

# The Effects of the *SWANCC* and *Rapanos* Supreme Court Rulings on South Carolina Waters

**Author:** Professor Kim Diana Connolly, University of South Carolina  
with research assistance by April Taylor and Joshua Houser



## Introduction

In the spring of 2009, the National Wildlife Federation, Ducks Unlimited, and Trout Unlimited, with generous support from the Turner Foundation, contracted with the University of South Carolina School of Law and School of the Environment to research Clean Water Act (CWA) jurisdictional determinations made by the Army Corps of Engineers (Corps), Charleston District, for water bodies in South Carolina. The purpose of the study was to assess on-the-ground impacts of two recent Supreme Court decisions – *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* in 2001 and *Rapanos v. United States* in 2006 – and subsequent guidance issued by the Corps and the U.S. Environmental Protection Agency (EPA).

This proved a daunting task. As will be set forth further below, determining exactly what has transpired with respect to assessment of jurisdiction by the Corps' Charleston District is close to impossible under the current legal and regulatory framework. This is largely due to the lack of basic records available: because the files are made up primarily of the actual application and its attachments as prepared by applicants, as well as very brief forms prepared by Corps staff that do not convey sufficient information for meaningful assessment.

In the course of the research, two troubling examples of waters that the Charleston District determined to be "non-jurisdictional" under the CWA were uncovered. As detailed in this report, these two determinations concerned sizable wetlands with obvious hydrological and ecological connections to some of South Carolina's most important navigable waters. Ultimately, restoring protection to all important South Carolina waters would result in better environmental safeguards and a more straightforward and transparent permitting process in South Carolina. The *SWANCC* and *Rapanos* decisions and their implementation by the Corps and EPA have left geographically isolated wetlands, intermittent, ephemeral and non-navigable headwater streams, and other wetlands without the level of Clean Water Act protection that Congress originally intended. In South Carolina, EPA estimates that 53 percent of the streams have no other streams flowing into them, and that 23 percent do not flow year-round. These smaller water bodies are among those most at risk of pollution as a result of diminished or withdrawn Clean Water Act protections. EPA also says that 1,993,219 people in South Carolina rely at least in part on drinking water from areas containing these smaller streams. In addition, using a conservative approach, the state could be deemed to have approximately 312,613 acres of so-called geographically "isolated" waters – water bodies that are particularly vulnerable to losing Clean Water Act safeguards.

This report summarizes the findings from investigation of recent Corps records concerning determinations of CWA jurisdiction.

Regulatory Procedures: The boundaries of Corps Charleston District regulatory authority (for both jurisdictional determinations and permitting actions under

Clean Water Act Section 404) are congruent with South Carolina's state borders. Such congruency does not occur in all states. The Charleston District has (like many other districts) adopted a joint application and streamlined process with the Department of Health and Environmental Control for the state of South Carolina that is available for many regulated activities, available at <http://www.sac.usace.army.mil/?action=permits.forms>. The Charleston District has been slow to adopt the national permit tracking database called ORM (Operation and maintenance business information link, Regulatory Module) system and seems unlikely to put previous records into that system, making it more difficult to research what is developing in that District.

Jurisdictional Determinations and Findings: The Charleston District explains that a "jurisdictional determination (JD) is the process of identifying and locating jurisdictional Waters of the United States (including wetlands) regulated by the [Corps]." The District has a number of webpages dedicated to educating the public and making information available about jurisdictional determinations. *See, e.g.,* The Wetland Jurisdictional Determination and Permit Process, [http://www.sac.usace.army.mil/?action=jurisdictional\\_determination.process\\_overview](http://www.sac.usace.army.mil/?action=jurisdictional_determination.process_overview). The Charleston District has also made efforts to educate the permitted community and other stakeholders, such as with a 15-16 September 2009 Regulatory Conference in Greenville, SC. The District also posts jurisdictional and non-jurisdictional forms on-line. *See* [http://www.sac.usace.army.mil/?action=jurisdictional\\_determination.home](http://www.sac.usace.army.mil/?action=jurisdictional_determination.home).

