

DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL  
CHAPTER 61

Statutory Authority: S.C. Code Ann. Section 48-1-10, *et seq.* (1976 as amended)

R.61-101, *Water Quality Certification*

**Preamble:**

DHEC has historically reviewed U.S. Army Corps of Engineer permits for activities that altered wetlands in South Carolina. Through the Bureau of Water's Section 401 water quality certification and the Office of Ocean and Coastal Resource Management's coastal zone consistency certification, DHEC was able to regulate activities, most notably placement of fill material, in wetlands. As a result of the U.S. Supreme Court decision, *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*, that held that the Corps does not have jurisdiction over isolated waters, DHEC's opportunity to review these impacts and issue appropriate certifications has been removed.

Since wetlands are waters of the state as defined in the SC Pollution Control Act, DHEC has the legal authority to regulate activities directly in wetlands. However, since there is currently no permitting program in place specifically for wetlands, DHEC has attempted to use existing permitting programs to review impacts to wetlands. This approach still leaves thousands of acres of isolated wetlands in South Carolina unprotected. In October 2002, several environmental groups, including the Southern Environmental Law Center, petitioned DHEC to begin rulemaking to protect South Carolina's wetlands.

Amendment to this regulation would provide a permitting program for DHEC to issue a State permit, modeled after the 401 water quality certification, for fill in waters, including wetlands, no longer subject to jurisdiction and therefore permitting by the Corps. This approach would simply restore DHEC's ability to regulate those waters previously regulated by DHEC through the prerequisites to the Corps permit. There is no intention to expand the authority of DHEC.

R. 61-101 will be replaced in its entirety because of recodification and stylistic changes made throughout the existing regulation. The proposed amendment will be submitted to the General Assembly for review.

**Discussion of Revisions:**

All revisions listed below will reinstate the Department's ability to review and regulate the placement of dredged or fill material into isolated waters by establishing a permit program modeled after the water quality certification program. This includes application procedures, review criteria, determination of nonfederal waters including wetlands, requirements for compensatory mitigation, and compliance and enforcement authority. There is also a new severability section. Sections I.4. and I.10 also include modifications for clarification to the present water quality certification program.

SECTION

REVISION

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|-----------------|--|
| R. 61-101       | Added language to include State permits.   |
| R. 61-101. A.1. | Added language to establish water quality permits pursuant to State Pollution Control Act. |

- R. 61-101. A.2. Added language that either a State water quality permit or Federal permit is required prior to discharge of dredged or fill material into waters of the State.
- R. 61-101.A.3. Added language that no permit or certification will be issued unless activity complies with certain regulations and plans.
- R. 61-101.A.4. Added language to include State permits.
- R. 61-101.A.5. Added language to include State permits.
- R. 61-101.A.6. Added language to include State permits.
- R. 61-101.A.7. Added language to include State permits.
- R. 61-101.B.1. Added numbering for codification.
- R. 61-101.B.4. Added definition for coastal zone consistency certification.
- R. 61-101.B.7. Added a definition for mitigation consistent with Federal National Environmental Policy Act.
- R. 61-101.B.8. Added a definition for nonfederal waters removed from the jurisdiction of the US Army Corps of Engineers.
- R. 61-101.B.9. Added a definition for water quality permit.
- R. 61-101.B.10. Added a definition for water quality standards.
- R. 61-101.B.11. Added a definition for wetlands consistent with the Federal definition.
- R. 61-101.B.12. Added definition for wetlands master planning.
- R. 61-101.C.1.–2. New section which includes information currently in the regulation regarding applicability of water quality certifications and new information regarding applicability of water quality permits.
- R. 61-101.D.1. Added language to include State permits.
- R. 61-101.D.1.(a) Added language to require agent's phone number.
- R. 61-101.D.3. Grammatical correction and change to reflect renumbering.
- R. 61-101.D.4. Added language to include State permits.
- R. 61-101.E.1. Added language to include State permits.
- R. 61-101.E.2. Added language to include State permits.
- R. 61-101E.4. Renumbered for codification.

