

2013-001118

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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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(Withdrawn, Substituted, and Refiled May 1, 2013)

SC. 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.

**APPENDIX FOR PETITION FOR WRIT OF CERTIORARI
VOLUME I OF II**

Stephen P. Hightower, Esquire
Office of General Counsel
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, SC 29201

Attorney for Respondent SC Department of
Health and Environmental Control

Christopher K. DeScherer, Esquire
Lisa M. Satsburg, Esquire
James Blanding Holman, IV, Esquire
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401-3051

Attorneys for American Rivers and The South
Carolina Coastal Conservation League

William W. Wilkins (SC Bar No. 4662)
Kirsten E. Small (SC Bar No. 75687)
James W. Potter (SC Bar No. 4537)
W. Thomas Lavender, Jr. (SC Bar No. 3143)
Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803-771-8900

Attorneys for Petitioner Duke Energy
Carolinas, LLC

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In The Supreme Court

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Lisa M. Satsburg, Esquire
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James W. Potter (SC Bar No. 4537)
W. Thomas Lavender, Jr. (SC Bar No. 3143)
Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803-771-8900

Attorneys for Petitioner Duke Energy
Carolinas, LLC

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from the Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Docket No. 09-ALJ-07-0377-CC

South Carolina Department of Health
and Environmental Control,

Appellant,

vs.

Duke Energy Carolinas, LLC,

Respondent.

American Rivers and South Carolina
Coastal Conservation League as

Interveners.

RECORD ON APPEAL

Stephen P. Hightower
S. C. Bar No. 72265
Staff Attorney
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201
TEL: (803) 898-3349
FAX: (803) 898-3367
EMAIL: hightosp@dhec.sc.gov
Attorney for Appellant SC DHEC

James W. Potter, Esquire
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Post Office Drawer 2426
Columbia, South Carolina 29202
TEL: (803)
FAX: (803)
EMAIL:
Attorney for Respondent Duke Energy, LLC

Christopher K. DeScherer
Southern Environmental Law Center
Post Office Box 609
Charleston, South Carolina 29402
TEL: (843) 720-5270
FAX: (843) 720-5240
EMAIL: cdescherer@selcsc.org
Attorney for Respondent/Interveners South
Carolina Coastal Conservation League and
American Rivers

Julia F. Youngman (*pro hac vice*)
Southern Environmental Law Center
200 West Franklin Street, Suite 3030
Chapel Hill, North Carolina 27516
TEL: (919) 967-1450
FAX: (919) 929-9421
EMAIL: jyoungman@selcnc.org
Attorney for Respondent/Interveners South
Carolina Coastal Conservation League and
American Rivers

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August 6, 2009

Via U.S. Mail – Certified

91 7108 2133 3936 3002 9231

Julie Youngman, Esquire
Southern Environmental Law Center
200 West Franklin Street, Suite 330
Chapel Hill, NC 27516-2559

91 7108 2133 3936 3002 9248

Christopher K. DeScherer, Esquire
Southern Environmental Law Center
38 Broad Street, Suite 200
Charleston, SC 29401

91 7108 2133 3936 3002 9255

James W. Potter, Esquire
Nexsen Pruet
PO Box 2426
Columbia, SC 29202

Via Interagency Delivery

Stephen P. Hightower, Esquire
SCDHEC – Office of General Counsel
2600 Bull Street
Columbia, South Carolina 29201

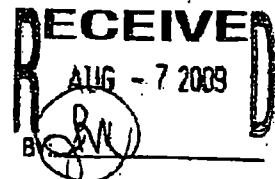
**RE: Docket No. 69-RFR-43 – Final Agency Decision – Duke Energy Carolinas, LLC, continued operation of the Catawba-Watauga Hydroelectric Project, FERC NO. 2232, Catawba and Watauga Rivers and five reservoirs in South Carolina
York, Lancaster, Chester, Fairfield and Kershaw Counties,
Public Notice No. DHEC-08-C-001**

Dear Counsel:

Please find attached the Final Agency Decision in the above referenced matter.

Sincerely,

Lisa Lucas Longshore
Lisa Lucas Longshore, Clerk



SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
2600 Bull Street • Columbia, SC 29201 • Phone: (803) 898-3432 • www.scdhec.gov

SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL

FINAL AGENCY DECISION

In Re: Duke Energy Carolinas, LLC

Continued operation of the Catawba–Wateree Hydroelectric Project, FERC No. 2232

Catawba and Wateree Rivers and five reservoirs in South Carolina

York, Lancaster, Chester, Fairfield and Kershaw Counties

Public Notice No. DHEC 08-C-001

Public Notice Date: August 8, 2008

Water Quality Certification issued: May 15, 2009

Board Docket No. 09-RFR-43

Appearances:

Julie Youngman, Esquire and Christopher K. DeScherer, Esquire, Southern Environmental Law Center for South Carolina Coastal Conservation League and American Rivers, Requestors

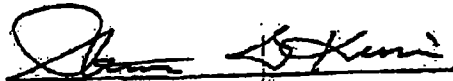
Stephen P. Hightower, Esquire, for South Carolina Department of Health and Environmental Control

James W. Potter, Esquire, Nexsen Pruet, LLC for Duke Energy Carolina, LLC, Applicant

This matter comes before the South Carolina Board of Health and Environmental Control (Board) for final review pursuant to S.C. Code Ann. § 44-1-60. On May 15, 2009, Department staff issued a Notice of Department Decision – Water Quality Certification authorizing the continued operation of the of the Catawba–Wateree Hydroelectric Project, FERC No. 2232 Catawba and Wateree Rivers and five reservoirs in South Carolina York, Lancaster, Chester, Fairfield and Kershaw Counties, Public Notice No. DHEC 08-C-001, to Duke Energy Carolina, LLC. The Notice of Department Decision – Water Quality Certification conditioned the State's Water Quality Certification on the Applicant's operation of the Catawba–Wateree Hydroelectric Project in accordance with the Comprehensive Relicensing Agreement, dated December 22, 2006, Revision 1, generally and with the enumerated portions incorporated by reference into the

Water Quality Certification. The Requestors filed a timely request for a final review conference and the conference was held on July 9, 2009.

Having reviewed the administrative record and heard from the parties in this matter, the Board has determined that the Notice of Department Decision - Water Quality Certification should be denied based on arguments set forth by the Requestors during the final review conference. The Board finds that the Water Quality Certification as issued does not provide sufficient flow to protect classified uses, the endangered shortnose sturgeon and adequate downstream flow of the Catawba River into South Carolina in order to provide reasonable assurance that certification requirements and water quality standards in the Catawba River in South Carolina will be met. Accordingly, the Department staff decision of May 15, 2009 is reversed and the certification is denied.