In performing this research, all forms related to jurisdictional determination requests since the *Rapanos* decision were downloaded from the District website and related data was recorded. Furthermore, select files were examined in both the Charleston District office as well as the South Carolina Department of Health and Environmental Control office to assess the decisions made regarding jurisdictional determinations. It is the author's conclusion, based on review of representative files and consultation with professionals who have reviewed Corps documentation, that the paperwork maintained by the District does not contain sufficient information to assess the extent of losses in the District and the type and value of resources being lost. It would appear that full records of decisions not to assert CWA jurisdiction over a water are not created until a lawsuit is threatened or filed challenging a particular decision (*see, e.g.,* the discussion below of the Spectre and Pine Hill tracts). The Corps places a great deal of reliance on materials submitted by applicants, and full review by other stakeholders is hampered by the lack of substantial records regarding the assessment phase.

The result is a process that is confusing and not transparent, making it difficult or impossible to assess what is being protected under the Act and why. It may take a substantial increase in the allocation of scarce assets to create and maintain better records of Corps decisions under the current Byzantine legal framework, to allow both the District, as well as interested stakeholders, to effectively monitor

and assess the process by which jurisdictional determinations are made. While better recordkeeping by the Corps needs to occur, clarifying the scope of the law to make clear that all important waters are protected would ensure greater levels of protections for South Carolina's waters, decrease agency administrative costs in making jurisdictional determinations, and remove the cause of the current confusion over how jurisdictional calls are made.



USFWS photo.

Cover photo courtesy of George Huntley.

## **Spectre Wetland, Horry County, South Carolina**

### **Overview:**

Like many coastal communities, the Murrells Inlet area in Horry County, South Carolina is experiencing unprecedented growth. The Corps has issued over 150 non-jurisdictional determinations for projects in Horry County during the last two years. The non-jurisdictional determination with respect to the Spectre, LLC site as depicted below provides an excellent demonstration of the issues facing South Carolina's wetlands following the *Rapanos* decision.

### **Site Location:**

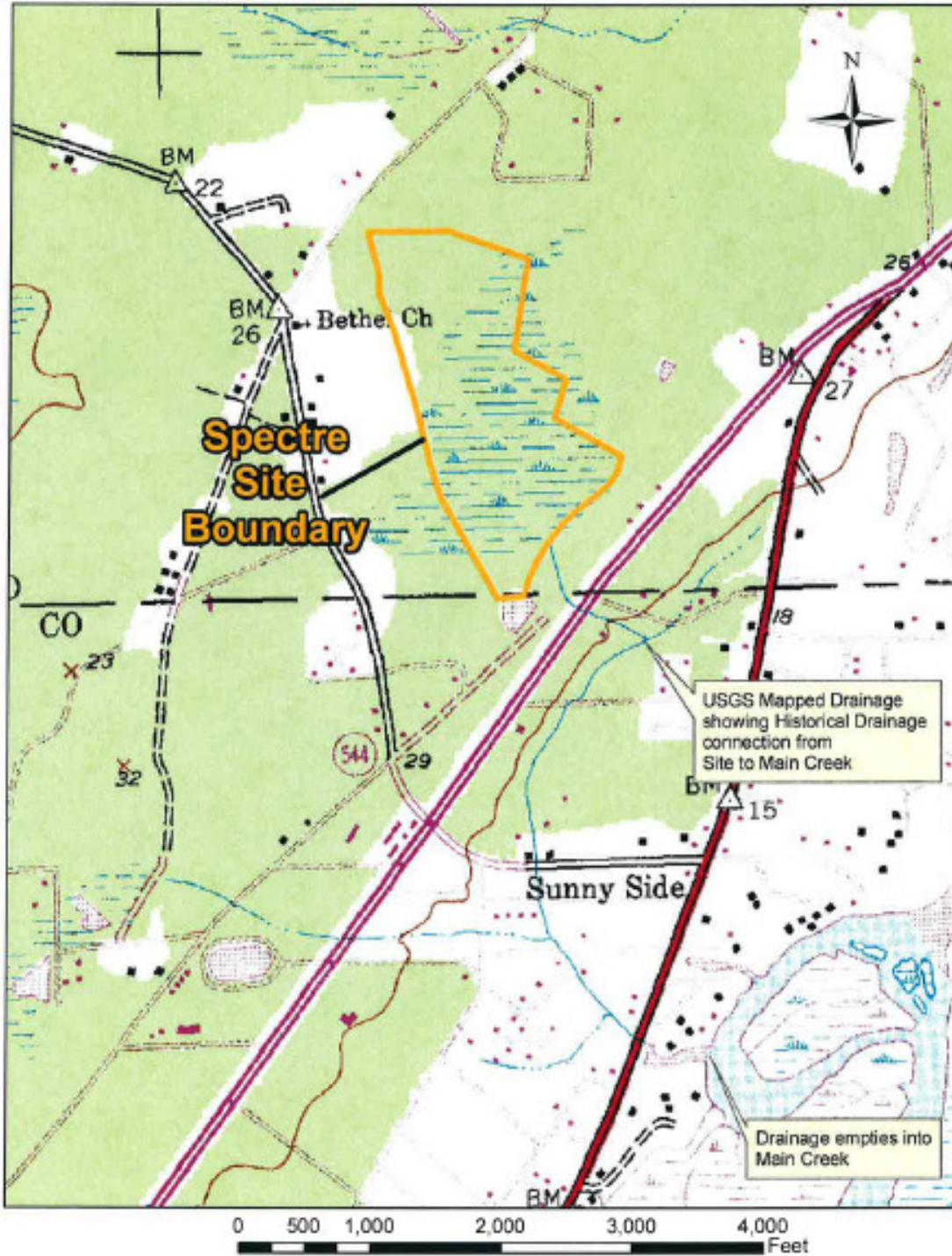
The 62.39-acre Spectre, LLC project site [SAC #: 87-2005-0575-3] is located between Highway 707 and the Highway 17 Bypass just north of the county line between Horry and Georgetown Counties. The 31.76 acres of freshwater wetlands delineated on this site historically drained into Main Creek and Murrells Inlet, until the hydrology was altered, possibly by the construction of the Highway 17 Bypass. Today the site drains into Collins Creek through multiple channels, which is connected to the Waccamaw River, a navigable waterway designated by the Corps' 1977 Navigability Study. Figure 1 below shows the Spectre Site map and its historic hydrologic connections, which have been altered.

