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## Environmental Law

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## ENVIRONMENTAL LAW

### I. LIMITATIONS PLACED ON THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL'S AUTHORITY UNDER THE FEDERAL CLEAN WATER ACT

In *Triska v. Department of Health & Environmental Control*<sup>1</sup> the South Carolina Supreme Court held that the Department of Health and Environmental Control (DHEC) did not have the authority to suspend or revoke a 401 Water Quality Certification<sup>2</sup> after it had been granted and the appeals process had expired.<sup>3</sup> Following a public hearing on the matter on November 8, 1979, DHEC granted Triska 401 Certification to construct a marina at Smith's Landing in Murrells Inlet. The plaintiff, Triska, had obtained a permit from the South Carolina Coastal Council,<sup>4</sup> and his permit application with the Army Corps of Engineers (Corps)<sup>5</sup> was under review in April 1982. At this time, DHEC notified the Corps that it was suspending 401 Certification pending an internal agency review.<sup>6</sup> DHEC reinstated certification on May 4, 1982, with certain minor modifications,<sup>7</sup> and the Corps subsequently issued its permit authorizing

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1. 292 S.C. 190, 355 S.E.2d 531 (1987).

2. A 401 Water Quality Certification is a certification given by DHEC which assures permit-issuing authorities that a proposed project is in conformity with the water quality standards contained in § 401 of the Federal Clean Water Act of 1977, 33 U.S.C. § 1341 (1982). Certification is a prerequisite to issuance of South Carolina Coastal Council and Army Corps of Engineers permits.

3. 33 U.S.C. § 1341(a)(1) provides that if the state certification authority fails to act on the certification request within one year, this requirement will be deemed to have been waived, and the Corps of Engineers may act on the permit without certification.

4. 292 S.C. at 192, 355 S.E.2d at 532. The South Carolina Coastal Council is responsible for issuing permits authorizing the utilization or alteration of critical areas of the coastal zone of South Carolina under 16 U.S.C. § 1456(c) (1982).

5. See Record at 44. Under 33 U.S.C. § 1344 (1982), the Corps of Engineers is responsible for issuing permits for any construction on navigable waters, but under 33 U.S.C. § 1341(a)(4) it may not issue such a permit until state certification is obtained or waived. See 292 S.C. at 193, 355 S.E.2d at 532.

6. DHEC claimed authority to review under S.C. CODE ANN. §§ 48-1-50(6), (20), (21), (24) (Law. Co-op. 1987). Brief of Appellant at 10.

7. The twelve differences between the November 1979 and May 1982 letters are largely semantical. See Record at 20.

construction.

Ten days later the Murrells Inlet Concerned Citizens Association filed a petition with DHEC requesting an adjudicatory hearing to challenge reinstatement.<sup>8</sup> In March 1983 DHEC's Board reviewed the hearing record and, over the objections of its own staff, suspended 401 Certification and directed the staff to conduct a complete review of the project. A final adjudicatory hearing was held in September 1984, and after reviewing the record of this hearing, DHEC issued a written order revoking Triska's 401 Certification on October 17, 1984. The trial court found that DHEC had revoked the certification unlawfully and reinstated it.<sup>9</sup>

At the final adjudicatory hearing, testimony indicated that conditions in the inlet had changed and that the proposed marina no longer would be in compliance with the Federal Clean Water Act.<sup>10</sup> The supreme court, however, focused on DHEC's authority to revoke a 401 Certification, regardless of any changes in the conditions which had led to initial certification. Through interpretations of the relevant federal regulations, South Carolina statutes, and case law, the court held that DHEC had acted without statutory or regulatory authority on at least four occasions in suspending and revoking Triska's 401 Certification.<sup>11</sup> While the granting or refusal of 401 Certification and the revoking of permits<sup>12</sup> is within the exclusive prerogative of state agencies such as DHEC,<sup>13</sup> the court found that under section 48-1-50(5) of the South Carolina Code,<sup>14</sup> DHEC does not have the specifically required authority or power to revoke anything la-

8. 292 S.C. at 193, 355 S.E.2d at 533.

9. *Id.* at 191, 355 S.E.2d at 531.

10. The Federal Clean Water Act is codified at 33 U.S.C. §§ 1251-1376 (1982). Record at 133-194. *See also* Brief of Appellant at 3-4. At the final adjudicatory hearing in 1984, testimony and scientific data were presented which showed that changes in certain environmental conditions in Murrells Inlet since 1979, as well as the location of Triska's spoil site, raised serious concerns that continued development of the marina would lead to erosion of the inlet and contamination of the local freshwater supply and shellfish population.

11. Record at 69-70.

12. *See* *Barker Indus. v. South Carolina Dept. of Health and Env'tl. Control*, 287 S.C. 424, 339 S.E.2d 136 (Ct. App. 1985).

13. *See* *Lake Erie Alliance for Protection of the Coastal Corridor v. United States Army Corps of Eng'rs*, 526 F. Supp. 1063, 1074 (W.D.Pa. 1981), *aff'd*, 707 F.2d 1392 (3rd Cir. 1983), *cert. denied*, 464 U.S. 915 (1983).

