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ENVIRONMENTAL LAW

I. NOTICE AND OPPORTUNITY TO BE HEARD REQUIRED IN WATER QUALITY 401 CERTIFICATION APPEAL

In *Stono River Environmental Protection Ass'n v. South Carolina Department of Health & Environmental Control*¹ the South Carolina Supreme Court held that the board of the Department of Health and Environmental Control (DHEC) denied due process to intervening parties by issuing 401 certification² before completing adjudicatory proceedings already in progress.³ *Stono River* attempts to clarify what constitutes minimum due process for parties challenging 401 certification decisions after *Triska v. South Carolina Department of Health & Environmental Control*.⁴

In May 1985, Harry A. Brunson, owner of Buzzard's Roost Marina, applied to DHEC for 401 certification.⁵ The DHEC staff denied his application.⁶ When Brunson appealed this decision to the DHEC board, both the Stono River Environmental Protection Association (Stono River EPA) and the Sierra Club moved to intervene against the possible issuance of the 401 certification.⁷ Brunson argued that Stono River EPA

1. 305 S.C. 90, 406 S.E.2d 340 (1991).

2. See Clean Water Act, § 401, 33 U.S.C. § 1341(a)(1) (1988) (describing process commonly known as "401 certification"). Under § 401 of the Clean Water Act, DHEC must determine whether any proposed activity that may result in a discharge into navigable waters will comply with state water-quality standards. *Id.*

3. *Stono River*, 305 S.C. at 94, 406 S.E.2d at 342.

4. 292 S.C. 190, 355 S.E.2d 531 (1987). In *Triska* the South Carolina Supreme Court found that 401 certification was not a "contested case" under the South Carolina Administrative Procedures Act, see *infra* note 11, and that DHEC therefore had no authority to conduct an adjudicatory hearing or to suspend or revoke 401 certification after the appeal period had expired. *Id.* at 195-97, 355 S.E.2d at 533-34.

5. DHEC's 401 certification was required before the South Carolina Coastal Council and the United States Army Corps of Engineers could issue permits to Brunson to begin expansion of his marina. *Stono River*, 305 S.C. at 92, 406 S.E.2d at 341.

6. The DHEC board relied upon and interpreted *Triska* as precluding any need for it to continue hearings before approving the application. *Id.*

7. *Id.* The DHEC board granted Stono River EPA's request for leave to intervene, but had not yet ruled on the Sierra Club's motion when this dispute arose. *Id.*

and the Sierra Club should not be allowed to intervene because under *Triska*, the DHEC board was not authorized to grant adjudicatory hearings in 401 certification cases.⁸ The DHEC board agreed. At a regularly scheduled meeting, the board reconsidered Brunson's application and issued the 401 certification.⁹ Stono River EPA and the Sierra Club sought review of the board's decision, but the circuit court affirmed.¹⁰

On appeal to the supreme court, Stono River EPA and the Sierra Club argued that they were entitled to a full adjudicatory hearing because 401 certification is a "contested case" under the South Carolina Administrative Procedure Act (APA).¹¹ Conversely, DHEC and Brunson contended that *Triska* justified DHEC's termination of the adjudicatory proceedings.¹² The supreme court defined the determinative issue as "whether Stono River EPA and the Sierra Club were denied an opportunity to contest the 401 certification in an adjudicatory proceeding."¹³

The court acknowledged that according to *Triska*, 401 certification was not a "contested case" under the APA.¹⁴ However, the *Stono River* court reasoned that *Triska* does not preclude the availability of "some type of administrative evidentiary appeal . . . in 401 certification cases"¹⁵ because administrative agencies such as DHEC must "meet minimum standards of due process."¹⁶ Accordingly, the court looked beyond the APA and found that the due process provisions of the South

8. *Id.*

9. *Id.*

10. *Id.* at 91, 406 S.E.2d at 341.

11. *Id.* at 93, 406 S.E.2d at 342. The South Carolina APA is codified at S.C. CODE ANN. §§ 1-23-310 to -400 (Law. Co-op. 1986). Section 1-23-310(2) defines a "contested case" as a "proceeding, including but not restricted to ratemaking, price fixing, and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." S.C. CODE ANN. § 1-23-310(2), *quoted in Stono River*, 305 S.C. at 93, 406 S.E.2d at 341. If a matter is a "contested case," the administrative agency must conduct an adjudicatory hearing to address the issues that aggrieved parties raise. *Stono River*, 305 S.C. at 92 n.2, 406 S.E.2d at 341 n.2 (citing S.C. CODE ANN. § 1-23-320).

