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Summary: Isolated Wetlands Act

**HISTORY OF LEGISLATIVE ACTIONS**

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**VERSIONS OF THIS BILL**

[3/15/2012](file:///p:\pprever\2011-12\5032_20120315.docx)

**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING CHAPTER 38 TO TITLE 48 SO AS TO ENACT THE “SOUTH CAROLINA ISOLATED WETLANDS ACT OF 2012”, TO PROVIDE THAT FOR PURPOSES OF THIS ACT, ISOLATED WETLANDS ARE THOSE WETLANDS NOT REGULATED BY THE FEDERAL CLEAN WATER ACT, TO ESTABLISH PROCEDURES AND CRITERIA FOR THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL TO ISSUE PERMITS FOR CONDUCTING CERTAIN DISCHARGING, DRAINING, AND DITCHING ACTIVITIES IN ISOLATED WETLANDS, AND TO MONITOR PERMIT COMPLIANCE.

Whereas, the South Carolina General Assembly finds that:

(1) isolated wetlands serve important environmental functions such as: providing habitat for wildlife, protecting water quality, and providing flood control;

(2) isolated wetlands offer important economic and recreational benefits such as hunting, fishing, bird watching, and tourism;

(3) the isolated wetlands in South Carolina have sustained a historical degradation, resulting in the need for an effective program to limit the degradation of isolated wetlands and to provide, where and when appropriate, for long‑term restoration and enhancement of isolated wetlands in South Carolina that have degraded or have been lost in the past;

(4) changes in federal, state, and local policies have decreased the rate of isolated wetland losses in recent years;

(5) interpretations by the United States Supreme Court regarding the scope and reach of the federal Clean Water Act have limited the federal government’s role in regulating impacts on isolated wetlands, delegating much authority to the states;

(6) the United States Supreme Court has indicated that regulation of land and water use is a traditional and primary power of the states;

(7) many of the state’s isolated wetlands exist on privately owned property;

(8) the State of South Carolina will implement an effective, balanced program to manage activities in and around isolated wetlands that:

(a) conserves and enhances environmentally significant isolated wetlands functions;

(b) requires mitigation to compensate for unavoidable isolated wetlands disturbances;

(c) recognizes the need for essential public infrastructure, such as highways, utilities, ports, airports, sewer systems, and public water supply systems, and the need to preserve strong local tax bases;

(d) respects and protects individual private property rights; and

(e) provides for sustained economic growth; and

Whereas, it is the policy of the State of South Carolina to:

(1) enact a permitting program for activities in isolated wetlands under this act that balances isolated wetlands protection with economic growth;

(2) conserve isolated wetlands without significant adverse impacts on the state, regional, and local economy, including significant reductions in state and local tax receipts;

(3) encourage the conservation and restoration of isolated wetlands functions where appropriate;

(4) achieve the goal of no net loss of isolated wetlands, except as otherwise stated in this act, when measured in terms of functions provided by the isolated wetlands on a statewide basis;

(5) implement the regulatory program authorized under this act to ensure that landowners are not denied the reasonable use of their property;

(6) streamline the permitting process for minimal impact projects in isolated wetlands;

(7) ensure an efficient and cost‑effective isolated wetlands regulatory program; and

(8) minimize regulatory gridlock by designating one state agency to implement the regulatory program for wetlands determined to be isolated by the federal government. Now, therefore,

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Title 48 of the 1976 Code is amended by adding:

“CHAPTER 38

Isolated Wetlands

Section 48‑38‑10. This chapter may be cited as the ‘South Carolina Isolated Wetlands Act of 2012’.

Section 48‑38‑20. For purposes of this chapter:

(1) ‘Abandoned’ means no construction, mining, processing, or reclamation activities have occurred during the previous seven years.

(2) ‘Activities’ means the discharge of dredged or fill material into waters, as defined in Section 48‑1‑10(2), as well as the draining, ditching, dewatering, or other alteration of the physical and chemical integrity of a wetland.

(3) ‘Board’ means the Board of the South Carolina Department of Health and Environmental Control.

(4) ‘Carolina Bay’ means a natural shallow depression largely fed by rain and shallow groundwater, with an elliptical shape and generally a northwest to southeast orientation.