Steven G. Kisner
Secretary
Board of Health and Environmental Control
For the Board

August 6, 2009

Notice of Right to Request Contested Case Hearing Before Administrative Law Court

S.C. Code §44-1-60(F)(2) provides that within thirty days after the receipt of the Board's written final agency decision an applicant, permittee, licensee, or affected person desiring to contest the final agency decision may request a contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act. A request for a contested case hearing before the Administrative Law Court (ALC) must be filed in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

Clerk's Office
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: <http://www.scalc.net>. If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the following address:

Lisa L. Longshore
Clerk of the Board
SC DHEC
2600 Bull Street
Columbia, SC 29201

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

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S.C. DEPT OF HEALTH
& ENVIRONMENTAL CONTROL

BEFORE THE SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL

2008 MAY 20 AM 4:10
OFFICE OF THE COMMISSIONER
CHIEF OF STAFF
CLERK OF SCDHEC BOARD

Duke Energy Carolinas, LLC
Catawba Wateree Hydroelectric Project

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) # DHEC 08-C-001
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**SOUTH CAROLINA COASTAL CONSERVATION LEAGUE AND AMERICAN
RIVERS' REQUEST FOR FINAL REVIEW OF THE SOUTH CAROLINA
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL'S PROPOSED
DECISION AND STAFF ASSESSMENT REGARDING WATER QUALITY
CERTIFICATION FOR DUKE ENERGY CAROLINA, LLC'S
CATAWBA WATREEE HYDROELECTRIC PROJECT**

Pursuant to South Carolina Annotated Code § 44-1-60(E), (F), and South Carolina Administrative Code §§.61-72, 61-101(G)(3), the South Carolina Coastal Conservation League and American Rivers (Petitioners) hereby request Final Review and Final Review Conference of the South Carolina Department of Health and Environmental Control's (Department) Notice of Department Decision and Staff Assessment regarding water quality certification for Duke Energy Carolinas, LLC's (Duke) Catawba Wateree Hydroelectric Project (Project). The Proposed Decision authorizes Duke to operate the Project in violation of state water quality standards, including the classified uses of the Wateree River. A copy of the Notice of Department Decision and Staff Assessment are attached as Exhibits 1 and 2, respectively.

**I.
PETITIONERS**

The Coastal Conservation League is a non-profit conservation organization with offices in Charleston, Georgetown, Beaufort, and Columbia, South Carolina. Our mission is

*Coastal Conservation League and American Rivers' Petition for Final Review
SCDHEC-08-C-001*

to protect South Carolina's threatened resources - its natural landscapes, abundant wildlife, clean water, and traditional communities. We have approximately 5,000 members who live in South Carolina. Our members use and enjoy the Catawba Wateree River waters for primary and secondary recreation, aesthetic enjoyment, and public water supply. By not requiring instream flows adequate to protect aquatic life and habitat, the Department's Proposed Decision will injure CCL's interests as a conservation organization dedicated to the protection of the State's waters and fish and wildlife. The Proposed Decision also will injure the interests of CCL's individual members who use and enjoy these waters, including the Congaree National Park, and have an interest in seeing them and their ecologies protected.

American Rivers is a non-profit conservation organization with offices in Washington, D.C., Columbia, South Carolina, and throughout the nation. We are dedicated to the protection and restoration of the nation's rivers. With over 65,000 supporters across the country, including those that live in the project vicinity, American Rivers is the nation's leading river conservation organization. By not requiring instream flows adequate to protect aquatic life and habitat, the Department's Proposed Decision will injure American Rivers' interests as a conservation organization dedicated to the protection of the nation's waters and fish and wildlife resources. The Proposed Decision also will injure the interests of American Rivers' supporters who use and enjoy these waters and have an interest in seeing them and their ecologies protected.

American Rivers and the Coastal Conservation League have been active participants in the Enhanced Traditional Licensing Process conducted by Duke Power since it began in 2003. We have served on the Foothills, Piedmont, and Lower Catawba Advisory

Coastal Conservation League and American Rivers' Petition for Final Review
SCDHEC-08-C-001

Committees; the Aquatic Resources Committee; and the Instream Flow Ad Hoc Committee.

We have attended numerous meetings and provided oral and written comments on documents and study plans.

We also have followed closely the Department's proceeding to certify the Project.

We have met with Department Staff, and filed comments regarding Duke's application for water quality certification on October 7, 2008.

Pursuant to S.C. Admin Code § 61-72, we agree to make any of our employees or consultants in this matter available for cross-examination at our expense or such other person upon the request of the Hearing Officer, on his own motion, or on the motion of any party.

Petitioners are represented legally in this matter by

Richard Roos-Collins
Julie Gantenbein
NATURAL HERITAGE INSTITUTE
100 Pine St., Ste. 1550
San Francisco, CA 94111

II. PROCEDURAL BACKGROUND

The Catawba-Wateree Hydroelectric Project consists of 11 reservoirs and 13 hydroelectric stations on the Catawba and Wateree Rivers in North and South Carolina. *See* FERC, Draft Environmental Impact Statement (Mar. 6, 2009), p. 1. Six of the reservoirs are in North Carolina. *See id.* Five of the reservoirs are in South Carolina: Wylie, Fishing Creek, Great Falls, Cedar Creek and Wateree. *See id.* In total, the Project affects more than 300 miles of river, a drainage area of more than 4750 square miles, and nearly 1800

miles of reservoir and island shoreline in both states.¹ In South Carolina, unimpounded river sections affected by the Project include 32 miles below the Wylie Dam, 2 miles at Great Falls and 76 miles below the Wateree Dam including parts of Congaree National Park. See *id.*

On August 29, 2006, Duke filed with FERC an application for new license for the project. See *id.* The existing license for the project was issued in 1958 and expired on August 31, 2008.

On December 28, 2006, Duke filed the Catawba-Wateree Revised Comprehensive Relicensing Agreement (CRA). The CRA largely superseded the measures Duke proposed in the new license application (NLA).

On August 8, 2008, the Department noticed and solicited public comment on the application. The deadline for comments was October 7, 2008. The application included a Supplemental Information Package (SIP), which contained many provisions of the CRA.

On May 15, 2009, the Department issued the Notice of Department Decision and Staff Assessment for Duke's application. The Staff Assessment finds:

"The 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. Numerous provisions of the CRA address water quality in CWHF waters. The SCDHEC will include all applicable portions of the CRA (listed under condition number one in Section VIII) as conditions of the WQC. Other sections, while not being required by the SCDHEC as conditions of the WQC, may be required by the FERC and/or will be implemented by the applicant to fulfill CRA obligations."