- R. 61-101.E.4.(c) Added provision for public notice on internet.
- R. 61-101.F.1. Changes to reflect renumbering.
- R. 61-101.G.1.-2. New section regarding determination of wetlands consistent with Federal procedures and determination of nonfederal wetlands.
- R. 61-101.H.1.-2. New section describing exempt activities consistent with Federal exemptions.
- R. 61-101.I.1. Added language to include State permits.
- R. 61-101.I.3.(c) Renumbered for codification.
- R. 61-101.I.2. Added language to include State permits.
- R. 61-101.I.4. Added language to include State permits and clarification of current practices.
- R. 61-101.I.5. Added provision for use of mitigation.
- R. 61-101.I.6. Added provision for wetlands master planning.
- R. 61-101.I.7. Added factors the Department will use in evaluating wetlands to be impacted and references table in the Appendix for computing required compensatory mitigation.
- R. 61-101.I.8. Added provision that projects with wetlands master planning may be eligible for expedited review.
- R. 61-101.I.9. Added language to include State permits.
- R. 61-101.I.10. Added language to include State permits and clarification of current practices.
- R. 61-101.I.11. Added language to include State permits.
- R. 61-101.J. Deleted language that specifies applicability to water quality certifications only.
- R. 61-101J.1. Added language to include State permits.
- R. 61-101.J.2. Added language to include State permits.
- R. 61-101.J.3. Added language to include State permits.
- R. 61-101.J.5. Added language to include State permits.
- R. 61-101.K. Added language to include State permits.
- R. 61-101.K.3. Added language to include State permits.
- R. 61-101.K.4. Added clarification that conditions of permits and certifications may not be

violated.

- R. 61-101.K.5. Added statement that Department may enforce compliance and may assess penalties for violations of permits and conditions.
- R. 61-101.L. Added severability section.
- Appendix A Added tables and instructions for evaluating wetlands impacts and computing required compensatory mitigation.

Stylistic changes, including corrections for clarity and readability, grammar, punctuation, typography, codification, references, language style and overall improvement of the text of the regulation were also made.

The entire regulation includes revisions due to recodification of additional or deleted language from the proposed text changes so that every section, subsection, subitem and item could be cited correctly.

#### **Notice of Staff Informational Forum:**

Staff of the Department of Health and Environmental Control invite members of the public and regulated community to attend a staff-conducted informational forum to be held on November 18, 2003, at 2:00 pm in Peoples Auditorium, South Carolina Department of Health and Environmental Control, 2600 Bull Street, Columbia, South Carolina. The purpose of the forum is to answer questions, clarify the issues, and receive comments from interested parties on the proposed amendment to the regulation. Due to admittance procedures at the DHEC Building, all visitors must enter through the Bull Street entrance and register at the front desk. Comments received shall be considered by staff in formulating the final draft proposal for submission to the Board of Health and Environmental Control for the Board public hearing scheduled for ~~December 11, 2003~~ ([BOARD PUBLIC HEARING DATE HAS CHANGED. CLICK HERE TO VIEW INFO ON THE NEW BOARD DATE](#)), as noticed below.

Interested parties are also provided an opportunity to submit written comments to the staff forum by writing to M. Rheta Geddings at Bureau of Water, South Carolina Department of Health and Environmental Control, 2600 Bull Street, Columbia, South Carolina, 29201, fax number (803) 898- 4140. To be considered, written comments submitted must be received no later than 5:00 p.m. on November 24, 2003. Comments received shall be submitted in a Summary of Public Comments and Department Responses for the Board's consideration at the public hearing as noticed below.

Copies of the text of the proposed amendment to the regulation for public notice and comment may be obtained by contacting M. Rheta Geddings at Bureau of Water, South Carolina Department of Health and Environmental Control, 2600 Bull Street, Columbia, South Carolina, 29201, telephone number (803) 898-4229, email address [geddinmr@dhec.sc.gov](mailto:geddinmr@dhec.sc.gov), fax number (803) 898-4140, or from the Department's website at <http://www.scdhec.net/water/>.

#### **Notice of Public Hearing and Opportunity for Public Comment Pursuant to S.C. Code Sections 1-23-110 and 1-23-111:**

Interested members of the public and regulated community are invited to make oral and written comments on the proposed amendment to the regulation at a public hearing to be conducted by the Board of Health and Environmental Control at its regularly-scheduled meeting on ~~December 11, 2003~~ ([BOARD PUBLIC](#)

[HEARING DATE HAS CHANGED. CLICK HERE TO VIEW INFO ON THE NEW BOARD DATE](#)).

The public hearing will be held in the Board Room of the Commissioner's Suite, Third Floor, Aycock Building of the Department of Health and Environmental Control, 2600 Bull Street, Columbia, South Carolina. The Board meeting commences at 10:00 a.m. at which time the Board will consider items on its agenda in order presented. The order of presentation for public hearings will be noticed in the Board's agenda to be published by the Department 24 hours in advance of the meeting. Persons desiring to make oral comments at the hearing are asked to limit their statements to five minutes and, as a courtesy, are asked to provide written copies of their presentation for the record. Due to admittance procedures at the DHEC Building, all visitors must enter through the Bull Street entrance and register at the front desk.

Interested parties are also provided an opportunity to submit written comments on the proposed amendment to the regulation by writing to M. Rheta Geddings at Bureau of Water, South Carolina Department of Health and Environmental Control, 2600 Bull Street, Columbia, South Carolina, 29201. To be considered, written comments submitted must be received no later than 5:00 pm on November 24, 2003. Comments received shall be submitted in a Summary of Public Comments and Department Responses for the Board's consideration at the public hearing as noticed above.

