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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge
Opinion No. 5062 (S.C. Ct. App. filed Dec. 12, 2012)
(Withdrawn, Substituted, and Refiled May 1, 2013)

Case No. 09-ALC-07-0377-CC

Duke Energy Carolinas, LLC . . . . .Petitioner,

v.

South Carolina Department of Health and Environmental Control, South Carolina Attorney General, American Rivers, and The South Carolina Coastal Conservation League . . . . .Respondents,

Of whom South Carolina Department of Health and Environmental Control and American Rivers and The South Carolina Coastal Conservation League are. . . . . Respondents.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that a Petition for Rehearing in this matter was made and finally ruled upon by the Court of Appeals on May 1, 2013.

QUESTIONS PRESENTED

I. **Did the Court of Appeals err in interpreting the Environmental Fees Regulation (S.C. Regulation 61-30) in a manner which effectively repeals the suspension provisions of the Water Quality Certification Regulation (S.C. Regulation 61-101)?**

II. **Did the Court of Appeals err in applying the tolling provision of the Environmental Fees Regulation to the calculation of the 180-day time period under the Water Quality Certification Regulation in a manner which creates a conflict between the two regulations which does not otherwise exist?**

III. **Is the Court of Appeals' decision in this matter in conflict with the Court's ruling in *Responsible Economic Development v. South Carolina Department of Health and Environmental Control*?**

STATEMENT OF THE CASE

Petitioner Duke Energy Carolinas, LLC ("Duke Energy") operates the Catawba-Wateree Hydroelectric Project (the "Project"), a network of reservoirs and hydroelectric stations on the Catawba and Wateree Rivers in North and South Carolina. (Staff Assessment, p. 2, App. p. APX_000036). Five of the reservoirs are located in South Carolina, in York, Chester, Lancaster, Fairfield, and Kershaw Counties: Lake Wylie, Fishing Creek Reservoir, Great Falls Reservoir, Cedar Creek Reservoir, and Lake Wateree. (*Id.* at pp. 2-3, App. pp. APX_000036-APX_000037). The Project provides valuable services to 14 counties and more than 30 municipalities in North Carolina and South Carolina, including energy for approximately 116,000 homes, water to support production of over 8,100 megawatts of steam-powered electric generation, drinking

water for over 1.3 million people, and water for operation of a number of large industrial facilities. (*Id.* at p. 4, App. p. APX_000008).

Duke Energy operates the Project pursuant to a 50-year license issued by the Federal Energy Regulatory Commission ("FERC") in 1958. On August 29, 2006, in anticipation of the 2008 expiration of this license, Duke Energy submitted an Application for New License to FERC in order to continue operating the Project. (*See* Affidavit of E. Mark Oakley ¶¶ 4-5, App. p. APX_000098). Because operation of the Project may result in a discharge into navigable waters, Section 401 of the federal Clean Water Act required Duke Energy to request a Water Quality Certification ("WQC") from South Carolina. *See* 33 U.S.C. § 1341(a)(1). Section 401 further provides that if the state fails to grant or deny certification "within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application." *Id.* On April 7, 2008, FERC issued a "Ready for Environmental Analysis" ("REA") notice on Duke Energy's Application, triggering Duke Energy's obligation to file an application for a WQC to Respondent South Carolina Department of Health and Environmental Control ("DHEC"). (Oakley Aff., ¶ 7, App. p. APX_000098). On June 5, 2008, Duke Energy submitted an application for a WQC to DHEC. (Oakley Aff., ¶ 8, App. p. APX_000098).

DHEC's consideration of Duke Energy's request for a WQC for the Project is governed by S.C. Regulation 61-101 (Supp. 2012), *Water Quality Certification* ("WQC Regulation"), which "establishes procedures and policies for implementing State water quality certification requirements of Section 401 of the Clean Water Act, 33 U.S.C. Section 1341." 25A S.C. CODE ANN. REGS. § 61-101(A)(1). The WQC Regulation sets

forth the scope and substance of DHEC's review of an application for a WQC. Additionally, the WQC Regulation expressly provides that DHEC must act on a WQC application within 180 days: "*Unless otherwise suspended or specified in this regulation*, the Department shall issue a proposed decision on all applications within 180 days of acceptance or [sic] an application." *Id.* § 61-101(A)(6) (emphasis added).

Under certain circumstances, the 180-day time limit may be temporarily suspended. For example, DHEC may suspend its processing of the WQC application "[i]f 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." 25A S.C. CODE ANN. REGS. § 61-101(A)(6) (Supp. 2012). The WQC Regulation also authorizes DHEC to suspend processing of the WQC application under certain circumstances and with proper notice to the applicant. The WQC Regulation provides in relevant part:

> 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 Article F.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 certification decision, 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.

