

Regulatory Process in SC (& a bit of history too!)



How are Wetlands Currently Regulated in SC?

- No specific State program
- Dependent upon Federal program
- Two prerequisite state certifications

Federal Program

Section 404 of the Clean Water Act

- Administered by the Corps of Engineers
- Oversight and guidelines by USEPA
- Input from US Fish and Wildlife Service, National Marine Fisheries Service, and State Historic Preservation Office
- 401 and CZM certifications by DHEC

Permits and Certifications

- Corps of Engineers Permit
 - Individual
 - Nationwide
- Sec. 401 Water Quality Certification
- Coastal Zone Consistency Certification
- Critical Area Permit (CAP)

Permit Can Not Be Issued if Either Certification or CAP is Denied

What Does Section 404 Regulate?

Only the placement of fill or dredged material into waters of the United States

Waters of the US - 1977

- Used for interstate or foreign commerce
- Interstate waters including wetlands
- Waters whose loss could affect interstate commerce
- Impoundments of waters
- Tributaries to waters
- Wetlands adjacent to waters

401 Certification Authority and Implementing Regulations

- Section 401 of the Federal Clean Water Act requires that applicants for federal permits for activities that will result in a discharge to waters of the US obtain a 401 Water Quality Certification
- SC Regulation 61-101 - Water Quality Certification

Water Quality Standards and 401 Water Quality Certification

- evaluate proposed projects in waters of the state -including wetlands- to make certain they will not contravene State water quality standards and/or eliminate existing or classified uses (SC R.61-68)

Wetland Classifications and Standards

- wetlands are considered waters of the State
- no specific classifications or standards for wetlands
- classifications and standards are taken from the adjacent (tributary to) waters
 - "where surface waters are not classified by name the use classification and numeric standards of the class of stream to which they are tributary shall apply" (SC R. 61-68)

Clean Water Act Goals

- Fishable/swimmable waters
- No discharge of toxics in toxic amounts
- No discharge of pollutants

DHEC Goals

- Protect surface and ground water quality
 - Appropriate and protective standards
- Reduce and Eliminate Pollution
 - Reduce nonpoint source pollution
 - Reduce point source discharges
 - Implement antidegradation

Antidegradation

- applicants must demonstrate that proposed projects will maintain the water quality necessary to protect the existing uses
- Examples of antidegradation questions:
 - Will the proposed project contribute to further degradation of 303(d) listed waterbodies?
 - Will the proposed project cause the closure of shellfish harvesting areas?

Water Quality Certification Program - Section 401

Program specific regulations have considerations for wetlands alterations

- Requires avoidance and minimization
- Requires alternatives analysis
- Requires mitigation

Water Quality Certification Program - Section 401

Process is coordinated and allows for public input

- Joint public notice with Corps and OCRM
- Public hearings when requested by 20
- Notice of proposed decision subject to appeal
- Final issued if not appealed

Water Quality Certification Program

- Section 401

- whether the proposed activity is water dependent and the intended purpose of the activity
- whether there are feasible alternatives to the proposed activity
- all potential water quality impacts of the project
 - impact on existing and classified uses
 - physical, chemical, and biological impacts
 - the effect on circulation patterns and water movement
 - cumulative impacts

SC Coastal Zone Management Act

- Regulations for Permitting in the Critical Areas of the Coastal Zone.
- R 30-1 through R 30-21. APA Procedures
- South Carolina Coastal Management Program.
- Policies and Procedures approved by Governor and General Assembly