(5) ‘Mitigation’ or ‘Mitigation project’ means in order of acceptability:

(a) avoiding impact by not performing the activity in isolated wetlands;

(b) minimizing impacts by limiting the degree or magnitude of the action and its implementation;

(c) rectifying the impact by repairing, rehabilitating, or restoring the affected environment;

(d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action;

(e) compensating for the impact by replacing or providing substitute resources or environments.

(6) ‘Department’ means the South Carolina Department of Health and Environmental Control.

(7) ‘Discharge of dredged or fill material’ means the addition of dredged or fill material into isolated wetlands.

(8) ‘Fill material’ means material placed in an isolated wetland where the material has the effect of:

(a) replacing any portion of an isolated wetland with dry land; or

(b) changing the bottom elevation of any portion of an isolated wetland. Fill material includes, but is not limited to, rock, sand, soil, clay, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in an isolated wetland.

(9) ‘Feasible’ means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purposes.

(10) ‘Isolated wetlands’ means those areas that are inundated or saturated by water at a frequency or duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions and that are not regulated under the federal Clean Water Act. The term ‘isolated wetlands’ does not include:

(a) waste treatment systems, including treatment ponds or lagoons, not constructed in isolated wetlands, designed to comply with water quality standards of the State;

(b) stormwater management facilities, or a drainage or irrigation ditch, located in upland, including storm water retention ponds;

(c) an artificially irrigated area that would revert to upland if the irrigation ceased;

(d) a waterfilled depression created in uplands incidental to construction activity, or to excavation activity, for the purpose of obtaining fill, sand, gravel, aggregates, or minerals unless these activities have been abandoned and the area otherwise meets the definition of isolated wetlands; or

(e) depressions in upland soil resulting solely from traffic from vehicles and human activity, excluding activity intended to change the elevation, slope, or composition and structure of wetland soils.

(11) ‘Mitigation bank’ means a site where wetlands are restored, created, or preserved expressly for the purpose of providing compensatory mitigation credits for compliance with mitigation requirements of an approved permit in accordance with the provisions of this chapter.

(12) ‘Compensatory mitigation’ may include restoration, enhancement, preservation of wetlands or the debiting of credits from a wetlands mitigation bank.

(13) ‘Person’ means an individual, public or private corporation, political subdivision, government agency, municipality, industry, copartnership, association, firm, trust, estate, or any other legal entity.

Section 48‑38‑30. Wetlands regulated by the federal government under the federal Clean Water Act are not under the jurisdiction of the department for purposes of this chapter.

Section 48‑38‑40. A delineation approved by a federal agency under Section 404 of the federal Clean Water Act within five years of submittal to the department may be accepted by the department but are not binding on the agency if there is evidence of fraud, bad faith, mistake, inaccuracy, or negligent misrepresentation by the applicant or agent procuring the delineation.

Section 48‑38‑50. (A) The department, after notice and opportunity for comment by affected parties, and using the procedures and criteria for permit issuance set forth in this chapter, shall issue permits for the activities in isolated wetlands regulated under this chapter.

(B) The content of the application for permits for activities in isolated wetlands is specified below. Upon receipt of an application, the department may require additional information to make the application complete. At a minimum, the application must contain:

(1) the name, address, phone numbers, and principal place of business of the applicant; the name, address, and phone number of the property owner, if different from the applicant; and, if applicable, the name, address, and phone number of the agent for the applicant;

(2) a complete description of the proposed permitted activity, including the location, affected water bodies, purpose and intent of the project, and maps, drawings, and plans sufficient for review purposes; detailed engineering plans are not required; (3) a description of all proposed activities reasonably associated with the proposed permitted project either directly or indirectly, including planned or proposed future development that relate to water quality or other environmental considerations;

(4) a description of the composition, source, and quantity of any material derived from activities as defined in Section 48‑38‑20(2) or to be dredged, or used as fill and a description of the area to be impacted, including the area of activities or fill in acres and a wetlands delineation or approximation, as appropriate;

(5) the method used to carry out activities as defined in Section 48‑38‑20(2), or the method of dredging, or filling and specific plans for disposal and control of dredge spoils; and

(6) the names and addresses of adjacent property owners.

(C) Within fourteen calendar days after the receipt of an application for an individual permit, the department shall notify the applicant if the application is complete. If the application is not complete, the department shall include in the notice an itemized list of the information or materials that are necessary to complete the application. If the applicant fails to provide information or materials that are necessary to complete the application within forty‑five calendar days after the department’s receipt of the application, the department may return the incomplete application to the applicant and take no further action on the application. The department shall make a good faith determination of the completeness of any application made.