Copies of the final proposed regulation for public hearing may be obtained by contacting M. Rheta Geddings at Bureau of Water, South Carolina Department of Health and Environmental Control, 2600 Bull Street, Columbia, South Carolina, 29201, telephone number (803) 898-4229, email address [geddinmr@dhec.sc.gov](mailto:geddinmr@dhec.sc.gov), fax number (803) 898-4140, or from the Department's website at <http://www.scdhec.net/water/>.

**Preliminary Fiscal Impact Statement:**

No costs to the State or significant cost to its political subdivisions as a whole should be incurred by these amendment. See Statement of Need and Reasonableness below.

**Statement of Need and Reasonableness:**

The statement of need and reasonableness was determined by staff analysis pursuant to S.C. Code Ann. Section 1-23-115(C)(1)-(3) and (9)-(11) (1976, as amended):

DESCRIPTION OF REGULATION: Amendment of Regulation 61-101, Water Quality Certification.

Purpose: Proposed amendment of R.61-101 will strengthen the existing regulation by creating a water quality permitting process for impacts to nonfederal waters.

Legal Authority: S.C. Code Ann. Sections 48-1-30 and 48-1-50 (1976, as amended), implementing the S.C. Pollution Control Act and the Federal Clean Water Act.

Plan for Implementation: The proposed amendment would be incorporated within R.61-101 upon approval of the General Assembly and publication in the *State Register*. The proposed amendment will be implemented in the same manner in which the present regulation is implemented.

**DETERMINATION OF NEED AND REASONABLENESS OF THE PROPOSED REGULATION BASED ON ALL FACTORS HEREIN AND EXPECTED BENEFIT:** This amendment is necessary to protect waters of the State that are not under federal jurisdiction.

DHEC has historically reviewed U.S. Army Corps of Engineer permits for activities that altered wetlands in South Carolina. Through the Bureau of Water's Section 401 water quality certification and the Office of Ocean and Coastal Resource Management's coastal zone consistency certification, DHEC was able to regulate activities, most notably placement of fill material, in wetlands. As a result of the U.S. Supreme Court decision, *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*, that held that the Corps does not have jurisdiction over isolated waters, DHEC's opportunity to review these impacts and issue appropriate certifications has been removed.

Since wetlands are waters of the state as defined in the SC Pollution Control Act, DHEC has the legal authority to regulate activities directly in wetlands. However, since there is currently no permitting program in place specifically for wetlands, DHEC has attempted to use existing permitting programs to review impacts to wetlands. This approach still leaves thousands of acres of isolated wetlands in South Carolina unprotected. In October 2002, several environmental groups, including the Southern Environmental Law Center, petitioned DHEC to begin rulemaking to protect South Carolina's wetlands.

Amendment to this regulation will provide a permitting program for DHEC to issue a State permit, modeled after the 401 water quality certification, for fill in waters, including wetlands, no longer subject to jurisdiction and therefore permitting by the Corps. This approach would simply restore DHEC's ability to regulate those waters previously regulated by DHEC through the prerequisites to the Corps permit. There is no intention to expand the authority of DHEC.

Stylistic and grammatical changes are necessary for readability, punctuation, typography, codification, references, and language style.

**DETERMINATION OF COSTS AND BENEFITS:** Existing staff and resources will be utilized to implement this amendment to the regulation. No additional cost will be incurred by the State if the revisions are implemented and therefore, no additional State funding is being requested.

In reviewing the potential for significant economic impact of the proposed amendment, the Department evaluated situations in which costs would most likely be incurred by the regulated community. The Department found that the overall impact to the State's political subdivisions or the regulated community as a whole was not likely to be significant in that prior to the SWANCC decision similar costs would have been incurred.

**UNCERTAINTIES OF ESTIMATES:** Minimal to moderate.

**EFFECT ON ENVIRONMENT AND PUBLIC HEALTH:** Implementation of this amendment will improve the protection of the environment. The amendment will promote and protect water quality and aquatic life of waters of the State.

**DETRIMENTAL EFFECT ON THE ENVIRONMENT AND PUBLIC HEALTH IF THE REGULATION IS NOT IMPLEMENTED:** Failure by the Department to incorporate protection of nonfederal waters into the regulation will lead to contamination of and loss of waters of the State with detrimental effects on the health of flora and fauna in the State as well as the citizens of South Carolina.

**Statement of Rationale:**

The statement of rationale was determined by staff analysis pursuant to S.C. Code Ann. Section 1-23-110(A)(3)(h) (1976, as amended).