### **The Corps' Non-Jurisdictional Determination:**

The Corps JD form filled out by Spectre, LLC indicated plans to use the land for commercial development. The JD form also set forth the corporation's intent to impact all 31.76 acres of wetlands. On May 16, 2005, the Corps declared all 31.76 acres of wetlands on the site (almost 50 percent of the site) as non-jurisdictional, identifying them as "isolated, intrastate wetland with no nexus to interstate commerce." Very little paperwork supported the initial decision.

### **Regulatory and Legal Status:**

Following the federal finding of no jurisdiction, on February 14, 2006 in a state-level stormwater permit application, Spectre, LLC indicated plans to excavate an 11-acre stormwater pond and use the material to fill the non-jurisdictional wetlands. An associated National Pollutant Discharge Elimination System (NPDES) permit for stormwater discharges pursuant to state law and Clean Water Act Section 402 was denied by the South Carolina's Office of Ocean and Coastal Resources Management (OCRM) of the Department of Health and Environmental Control. As part of that decision, the agency suggested that the wetlands be preserved and buffered.



**Figure 1**

**Topographic Map**

Topographic Map courtesy of Donley Kisner of Environmental Research Inc. and the Southern Environmental Law Center.

In 2008, Spectre, LLC appealed the storm water permit in South Carolina state court, and an administrative law judge held that OCRM did not have authority to regulate these wetlands under state law due to the lack of Clean Water Act jurisdiction. The South Carolina Supreme Court recently reversed that ruling and upheld the validity of the South Carolina Coastal Management Program and reaffirmed its applicability to all wetlands in the coastal zone. The South Carolina Environmental Law Project represented a number of environmental groups in that matter.



Figure 2: Collins Creek, the waterway into which the wetlands on the Spectre site currently drain. Photo courtesy of Donley Kisner of Environmental Research Inc. and the Southern Environmental Law Center.