25A S.C. CODE ANN. REGS. § 61-101(C)(2)-(4) (Supp. 2012) (emphasis added). The WQC Regulation clearly mandates the specific circumstances under which the processing of a WQC application can be and is suspended by DHEC.

DHEC *never* suspended the processing of Duke Energy's WQC application as provided in the WQC Regulation, and DHEC *failed* to act on the application within the mandatory 180-day time period set forth in the WQC Regulation. While there were several requests for additional information from Duke Energy during this time period, DHEC did *not* provide Duke Energy with notice of a suspension of its processing of the WQC application. DHEC communications with Duke Energy during its review of the WQC application referred to the running of "the 180-day clock" but these communications consistently cited *only* S.C. Regulation 61-30, *Environmental Protection Fees* ("Environmental Fees Regulation").

The Environmental Fees Regulation was promulgated pursuant to the Environmental Protection Fund Act, S.C. CODE ANN. §§ 48-2-10 *et seq.* (2008 & Supp. 2012) ("Fund Act"). The Fund Act establishes a special account, separate from the State's general fund, to be used to defray DHEC's costs in administering certain regulatory programs, including permitting programs under the Clean Water Act. S.C. CODE ANN. §§ 48-2-30, -40. The Fund Act requires DHEC to promulgate regulations setting the fees authorized under the Act and establishing "a schedule for timely action" on permit applications. *Id.* §§ 48-2-50, -70. Section 48-2-70 further expressly provides that the consequence of a failure by DHEC to grant or deny the application with that time frame is *refund of the fee to the applicant. See id.* § 48-2-70. Moreover, the Environmental Fees Regulation expressly limits the applicability of the time schedules

defined therein to the payment and refunding of permit fees under the Fund Act:

> "Time Schedules"[:] In accordance with S.C. Code Sections 48-2-70 and 48-39-150, a "schedule of timely review" *for purposes of this regulation* shall begin when the applicant is notified that the application is administratively complete or within ten days of receipt of the application, whichever comes first; and end when a final decision is rendered. It will include required technical review, required public notice, and end with a final decision by the Department to issue or deny the permit. The time schedule may be tolled or extended in accordance with the conditions stipulated in Section H(1) of this regulation.

24A S.C. CODE ANN. REGS. § 61-30(B)(22) (emphasis added).

Subsection (H)(2)(a) of the Environmental Fees Regulation sets the time limit for DHEC's decision on a WQC application at 180 days. 24A S.C. CODE ANN. REGS. § 61-30(H)(2)(a)(vii). However, Subsection (H)(1)(c) provides that "[t]he time schedule shall be tolled when the Department makes a written request for additional information and shall resume when the Department receives the requested information from the applicant." 24A S.C. CODE ANN. REGS. § 61-30(H)(1)(c). DHEC's references to "stopping the 180-day clock" in its communications with Duke Energy referenced *only* the Environmental Fees Regulation.

As noted above, Duke Energy submitted its WQC application on June 5, 2008. DHEC thereafter made several requests for additional information, each time advising Duke Energy that the 180-day clock *under the Environmental Fees Regulation* would stop while DHEC was waiting on the requested information. None of these communications advised Duke Energy that the separate 180-day clock *under the WQC Regulation* had been suspended. For example, in a letter dated August 19, 2008, DHEC staff advised as follows:

> Please submit all requested information by <u>October 19, 2008</u> so that we may expedite the process and complete a technical review of your application. *Pursuant to Regulation 61-30*, the Department has 180 days

> to complete action on an application for 401 Water Quality Certification *or the assessed fee must be returned.* Once the fee and affidavit of publication is received (required in a letter from the Department dated August 15, 2008), your application will be deemed complete and the 180-day clock will start. In addition, these 180 days include only those days in which the Department is actively reviewing the application; the clock stops when information is requested and the Department is waiting on a response.

(August 19, 2008 letter from DHEC Staff Member William R. "Rusty" Wenerick to Duke Energy Carolinas, LLC, App. pp. APX_000145-APX_000146) (italicized emphasis added). Similarly, in a letter dated October 8, 2008, DHEC staff requested additional information from Duke Energy and again advised Duke Energy as follows:

> Please submit your responses by November 8, 2008 so that we may expedite the review process. *Pursuant to Regulation 61-30*, the Department has 180 days to complete action on an application for 401 Water Quality Certification *or the assessed fee must be returned.* These 180 days include only those days in which the Department is actively reviewing the application; the clock stops when information is requested and the Department is waiting on a response.