The U.S. Supreme Court decision, *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*, issued January 9, 2001, in effect removed isolated waters from the permitting jurisdiction of the Corps of Engineers. Since the Corps of Engineers no longer issues permits for the discharge of fill material into isolated wetlands, there is no requirement nor is there any mechanism for the Department to issue water quality certification and coastal zone consistency certification. Presently, there is State review for fill into isolated wetlands only if another State permit is required. The proposed amendment will provide a permitting program to reinstate the Department’s previous authority to regulate all discharges into isolated waters. It will also streamline the process for obtaining a permit for discharges into isolated waters including wetlands.

**Text of Proposed Amendment for Public Notice and Comment:**

**61-101 WATER QUALITY PERMITS AND CERTIFICATIONS**

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**A. GENERAL**

1. This regulation establishes procedures and policies for issuing water quality permits pursuant to the S.C. Pollution Control Act, S.C. Code Ann. 48-1-10, *et seq.* (1976, as amended) and hereinafter known as the Pollution Control Act and for implementing State water quality certification requirements of Section 401 of the Clean Water Act, 33 U.S.C. Section 1341.

2. No person may discharge dredged or fill material into a water of the State unless the discharge is authorized by a permit issued by the U.S. Army Corps of Engineers or issued pursuant to this regulation.

3. No permit or certification shall be issued under this regulation unless the Department determines that the discharge will comply with all applicable water quality standards and other provisions of this regulation

and, for activities in the coastal zone, the Department determines that the activity is consistent with the coastal zone management plan.

4. The Department may issue, deny, or revoke general permits or certifications for categories of activities or for activities specified in Federal nationwide or general dredge and fill permits pursuant to Federal law or regulations. Such general permits or certifications are subject to the same process as individual certifications.

5. Any permit or certification issued by the Department shall specify where appropriate that any such discharge will comply with applicable provisions of Sections 301, 302, 303, 306, and 307 of the Federal Clean Water Act. If there is not an applicable effluent limit or standard under such sections, the Department will so certify. The Department shall also certify that there is reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards regulations. No permit or certification will be issued if such assurance is not provided.

6. Any permit or certification issued by the Department shall also set forth any limitations, conditions, or monitoring requirements necessary to assure maintenance of classified or existing water uses and standards and compliance with other requirements of these regulations or other appropriate requirements of State law.

7. If an activity also requires a permit for construction in State navigable waters pursuant to applicable laws and regulations, the review for the water quality permit or certification will consider issues of that permit and the Department will not issue a separate permit for construction in State navigable waters. The water quality permit or certification will serve as the Construction in Navigable Waters Permit.

## B. DEFINITIONS

1. Other than those terms defined below, any term used in this regulation shall be the same as defined in S.C. Code Ann. Section 48-1-10 (1976, as amended) or Regulation 61-68, *Water Classifications and Standards*.

2. Board means the Board of the Department of Health and Environmental Control.

3. Certification means certification as required under Section 401 of the Clean Water Act, 33 U.S.C. Section 1341.

4. Coastal zone consistency certification means the procedures of OCRM review of the permit applications processed by the Department ( in the coastal zone ) in order to determine the project's compliance with the policies of the Coastal Zone Management Program.

5. Commissioner means the Commissioner of the Department of Health and Environmental Control.

6. Department means the Department of Health and Environmental Control.

7. Mitigation means

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(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.

8. Nonfederal water(s) means a water which is identified according to the specified delineation methodology but which is not subject because of regulation, rule, memorandum of agreement, guidance letter, interpretive document, or judicial decision to regulatory jurisdiction pursuant to 33 U.S.C. Section 1344 by the US Army Corps of Engineers.

9. Water quality permit means a permit issued by the Department for the deposition of dredged or fill material into waters of the State.

10. Water quality standards means water quality standards set pursuant to R.61-68, *Water Classifications and Standards*, and R.61-69, *Classified Waters*.

11. Wetlands means 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. Wetlands are waters of the State and generally include swamps, marshes, bogs, and similar areas.

12. Wetlands Master Plan means a plan prepared prior to development or permitting of a project that identifies all wetlands, drainage patterns, and conceptual development. The plan must also identify those wetlands proposed for impact as well as any compensatory mitigation offered for the impacts including areas which are on site and off site.

## C. APPLICABILITY

1. Water Quality Certification. Any applicant for a Federal license or permit to conduct any activity which during construction or operation may result in any discharge to navigable waters is required by Federal law to first obtain a certification from the Department. Potential applicants are encouraged to contact the Department prior to submitting an application. Federal law provides that no Federal license or permit is to be granted until such certification is obtained.

(a) Federal permits or licenses for which certification is required as determined by the Federal agency include but are not necessarily limited to:

(i) individual or general Federal permits issued pursuant to Section 404 of the Clean Water Act, 33 U.S.C. Section 1344.