Staff Assessment, p. 10. It concludes:

¹ The number of affected river miles stated here includes the Wateree River below the Wateree Hydroelectric Development.

There will be no adverse water quality impacts from the proposed project provided the applicant adheres to the conditions in Section VIII of this staff assessment. The SCDHBC has reasonable assurance that the water quality standards of Regulation 61-68 will not be contravened as a result of the proposed work. The proposed activity will result in no significant degradation to the aquatic ecosystem, will enhance existing and classified uses of the Catawba and Wateree Rivers and reservoirs, and is in compliance with the above regulations provided the applicant adheres to the conditions in Section VIII of this staff assessment. The above assessment also ensures that the proper sequencing of avoidance, minimization, and appropriate compensation for unavoidable impacts has been demonstrated."

Id., p. 23.

III. LEGAL BACKGROUND

A. Federal Clean Water Act

Congress enacted the federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, not merely to preserve existing water quality, no matter how degraded, but to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (emphasis added). One of the goals of the Act is to achieve, "wherever attainable . . . water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." *Id.* at § 1251(a)(2).

In order to ensure the protection and enhancement of water quality, the Clean Water Act affords States oversight authority for federally-permitted activities that include a discharge which may affect water quality of state waters. Specifically, Clean Water Act section 401(a)(1) provides:

Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of [the Clean Water Act].

33 U.S.C. § 1341(a)(1). The State must ensure compliance with all applicable state and federal water quality standards² before issuing a § 401 water quality certification. If operation of the proposed activity would violate water quality standards and cannot reasonably be expected to meet water quality standards through remedial actions, the State must deny certification. *See* 33 U.S.C. § 1341(a)(1) & (3). The federal Clean Water Act also authorizes the State to conditionally approve a § 401 certification by imposing any conditions or "any other appropriate requirement of State law" necessary to ensure compliance with water quality standards. *See* 33 U.S.C. § 1341(d).

B. South Carolina Law

South Carolina has adopted the following policy with regard to protection of state environmental quality:

It is declared to be the public policy of the State to maintain reasonable standards of purity of the air and water resources of the State, consistent with the public health, safety and welfare of its citizens, maximum employment, the industrial development of the State, the propagation and protection of terrestrial and marine flora and fauna, and the protection of physical property and other resources. It is further declared that to secure these purposes and the enforcement of the provisions of this chapter, the Department of Health and Environmental Control shall have authority to abate, control and prevent pollution.

S.C. Code Ann. § 48-1-20. The Department is empowered to "[t]ake all action necessary or appropriate to secure to this State the benefits of the Federal Water Pollution Control Act or

² Pursuant to § 303 of the Clean Water Act, state water quality standards must "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based on such uses." 33 U.S.C. § 1313(c)(2)(A). The U.S. Supreme Court has made clear that "§ 303 is most naturally read to require that a project be consistent with *both* components, namely the designated use *and* the water quality criteria." *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 715 (1994) (emphasis in original). Thus, "a project that does not comply with a designated use of the water does not comply with the applicable water quality standards." *Id.*
Coastal Conservation League and American Rivers' Petition for Final Review
SCDHEC-08-C-001

the Federal Air Quality Act and any and all other Federal and State acts concerning air and water pollution control." S.C. Code Ann. § 48-1-50(17).

The Department has adopted water quality classifications and standards at R.61-68, which

"establish the State's official classified water uses for all waters of the State, establish general rules and specific numeric and narrative criteria for protecting classified and existing water uses, and establish procedures for classifying waters of the State. The water quality standards include the uses of the waters, the numeric and narrative criteria, and the antidegradation rules contained in this regulation."

S.C. Admin. Code 61-68(A)(1).

The antidegradation rules for the State provide:

"1. Existing water uses and the level of water quality necessary to protect these existing uses shall be maintained and protected regardless of the water classification and consistent with the policies below.

...

b. Existing uses and water quality necessary to protect these uses are presently affected or may be affected by instream modifications or water withdrawals. The stream flows necessary to protect classified and existing uses and the water quality supporting these uses shall be maintained consistent with riparian rights to reasonable use of water.

c. Existing or classified ground water uses and the conditions necessary to protect those uses shall be maintained and protected...."

S.C. Admin. Code § 61-68(D).

The Department has designated the Catawba Wateree River, the entire stream tributary to the Santee River, as Freshwaters. See S.C. Admin. Code § 61-69.

"Freshwaters (FW) are freshwaters suitable for primary and secondary contact recreation and as a source for drinking water supply after conventional treatment in accordance with the requirements of the Department. Suitable for fishing and the survival and propagation of a balanced indigenous aquatic community of fauna and flora. Suitable also for industrial and agricultural uses."

*Coastal Conservation League and American Rivers' Petition for Final Review
SCDHEC-08-C-001*

S.C. Admin. Code § 61-68(G)(10).

The Department also has adopted procedures and policies for implementing State water quality certification requirements of Clean Water Act § 401 at R.61-101, which provide:

"4. Any certification issued by the Department shall specify where appropriate that any such discharge will comply with applicable provisions of Sections 301, 302, 303, 306, and 307 of the Federal Clean Water Act. If there is not an applicable effluent limit or standard under such sections, the Department will so certify. The Department shall also certify that there is reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards regulations. No certification will be issued if such assurance is not provided.

5. Any certification issued by the Department shall also set forth any limitations, conditions, or monitoring requirements necessary to assure maintenance of classified or existing water uses and standards and compliance with other requirements of these regulations or other appropriate requirements of State law."

SC Admin. Code § 61-101(A)(4)-(5).

The scope of review for certification decisions is as follows:

1. The Department shall prepare a written assessment on each proposed activity requiring a Federal license or permit. This assessment shall address the water quality impacts of the project and will make conclusions concerning compliance with water quality standards, protection of classified uses, and related water quality impacts. Such assessment shall be available to the applicant and to the public upon request.
2. A certification shall be issued if the applicant has demonstrated that the project is consistent with the provisions of these regulations; the State Water Quality Standards, R. 61-68; and the Federal Clean Water Act, 33 U.S.C. 1341, and regulations promulgated thereunder by the U.S. Environmental Protection Agency.
3. In assessing the water quality impacts of the project, the Department will address and consider the following factors:
 - (a) whether the activity is water dependent and the intended purpose of the activity;
 - (b) whether there are feasible alternatives to the activity;

(c) all potential water quality impacts of the project, both direct and indirect, over the life of the project including:

- (1) impact on existing and classified water uses;
- (2) physical, chemical, and biological impacts, including cumulative impacts;
- (3) the effect on circulation patterns and water movement;
- (4) the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others.