In addition to that pending action, the Southern Environmental Law Center has filed a lawsuit in federal district court against the Corps, EPA, and others on behalf of the South Carolina Coastal Conservation League, South Carolina Wildlife Federation, National Wildlife Federation, and the Waccamaw Riverkeeper. Spectre, LLC is also a defendant in this lawsuit and has filed a counterclaim against the plaintiffs. The case is currently stayed pending a reevaluation of the wetland's jurisdictional status by the federal defendants.

As of early fall 2009, the site had been timbered but no other actions have been

undertaken by Spectre, LLC.



Figure 3: Aerial Photo of the timbered site showing a hydrologic connection to a tributary of Collins Creek (the "L" shaped channel in the middle of picture). Photo courtesy of Donley Kisner of Environmental Research Inc. and the Southern Environmental Law Center.

### **Coastal Wetlands and Climate Change:**

Protection of wetlands in the coastal zone, like the Spectre wetland, is also vital in efforts to allow species and coastal communities to adapt to and survive climate change. Coastal wetlands provide buffers between salt and fresh water. They provide breeding habitat for many fish and other aquatic species. They also protect people and communities by providing buffers from storm surges brought on by both increased sea level rise and the near certainty of more intense storms. The wetland at issue in the Spectre litigation provides flood storage capacity along the coast and likely provides habitat areas for certain species, though it may be too far inland to be an immediate replacement for wetlands destroyed by rising sea levels.

In the Southeast, anticipated coastal wetland loss due to climate change is estimated to be severe. Multiple studies have indicated climate change will result in a net loss of coastal

wetlands in South Carolina. For instance, in the Charleston area a three foot sea level rise will likely result in a 50 percent loss of coastal marsh, while a five foot sea-level rise could cause an 80 percent loss of coastal marsh. Timothy W. Kana et al., *Charleston Case Study*, available at [http://epa.gov/climatechange/effects/downloads/toc-wet\\_chap2.pdf](http://epa.gov/climatechange/effects/downloads/toc-wet_chap2.pdf). Additionally, the United States Geological Survey (USGS) has found that “[a]mong the areas of greatest risk [from climate change] in the United States are low-lying coastal habitats ... along the northern Gulf of Mexico and the southeast Atlantic coasts.” USGS, *Coastal Wetlands and Climate Change: Overview*, available at [www.nwrc.usgs.gov/climate/fs89\\_97.pdf](http://www.nwrc.usgs.gov/climate/fs89_97.pdf).

Vigilant protection of wetlands and other waters by appropriate understanding and implementation of regulatory requirements is essential in this era of climate change.



Figure 4: Murrells Inlet, the coastal water the Spectre wetland historically flowed into. Photo courtesy of George Huntley.

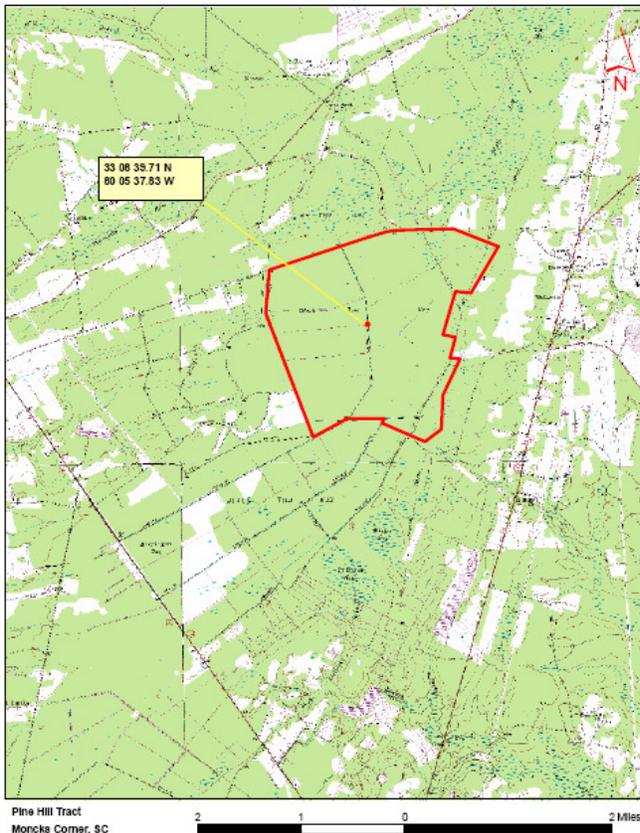
## Pine Hill Tract Wetlands, Berkeley County, South Carolina

### Overview:

The Black Tom Bay area in Berkeley County, where the Pine Hill Tract is located, has historically been known as a significant wetland system in South Carolina. The Pine Hill Tract is one of the largest known non-jurisdictional determinations in South Carolina, and as such demonstrates many issues facing South Carolina's freshwater wetland systems following the *Rapanos* decision.