(ii) Federal permits issued pursuant to Sections 9 and 10 of the Federal River and Harbor Act, 33 U.S.C. Sections 401 and 403.

(iii) permits or licenses issued by the Federal Energy Regulatory Commission, 16 U.S.C. Section 1791, et seq.

(b) The Department is required by Federal law to issue, deny, or waive certification for Federal licenses or permits within one (1) year of acceptance of a completed application unless processing of the

application is suspended. If the Federal permitting or licensing agency suspends processing of the application on request by the applicant or the Department or of its own volition, suspension of processing of application for certification will also occur, unless specified otherwise in writing by the Department. Unless otherwise suspended or specified in this regulation, the Department shall issue a proposed decision on all applications within 180 days of acceptance of a complete application.

(c) For Federal permits that require both a water quality certification and a coastal zone consistency certification, the coastal zone consistency certification determination shall be issued as a component of, and concurrently with, the water quality certification, according to the administrative procedures set forth in this regulation, and in accordance with the management policies of the S.C. Coastal Management Program and applicable laws and regulations. In these instances, the water quality certification will serve also as the coastal zone consistency certification.

(d) The Department will not issue a separate 401 water quality certification for an activity that requires a direct permit for alteration of the critical area of the coastal zone pursuant to applicable regulations governing issuance of permits for alteration of the critical area of the coastal zone. The Department will process permit applications pursuant to applicable regulations governing issuance of permits for alteration of the critical area of the coastal zone with coordination and input from appropriate staff regarding water quality impacts. The direct permit will serve as the 401 water quality certification for an associated Federal permit.

2. Water Quality Permit. An applicant for an activity which may result in a discharge of dredged or fill material to a nonfederal water is required to first obtain a permit from the Department. Potential applicants are encouraged to contact the Department prior to submitting an application.

(a) For activities that require both a water quality permit and a coastal zone consistency certification, the coastal zone consistency certification determination shall be issued as a component of, and concurrently with, the water quality permit, according to the administrative procedures set forth in this regulation, and in accordance with the management policies of the S.C. Coastal Management Program and applicable laws and regulations.

(b) In these instances, the water quality permit includes the coastal zone consistency certification.

#### D. APPLICATIONS

1. Any applicant for a water quality permit or certification must present a complete application to the Department in a manner specified by the Department. Federal application forms or forms provided by the Department will be accepted. Upon receipt of an application the Department may require additional information to make the application complete. The Department will accept a public notice issued by the Federal permitting or licensing agency as application for certification if it contains sufficient information. Generally, the date of receipt of the public notice will be considered the date of application for certification. As a minimum the application must contain the following information:

(a) the name, address, phone numbers, principal place of business of the applicant and, if applicable, the name, address and phone number of the agent for the applicant.

(b) a complete description of the proposed permitted activity, including the location, affected waterbody(s), purpose, and intent of the project; maps, drawings, and plans sufficient for review purposes (detailed engineering plans are not required).

(c) 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 considerations.

(d) a description of the composition, source, and quantity of any material to be dredged or used as fill and a description of the area to be impacted, including the area of fill in acres.

(e) the method of dredging or filling and specific plans for disposal and control of dredge spoils.

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

2. If the Department does not request additional information within ten (10) days of receipt of the application or joint public notice, the application will be deemed complete for processing; however, additional information may still be requested of the applicant within sixty (60) days of receipt of the application.

3. The Department may require the applicant to provide water quality monitoring data, water quality modeling results, or other environmental assessment related to factors in Section I.3 prior to accepting or processing the application and assessing the impacts of the proposed activity.

4. When the Department requests additional information it will specify a time for submittal of such information. If the information is not timely submitted and is necessary for reaching a decision, the permit or certification will be denied without prejudice or processing will be suspended upon notification to the applicant by the Department. Any subsequent resubmittal will be considered a new application.

## E. PUBLIC NOTICE

1. Public notice is required of all applications for a water quality permit or certification of Federal licenses or permits. When consistent with procedures herein and practical, joint public notice procedures with Federal or State agencies will be used to facilitate processing.

2. The public notice of application shall provide a reasonable period of time, normally thirty (30) days from the date of notice, within which interested persons may submit their views and information concerning the permit or certification application to the Department.

3. 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 (15) days. If the Department determines that an application involves a major activity, the notice period may be extended up to sixty (60) days from the date of the initial public notice.

4. Public notice of the application shall be by each of the following methods:

(a) by the Department's mailing a copy of the Notice of Application to:

(i) the applicant.

(ii) any agency with jurisdiction over or interest in the activity or disposal site.

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

(iv) newspapers of local and statewide interest in the area.

(v) any adjacent State agency of North Carolina or Georgia with jurisdiction over or interest in common waters affected by the proposed activity.