4. Certification of the activities listed below will be issued when there are no feasible alternatives. When issuing certification for such activities, the Department shall condition the certification upon compliance with all measures necessary to minimize adverse effects, including stormwater management....

5. Certification will be denied if:

- (a) the proposed activity permanently alters the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired;
- (b) there is a feasible alternative to the activity, which reduces adverse consequences on water quality and classified uses;
- (c) the proposed activity adversely impacts waters containing State or Federally recognized rare, threatened, or endangered species;
- (d) the proposed activity adversely impacts special or unique habitats, such as National Wild and Scenic Rivers, National Estuarine Research Reserves, or National Ecological Preserves, or designated State Scenic Rivers;

6. Certification will not be issued unless the Department is assured appropriate and practical steps including stormwater management will be taken to minimize adverse impacts on water quality and the aquatic ecosystem...."

SC Admin. Code § 61-101(F).

IV.
ISSUES FOR APPEAL

A. Provision 1(a)(iii), Specifically Land Conservation and Money Payments in Lieu of Higher Minimum Flows, Will Not Mitigate the Project's Impacts on Water Quality, Classified Uses, and Endangered Species As Required by R. 61-68(A)(4)-(5) and R. 61-68(F)(5)(b)-(c).

Provision 1(a)(iii) of the Department Decision provides:

"[Duke] must operate the Catawba-Wateree Hydroelectric Project (CWHP) in accordance with portions of the [CRA]. The following portions of the CRA as applicable to South Carolina Developments of the CWHP are hereby incorporated into this 401 Water Quality Certification (WQC) by reference:

a) CRA - Resource Agreements

...

iii) 4.0 Habitat Flow Agreements."

Department Decision, p. 1. Section VIII of the Staff Assessment explains that CRA section 4.0, *Habitat Flow Agreements*, requires Duke to conserve 100-foot-wide buffers along streams and \$1 million to SCDNR in order to mitigate flow-related impacts in waters affected by the project.

CRA section 4.6 provides the South Carolina Flow Mitigation Package:

"4.6 South Carolina Flow Mitigation Package - The Parties agree to the following South Carolina Flow Mitigation Package to mitigate for unavoidable Project impacts to the Wylie Regulated River Reach, the Great Falls Long and Short Bypassed Reaches, and the Wateree Bypassed Reach.

4.6.1 Conservation Easements - The Licensee shall mitigate for these impacts by providing 100-ft wide perpetual conservation easements (measured horizontally from the top of the bank) on approximately 5.5 bank miles of the Catawba River. These easements, affecting approximately 67 acres of land, will be transferred to the South Carolina Department for Natural Resources (SCDNR or a land trust if the SCDNR so chooses, within 18 months following the issuance of the New License and the closure of all rehearing and administrative challenge periods related to water quality and to water quantity, including reservoir levels and Project flow releases. The land areas

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covered by these easements shall not be included within the FERC Project Boundaries. The easement below the Wylie Development shall also incorporate the trail identified in Paragraph 10.27.23.1. See Appendix I for map (tiles) depicting the approximate locations of these easements and Appendix O a conceptual outline of the conservation easements.

4.6.2 Mitigation Fund - The Parties further agree that, within one year following the issuance of the New License and the closure of all rehearing and administrative challenge periods related to water quality and to water quantity, including reservoir levels and Project flow releases, the Licensee shall provide a one-time contribution of \$1 million to the South Carolina Department of Natural Resources (SCDNR) to create the Catawba-Wateree Hydroelectric Project Fish and Wildlife Mitigation and Enhancement Fund. Activities eligible for support from this fund will include survey and inventory, research, and population enhancement of fish and wildlife in the Catawba-Wateree River Basin, to include rare, threatened or endangered species; biodiversity protection and enhancement, and environmental outreach programs."

CRA, pp. 4-2 - 4-3. According to Duke, "At the conclusion of this process, flows in the Wylie Regulated River Reach, the Great Falls Long Bypassed Reach, and the Wateree Spillway Channel were identified as not fully meeting resource agency resource objectives and, therefore, mitigation is being provided." SIP, p. 121.

According to Duke, such mitigation is consistent with North Carolina and U.S. Army Corps of Engineers' guidance, specifically *Stream Mitigation Guidelines, April 2003*. See *id.* However, this guidance was not developed or intended for instream flow mitigation. There is no reference to flow mitigation in the document. Further, to our knowledge, this guidance has not been adopted or otherwise endorsed in South Carolina.

Out-of-kind mitigation in the form of land conservation and money payments are inadequate to assure maintenance of classified or existing water uses and standards and compliance with other requirements of the Department's regulations as required by R. 61-101(A). The proposed land protection packages does not mitigate for project impacts to instream flow. Based on our review of the record before the Department, we have been

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unable to find any scientific basis for trading stream flow for land protection because lands do not mitigate impacts to the functions and values of the affected aquatic resources resulting from decreased flows. Stream flow is essential for shaping the physical, chemical and biological processes of a river (Instream Flow Council 2004). The Instream Flow Incremental Methodology (IFIM) study conducted by Duke clearly demonstrated how various flow regimes affect physical conditions for aquatic life, e.g., water depth and velocity, and access to certain substrate types and cover. Properly prescribed stream flows for physical habitat also provide for biological and, in many cases, water chemistry functions.

Aquatic life and other beneficial uses of river flow are distinctly separate from the values addressed by land protection and, therefore, do not meet the fundamental goal of mitigation: to replace the chemical, physical and biological functions and values lost to authorized impacts. *See, e.g.*, 60 Fed. Reg. 58605 (Nov. 28, 1995). Riparian land protection does little to mitigate the adverse impacts to physical conditions of the water body that would be lost under the proposed flow regimens. It does not provide water depth and velocities or access to certain substrates and cover. The impact of drastically reduced flow cannot be replaced or accounted for with land protection because land protection does not provide the same, or even comparable, ecological benefits necessary to effectively mitigate for flow-related impacts.

The Staff Assessment does not demonstrate that there are no feasible alternatives to out-of-kind mitigation that would reduce adverse consequences on water quality and classified uses and endangered species as required by R. 61-101(F)(5)(b)-(c). The Petitioners propose alternative operations to provide in-kind mitigation in the form of additional water flows in

the unimpounded sections of the Catawba and Wateree rivers per the table below.

Hydrologic modeling has demonstrated that these flows are available under most periods when inflows to the Project are approaching average or higher than average conditions. The enhanced flows we recommend would not be expected during drought or low flow conditions.

Continuous Minimum Flows for Diadromous Fish (cfs)			
Month	Wateree Reach	Great Falls - Long Channel	Wylie Reach
January	2,700	450	1,100
February	3,700	850	1,400
March	3,700	1,500	1,800
April	2,700	1,500	1,800
May	2,400	850	1,400

By not adopting in-kind mitigation in the form of higher flows, the Department Decision and Staff Assessment violate R. 61-68(A)(4)-(5) and R. 61-68(F)(5)(b)-(c).