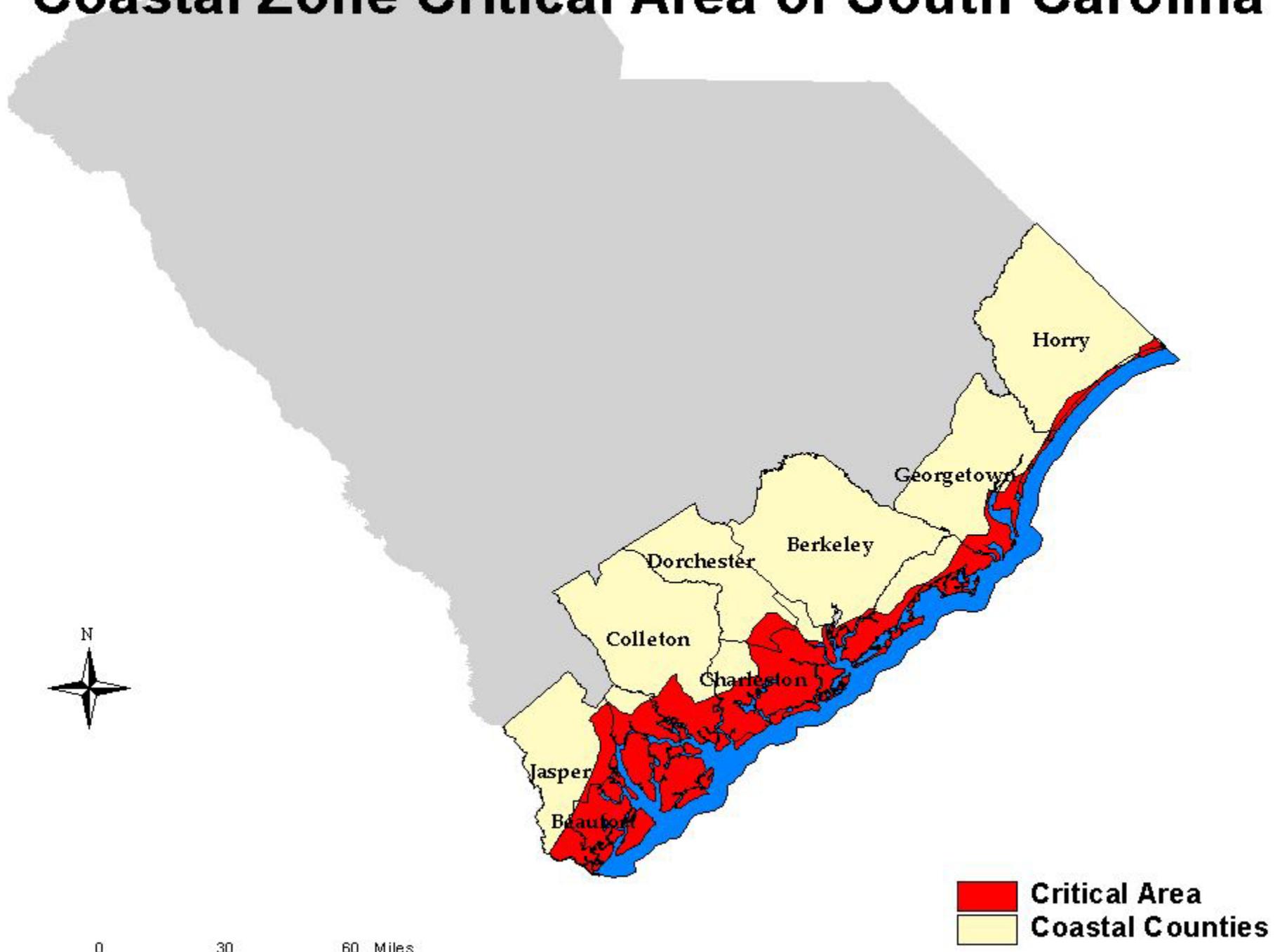
Coastal Legislative Milestones

- 1972 Federal Coastal Zone Management Act
- 1977 South Carolina Coastal Management Act
- 1979 South Carolina Coastal Management Plan Approved
- 1991 Storm Water and Sediment Reduction Act
- 1992 Storm Water and Sediment Reduction Regulations R. 72-300

1979 Coastal Zone Management Plan

- Approved Policies and Procedures for all projects in the Coastal Zone.
- Affects both direct and indirect permit actions
- Direct permitting actions (critical area) are covered by regulations and policies.
- Indirect (certifications) are covered by the CZMP only - no coastal regulations.