(October 8, 2008 letter from William R. "Rusty" Wenerick to Duke Energy Carolinas, LLC, App. p. APX_000148-APX_000149) (emphasis added). Again, by letter dated October 21, 2008, DHEC staff requested additional information and advised Duke Energy of the suspension of the 180-day clock under the Environmental Fees Regulation:

> Please submit your responses by November 21, 2008 so that we may expedite the review process. *Pursuant to Regulation 61-30*, the Department has 180 days to complete action on an application for 401 Water Quality Certification *or the assessed fee must be returned.* These 180 days include only those days in which the Department is actively reviewing the application; the clock stops when information is requested and the Department is waiting on a response.

(October 21, 2008 letter from William R. "Rusty" Wenerick to Duke Energy Carolinas, LLC, App. pp. APX_000157-APX_000158) (emphasis added). None of these letters mentioned suspension of the review of Duke Energy's WQC application under the WQC

Regulation. Additionally, all of these letters stated that the consequence of DHEC's failure to make a decision on Duke Energy's WQC application within the 180-day time frame would be the return of Duke Energy's application fee pursuant to the Environmental Fees Regulation.

Duke Energy was never notified by DHEC that processing of its WQC Application was suspended pursuant to the WQC Regulation. (Oakley Aff., ¶ 11, App. p. APX_000099). Indeed, once Duke Energy's WQC application was complete—an event that occurred no later than August 8, 2008, as evidenced by DHEC's placement of the application on public notice—there was no basis for a suspension of the 180-day clock under the WQC Regulation. (Affidavit of Williams R. Wenerick, "Wenerick Aff.," ¶ 8 and Exh. 2, App. pp. APX_000131 and APX_000141-APX_000143; Transcript of Motion Hearing dated May 6, 2010, hereinafter "Hrg. Tr.," p. 32, ll. 2-14, App. p. APX_000321).[1] At no time after that date did FERC suspend the processing of the federal license application (which, as explained above, would have allowed DHEC to suspend the WQC application upon notice to Duke Energy), nor did DHEC provide Duke Energy with notice, written or otherwise, that processing of the WQC application had been suspended pursuant to the WQC Regulation. Accordingly, the 180-day time limit on DHEC's decision on Duke Energy's WQC application began to run no later than August 8, 2008, and thus expired no later than February 4, 2009. However, DHEC did not issue a decision on Duke Energy's WQC application until May 15, 2009, when DHEC issued a notice of its proposed decision ("NOPD"). (Oakley Aff., ¶ 13, App. p.

[1] At the hearing on the Motion for Summary Judgment, counsel for DHEC conceded that DHEC had a complete application on August 8, 2008, when Duke Energy's application was placed on public notice. (Hrg. Tr., p. 32, ll. 2-14, App. p. APX_000321).

APX_000099).

The NOPD notified the public of DHEC's decision to certify the Project with certain conditions. The NOPD incorporated by reference certain portions of the Comprehensive Relicensing Agreement for CWHP, FERC Project No. 2232, dated December 22, 2006 ("CRA"). (NOPD, p. 1, App. p. APX_000031). The CRA is a binding agreement between Duke Energy and 70 stakeholders from North Carolina and South Carolina, including S.C Department of Natural Resources, S.C. Department of Parks, Recreation, and Tourism, S.C. Department of Archives and History, local governments, and private entities. (Staff Assessment, p. 1, App. p. APX_000035). Other entities, including the National Marine Fisheries Service, U.S. Fish and Wildlife Services, and DHEC, participated in the development of the CRA, but were not signatories to the Agreement. (*Id.*). The CRA addresses a broad range of issues related to Duke Energy's operation of the Project, including water quality, species protection, reservoir elevations, recreation flows, water user needs, drought response, shoreline management, and public recreation facilities. (*Id.*). The NOPD expressly incorporated, *inter alia*, the following Resource Agreements in the CRA: Reservoir Elevation Agreements, Recreation Flow Agreements, and Habitat Flow Agreements, Low Inflow Protocol Agreements, and Water Quality Agreements. (Public Notice # DHEC 08-C-001, p. 1, App. p. APX_000031). In the Staff Assessment for Duke Energy's application, the DHEC staff detailed extensive water quality monitoring and modeling conducted by Duke Energy and concluded that "[t]he applicant's analysis and applicable portions of the CRA together provide reasonable assurance that the water quality standards of Regulation 61-68 will not be contravened as a result of the proposed work."

(Staff Assessment, p. 10, App. p. APX_000044).