- B. Provision 1(a)(iii) of the Department Decision, Specifically the Minimum Flows for the Wateree Regulated and Bypassed Reaches, Will Not Protect Classified Uses or Endangered Shortnose Sturgeon As Required by R. 61-68(A)(4)-(5) and R. 61-68(F)(5)(b)-(c).

Provision 1(a)(iii) of the Department Decision requires Duke to operate the Project in accordance with Section 4.0 of the CRA, *Habitat Flow Agreements*. See Department Decision, p. 1. Section 4.1.1 of the CRA incorporates by reference the proposed license article for Minimum Flows. This proposed license article recommends minimum flows ranging from 930 cfs to 2700 cfs for the Wateree Regulated Reach. According to relicensing studies prepared by Duke, these flows would provide only 7% to 48% of the potential habitat for this species. The CRA does not recommend any flow be maintained in the Wateree Bypass reach.

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The Staff Assessment finds that the measures proposed in the CRA are adequate to protect federally listed shortnose sturgeon (*see* 32 Fed. Reg. 4001 (Mar. 11, 1967)):

"The shortnose sturgeon was considered during the flow analysis and the SCDHEC believes that the proposed minimum flows, along with other provisions of the CRA (including the WHIP, spring flow stabilization period at Wateree, flood spill management at Wateree, etc.) and Accord are adequate to avoid any adverse impacts to waters containing the shortnose sturgeon. The SCDHEC will include all applicable portions of the CRA as conditions of the WQC."

Staff Assessment, p. 19.

The flows recommended in the CRA are not adequate to prevent adverse impacts to the Wateree Regulated or Bypassed Reach which contains or will contain the federally-listed endangered shortnose sturgeon. Further, the Staff Assessment's implicit finding that there are no feasible alternatives to the CRA flows that would reduce the adverse consequences on water quality and classified uses is not correct.

The National Marine Fisheries Service (NMFS), the federal agency responsible for administering the Endangered Species Act with respect to marine fishes, has recommended higher flows for the Wateree Development: "The NMFS recommendation for the Wateree Development included minimum continuous flows of 930 cfs during June to December; 2,400 cfs during January; 3,700 cfs during February; 3,700 cfs during March; 2,700 cfs during April; and 2,400 cfs during May." NMFS, Comments re DEIS, eLibrary no. 20090506-5070 (May 6, 2009), p. 5; *see also* NMFS, Preliminary Recommendations, Terms, Conditions and Reservation of Authority to Prescribe Fishways, eLibrary no. 20080606-5077 (June 5, 2008), pp. 6-7, App. B. We recommended similar flows in our comments on Duke's application for certification.

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According to NMFS these flows "would provide adequate spawning habitat for shortnose sturgeon recovery, as well as other target anadromous species." *Id.* Enhancement of diadromous fish habitat below the Wateree development is necessary to mitigate the ongoing impacts of the Project on shortnose sturgeon and other diadromous fish:

"Project dams presently block upstream migrations for diadromous species to the entire Catawba River Basin above the Wateree Dam, including over 225 miles of habitat formerly available to river spawning species. The continue impacts of this habitat blockage severely and adversely depress diadromous fish populations. Depression of diadromous fish populations and migrations, particularly for alosine species, also adversely affects marine and estuarine food webs because these fish serve as prey for birds, marine mammals, estuarine fish, and marine fish."

Id., p. 4.

According to the DEIS, "[FERC Staff's] analysis of the Revised CRA and alternative flow recommendations for the Wateree Development (table 39) indicate that the recommended alternatives may have the potential to provide more spawning habitat than the proposed Revised CRA flows." DEIS, p. 210. According to the DEIS, the CRA flows would provide only 15.7 to 60.1% of maximum weighted usable area (WUA) for endangered shortnose sturgeon. *See id.*, p. 211, Table 39. By contrast, the flows recommended by NMFS and Petitioners would provide 55.1% to 77.8% maximum WUA. *See id.* This represents an 18 to 62% *improvement* over CRA flows depending on the month. *See id.*

NMFS has stated that its recommended flows would have significant benefits for sturgeon and other diadromous fish species, and that they would address sturgeon flows through the consultation process under Endangered Species Act (ESA) section 7, 16 U.S.C. § 1536. NMFS has not yet responded to FERC's request for concurrence with FERC Staff's finding that the new license is not likely to adversely affect shortnose sturgeon (*see letter*

from Mark Pawlowski, FERC, to Prescott Brownell, NMFS, eLibrary no. 20090323-3012 (Mar. 23, 2009)) Thus, it is not clear whether NMFS will recommend implementation of higher flows at the Wateree Development as necessary to protect and restore shortnose sturgeon under its ESA authority.

Based on this and other evidence in the Department's record, we believe that the minimum flows for the Wateree development required in the Department Decision will not assure compliance with water quality standards. More specifically, it will not assure suitability for fishing and the survival and propagation of a balanced indigenous aquatic community of fauna and flora. The minimum flows recommended by NMFS and Petitioners represent a feasible alternative which would reduce adverse consequences on water quality and classified uses. Further, the Staff Assessment does not demonstrate that the proposed activity will not adversely impact waters that contain the federally-listed endangered shortnose sturgeon. By not adopting minimum flows from the Wateree development adequate to (1) assure suitability for fishing and the survival and propagation of a balanced indigenous aquatic community of fauna and flora, and (2) avoid adverse impacts to federally-listed endangered shortnose sturgeon in project waters, the Department Decision and Staff Assessment violate R. 61-68(A)(4)-(5) and R. 61-68(F)(5)(b)-(c).

C. Provision 1(a)(iii), of the Department Decision, Specifically the Discretionary Wateree Spring Stable Flow Periods, Will Not Protect Classified Uses or Endangered Shortnose Sturgeon As Required By R. 61-68(A)(4)-(5) and R. 61-68(F)(5)(b)-(c).

Provision 1(a)(iii) of the Department Decision requires Duke to operate the Project in accordance with Section 4.0 of the CRA, Habitat Flow Agreements. See Department Decision, p. 1. Section 4.8 of the CRA describes two, 10-day periods of flow stabilization downstream of the Wateree Dam:

"4.8 Wateree Spring Stable Flow Periods

4.8.1 The Licensee shall implement a Spring Stable Flow Periods Protocol at the Wateree Development as set forth in this Section 4.8, only if inflows are sufficient to allow implementation without unreasonably affecting the Licensee's operation as determined by the Licensee.