14. S.C. CODE ANN. § 48-1-50(5) (Law. Co-op. 1987).

beled a certification. Although the supreme court had previously issued opinions regarding the powers of state agencies under South Carolina's version of the Model Administrative Procedures Act,<sup>15</sup> this opinion was the court's first effort to delineate the limit of DHEC's authority under the Federal Clean Water Act.

While this decision appears to have a serious negative impact on DHEC's ability to protect the environment of South Carolina, the court carefully pointed out that under section 1341(a)(3) of the Federal Clean Water Act, DHEC continues to have the power to monitor projects and to notify permitting agencies of any violations of the Clean Water Act that occur after the agency has granted 401 Certification. Therefore, this decision was only of limited benefit to Triska. Since DHEC retained the authority to monitor compliance with the Clean Water Act, the notification to the permitting authorities of non-compliance with the act could still lead to the revocation of either the Coastal Council or Corps of Engineers permit. While this method of revocation may take longer, Triska still may be unable to operate his marina once it is completed.

Had the court relied solely on the language of the Clean Water Act, the consequences of the decision here would be without question. Instead, the court's reasoning that DHEC's actions were also invalid because they exceeded DHEC's statutory authority<sup>16</sup> seems contradictory in view of a supreme court opinion issued just twenty-one days after *Triska*. In *City of Columbia v. Department of Health and Environmental Control*<sup>17</sup> the court stated that "[b]y necessity, however, a regulatory body possesses not only the powers expressly conferred on it but also those which must be inferred or implied for it to effectively carry out the duties with which it is charged."<sup>18</sup> The court further rea-

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15. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981) (interpreting the MODEL STATE ADMINISTRATIVE PROCEDURES ACT, 14 U.L.A. 371-506 (1980) (codified in S.C. CODE ANN. §§ 1-23-310 to -400 (Law. Co-op. 1986 & Supp. 1987)). See also *Palmetto Alliance, Inc. v. South Carolina Pub. Serv. Comm'n*, 282 S.C. 430, 319 S.E.2d 695 (1984); *Carter v. South Carolina Coastal Council*, 281 S.C. 201, 314 S.E.2d 327 (1984). Cf. *Guerard v. Whitner*, 276 S.C. 521, 280 S.E.2d 539 (1981) (order cannot be made by administrative body that would alter materially or add to the law).

16. 292 S.C. at 191, 355 S.E.2d at 531.

17. *Id.* at 199, 355 S.E.2d at 536.

18. *Id.* at 202, 355 S.E.2d at 538 (citing *Carolina Water Serv. Inc. v. South Carolina Pub. Serv. Comm'n*, 272 S.C. 81, 248 S.E.2d 924 (1978); *Beard-Laney, Inc. v. Darby*, 213

soned that the delegation of authority to DHEC should be construed liberally since the agency is concerned with the protection of the public health and welfare. Although *City of Columbia* concerned a different statute,<sup>19</sup> *Triska* seems difficult to justify, particularly since many of the court's reasons for allowing DHEC to exceed its statutory authority in *City of Columbia* are identical to DHEC's arguments in *Triska*.<sup>20</sup> While there appear to be practical reasons for the court's decision in *Triska*, these two decisions have left unanswered the general question of when DHEC may exceed its specifically conferred authority.

The effect of the supreme court's decision in *Triska* can be put into perspective by realizing that the 401 Certification requirement is solely a creature of federal statute.<sup>21</sup> The content of the certification is essentially no more than a statement of assurance that the activity will comply with the applicable provisions of the Clean Water Act.<sup>22</sup> In *Triska*, the supreme court effectively points out that even if DHEC were given the authority to revoke certification, it would be futile to do so unless the Coastal Council and Corps of Engineers subsequently revoked the permits they had previously issued.<sup>23</sup> This view is strongly supported by the Corps of Engineers, which would object to allowing state agencies to usurp its authority by essentially revoking a Corps permit through the revocation of state certification. Since DHEC retains its authority to initially certify and monitor such projects, *Triska* will have little impact on DHEC's ability to enforce the Clean Water Act.

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S.C. 380, 49 S.E.2d 564 (1948)).

19. *City of Columbia* concerned DHEC's authority to acquire sewer systems by condemnation or negotiation under 42 U.S.C.A. §§ 4601 to 4655 (West 1983 & Supp. 1987). 292 S.C. at 199, 355 S.E.2d at 536.

20. Compare Brief of Appellant at 15 with 292 S.C. at 202-03, 355 S.E.2d at 538. Both argued that the authority of an administrative agency is construed liberally when the agency is concerned with the public health and welfare.

21. Harleston & McLeod, *State Environmental Enforcement and Permit*, in PRACTICAL ENVIRONMENTAL LAW FOR THE GENERAL PRACTITIONER (S.C. Bar JCLE 1985).

22. These provisions usually translate into compliance with state water quality standards developed by DHEC under § 303 of the Federal Water Pollution Control Act. 33 U.S.C. § 1313 (1982).

23. 292 S.C. at 196, 355 S.E.2d at 534.