The NOPD further required that Duke Energy "provide for upstream fish passage and downstream fish passage and protection at the [Project] in South Carolina consistent with the 'Santee River Basin Accord for Diadromous Fish Protection, Restoration, and Enhancement' (Accord)." (*Id.* at p. 2, App. p. APX_000032). The Accord is an agreement among Duke Energy, S.C. Department of Natural Resources, N.C. Wildlife Resources Commission, and U.S. Fish and Wildlife Service to address the Project's impact on aquatic ecosystems within the Project. (Staff Assessment, p. 17, App. p. APX_000051). DHEC's Staff Assessment concluded that approval of the Accord by these state and federal agencies "indicates to the SCDHEC that the terms are appropriate and practical." (Staff Assessment, p. 17, App. p. APX_000051). DHEC staff thus made Duke Energy's compliance with the terms of the Accord a condition of the WQC. (NOPD, p. 2, App. p. APX_000032). According to the terms of the NOPD, the final WQC for the Project would be issued by DHEC unless there was a timely request for review of the NOPD.

On May 29, 2009, Respondents American Rivers and South Carolina Coastal Conservation League (hereinafter, the "Environmental Groups") filed a Request for Final Review with the South Carolina Board of Health and Environmental Control ("Board"). (*See* Request for Final Review dated May 29, 2009, App. pp. APX_000009-APX_000058). On August 6, 2009, the Board issued the final agency decision, a written order reversing the DHEC staff decision and denying the WQC. (*See* Final Agency Decision dated Aug. 6, 2009, App. pp. APX_000005-APX_000008). Duke Energy timely requested a contested case hearing in the Administrative Law Court ("ALC").

(*See* Notice of Request for Contested Case Hearing dated Sept. 4, 2009, App. pp. APX_000059-APX_000062). The ALC thereafter entered an order allowing the Environmental Groups to intervene in the matter. (*See* Order, Nov. 9, 2009, App. pp. APX_000063-APX_000064). The ALC also allowed the South Carolina Attorney General to intervene for the limited purpose of protecting the State's interest in then-pending litigation between the State and North Carolina in the original jurisdiction of the United States Supreme Court. (*See* Order, Nov. 9, 2009, App. pp. APX_000065-APX_000066).

On January 21, 2010, Duke Energy filed its Motion for Summary Judgment and Motion for Declaratory Judgment. (*See* Motion for Summary Judgment and Motion for Declaratory Judgment dated January 21, 2010, App. pp. APX_000067-APX_000073). The ALC heard oral argument on Duke Energy's motions on May 6, 2010 and granted the motions in a June 10, 2010 Order on Motion for Summary Judgment. (*See* Order on Motion for Summary Judgment dated June 10, 2010, App. pp. APX_000375-APX_000389). The ALC ruled that because DHEC failed to act on Duke Energy's WQC application within the 180-day time period mandated in the WQC Regulation, it had waived certification of the Project. On June 21, 2010, DHEC and the Environmental Groups filed a Joint Motion for Reconsideration. (*See* Joint Motion for Reconsideration dated June 21, 2010, App. pp. APX_000390-APX_000094). While that motion was pending, DHEC and the Environmental Groups filed separate notices of appeal. On July 9, 2010, the ALC denied the Joint Motion for Reconsideration. (*See* Order, July 9, 2010, App. pp. APX_000414-APX_000415). DHEC and the Environmental Groups (hereinafter collectively referred to as "Respondents") each filed a subsequent notice of

appeal. On August 3, 2010, the Court of Appeals notified the parties that the appeals would be consolidated. On January 31, 2011, Duke Energy filed a Motion to Dismiss which was denied on April 20, 2011. Following briefing and oral arguments, the Court of Appeals issued Opinion No. 5062 on December 12, 2012, reversing the ALC order and remanding the case to the ALC. On January 10, Duke Energy filed a petition for rehearing. On May 1, 2013, the Court of Appeals granted Duke Energy's petition for rehearing and substituted Opinion No. 5062 filed May 1, 2013 ("Opinion").

SUMMARY OF ARGUMENT

Duke Energy respectfully petitions this Court for a writ of certiorari to review the decision of the Court of Appeals. The interpretation of the suspension provision of the WQC Regulation is a novel question of law which will affect future WQC applications under consideration by DHEC.[2] The WQC Regulation and the Environmental Fees Regulation address different issues. The Court of Appeals' decision erases the distinction between the two regulations and effectively repeals the suspension provisions of the WQC Regulation by giving effect only to the tolling provision of the Environmental Fees Regulation. In contrast, the ALC interpreted the WQC Regulation and the Environmental Fees Regulation in a manner which reconciles any perceived conflicts between the two regulations and gives full effect to both. Moreover, as Judge Thomas explained in her dissent from the Court of Appeals' decision, to the extent there is a conflict between these two regulations, the established rules of construction require that the specifically applicable suspension provisions of the WQC Regulation control over the more general provisions of the Environmental Fees Regulation. (Opinion, pp. 15-16, App. pp.

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[2] The Court of Appeals decision will affect permits other than FERC relicensing; all permits issued by the United States Army Corps of Engineers would also be impacted.