### Site Location:

The 2,276.71-acre Pine Hill Tract project site [SAC#: 2006-2019-2JY] is located about 36 miles northwest of Charleston, and south of Black Tom Road. The developer once planned to build a water sport resort with a ski competition lake on part of the site and a sand mine on another. The Pine Hill site is within the Ashley River Watershed, which flows into Charleston Harbor from the Black Tom Bay wetland system via perennial streams.



The NJD exposes all the wetlands on the site to federally unregulated pollution and destruction. The site was historically used for silviculture (tree farming), which created a dewatered and fragmented wetland system. Although the assessment of existing connectivity in such altered areas can be complex, expert analysis demonstrates that the wetlands on the Pine Hill Tract are part of a large and integrated headwater wetland system linked to the Ashley River and ultimately Charleston Harbor.

Figure 5, inset, shows the Pine Hill site. An expert analysis has indicated that the site likely contains far more wetlands than the nearly 500 acres delineated by the Corps.

### The Corps' Non-Jurisdictional Determination:

On February 5, 2007, the Corps declared the 492.93 acres (over 21 percent of the site) of wetlands to be non-jurisdictional by identifying the site as "isolated, intrastate

wetland with no nexus to interstate commerce.” This 492.93-acre non-jurisdiction determination is one of the largest known in South Carolina to date. In fact, the area is about eight-tenths of a square mile.

Figure 6, below, shows an aerial photo of the Pine Hill site and the significant presence of silviculture of the area.



Figure 6: Aerial view of Pine Hill site. Photo courtesy of Donley Kisner of Environmental Research Inc. and the Southern Environmental Law Center.

### **Regulatory and Legal Status:**

South Carolina’s Department of Health and Environmental Control (DHEC) has yet to determine whether this project should be classified as a development or as a mine project. Furthermore, conservation groups, including the South Carolina Coastal Conservation League and the National Wildlife Federation, represented by the Southern Environmental Law Center, have filed a notice-of-intent to sue to commence proceedings to challenge this erroneous jurisdictional determination in court. As shown

below in Figure 7, these wetlands connect via various surface drainages to downstream waters. They also likely represent substantial flood storage and water recharge areas, as well as provide pollutant filtration and wildlife habitat functions.



Figure 7. One of several drainages leaving the Pine Hill site and eventually flowing into the Ashley River. Photo courtesy of Donley Kisner of Environmental Research Inc. and the Southern Environmental Law Center.

## **Conclusion**

Important South Carolina waters are at risk of losing basic Clean Water Act protections from pollution and destruction due to recent legal and regulatory confusion. When it passed the Clean Water Act, Congress (with strong bi-partisan support) realized that in order to protect water quality, all – not just some – important waters must be protected. For a generation, the Act succeeded in making great strides in cleaning up waters in South Carolina and across the nation. But the framework of protections provided by the Act is now in peril.

Without the restoration of comprehensive Clean Water Act protections, an increase in the number of vital wetlands and other waters in South Carolina that will be polluted or destroyed is virtually certain. It is equally certain that this will lead to the degradation of some of South Carolina's most prized waters, from its mountain streams to its coastal wetlands; will threaten South Carolina's drinking and agricultural water supply; and will foul the resources South Carolinians depend on for hunting, fishing, wildlife viewing and other outdoor recreation. Additionally, as the current confusion reigns, regulators, the regulated community, and conservationists are expending large amounts of time, money and resources litigating questions that for a generation were thought to be largely resolved. For all these reasons, it is important that Clean Water Act protections be fully restored to South Carolina's waters.



US FWS photo.