(vi) anyone who has specifically requested copies of public notices. The list of such persons will be updated periodically and persons deleted who fail to respond to normal Department requests to identify continued interest. Non-governmental interests out-of-state may be charged an annual fee of \$25.00 for notices.

(b) by publication by the applicant of the Notice of Application in a newspaper of local or general circulation reasonably expected to cover the area affected by the activity. Such publication by the applicant shall 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 (15) days of publication.

(c) by publication on the Department website or equivalent publicly available electronic media, when available.

(d) the Department will coordinate with other regulatory agencies and develop joint procedures for publication of notices of applications where feasible to minimize duplication.

## F. PUBLIC HEARING

1. Any person may request a public informational hearing during the initial comment period discussed in Sections E.2. through E.4. above. Requests shall be in writing and shall state the nature of the issues to be raised at the hearing.

2. The Department shall hold a public informational hearing whenever twenty (20) or more individual written requests are received during the public comment period and which raise water quality and classified use issues. A hearing may also be held whenever the Department staff determines that it may be useful in reaching a decision on an application. Such hearing will be conducted by Department staff personnel.

3. All public hearings shall be reported verbatim. A copy of the transcript shall be made available for public inspection.

4. The public comment period on an application will automatically be extended to fifteen (15) days past the date of the hearing. Further extensions may be granted at the discretion of the hearing officer.

5. The Department will coordinate with other regulatory agencies and conduct joint public hearings where feasible.

## G. DETERMINATION OF WETLANDS

1. Delineation of wetland boundaries pursuant to this regulation shall be governed by procedures contained in the 1987 wetlands delineation manual published by the U.S. Army Corps of Engineers and any document that the U.S. Army Corps of Engineers issues interpreting that manual shall be used.

(a) It shall be the initial responsibility of a party seeking a permit to alter or discharge pollutants into wetlands under this section to determine the extent and reach of wetlands that will be impacted by the permitted activity and to provide such information as the Department shall specify documenting the extent and nature of the subject wetlands and related aquatic sites as well as information concerning the impacts proposed.

(b) If the U.S. Army Corps of Engineers issues a determination as to whether a wetland is a nonfederal wetland, the Department shall adopt that determination.

2. A wetland is identified as a nonfederal wetland if any of the following applies:

(a) Any discharges of dredged or fill material into the wetland are determined not to be subject to regulation under 33 U.S.C. Section 1344 due to the decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) or any subsequent interpretations of that decision by a federal agency or by a federal district or federal appellate court that applies to wetlands located in this state.

(b) The wetland is determined to be a nonnavigable, intrastate, and isolated wetland under the decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) or any subsequent interpretations of that decision by a federal agency or by a federal district or federal appellate court that applies to wetlands located in this state.

(c) The wetland is determined by statute, regulation, regulatory guidance letter, or court decision to be not subject to the jurisdiction of the U.S. Army Corps of Engineers.

## H. EXEMPTIONS

1. Except as provided in Section H.2. below, the permit requirement does not apply to any discharge that is the result of any of the following activities:

(a) normal farming, silviculture, or ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(b) maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(c) construction or maintenance of farm ponds, stock ponds, or irrigation ditches, or the maintenance of drainage ditches;

(d) construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the waters are not impaired, that the reach of the waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized.

2. For a discharge that would be exempt under Section H.1. above, the activity is subject to a permit if the discharge is part of an activity that has as its purpose bringing a nonfederal wetland, or part of a nonfederal wetland, into a use for which it was not previously subject and if the activity may do any of the following:

(a) Impair the flow or circulation of any nonfederal wetland.

(b) Reduce the reach of any nonfederal wetland.

## I. SCOPE OF REVIEW FOR APPLICATION DECISIONS

1. The Department shall prepare a written assessment on each proposed activity requiring a State water quality permit or certification of a Federal license or permit . This assessment shall address the water quality impacts of the project and make conclusions concerning compliance with water quality standards and the protection of classified uses. Such assessment shall be available to the applicant and to the public upon request.

2. A permit or certification shall be issued if the applicant has demonstrated that the project is consistent with the provisions of these regulations; the State Water Quality Standards, R. 61-68; and for the certification of the Federal Clean Water Act, 33 U.S.C. Section 1341, and regulations promulgated thereunder by the U. S. Environmental Protection Agency.

3. In assessing the water quality impacts of the project, the Department will address and consider the following factors:

(a) whether the activity is water dependent and the intended purpose of the activity;

(b) whether there are feasible alternatives to the activity;

(c) all potential water quality impacts of the project, both direct and indirect, over the life of the project including:

(i) impact on existing and classified uses;

(ii) physical, chemical, and biological impacts, including cumulative impacts;

(iii) the effect on circulation patterns and water movement;

(iv) the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others.