4.8.2 Time Period - Unless operating in accordance with the Low Inflow Protocol or the Maintenance and Emergency Protocol, the Licensee shall endeavor in good faith to provide in each full calendar year for the term of the New License two ten-day periods of stable flow from the Wateree Development.

The first ten-day period shall be between February 15 and April 1; the second 10-day period shall be between April 1 and May 15.

4.8.3 Wateree Development Operations - In the event that the Licensee has to change hydro unit operational configurations at the Wateree Powerhouse during a ten-day stable flow period to maintain Lake Wateree reservoir levels within the Normal Operating Ranges specified in the proposed Reservoir Elevations License Article, the Licensee shall maintain the changed hydro unit operational configuration for at least eight consecutive hours before making any additional changes

4.8.4 Coordination with the Spring Reservoir Level Stabilization Program - If the Licensee cannot operate the Project to provide the Spring Stable Flow Periods and also maintain Lake Wateree reservoir level as specified in the proposed Spring Reservoir Level Stabilization Program License Article, then the Licensee shall suspend the Spring Reservoir Level Stabilization Program at Lake Wateree for that calendar year in accordance with Paragraph (B) of the proposed Spring Reservoir Level Stabilization Program License Article...."

CRA section 4.8, as incorporated in the Department Decision, will not protect endangered shortnose sturgeon and other diadromous fish species, or otherwise assure project waters are suitable for fishing and the survival and propagation of a balanced indigenous aquatic community of fauna and flora.

We agree that spring stable flow periods should be a condition of the water quality certification. These flow stabilization periods were originally proposed by NMFS to mitigate the effect of project operations and enhance spawning conditions for shortnose sturgeon. Stable flow periods will also benefit spawning conditions for other diadromous and resident fish.

However, the provision as drafted is not enforceable. Under Section 4.8 of the CRA, compliance with the flow stabilization measures is left to the Duke's sole discretion. Duke may decline to provide stable flows if Duke determines that implementation would "unreasonably affect" project operations. Section 4.8 does not state any objective criteria for determining "unreasonable" impacts to project operations. Section 4.8 of the CRA only requires Duke to make "good faith efforts" to provide stable flow conditions. Again, there are no objective criteria for determining "good faith." Section 4.8 is not included in the proposed license articles, and so may not be include in the FERC license.

We recommend that the Department adopt alternative language that makes the flow stabilization period mandatory and enforceable, rather than discretionary. As stated above, flow stabilization is important to successful spawning for the endangered shortnose sturgeon. We believe measures necessary to protect endangered species such as the shortnose sturgeon must be enforceable by the Department in order to provide reasonable assurance that the

proposed activity will not adversely affect waters containing this species. The Staff Assessment does not demonstrate that enforceable, rather than discretionary, Wateree Spring Stable Flow Periods are infeasible.

By not requiring Duke to provide Wateree Spring Stable Flow Periods as necessary to (1) assure suitability for fishing and the survival and propagation of a balanced indigenous aquatic community of fauna and flora, and (2) avoid adverse impacts to federally-listed endangered shortnose sturgeon in project waters, the Department Decision and Staff Assessment violate R. 61-68(A)(4)-(5) and R. 61-68(F)(5)(b)-(c).

V.
REQUEST FOR RELIEF

We request that the Board grant the following relief:

1. Convene a final review conference pursuant to S.C. Code Ann. § 41-60(F).
2. Issue a Water Quality Certification which requires Duke to release from the Wateree development minimum continuous flows of 930 cfs during June to December; 2,400 cfs during January; 3,700 cfs during February; 3,700 cfs during March; 2,700 cfs during April; and 2,400 cfs during May in order to comply with state water quality standards, assure project waters are suitable fishing and the survival and propagation of a balanced indigenous aquatic community of fauna and flora, and avoid adverse impacts to federally-listed endangered shortnose sturgeon.
3. Issue a Water Quality Certification which makes Duke's compliance with the Wateree Spring Stable Flow Periods Protocol, as described in CRA section 4.8, mandatory.

VI.
CONCLUSION

We request that the Board grant this request for final review and schedule a final review conference consistent with South Carolina Code § 44-1-60 (E), (F).

Respectfully Submitted,



Gerrit Jöbsis
Southeast Region Director
American Rivers
2231 Devine Street, Suite 202
Columbia, SC 29205
803-771-7114
gjobsis@americanrivers.org



Patrick Moore
Government Relations
Coastal Conservation League
2231 Devine Street, Suite 202
Columbia, SC 29205
803-771-7750
patrickm@ccccl.org

Dated: May 29, 2009

DECLARATION OF SERVICE
DUKE ENERGY CAROLINAS, LLC'S
CATAWBA WATEREE HYDROELECTRIC PROJECT
DHEC 08-C-001

I, Heather Spires, declare that I today served the attached "South Carolina Coastal Conservation League And American Rivers' Request For Final Review Of The South Carolina Department Of Health And Environmental Control's Proposed Decision And Staff Assessment Regarding Water Quality Certification For Duke Energy Carolina, LLC's Catawba Wateree Hydroelectric Project" as follows:

Via Hand Delivery

Lisa Longshore
Clerk of the Board
SC DHEC
Columbia, SC 29201

Via First Class Mail

Duke Energy Carolinas, LLC
c/o Mark Oakley, P.E.
P.O. Box 1006
Charlotte, North Carolina 28201-1006

Dated: May 29, 2009

By: Heather Spires
Heather Spires
SOUTH CAROLINA COASTAL
CONSERVATION LEAGUE
2231 Devine Street, Suite 100
Columbia, SC 29205
(803) 771-7114
heathers@scccl.org

Exhibit 1



Bureau of Water
2600 Bull St
Columbia SC 29201

Public Notice # DHEC 08-C-001

Public Notice Date: May 15, 2009

NOTICE OF DEPARTMENT DECISION – WATER QUALITY CERTIFICATION

The Department, acting on an application for Water Quality Certification pursuant to Section 401 of the Federal Clean Water Act, has reached a proposed decision for the project described below:

Duke Energy Carolinas, LLC
Continued operation of the Catawba-Wataree Hydroelectric Project
Catawba and Wataree Rivers and five reservoirs in South Carolina
York and Kershaw Counties
P/N DHEC 08-C-001

After reviewing the project plans, Department Staff determined that there is a reasonable assurance that the proposed project will be conducted in a manner consistent with the certification requirements of Section 401 of the Federal Clean Water Act. Accordingly, the Department proposes to certify the project with conditions as follows:

- 1) Duke Energy Carolinas, LLC (applicant) must operate the Catawba-Wataree Hydroelectric Project (CWHP) in accordance with portions of the Comprehensive Relicensing Agreement for the CWHP, FERC Project No. 2232; December 22, 2006; Signature Copy; Revision 1 (CRA). The following portions of the CRA as applicable to South Carolina Developments of the CWHP are hereby incorporated into this 401 Water Quality Certification (WQC) by reference:
 - a) CRA - Resource Agreements
 - i) 2.0 Reservoir Elevation Agreements
 - ii) 3.0 Recreation Flow Agreements
 - iii) 4.0 Habitat Flow Agreements
 - iv) 6.0 Low Inflow Protocol (LIP) Agreements
 - v) 7.0 Maintenance and Emergency Protocol (MEP) Agreements
 - vi) 13.0 Water Quality Agreements
 - vii) 15.0 Gaging and Monitoring Agreements (15.1-15.5 only, 15.6 Groundwater Monitors is excluded)
 - b) CRA - Appendices:
 - i) A: Proposed License Articles
 - (1) A-1.0 Reservoir Elevation Articles
 - (a) Reservoir Elevations
 - (b) Spring Reservoir Level Stabilization Program
 - (2) A-2.0 Flow Articles
 - (a) Recreational Flows
 - (b) Minimum Flows
 - (c) Wylie High Inflow Protocol (WHIP)

- (d) Flows Supporting Public Water Supply and Industrial Processes
 - (e) Flow and Water Quality Implementation Plan (FWQIP)
 - (3) A-3.0 LIP Article
 - (a) LIP for the Catwaba-Wateree Project
 - (4) A-4.0 MEP Article
 - (a) MEP for the Catwaba-Wateree Project
 - (5) A-5.0 Water Quality Article
 - (a) Water Quality Monitoring Plan (WQMP)
 - (6) A-6.0 Gaging and Monitoring Article
 - (a) Flow and Reservoir Elevation Monitoring
 - (b) Funding for USGS Streamflow Gages
 - ii) C: LIP for the Catwaba-Wateree Project
 - iii) D: MEP for the Catwaba-Wateree Project
 - iv) F: WQMP
 - v) L: FWQIP
- 2) The applicant must follow the Quality Assurance Project Plan; Revision #0; January 6, 2009 (QAPP) while the CWHF FERC license is valid. If changes are proposed to the QAPP, they must be submitted to the SCDHEC for review and written approval before being implemented.
 - 3) The applicant must provide for upstream fish passage and downstream fish passage and protection at the CWHF in South Carolina consistent with the "Santee River Basin Accord for Diadromous Fish Protection, Restoration, and Enhancement" (Accord), unless it conflicts with other requirements of State or Federal laws and regulations.
 - 4) The applicant must take all necessary measures during CWHF facility operation and maintenance to prevent fuel, oil, tar, trash, debris and other pollutants from entering the adjacent waters or wetlands.

If the SC Department of Health and Environmental Control determines State Water Quality Standards are being contravened in the immediate vicinity of the project site, the applicant must take action to determine the cause of the violations and rectify the situation.

A copy of the staff assessment supporting the proposed decision is enclosed. A copy of plans submitted by the applicant is available for review in the office of the Division of Water Quality, Bureau of Water. Additional information about the technical aspects of this application is available from Rusty Wenerick, the project manager, at 803-898-4266.

The final 401 Water Quality Certification will be issued unless there is a timely request for review of the Proposed Decision based on water quality or water use impacts.

The issuance of this Notice of Department Decision represents a final staff decision that may be appealed. The procedures for appeals went into effect July 1, 2006 pursuant to 2006 Act No. 387. Please see the attached page titled "Notice of Appeal Procedure" for details.

Chuck Hightower, Manager
Water Quality Certification
and Wetlands Section

Notice of Appeal Procedure

The following procedures are in effect beginning July 1, 2006, pursuant to 2006 Act No. 387:

1. This decision of the S.C. Department of Health and Environmental Control (Department) becomes the final agency decision 15 days after notice of the decision has been mailed to the applicant or respondent, unless a written request for final review is filed with the Department by the applicant, permittee, licensee, or affected person.
2. An applicant, permittee, licensee, or affected person who wishes to appeal this decision must file a written request for final review with the Clerk of the Board at the following address or by facsimile at 803-898-3323.

Clerk of the Board
SC DHEC
2600 Bull Street
Columbia, SC 29201

3. The request for final review should include the following:
 - a. the grounds on which the Department's decision is challenged and the specific changes sought in the decision
 - b. a statement of any significant issues or factors the Board should consider in deciding how to handle the matter
 - c. a copy of the Department's decision or action under review
4. In order to be timely, a request for final review must be received by the Clerk of the Board within 15 days after notice of the decision has been mailed to the applicant or respondent. If the 15th day occurs on a weekend or State holiday, the request is due to be received by the Clerk of the Board on the next working day. The request for final review must be received by the Clerk of the Board by 5:00 p.m. on the date it is due.
5. If a timely request for final review is filed with the Clerk of the Board, the Clerk will provide additional information regarding procedures.
6. The Board of Health and Environmental Control has 60 days from the date of receipt of a request for final review to conduct a final review conference. The conference may be conducted by the Board, its designee, or a committee of three members of the Board appointed by the chair.
7. If a final review conference is not conducted within 60 days, the Department decision becomes the final agency decision, and a party may request a contested case hearing before the Administrative Law Court within 30 days after the deadline for the final review conference.

The above information is provided as a courtesy; parties are responsible for complying with all applicable legal requirements.

Exhibit 2

STAFF ASSESSMENT

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL (SCDHEC) DIVISION OF WATER QUALITY WATER QUALITY CERTIFICATION AND WETLANDS SECTION

I Background Information

Applicant: Duke Energy Carolinas, LLC (applicant)

P/N Number: SCDHEC-08-C-001

P/N Date: August 8, 2008

P/N Close: October 7, 2008 (60 days)

Section of Applicable Federal Law: ☒ Federal Energy Regulatory Commission (FERC) License
☐ Section 10 Permit ☐ Section 404 Permit
☒ Section 401 Water Quality Certification (WQC)

Section of Applicable State Law: ☐ Coastal Zone Consistency ☐ Permit for Construction in Navigable Waters

Brief explanation and purpose of activity:

The subject of this review is the continued operation of the Catawba-Watauga Hydroelectric Project or CWHP (FERC Project No. 2232) in South Carolina in the same general manner as in the past, but modified to be consistent with the Comprehensive Relicensing Agreement (The CRA) and The Santee River Basin Accord for Diadromous Fish Protection, Restoration, and Enhancement (The Accord) under a new FERC license. The WQC application, including a supplemental information package (SIP), is available for review in the office of the Division of Water Quality or on the web at: <http://www.scdhec.gov/environment/water/cwferc401.htm>.