(D) Except as provided in this section, the department shall provide public notice of the receipt of a complete application for an individual permit. Notices must be archived and posted on the department’s website. The notice must contain sufficient information for the reader to understand the location, nature, and extent of the proposed activity; solicit comments and state the comment deadline and an address to which comments must be sent; and provide a contact for further information. Public notice of the application must be by each of the following methods:

(1) by the department mailing a copy of the Notice of Application to:

(a) the applicant;

(b) any agency with jurisdiction over or interest in the activity or disposal site;

(c) owners or residents of property adjoining the area of the proposed activity as identified in the application;

(d) newspapers of local interest in the area;

(2) by the applicant publishing the Notice of Application in a newspaper of local or general circulation reasonably expected to cover the area affected by the activity. The publication must contain sufficient information for the reader to understand the location, nature, and extent of the proposed activity and a contact for further information. The applicant shall provide the department with an affidavit of publication from the newspaper within fifteen days of publication; and

(3) by the department publishing on its website or equivalent publicly available electronic media, when available.

(E) The department shall coordinate with other regulatory agencies and develop joint procedures for publication of notices of applications, where feasible, to minimize duplication.

(F) The department shall accept comments and requests for a public hearing from affected parties concerning the application for thirty days following the publication of notice of the application. If the department determines that an application is of a type that is routinely granted and the impacts are minor, the department may reduce the notice period to fifteen days. The department shall hold a public informational hearing whenever twenty or more individual written requests are received during the public comment period and which raise water quality and classified use issues. A hearing, conducted by department staff, also may be held whenever department staff determines that it may be useful in reaching a decision on an application. When applicable, joint public hearings must be held with federal or other agencies.

(G) The department may coordinate and receive comments from other agencies before the department issues a permit. State agencies that provide comments or object to the issuance of a permit must defend their objection by providing testimony. The department may deny a permit based on an objection of a federal or state agency, but the department shall issue a permit over the objection of another agency if the department finds justification for issuing the permit.

(H) The department shall provide a written explanation to an applicant for an individual permit on the basis of a proposed denial of an application within thirty calendar days of the denial.

(I) The department may not deny a permit without review and stating a basis for denial.

(J) The department shall make final decisions on all applications within one hundred eighty calendar days or the applicant is due a full refund of all fees paid to the department for the application and processing the application. An administrative appeal tolls the running of the one hundred eighty‑day period.

Section 48‑38‑60. (A) The department shall determine whether to issue a permit for an activity in isolated wetlands based on a sequential analysis that, to the maximum extent practicable:

(1) avoids adverse impact on the isolated wetlands;

(2) minimizes the adverse impact on isolated wetlands functions that cannot be avoided; and

(3) compensates for any loss of isolated wetlands functions that cannot be avoided or minimized.

(B) A permit must be issued if the applicant has demonstrated that the activity is consistent with the provisions of this chapter, applicable regulations, the State Water Quality Standards provided for in R. 61‑68, and is not contrary to the public interest.

(C) Activities, as defined in Section 48‑38‑20(2), in wetlands, are deemed to be permitted if the wetlands affected are less than or equal to one acre. This provision is allowed only once for each project site. Mitigation is not required for these impacts.

(D)(1) Except as otherwise provided in this section, requirements for compensatory mitigation must be imposed when the department finds that an activity undertaken under this section will result in the unavoidable loss or degradation of isolated wetland functions where the loss or degradation is not temporary.

(2) When determining mitigation requirements in a specific case, the department shall take into consideration the type of isolated wetland affected by the activity, and the nature of the impact on wetland functions, or whether any adverse effects on isolated wetlands are of a permanent or temporary nature. The mitigation requirement must be calculated based upon the specific impact of a particular project.

(3) The department shall consider the mitigation requirement of this section to be met, with respect to activities in isolated wetlands, if the activities are carried out in accordance with an approved reclamation plan or permit that requires recontouring and revegetation so that preexisting wetlands functions are fully restored.

(4) Compensatory mitigation requirements may be calculated by use of the Charleston District Corps of Engineers’ Standard Operating Procedures for Compensatory Mitigation used in South Carolina, or in accordance with standards promulgated by the department in regulation.