4. The permit for or certification of the activities listed below will be issued when there are no feasible alternatives. When issuing a permit or certification for such activities, the Department shall condition the permit or certification upon compliance with all measures necessary to minimize adverse effects, including but not limited to stormwater management and mitigation. The Department shall issue proposed permit or certification decisions on such applications within sixty (60) days of acceptance of the application unless otherwise suspended or in accordance with State permitting agency procedures. The Department will also attempt to issue general permits or certifications for such activities.

(a) public boat ramps to enhance recreational use of waters.

(b) filling necessary for public highways or bridges.

(c) filling or disturbances to facilitate construction of electric transmission lines or other public utility crossings, including those of rural electric cooperatives.

(d) dredging and filling related to maintenance of Federal or State navigational channels and ports.

(e) activities utilizing Best Management Practices (BMP) which are part of an established on-going farming, ranching, aquaculture, or silviculture operation.

(f) public water supplies.

5. Mitigation may be required by the Department prior to issuance of a water quality permit or certification. Compensatory mitigation from an approved mitigation bank may be allowed. The procedures for the establishment and use of mitigation banks will use the Corps of Engineers Mitigation Banking Agreements.

6. For projects where waters of the State to be filled include nonfederal wetlands, the applicant may prepare a master plan for the project site which identifies all wetlands on the site, drainage patterns, and conceptual development. The applicant must include as part of the master plan a certification that there are no endangered species or critical habitat in the area proposed for fill. The master plan must demonstrate that adequate compensatory mitigation will be provided for wetland losses.

7. The Department will evaluate nonfederal wetlands proposed for filling with consideration of the type of wetland, the size of the wetland, any hydrologic connection to other waters, the landscape position, and how well the wetland performs ecological functions. The amount of mitigation will be determined by utilizing the tables in the Appendix.

8. Nonfederal wetlands identified in a wetland master plan approved by the Department and determined by the Department to have minimal value based on the evaluation, may be eligible for expedited review under a general permit.

9. A permit or certification will be denied if:

(a) the proposed activity permanently alters the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired;

(b) there is a feasible alternative to the activity which reduces adverse consequences on water quality and classified water uses;

(c) the proposed activity adversely impacts waters containing State or Federally recognized rare, threatened, or endangered species;

(d) the proposed activity adversely impacts special or unique habitats, such as National Wild and Scenic Rivers, National Estuarine Research Reserves, or National Ecological Preserves, or designated State Scenic Rivers;

10. A permit or certification will not be issued unless the Department is assured appropriate and practical steps, including but not limited to stormwater management and mitigation, will be taken to minimize adverse impacts on water quality and the aquatic ecosystem.

11. After-the-fact permits or certifications will be reviewed under the same standards as normal applications; however, the Department may require restoration and/or other actions as a condition of certification. The applicant in such cases shall have the burden of proving the original baseline conditions, and the permit or certification may be denied in the absence of such proof.

#### J. NOTICE OF PROPOSED DECISIONS AND ADJUDICATORY HEARINGS

1. The Department shall issue a notice of proposed decision on application for a water quality permit or certification, including any proposed conditions. Such notice shall advise of availability of the staff assessment and related file information. Such notice shall be mailed to:

- (a) the applicant;
- (b) agencies having jurisdiction or interest over the disposal site or activity site;
- (c) owners or residents of property adjoining the area of the proposed activity; and
- (d) those persons providing comment in response to the initial notice of application.

2. Persons with legal standing to contest the permit or certification shall have rights to appeal the decision.

3. A person desiring to appeal a determination must submit a written request for an adjudicatory hearing within fifteen days of notice of the determination. The request must set forth the manner in which the person requesting the hearing would be injured by issuance of the permit or certification. If no appeal of the proposed decision is timely received, the proposed decision of the Department shall become final.

4. Upon timely request for a hearing, the matter shall be heard as a "contested case" under the South Carolina Administrative Procedures Act, and shall be processed according to law. Determinations of whether a person has legal standing to contest a determination shall be made in the course of the contested case proceeding.

5. Appeals of a permit or certification which include coastal zone consistency certification will be heard according to the above procedures unless the appeal is based exclusively on a coastal zone management issue. In that case the appeal will be heard according to the procedures for appeals of coastal zone consistency certifications.

6. Appeals of a certification included in the direct permit for alteration of the critical area of the coastal zone will be heard as part of that permit appeal according to the procedures for appeals of direct permits for alteration of the critical area of the coastal zone.

#### K. ENFORCEMENT OF PERMIT OR CERTIFICATION DECISIONS AND CONDITIONS

1. Any certification condition is intended to become a condition of the Federal or State license or permit as specified in Federal or State law.