APX_000811-APX_000812). Additionally, the Court of Appeals' decision is in conflict with this Court's decision in *Responsible Economic Development v. South Carolina Department of Health and Environmental Control*, 371 S.C. 547, 641 S.E.2d 425 (2007). A writ of certiorari is therefore appropriate in this case.

ARGUMENT

I. THE COURT OF APPEALS' INTERPRETATION OF THE ENVIRONMENTAL FEES REGULATION EFFECTIVELY REPEALS THE SUSPENSION PROVISIONS OF THE WQC REGULATION—DESPITE THE ABSENCE OF AN IMPLIED OR EXPRESS REPEAL OF SUCH PROVISIONS IN EITHER THE ENVIRONMENTAL PROTECTION FUND ACT OR THE ENVIRONMENTAL FEES REGULATION.

Without any support for its ruling, the Court of Appeals found that the Environmental Fees Regulation "allows for tolling as well as suspension of the time schedule" and further found that the "tolling provisions of 61-30 [the Environmental Fees Regulation] are also applicable to Regulation 61-101 [the WQC Regulation]." (Opinion, p. 11, App. p. APX_000807). This attempt to blend the independently operable provisions of the WQC Regulation and the Environmental Fees Regulation effectively repeals the suspension provisions in the WQC Regulation. The WQC Regulation provides for very specific circumstances under which the running of the 180-day time period for review of an application for a WQC may be suspended by DHEC. As discussed below, these circumstances are far more narrow than those under which the running of the 180-day period is tolled under the Environmental Fees Regulation.

The requirements for suspending the 180-day clock under the WQC Regulation are much more demanding than the requirements for suspension under the Environmental Fees Regulation. The Environmental Fees Regulation provides for suspension of its 180-

day clock upon DHEC's written *request* for information from an applicant, and the time is tolled until DHEC receives the requested information. 24A S.C. CODE ANN. REGS. § 61-30(H)(1)(c) (Supp. 2012). In contrast, the WQC Regulation suspends the running of the 180-day time period only if (1) DHEC has requested additional information from an applicant and has specified a deadline for submission of that information; (2) the applicant fails to timely provide the requested information; (3) DHEC determines that such information is necessary to its decision on the application; *and* (4) DHEC *notifies the applicant* that processing of the WQC application has been suspended. 25A S.C. CODE ANN. REGS. § 61-101(C) (4) (Supp. 2012).

Under the Court of Appeals' interpretation, which applies the tolling rules of the Environmental Fees Regulation to the calculation of time under the WQC Regulation, the 180-day clock under the WQC Regulation is stopped when only the first of the four criteria identified is met—rendering the second, third and fourth requirements meaningless. The application of tolling under the Environmental Fees Regulation to the calculation of the 180-day time period in the WQC Regulation thereby effectively repeals the suspension provisions of the WQC Regulation.

Neither the Fund Act pursuant to which the Environmental Fees Regulation was promulgated, nor the Environmental Fees Regulation itself, contains an express repeal of any provision of the WQC Regulation. The Court of Appeals found that the Fund Act's "plain language indicates the time schedule provided in Regulation 61-30 [the Environmental Fees Regulation], as well as any corresponding explanation of how to count the days in that time schedule, would be applicable to any previous regulation under which the permit is authorized." (Opinion, p. 10, App. p. APX_000806).

However, while time schedules *for a fee refund* under the Environmental Fees Regulation apply to permits authorized by prior regulation, nothing in the Fund Act provides that a regulation promulgated pursuant to the Fund Act amends or supersedes *permitting requirements* promulgated under a prior regulation. Indeed, Section 48-2-70 expressly provides that the *sole* effect of failure to meet the time frame in the Environmental Fees Regulation is the refund of the application fee imposed under the Regulation:

> Under each program for which a permit processing fee is established pursuant to this article, the promulgating authority also shall establish by regulation a schedule for timely action by the Department of Health and Environmental Control on permit applications under that program.... If the department fails to grant or deny the permit within the time frame established by regulation, *the department shall refund the permit processing fee to the permit applicant.*

S.C. CODE ANN. § 48-2-70 (2008) (emphasis added). Neither this provision of the Fund Act nor the Environmental Fees Regulation promulgated thereunder expressly repeals any provision of prior regulations establishing the procedural and substantive requirements governing DHEC permitting decisions. And, unlike the WQC Regulation, neither the Fund Act nor the Environmental Fees Regulation addresses the issue of waiver under the federal Clean Water Act.