Coastal Zone Critical Area of South Carolina



Coastal Zone Management Program

DIRECT AUTHORITY

Critical Area

- Marshes, Beaches and Coastal Waters
- Regulations for Permitting in the Critical Areas of the Coastal Zone.
- R 30-1 through R 30-21 APA Procedures
- Regulations approved by General Assembly and Governor

INDIRECT AUTHORITY

Outside Critical Area

- 8 Coastal Counties
- Certify other State and Federal Activities/Actions
- Policies and Procedures approved by General Assembly and Governor

Definitions

- Critical Area:
 - Coastal Waters
 - Tidelands
 - Beach/Dune System
 - Beaches

Critical Lines

- Must be signed and dated by OCRM staff to be valid.
- Good for five years except for eroding stream banks.
- Staff reviews about 1200 requests a year.

General Permits

Shorter notice time frame than direct permits:
10 day newspaper notice

Activities include: additions to docks, nesting platforms, special events, directional bores for utility lines, mariculture, sandfencing, Soil borings, non-attached decks, landscaping and minor beach renourishment.

Critical Area Permitting Process

- Application
 - OCRM (1-14 days)
 - Joint Federal (14-60 days)
- Public notice
 - Time Frames (15-30 days)
 - Agency and public comment (14-365 days)
 - (365 days § 401 time frame)
- Public Hearing
- Review
 - Site visit
 - GIS, comments, Decision Document
- Decision
 - Appeals Process (120 days +)

Regulatory Procedures

- No separate application to DHEC
- Joint public notice process (15 days)
- Joint P/N serves as application to DHEC
- Opportunity for a Public Hearing
- Preparation of a Staff Assessment
- Issue Notice of Proposed Decision
- Issue/Deny Final Certification

Interagency Team



- US Army Corps of Engineers
- US Environmental Protection Agency
- US Fish & Wildlife Service
- National Marine Fisheries Service
- SC Department of Health & Environmental Control
- SC Department of Natural Resources
- SC Department of Archives & History

Wetlands....

How are they
considered in SC
and what have we
done???

What is a wetland?

"Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."

Who Decides Which Wet Areas are "Wetlands"?

- The Corps of Engineers
- Using 1987 Delineation Manual
- A scientific determination using three parameters
 - Hydrology
 - Hydric soils
 - Hydrophytic vegetation

Over the years....

The State's ability to regulate wetlands has decreased due to several important court cases.

Wetlands Ditching

The Tulloch Rule

- 1993 - North Carolina Wildlife Federation v. Tulloch (Corps Colonel)
 - *de minimis* discharge subject to regulation
- 1997 - American Mining Congress v. USACOE
 - US District Court of DC declared invalid but decision stayed while Corps appealed
- 1998 - US Court of Appeals for DC affirmed

Isolated Wetlands

SWANCC v. Corps - 2001

- Isolated waters and wetlands removed from Corps jurisdiction
- Migratory Bird Rule invalid
- Waters must show connectivity