(5) If mitigation is required and if on‑site mitigation is not a feasible alternative, then off‑site mitigation may come from a mitigation bank with available credits in the service area. Only mitigation banks approved under the Joint State and Federal Administrative Procedures for the Establishment and Operation of Wetlands Mitigation Banks in South Carolina or the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (60 C.F.R. 58,605 (November 28, 1995)) or under such guidelines as may be promulgated by the department in regulation, and with an appropriate service area may be considered to be in compliance with the requirements of this subsection. Mitigation from a mitigation bank must be supplied from an approved mitigation bank where wetlands functions have already been restored. If a mitigation bank is not available, an in‑lieu bank must be accepted if the service area is appropriate. Where possible, mitigation should be in an isolated wetland.

(6) Any mitigation under this section must involve a clearly defined mitigation project that is subject to a formal agreement with the department and for which adequate assurance of success and timely implementation have been given including, but not limited to, long‑term monitoring and maintenance provisions and appropriate protective mechanisms.

(E) No activity may be permitted in a Carolina Bay of any size except public transportation projects where the impact to the human or natural environment caused by avoiding the Carolina Bay would be significantly greater than the impact to the Carolina Bay; activities that restore or enhance the isolated wetlands; and activities associated with National Pollutant Discharge Elimination System permitted discharges approved pursuant to the federal Clean Water Act and state water quality standards.

Section 48‑38‑70. (A) The following activities are not prohibited by or otherwise subject to regulation under this chapter:

(1) normal farming, silviculture, aquaculture, and ranching activities including, but not limited to, plowing, regeneration of forest stands, seeding, cultivating, haying, grazing, normal maintenance activities, minor drainage, harvesting for the production of food, fiber, forest products, or upland soil and water conservation practices;

(2) activities for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures including, but not limited to, dikes, dams, levees, flood control channels or other engineered flood control facilities, water control structures, water supply reservoirs, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(3) activities for the purpose of maintenance of farm or stock ponds, or irrigation canals or ditches, or the maintenance of drainage ditches;

(4) activities for the purpose of construction of temporary sedimentation basins on a construction site which do not include placement of fill material into waters of the State;

(5) activities for the purpose of construction or maintenance of farm roads, forest roads, temporary roads for moving mining equipment, or access roads for utility lines if the roads are constructed and maintained in accordance with best management practices to ensure that the reach of the wetlands is not decreased;

(6) mining activities in isolated wetlands conducted pursuant to a federal, state, regional, or local permit that requires the reclamation of the affected isolated wetlands if the reclamation will be completed within a reasonable period of time after completion of activities at the site and, upon completion of the reclamation, the isolated wetlands will support functions generally equivalent to the functions supported by the isolated wetlands at the time of commencement of the activities;

(7) activities for the management, enhancement, or creation of a wetland habitat to enhance isolated wetlands for waterfowl hunting, if the wetland and surrounding area are kept in an otherwise natural condition; and

(8) activities related to routine and emergency maintenance, repair, replacements of, or minor improvements to, utility and common carrier facilities including, but not limited to, electricity, natural gas, communications, water, sewer, transportation, and railroad facilities, as long as those activities do not result in an enlargement of the project or result in a discharge. The term ‘emergency’ as used in this subsection includes catastrophic events, whether natural or manmade, or emergency orders to protect the public’s health and safety. The term ‘maintenance’ as used in this subsection includes the cutting of vegetation not regulated by the Army Corps of Engineers for jurisdictional wetlands.

(B) Any activity in items (1) through (8) of subsection (A) that brings an isolated wetlands into a use not included in items (1) through (8) is subject to permitting under this section. Any transportation project permitted pursuant to Section 404 of the federal Clean Water Act does not require a permit under this section so long as the requirements related to federal jurisdictional wetlands, including mitigation as defined in Section 48‑38‑20(5), are equally applied to isolated wetland impacts.

(C) Any state or otherwise publicly owned isolated wetlands located upon lands otherwise open for public recreation, including waterfowl hunting, must be open to the same type of public recreation, subject to state and federal law.

(D) Activities in the Coastal Zone that require a permit or notification, pursuant to the South Carolina Stormwater Management and Sediment Reduction Act, provided the permit application is filed with the department prior to the effective date of this chapter, are not prohibited by or otherwise subject to regulation under this chapter.