Moreover, neither the Fund Act nor the Environmental Fees Regulation implicitly repeals any provision of prior permitting regulations, including the WQC Regulation. "Repeals by implication are not favored by courts and to repeal a statute on account of an asserted conflict or repugnancy with another, 'the repugnancy must not only be plain, but the provisions of the two statutes must be incapable of any reasonable reconcilement; for if they can be construed so that both can stand, the Court will so construe them.'" *City of Rock Hill v. South Carolina Dep't of Health and Envtl. Control*, 302 S.C. 161, 167-68, 394 S.E.2d 327, 331-32 (1990) (quoting *Pearson v. Mills Mfg. Co.*, 82 S.C. 506, 509, 64

S.E. 407, 409 (1909)). Neither the Fund Act nor the Environmental Fees Regulation is repugnant to the WQC Regulation. To the contrary, as discussed above, the Environmental Fees Regulation and the WQC Regulation were enacted under different enabling statutes to achieve distinctly different purposes. The Fund Act established a funding mechanism for DHEC's administration of certain regulatory programs, including WQC applications. S.C. CODE ANN. §§ 48-2-30 and -40. The Environmental Fees Regulation promotes this purpose by providing for the limited application of the time schedules defined therein. *See* 24A S.C. CODE ANN. REGS. § 61-30(B)(22) . There is no doubt that the "time schedules" set forth in the Environmental Fees Regulation are solely "for purposes of this regulation" and established in accordance with Section 48-2-70 of the Fund Act, which provides for refund of fees upon DHEC's failure to process an application within the time period established by regulation. Additionally, the Fund Act requires DHEC to establish a process whereby the applicant may appeal the calculation of the fee. *See* S.C. CODE ANN. § 48-2-60 (2008). Accordingly, the Fund Act provides for appeal of the calculation or application of a fee authorized by the Act only—not for an appeal of the substantive decision on a permit application. This narrow appeal provision is further evidence of the limited legislative purpose of the Fund Act.

The WQC Regulation, in contrast, was promulgated pursuant to the South Carolina Pollution Control Act to satisfy Section 401 of the Clean Water Act. As Judge Thomas notes in her dissent, the requirements of the Clean Water Act

> include prompt action by state agencies on requests for water quality certification, an objective important enough to warrant a legislative mandate in the Clean Water Act that unreasonable delay by a state agency in acting on such a request for water quality certification would be tantamount to a waiver by the State of its right to deny certification, which in turn would delay the applicant's pursuit of any federal license or permit

for which state water quality certification is a prerequisite.

(Opinion, p. 15, App. p. APX_000815 (Thomas, J., dissenting) (citing *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 430, 702 S.E.2d 246, 253 (2010), which states that Regulation 61–101 "establishes procedures and policies for implementing water quality certification requirements of Section 401 of the Clean Water Act")). The WQC Regulation provides not only the criteria for DHEC's substantive decision on a WQC certification, but also the procedural requirements and deadlines established to conform to the statutory framework of Section 401 of the Clean Water Act. The tolling provisions of the Environmental Fees Regulation and the WQC Regulation are therefore capable of a "reasonable reconcilement." *City of Rock Hill*, 302 S.C. at 167-68, 394 S.E.2d at 331-32.

Moreover, even if the application of both regulations were somehow viewed to create a conflict, the WQC Regulation would govern the calculation of the 180-day time period required thereunder. Specific statutes are not to be considered repealed by a later *general* statute unless there is a direct reference to the earlier statute or the intent of the legislature to do so is explicitly implied. *Atlas Food Systems and Serv., Inc. v. Crane National Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995). As discussed *supra*, neither the Fund Act nor the Environmental Fees Regulation contains an express or implied legislative intent to amend or supersede any provision of the WQC Regulation. Looking comprehensively at the overall purpose of both regulations, the WQC Regulation is unquestionably the "specific" statute with respect to DHEC's substantive review of a WQC application. On the other hand, the Environmental Fees Regulation addresses a vast number of permitting decisions to be rendered by DHEC, only one of which involves WQCs, but does so only in the context of

setting the fees and a schedule for refund of such fees. Moreover, this Court has acknowledged that the WQC Regulation governs the water quality certification process. *See South Carolina Coastal Conservation League v. South Carolina Dep't of Health and Envtl. Control*, 390 S.C. 418, 430, 702 S.E.2d 246, 253 (2010) ("[The WQC Regulation] establishes procedures and policies for implementing water quality certification requirements of Section 401 of the Clean Water Act and requires DHEC to send notice to specific parties."). Accordingly, as Judge Thomas notes in her dissent, any perceived conflict between the WQC Regulation and the Environmental Fees Regulation should have been reconciled to give effect to the more specific provisions of the WQC Regulation.

II. THE COURT OF APPEALS' APPLICATION OF THE TOLLING PROVISION OF THE ENVIRONMENTAL FEES REGULATION TO THE CALCULATION OF THE 180-DAY TIME PERIOD UNDER THE WQC REGULATION CREATES A CONFLICT BETWEEN THE TWO REGULATION WHICH DOES NOT OTHERWISE EXIST.