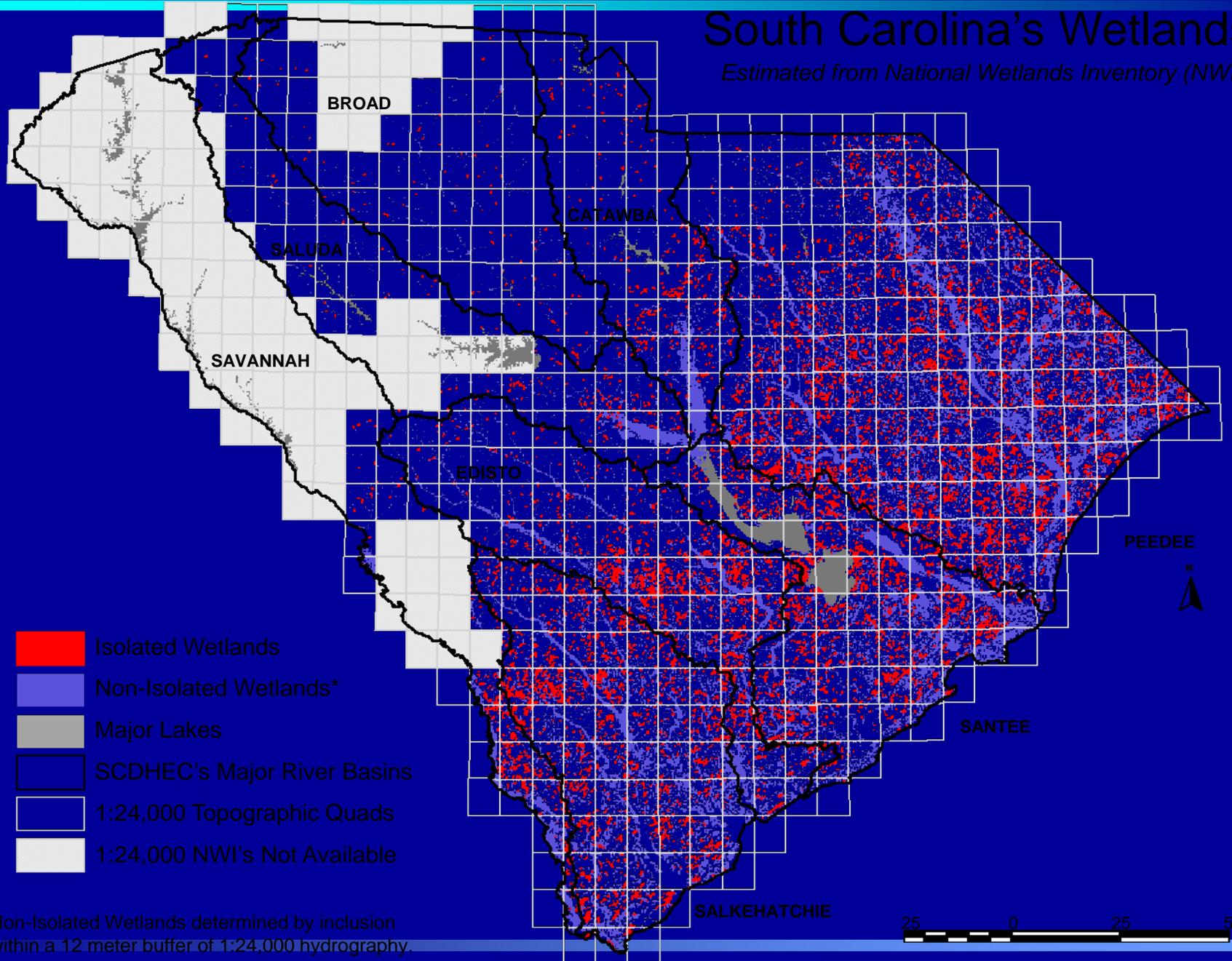
Migratory Bird Rule - 1986



- Habitat of birds protected by Migratory Bird Treaties
- Used by migratory birds which cross state lines
- Habitat for endangered species
- Use to irrigate crops sold in interstate commerce

South Carolina's Wetlands

Estimated from National Wetlands Inventory (NWI)



* Non-Isolated Wetlands determined by inclusion within a 12 meter buffer of 1:24,000 hydrography.