2. Certification conditions which are included as conditions of such license or permit are subject to enforcement mechanisms available to the Federal or State agency issuing the license or permit. Other mechanisms under State law may also be used to correct or prevent adverse water quality impacts from construction or operation of activities for which certification has been issued.

3. The Department may conduct inspections for determining compliance with permit or certification conditions.

4. No person may violate any condition imposed by the Department in a water quality permit or certification under this regulation

5. The Department may assess penalties for any violations of any condition of a water quality permit or certification pursuant to the South Carolina Pollution Control Act.

L. SEVERABILITY. Should any section, paragraph, or other part of this regulation be declared invalid for any reason, the remainder shall not be affected.

Appendix: Determination of Compensatory Mitigation for Impacts to Nonfederal Wetlands with Consideration of Factors Presented in Section I.7.

Table 1, *Required Mitigation Credits for Impacts to Nonfederal Wetlands*, is used to evaluate the nonfederal wetlands proposed for impact to determine the amount of mitigation required. A determination of the physical and ecological characteristics must be made for each wetland proposed for impact on the project site. Consideration is given to the amount of acreage to be impacted as well as whether or not a wetlands master plan has been developed for the site.

Table 2, *Proposed Mitigation for Impacts to Nonfederal Wetlands*, is used to evaluate the areas offered as compensatory mitigation. A determination of the characteristics of the mitigation is made for each area offered. The compilation of these scores provides the proposed credit for each area offered.

Table 3, *Mitigation Credits Offered for Impacts to Nonfederal Wetlands*, is used to determine if sufficient mitigation has been offered. The proposed credit for each area is multiplied by the acreage of the area. This number represents the mitigation offered.

The mitigation offered from Table 3 must equal or exceed the mitigation required in Table 1.

TABLE 1: REQUIRED MITIGATION CREDITS FOR IMPACTS TO NONFEDERAL WETLANDS			
A. Physical Characteristics		Points	Score
<b>1. Landscape Position</b>			
not within 100 year floodplain		0	
within 100 year floodplain		1	
<b>2. Wetland Hydrology</b>			
greater than 100 feet from contiguous		0	
100 feet or less from contiguous wetlands		1	
<b>3. Configuration of area to be impacted</b>			
more linear (narrow fingers)		0	
more rounded/bulbous		1	
<b>B. Ecological Characteristics</b>			
<b>1. Existing Functions and Conditions</b>			
a. water quality improvement	3 for each item which appears to be fully functional 2 for each item which appears to be slightly impaired 1 for each item which appears to be impaired 0 for each item which appears to be very impaired	a.	
b. floodwater storage		b.	
c. groundwater recharge		c.	
d. habitat for flora and fauna		d.	
			$\sum(a,b,c,d) \div 4 =$
<b>2. Wetland Rarity</b>			
Common (Bald Cypress-Tupello Gum Swamp, Swamp Tupelo Pond, Pocosins other than seepage or swale types, Bottomland Hardwood, Non-alluvial Swamp Forest, Pond Pine Woodland, Pine Flatwoods, Man-made lakes or ponds, Vegetated Lake Littoral Zone)		1	
Uncommon/Vulnerable (Carolina Bay, High Elevation Seep, Bay Forest, Salt Shrub Thicket, Swale Pocosin, Pond Cypress Pond, Seepage Pocosin, Upland Depression Swamp Forest)		2	
Rare (Hillside Herb Bog, Upland Bog, Atlantic White Cedar Bog, Depression Meadow, Piedmont Seepage Forest, Limestone Sink, Pine Savannah, Interdune Pond, Tidal Freshwater Marsh)		3	
		subtotal	
<b>C. Acreage</b>			
Total acres of nonfederal wetlands impacted		acres	# acres x subtotal ==
<b>D. Masterplanning</b>			
Masterplan developed and approved		Line C x 0.75 ==	
		Required credits	

<b>TABLE 2: PROPOSED MITIGATION FOR IMPACTS TO NONFEDERAL WETLANDS</b>		
	<b>Points</b>	<b>Score</b>
<b>1. Mitigation Type</b>		
preservation	1	
enhancement	2	
restoration	3	
mitigation bank	3	
<b>2. Buffering</b>		
none	0	
0-20 feet	1	
21-35 feet	2	
> 36 feet	3	
<b>3. Type of Protection</b>		
restrictive covenant	1	
conservation easement	2	
transfer fee title	3	
<b>4. Kind</b>		
out of kind	0	
in kind	1	
	Proposed Credits	

<b>TABLE 3: MITIGATION CREDITS OFFERED FOR IMPACTS TO NONFEDERAL WETLANDS</b>						
	Area 1	Area 2	Area 3	Area 4	Area 5	Total
Credits Offered (CO)						
Area in acres (A)						
Total [CO x A]						