The Environmental Fees Regulation sets the time period for DHEC's decision on a WQC application at 180 days. The Court of Appeals noted that the 180-day time schedule for processing a WQC application under the Environmental Fees Regulation "mirrors Regulation 61-101's [the WQC Regulation's] time schedule for permit review." (Opinion, p. 11, App. p. APX_000807). The Court of Appeals further noted that "many portions of Regulation 61-30's [the Environmental Fees Regulation's] requirements and procedures regarding the application procedure mirror the requirements in Regulation 61–101 [the WQC Regulation]." *Id.* The Court of Appeals thus concluded: "Reading the statutory mandates and regulatory requirements in their plain and ordinary sense indicates that Regulation 61–30 and 61–101 were to be read together to provide DHEC more flexibility in the processing of permits. Both of the regulations can exist without

one negating the other, as Regulation 61-30 clarifies how Regulation 61-101's 180-day time period of review will be counted." *Id.* (footnote omitted).

The Court of Appeals' grafting of the tolling provisions of the Environmental Fees Regulation onto the WQC Regulation does not harmonize the two regulations, but in fact creates direct conflicts where none would otherwise exist. The most obvious conflict is with the 60-day time period for certain WQC applications under the WQC Regulation. *See* 25A S.C. CODE ANN. REGS. § 61-101(F)(4). Under the Court of Appeals' reasoning, the 180-day time period for a fee refund under the Environmental Fees Regulation overrides the 60-day period set forth in the WQC Regulation—thereby *tripling* the time DHEC has to act. Moreover, as discussed above, the Court of Appeals' application of the tolling provision of the Environmental Fees Regulation to the calculation of the 180-day time period under the WQC Regulation effectively eliminates the other requirements for suspension under the WQC Regulation.

This conflict is unnecessary. The ALC's decision harmonizes these two regulations by interpreting differing methods of calculating the 180-time periods in a manner which gives full effect to both regulations. "It is well settled that statutes in apparent conflict should, if possible, be construed so as to allow both to stand and to give effect to each." *National Advertising Co., Inc. v. Mount Pleasant Bd. of Adjustment*, 312 S.C. 397, 400, 440 S.E.2d 875, 877 (1994). "Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative." *Hodges v. Rainey*, 341 S.C. 79, 88, 533 S.E.2d 578, 583 (2000) (citation omitted). As the ALC correctly held, any perceived dissimilarity between these regulations does not create a direct conflict because each regulation determines the applicable method for calculating the

180-day time periods *for distinctly separate and unrelated purposes*. Citing to this Court's holding in *Responsible Economic Development v. South Carolina Department of Health and Environmental Control*, 371 S.C. 547, 641 S.E.2d 425 (2007), the ALC found that as follows: "Here, there are no provisions that specifically provide [the WQC Regulation and the Environmental Fees Regulation] are overlapping. Rather, each regulation administers the provisions of the law authorizing the regulation." (Order on Motion for Summary Judgment dated June 10, 2010, p. 7, App. p. APX_000381). The ALC thereby interpreted the Environmental Fees Regulation and the WQC Regulation in a manner which renders both regulations fully operative.

While the Court of Appeals was clearly troubled with the apparent incongruity of two DHEC regulations, both touching on water quality certifications, each with a 180-day period, it is not for the Court of Appeals to fix this apparent incongruity. These are legislative rules. It is a court's duty to interpret these rules and to give each full effect, if possible. *Benat v. State Farm Mut. Ins. Co.*, 286 S.C. 132, 134, 333 S.E.2d 57, 58 (Ct. App. 1985) ("It is the duty of this court to interpret the law. We have no legislative authority and cannot vary a statutory scheme and this is true no matter how logical the basis of the variance."). As the ALC determined, it is possible to give each full effect, and the ALC's decision should therefore be reinstated.

III. THIS COURT'S RULING IN *RESPONSIBLE ECONOMIC DEVELOPMENT* GOVERNS THE INTERPRETATION OF THE WQC REGULATION AND THE ENVIRONMENTAL FEES REGULATION IN THIS CASE.

The Court of Appeals found that *Responsible Economic Development v. South Carolina Department of Health and Environmental Control*, 371 S.C. 547, 641 S.E.2d 425 (2007), can be distinguished from the facts in this case. However, the Court of

Appeals recites the holding in *Responsible Economic Development* as follows:

> *Responsible Economic* held that regulations from different enabling acts could not be applied to each other when the regulations did not reference each other and there is an absence of statutory authorization to apply the two acts and their corresponding regulations to each other.

(Opinion, p. 10, App. p. APX_000806). Under the Court of Appeals' own recitation of the holding, *Responsible Economic Development* is directly on point with, and should control the outcome of, this case.

