

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1517

NATURALAND TRUST; SOUTH CAROLINA TROUT UNLIMITED;
UPSTATE FOREVER,

Plaintiffs - Appellants,

v.

DAKOTA FINANCE LLC, d/b/a Arabella Farm; KEN SMITH; SHARON SMITH;
WILLARD R. LAMNECK, JR.,

Defendants - Appellees.

SOUTH CAROLINA COASTAL CONSERVATION LEAGUE; CHARLESTON
WATERKEEPER,

Amici Supporting Appellants.

SOUTH CAROLINA CHAMBER OF COMMERCE,

Amicus Supporting Appellee.

Appeal from the United States District Court for the District of South Carolina, at
Greenville. Joseph Dawson, III, District Judge. (6:20-cv-01299-JD)

Argued: May 5, 2022

Decided: July 20, 2022

Before MOTZ, QUATTLEBAUM, and HEYTENS, Circuit Judges.

Reversed and remanded by published opinion. Judge Heytens wrote the opinion, in which Judge Motz joined. Judge Quattlebaum wrote a dissenting opinion.

ARGUED: Michael George Martinez, SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT, Greenville, South Carolina, for Appellants. Elizabeth Bartlett Partlow, LAW OFFICES OF ELIZABETH B. PARTLOW, LLC, West Columbia, South Carolina, for Appellees. **ON BRIEF:** Amy Armstrong, Lauren M. Milton, SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT, Georgetown, South Carolina, for Appellants. Adam B. Lambert, ACKER LAMBERT HINTON, P.A., Pickens, South Carolina, for Appellees. Geoffrey R. Gisler, Alex J. Hardee, SOUTHERN ENVIRONMENTAL LAW CENTER, Chapel Hill, North Carolina, for Amici South Carolina Coastal Conservation League and Charleston Waterkeeper. Karen Aldridge Crawford, KLAC LAW LLC, Columbia, South Carolina; Michael S. Traynham, NEXSEN PRUET, LLC, Columbia, South Carolina, for Amicus South Carolina Chamber of Commerce.

TOBY HEYTENS, Circuit Judge:

The Clean Water Act contains a citizen-suit provision allowing adversely affected persons to sue polluters in federal court. 33 U.S.C. § 1365(a)(1). The Act also contains a provision stating that a violation of its requirements “shall not be the subject of a civil penalty action under . . . section 1365” if a State “has commenced and is diligently prosecuting an action under a State law comparable to” the federal scheme for assessing civil penalties. § 1319(g)(6)(A)(ii). The main question here is whether a state agency’s notice of an alleged violation for failure to obtain a required permit, without more, “commence[s] . . . an action” within the meaning of that provision. Because we conclude it does not, we reverse the district court’s judgment and remand for further proceedings.

I.

Intending to operate “a working farm with an orchard and vineyard, and later an event barn for weddings and other celebrations,” Ken and Sharon Smith formed Arabella Farm, LLC. Farm Br. 2. The farm was built on property purchased by another Smith vehicle called Dakota Finance, LLC, and abutted land owned by the Smiths’ son-in-law, Willard Lamneck, Jr. Like the parties, we refer to the Smiths, Lamneck, and the two LLCs collectively as Arabella Farm.

Arabella Farm’s site borders South Carolina’s Jocassee Gorges area and is bounded by three bodies of water—Clearwater Branch, Peach Orchard Branch, and an unnamed tributary of the Eastatoe River. In 2017, Arabella Farm began clearing 20 acres of land to create its venue. The clearing process dramatically altered the steep, mountainous landscape and exposed the underlying granular soil. Although such an extensive land

disturbance ordinarily would require obtaining stormwater permits and adhering to other regulations, see 40 C.F.R. § 122.26(a)(1)(ii), (9)(i)(B), (c)(1), Arabella Farm claimed its work fell within an agricultural exemption to the Clean Water Act’s requirements. Before starting work, Arabella Farm did not seek any permits or install sediment or stormwater control measures, which allegedly resulted in significant discharges of sediment-laden stormwater onto nearby property and caused widespread erosion and other detrimental impacts.

Arabella Farm’s activities eventually caught the attention of government regulators. In April 2019, the South Carolina Department of Health and Environmental Control (Department) conducted an inspection to evaluate the farm’s compliance with the National Pollutant Discharge Elimination System (NPDES) program. The Clean Water Act regulates “point sources” that discharge pollutants and authorizes States to issue NPDES permits for such discharges. 33 U.S.C. § 1342. The permit program is administered through a scheme of cooperative federalism—the Environmental Protection Agency allows South Carolina to administer its own permit program in lieu of the federal one, see § 1342(b); 40 Fed. Reg. 28,130 (July 3, 1975), and the Department enforces the State’s requirements, see S.C. Code §§ 48-1-10 *et seq.*

Subsequent site inspections revealed inadequate stormwater controls, significant erosion, and off-site impacts. In August 2019, the Department sent a letter advising Arabella Farm that it was required to obtain an NPDES permit and instructing the farm “to cease and desist any activity at the [s]ite other than the installation and maintenance of storm water, sediment and erosion control measures as directed by its design engineer.” JA

57–58. In September 2019, the Department sent the farm a “Notice of Alleged Violation/Notice of Enforcement Conference” and informed the farm of a voluntary “informal” enforcement conference scheduled for the end of that month. JA 54, 58–59. The conference would be “closed to the public and media.” JA 59.

In November of the same year, Naturaland Trust and Trout Unlimited—non-profit organizations dedicated to conserving land, water, and natural resources—sent a notice of intent to sue letter to the Smiths, Lamneck, and the registered agent of Dakota Finance. As the statute requires, the letter detailed the alleged violations of the Clean Water Act. See 33 U.S.C. § 1365(b)(1)(A).

EPA regulations also require such notices to include “sufficient information to permit the recipient to identify . . . the full name, address, and telephone number of the person giving notice.” 40 C.F.R. § 135.3(a). The letter described Trout Unlimited as a “national non-profit” with “two local chapters in the Upstate of South Carolina” and “many members who regularly utilize the Eastatoe River and Little Eastatoe Creek in the vicinity of the [Smiths’] properties,” and listed its name and address as: “Trout Unlimited, C/O Greg Placone, P.O. Box 27172, Greenville, S.C[.] 29616.” JA 63–64, 76. At the bottom, the letter suggested contacting counsel—Michael Corley of the South Carolina Environmental Law Project—and provided Corley’s address and phone number.

After the required 60-day notice period elapsed, see 33 U.S.C. § 1365(b)(1)(A), Naturaland Trust and South Carolina Trout Unlimited (together, the conservationists) sued

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.