction of the road. It has not done so, however, either in the form of a standalone wetlands statute or in regulations creating a wetlands impact permit requirement under the umbrella of the Pollution Control Act. In fact, the General Assembly has expressly provided that the prohibition in the Act against discharging pollution into the environment without a permit does not apply to, "discharges for which the department has no regulatory *permitting* program." S.C. Code Sec. 48-1-90(2)(b). The certifications at issue here are clearly not permits within the S.C. Pollution Control Act or the S.C. Coastal Zone Management Act. Triska v. SCDHEC, 292 S.C.190, 355 S.E.2d 531 (1987). The fact that issuance of these certifications are actions deemed to be proper subjects for a contested case pursuant to the Administrative Procedures Act does not convert them into permits subject to enforcement by the state.

Appellants claim that this the Administrative Law Court's Orders "allow" the filling of wetlands as part of the construction of International Drive. Those Orders do not allow this work to proceed. Only the Corps of Engineers permit allows this to be done. It is the effectiveness of the Corps' permit alone that authorizes the county to fill the wetlands Appellants say concern them. Even revocation of the certifications by DHEC would not alter the fact that the Corps' permit has been issued and control over the work thus authorized is entirely in the hands of the Corps and/or federal courts. The state constitutional provisions

Appellants cite have no application in a case such as this, where the Orders they seek to appeal can have no practical legal effect on the work they seek to halt. Pursuit of the appeal filed by Appellants, regardless of the outcome, will have no concrete legal effect on construction of the project. The only result of the appeal will be what amounts to an advisory opinion as the issues to be resolved on appeal are now moot.

Appellants' anxiety over a "trend" to allow challenged projects to proceed because they have reached a certain level of completion and any legal action aimed at stopping them is rendered moot is misplaced here, whether it has any validity or not. In this case, Appellants were challenging two certifications – not permits or authorizations – by SCDHEC which had a "shelf life" mandated by federal law. Once the Congressionally mandated deadlines passed, these certifications were no longer required by federal law. To be sure, this poses a substantial hurdle for persons wishing to challenge the propriety of such certifications. That is a dilemma created by federal law, however. Certifications pursuant to Section 401 of the Clean Water Act or the Coastal Zone Management Act could be rendered legally enforceable requirements by the General Assembly, but, to date, they have not been raised to this level.

The dilemma, to the extent that it exists at all, as described by Appellants, was one of their own creation. Appellants were well aware that the Corps was preparing to issue its permit and, yet, they took no action whatsoever to prepare the way for a legal challenge to that permit in federal court. They could have filed a Notice of Intent to file a citizens suit under the Clean Water Act, 33 U.S.C. Sec. 1365, but did not do so. They could have filed a federal suit immediately upon losing their case in the Administrative Law Court, but they did not do so. The holder of a validly issued federal permit, such as Horry County, is not required by the law or common sense to wait for challengers like the Appellants to take action to challenge them in federal court. The applicable federal statute of limitations is six years. No conceivable standard of reasonableness requires waiting that long to proceed with a long planned project. If the project has proceeded

to a point that renders its challenge moot in state court, this is a condition created by the Appellants themselves.

CONCLUSION

The issues raised by Appellants in their challenge to the two SCDHEC certifications at issue are now moot. The federal permit has been issued and it is the only permit that authorizes the work Appellants complain of, the construction of 5.6 mile road in Horry County known as International Drive. Staying the orders of the Administrative Law Court will achieve nothing, therefore. For these reasons, Horry County respectfully requests that the Petition for a Writ of Supersedeas be denied.

Respectfully submitted,



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November 16, 2016
Mount Pleasant, South Carolina

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South Carolina Department of Health and Environmental Control
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.....Respondents,

vs.

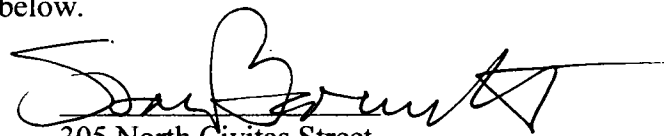
South Carolina Coastal Conservation League and South Carolina
Wildlife

Federation.....Appellants.

PROOF OF SERVICE

I certify that I have served the Horry County Public Works Response to Appellants' Petition for a Writ of Supersedeas on the Appellants and other Respondents by depositing a copy of it in the United States Mail, postage prepaid on November 16, 2016 addressed to the parties below.

November 16, 2016



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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
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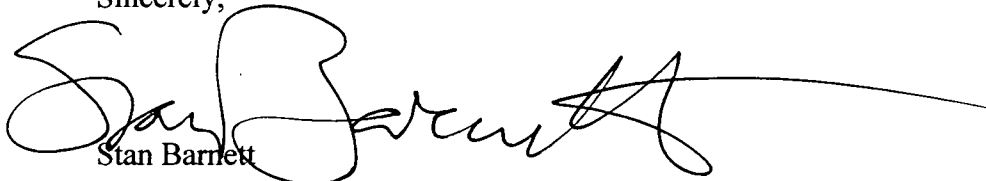
RE: S.C. DHEC and Horry County Public Works v. SC Coastal Conservation League and SC
Wildlife Federation
Admin Law Court Case No. 15-ALJ-07-0404-CC

Dear Ms Kitchings:

Enclosed please find an original and six copies of Respondent Horry County's Response
to Appellants' Petition for a Writ of Supersedeas in the above styled appeal.

With kindest regards and appreciation, I remain

Sincerely,


Stan Barnett

Cc: Amy E. Armstrong, Esq.
Michael Traynham, Esq.
Nathan Haber, Esq.
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