25 0 25 50 Miles

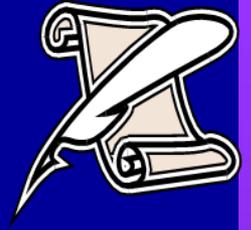
SC's Response

2001

- DHEC issued Emergency Regulation (Document # 2617)
 - Issued February 15, 2001
 - Required water quality certification and/or CZMP certification for fill in wetlands for activities that required another DHEC permit but no 404 Permit was required
 - Valid for 90 days

SC's Response

SC Senate took up wetlands legislation



1/30/2001 S 223

"South Carolina Wetlands Protection Act"

2/6/2001 S 287

"Freshwater Wetlands Protection Act"

4/4/2001 S 550

"South Carolina Carolina Bays Protection Act"

SC's Response

Result ??



SC's Response

2002

Petition from Environmental Groups:

- Southern Environmental Law Center
- SC Wildlife Federation
- SC Sierra Club
- SC Native Plant Society
- SC Audubon Society

For "DHEC to issue declaratory rulings and begin rulemaking to protect SC wetlands"

SC's Response

Petition from Environmental Groups:

'Carry out the duties required in the Pollution Control Act (PCA) to regulate the pollution of "nonfederal wetlands" '

SC's Response

2003 - 2004

DHEC Proposed Revisions to R.61-101

Would have included provisions for issuing a Water Quality Permit for an activity which may result in a discharge of dredged or fill material to a nonfederal water

SC's Response

2003 - 2004

Permitting Process would have been the same as the Certification Process

Public notice process

Opportunity for a Public Hearing

Preparation of a Staff Assessment

Issue Notice of Proposed Decision

Issue/Deny Final Permit

Senate inquiry into the existing statutory Authority to regulate wetlands and to promulgate the emergency regulations...



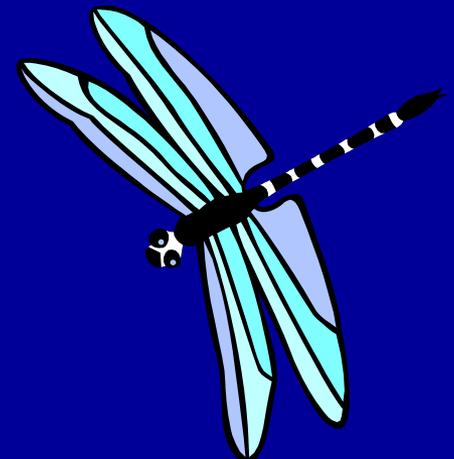
DHEC's Office of General Counsel response:

South Carolina Code Ann, Section 48-1-90(a) (1987) provides:

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.

SC Pollution Control Act

- Waters of the state broadly defined
- Wetlands considered Waters of the State
- Upheld in State Circuit Court - 1995



SC Definition of Waters

"lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic Ocean within the territorial limits of the State and all other bodies of surface or underground water, natural or artificial, public or private inland or coastal, fresh or salt, which are wholly or partially within or bordering the State or within its jurisdiction."

SC's Response

2003 - 2004

SC House took up wetlands legislation



2/2004 H 4838

"South Carolina Isolated Wetlands Act of 2004"

3/2004 H 4934

"South Carolina Isolated Wetlands Act of 2004"

4/2004 H 5140

Add word "wetlands" to PCA definition of Waters of the State

SC's Response

Result ??



SC's Response 2004

South Carolina Wetlands Stakeholders Process



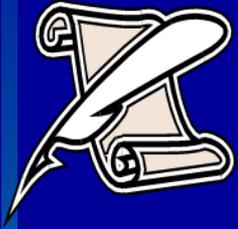
Fall 2004



<http://www.scdhec.net/water/pubs/wetlandsfinal.pdf>

SC's Response

2006



SC Senate took up wetlands legislation

Again!

And Again in 2007 !

S. 1206 "South Carolina Isolated Wetlands Act of 2006"



What's Next????



Keep your eye on our website:
<http://www.scdhec.net/water/>

And on the SC legislature's website:
<http://www.scstatehouse.net/>



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