12. *Stono River*, 305 S.C. at 92-93, 406 S.E.2d at 341.

13. *Id.* at 92, 406 S.E.2d at 341.

14. *Id.* at 93, 406 S.E.2d at 342.

15. *Id.*

16. *Id.* at 93-94, 406 S.E.2d at 342.

Carolina Constitution require notice and opportunity to be heard in such administrative appeals.¹⁷

The court concluded that DHEC's actions lacked specific components of due process;¹⁸ the mere presence of the parties at the DHEC board meeting did not suffice.¹⁹ Although the appeals of Stono River EPA and the Sierra Club were timely, DHEC did not give the parties notice of the issues under consideration.²⁰ Therefore, the parties did not have the opportunity to present evidence or to cross-examine witnesses.²¹ Accordingly, the court found that DHEC's procedure did not meet the minimum standards of due process required by the South Carolina Constitution.²²

Currently, *Stono River* has little practical effect on the procedural protections that DHEC must afford parties in 401 certification appeals because, since November 1990, 401 certification appeals have been

17. *Id.* at 94, 406 S.E.2d at 342 (quoting S.C. CONST. art. I, § 22 ("No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard . . . and he shall have in all instances the right to judicial review.")).

18. *Id.* As the court recognized: "Due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 94, 406 S.E.2d at 342 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)); see also DAVID E. SHIPLEY, *SOUTH CAROLINA ADMINISTRATIVE LAW* 5-17 to 5-20 (2d ed. 1989) (discussing the Administrative Procedures Act and due process considerations).

Importantly, the section of the South Carolina Constitution that the court cited does not state expressly that parties should have the right to cross-examine or call witnesses under oath. See *supra* note 17. Past South Carolina Supreme Court decisions have left undecided the degree of procedural due process required in the administrative context. See SHIPLEY, *supra*, at 5-22 to 5-25. Shipley contrasts the court's holdings in *Smith & Smith, Inc. v. South Carolina Public Service Commission*, 271 S.C. 405, 247 S.E.2d 677 (1978) (requiring a full adjudicatory hearing), and *First Federal Savings & Loan Ass'n v. Board of Bank Control*, 263 S.C. 59, 207 S.E.2d 801 (1974) (ruling that no adversarial hearing was required because a brief personal appearance before the administrative board satisfied due process).

19. See *Stono River*, 305 S.C. at 94, 406 S.E.2d at 342.

20. *Id.*

21. *Id.*

22. *Id.* The court expressly distinguished *Triska*, stating that in *Triska* "DHEC attempted to revoke a 401 certification more than three years after certification had been granted and the appeal process had expired. Moreover, an adjudicatory hearing was held in *Triska*, and all parties had an opportunity to present evidence and cross examine witnesses." *Id.* at 93, 406 S.E.2d at 341.

“contested cases” under the APA.²³ However, *Stono River* establishes possible precedent for parties appealing decisions in other administrative contexts when the issue does not fall within the APA’s definition of “contested case.”²⁴

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23. S.C. CODE REGS. 61-101(G)(5) (1991). DHEC now grants these appeals full adjudicatory hearings as prescribed under South Carolina Code of Regulations 61-72. *Id.*

24. *See, e.g.,* League of Women Voters v. Litchfield-by-the-Sea, 305 S.C. 424, 409 S.E.2d 378 (1991). In this case, Litchfield-by-the-Sea (“Litchfield”) petitioned DHEC for a permit to build a sewer system for a residential development. *Id.* at 425, 409 S.E.2d at 379. Litchfield also needed the South Carolina Coastal Council to certify that the project was consistent with the Coastal Zone Management Program. *Id.* This certification is not coextensive with 401 certification and, therefore, was not covered by S.C. CODE REGS. 61-101 (1991). The South Carolina Supreme Court cited *Triska* and *Stono River* as consistent with its holding that parties appealing the council’s certification are entitled to notice and an opportunity to be heard. *Litchfield*, 305 S.C. at 426-27, 409 S.E.2d at 380. The court did not address whether the South Carolina Constitution requires trial-type proceedings or substantially less-extensive procedures.