Section 48‑38‑80. (A) The department, after notice and opportunity to affected parties for comment and a public hearing, shall issue general permits for any category of activities similar in nature and effect if the department determines that the activities in the category causes only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. The department may prescribe best management practices or other appropriate special conditions for any general permit issued under this section for isolated wetlands larger than one acre in size.

(B) No general permit issued under this section may be effective for a period of more than five years after the date of its issuance and the general permit may be revoked or modified by the department if, after notice and opportunity to affected parties for comment and a public hearing, the department determines that the activities authorized by the general permit are not in compliance with the requirements of this chapter.

(C) A notice of the adoption or change of a general permit under this chapter must be published in the South Carolina State Register.

(D) Consistent with the above requirements, general permits are envisioned for the following:

(1) activities impacting two acres or less but more than one acre of isolated wetlands, if adequate mitigation is provided;

(2) activities for the placement of a structural member for a pile‑supported structure, such as a pier or dock, or for a linear project such as a bridge, transmission, or distribution‑line footing, or elevated or other walkway. These activities do not include special clearing activities or techniques that meet the Army Corps of Engineers criteria for exemption for jurisdictional wetlands permitting;

(3) construction of bulkheads or other structures for the sole purpose of preventing bank erosion or collapse if no fill is necessary;

(4) repair or replacement of structures or fill in existence on the effective date of this chapter, so long as the original structure is not expanded so as to require additional square footage of regulated areas impacted;

(5) fill required for remediation of any hazardous waste site, whether pursuant to the federal Resource Conservation and Recovery Act or the Comprehensive Environmental Response, Compensation, and Liability Act or the state’s solid or hazardous waste statutes; and

(6) fill required for compliance with a state or federal order related to enforcement of state or federal statutes regulating fill of waters or wetlands or navigable waters.

Section 48‑38‑90. (A) Appeals from decisions pursuant to this chapter must comply with the Administrative Procedures Act. However, appeals of federal delineations, as allowed under Section 48‑38‑30, generally must follow the federal appeals process, unless a party is appealing a decision with respect to areas determined to be outside federal jurisdiction, and these appeals may be included in an appeal of a permit decision pursuant to the Administrative Procedures Act.

(B) The applicant or other affected person with standing to contest the grant or denial of an application may request a contested case hearing regarding the department’s decision. The request must be made in accordance with the regulations of the department and the Rules of Procedure for the Administrative Law Court.

Section 48‑38‑100. (A) The department, within eighteen months after the effective date of this chapter and in consultation with appropriate state agencies and stakeholders in the regulated community, and other interested and affected parties, shall issue regulations to implement this chapter. In promulgating these regulations, the department must be guided by wetlands regulations currently in effect under existing federal and state wetlands programs.

(B) Until these regulations are promulgated and take effect, the department shall implement this chapter using its inherent authority under the South Carolina Pollution Control Act and the regulations promulgated or to be promulgated thereunder consistent with the dictates of this chapter.

(C) The department is authorized to promulgate a schedule of fees for providing services necessary to operate the permitting program and is further authorized to retain the fees for the operation of the permitting program. The amount of the fees may not exceed the cost of operating the isolated wetlands permitting program. The schedule of fees must be evaluated annually by the department.

Section 48‑38‑110. (A) The department may conduct inspections for determining compliance with isolated wetlands permits issued under this chapter.

(B) No person may violate any condition imposed by the department in an isolated wetlands permit issued under this chapter, and no person may conduct an activity in an isolated wetland, unless the activity is specifically exempted by this chapter or department regulations, without first obtaining a permit pursuant to this chapter.

(C) Pursuant to the South Carolina Pollution Control Act, the department may issue cease and desist orders, require restoration or similar activities, and assess penalties for any violations under this chapter.

Section 48‑38‑120. (A) Nothing in this chapter precludes or denies the right of any local governmental entity to control or regulate activities in any isolated wetlands within the jurisdiction of the regional or local government; provided any local ordinance, regulation, or standard must be consistent with and not more restrictive than the provisions of this chapter.

(B) Nothing in this chapter precludes adoption and enforcement of ordinances relating to land use regulations pursuant to Chapter 29, Title 6, or ordinances to protect public safety and health.”

SECTION 2. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 3. The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

SECTION 4. This act takes effect upon approval by the Governor.

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