In *Responsible Economic Development*, the appellants challenged the issuance of a stormwater permit, claiming *inter alia*, that the proposed development violated the anti-degradation rules set forth in DHEC Regulations 61-68 and 61-69. *See id.* at 549, 641 S.E.2d at 426. In addressing this argument, this Court held that DHEC's review of an application for a stormwater permit must be conducted pursuant to the Stormwater Management and Sediment Reduction Act ("Stormwater Act") and the regulations promulgated thereunder, rather than under DHEC Regulations 61-68 and 61-69, which were promulgated under the Pollution Control Act and therefore did not apply to review of an application for a stormwater permit:

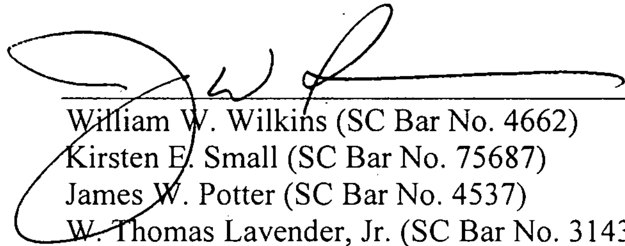
> Relevant to this appeal, the regulations of the Pollution Control Act—Regulations 61-68 and -69—and the regulations of the Stormwater Act—Regulations 72-305 and -307—do not reference each other and are authorized by different enabling acts. *In the absence of statutory authorization to apply the two acts and their corresponding regulations to each other, the regulations of the Pollution Control Act do not apply to the Stormwater Act or its regulations.* Accordingly, we conclude, as a matter of law, the case-by-case modification of regulatory requirements under the Stormwater Act cannot be invoked because of an alleged violation of the Pollution Control Act's regulations. Furthermore, a stormwater permit issued pursuant to the Stormwater Act cannot be denied based on the regulations of the Pollution Control Act. Therefore, Regulation 72-305(B)(4) does not require the denial of a stormwater permit on the ground that the anti-degradation rules have been violated because the regulations of the Pollution Control Act do not apply to the Stormwater Act.

Id. at 552-553, 641 S.E.2d at 428 (emphasis added). As discussed more fully *supra*, the WQC Regulation and the Environmental Fees Regulation were promulgated under two different enabling acts. The WQC Regulation was first promulgated in 1990 under the Pollution Control Act, and Regulation 61-30 was promulgated in 1995 under the Fund Act. As in *Responsible Economic Development*, while the regulations may touch on common general subjects, there is no express authorization in either the Pollution Control Act or the Fund Act to apply these Acts and the regulations promulgated thereunder to each other. The WQC Regulation expressly governs DHEC's decision on a WQC application. As such, the Environmental Fees Regulation cannot be applied in a manner which affects a decision made pursuant to the WQC Regulation. Accordingly, the Court of Appeals erred in applying the tolling provision of the Environmental Fees Regulation to the calculation of the 180-day time period for DHEC's decision on Duke Energy's WQC application pursuant to the WQC Regulation.

CONCLUSION

The proper interpretation of the State's regulatory scheme is a matter of great public importance. Duke Energy respectfully asks this Court to grant certiorari to review the decision of the Court of Appeals.

June 28, 2013



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge
Opinion No. 5062 (S.C. Ct of App. Filed December 12, 2012)
(Withdrawn, Substituted, and Refiled May 1, 2013)

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S.C. Supreme Court

Case No. 09-ALC-07-0377-CC

Duke Energy Carolinas, LLC . . . . .Petitioner,

v.

South Carolina Department of Health and Environmental
Control, South Carolina Attorney General, American Rivers, and
The South Carolina Coastal Conservation League. . . . . Respondents,

Of whom South Carolina Department of Health and Environmental
Control and American Rivers and The South Carolina Coastal
Conservation League are. . . . . Respondents.

PROOF OF SERVICE

I certify that I have served the Petitioner for Writ of Certiorari on counsel of record for Respondents and Clerk of Court of Appeals by depositing a copy of it in the United States Mail, postage prepaid, on June 28, 2013, addressed to:

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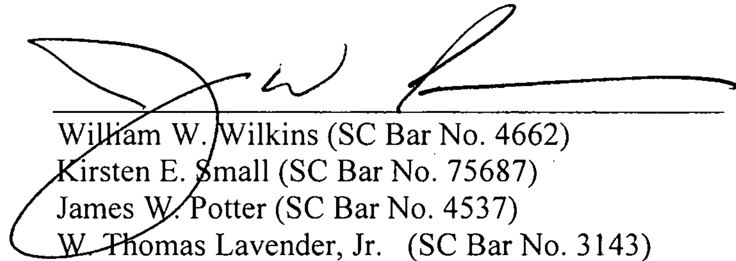
June 28, 2013



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