The WQC file contains a copy of the CRA signed by 70 stakeholders from two (2) States, including the:

- S.C. Dept. of Archives and History (SCDAH);
- S.C. Dept. of Natural Resources (SCDNR);
- S.C. Dept. of Parks, Recreation, and Tourism (SCDPRT);
- N.C. Dept. of Environment and Natural Resources (NCDENR); and
- N.C. Wildlife Resources Commission (NCWRC).

The National Marine Fisheries Service (NMFS), U.S. Fish and Wildlife Service (USFWS), and SCDHEC participated in the development of the CRA but are not signatories.

The CRA addresses operation of the CWHP and many other issues including some beyond the scope of this review:

- Water Quality
- Habitat Flows
- Species Protection
- Reservoir Elevations
- Recreation Flows
- Water User Needs
- Drought Response
- Maintenance and Emergency Response
- Compliance Gaging and Monitoring
- Shoreline Management
- Public Recreation Facilities
- Public Information
- Cultural Resources
- And Other Resource Enhancement Interests

The CRA includes proposed FERC license articles, non-license agreement terms, general terms, attachments/appendices, and supporting documentation.

The Accord (Appendix D of the SIP) represents a collaborative approach among utilities that operate hydroelectric projects in the Santee River Basin (including the Catawba and Wateree Rivers and CWHP reservoirs) and State and Federal resource agencies to protect, enhance and restore diadromous fish. Signatories include the:

- USFWS
- SCDNR
- NCWRC

The NMFS and SCDHEC participated in the development of the Accord but are not signatories.

- While the NMFS did not sign the Accord, that agency's preliminary recommendations do not conflict with the Accord, and the NMFS is not excluded from becoming a signatory in the future. Note also that the Accord follows and supports the Santee-Cooper Basin Diadromous Fish Passage Restoration Plan, which was authored by the NMFS, USFWS and SCDNR in 2001, and accepted by the FERC as a comprehensive plan.

Waterbody Name: The Catawba and Wateree Rivers and five (5) reservoirs in South Carolina: 1) Lake Wylie, 2) Fishing Creek Reservoir, 3) Great Falls Reservoir, 4) Cedar Creek (Stumpy Pond) Reservoir, and 5) Lake Wateree.

Water Classification: FW

Waterbody Location: Starting at Lake Wylie on the border with North Carolina in York County and ending at the tailrace and spillway channel of Lake Wateree in Kershaw County, South Carolina.

Is the Waterbody on the 2008 303(d) List? (x) Yes, see Table 1 below. () No

Table 1. SCDHEC Monitoring Stations in the vicinity of the CWHP on the 2008 303(d) List.

WATERBODY	STATION ID	COUNTY	USE	CAUSE
Lake Wylie	CW-197	York	AL	CU
Lake Wylie	CW-230	York	AL	CU
Fishing Creek Reservoir	CW-016F	Chester	AL	TN, TP
Fishing Creek Reservoir	CW-057	Chester	AL	NH, NH-PT, TP
Fishing Creek Reservoir	RL-01012	Chester	AL	CHLA
Great Falls Reservoir	RL-01322	Chester	AL	TP, TP, TURBIDITY
Great Falls Reservoir	RL-03458	Chester	AL	TP, TURBIDITY
Great Falls Reservoir	RL-05171	Chester	AL	TP
Great Falls Reservoir	RL-06429	Chester	AL	TP
Cedar Creek Reservoir	CW-175	Chester	AL	TP, TURBIDITY
Cedar Creek Reservoir	RL-05110	Chester	AL	TP
Cedar Creek Reservoir	RL-03351	Chester	AL	CU, TP, TURBIDITY
Cedar Creek Reservoir	RL-05133	Chester	AL	TP, TURBIDITY
Cedar Creek Reservoir	RL-04379	Chester	AL	TP
Cedar Creek Reservoir	RL-05391	Chester	AL	TP
Cedar Creek Reservoir	RL-06431	Chester	AL	TP
Cedar Creek Reservoir	RL-06433	Chester	AL	TP
Cedar Creek Reservoir	CW-033	Lancaster	AL	TP, TURBIDITY
Cedar Creek Reservoir	RL-01007	Lancaster	AL	CHLA, DO
Cedar Creek Reservoir	RL-02452	Lancaster	AL	TP

Discharges from CWHP developments, i.e. from dams/powerhouses, have historically shown exceedences of the state DO water quality standard during warmer months at all SC developments. The Wylie Development discharge has shown very infrequent (0.10%) and minor exceedences of the pH standard. The applicant proposes measures and a compliance schedule to bring all CWHP discharges into compliance with the DO standard. The SCDHEC has reviewed the applicant's proposal and found that it gives reasonable assurance of compliance with the DO standard in all CWHP discharges, particularly after full implementation. pH in the Wylie Development discharge is not frequent or significant enough to warrant concern and should improve when DO is in compliance. Therefore, continued operation of the CWHP as proposed will not contribute to any listed impairment. See complete discussion below in Section VI. Conclusions, under the headings "Water Quality."

A. Description

The CWHP in South Carolina consists of 1) the Wylie Development, 2) the Fishing Creek Development, 3) the Great Falls/Dearborn Development, 4) the Rocky Creek/Cedar Creek Development, and 5) the Wateree Development located in York, Lancaster, Chester, Fairfield, and Kershaw Counties.

1. The Wylie Development includes a dam, reservoir, powerhouse and other appurtenances.
2. The Fishing Creek Development also includes a dam, reservoir, powerhouse and other appurtenances.
3. The Great Falls/Dearborn Development includes three (3) dams (The Great Falls Diversion Dam, Dearborn Dam and Great Falls Dam), the Great Falls bypassed spillway and headworks, a reservoir, two (2) powerhouses (Great Falls Powerhouse and Dearborn Powerhouse) separated by a retaining wall and other appurtenances.
4. The Rocky Creek/Cedar Creek Development includes an overflow spillway, a concrete bulkhead that forms the lower end of Rocky Creek forebay canal, a reservoir, two (2) powerhouses (Cedar Creek Powerhouse and Rocky Creek Powerhouse) and other appurtenances.
5. The Wateree Development includes a dam, reservoir, powerhouse and other appurtenances.

More complete descriptions and maps of each development and existing facilities are included in Section 5 of the SIP. Maps are also appended to this staff assessment.

The applicant operates the Wylie and Wateree Developments for peaking energy, maintenance of target lake levels, and in support of downstream water use. The Fishing Creek Development is operated for peaking energy and maintenance of target lake levels. The Great Falls/Dearborn and Rocky Creek/Cedar Creek Developments are operated for peaking energy. Overall, the CWHP is operated in an integrated "stair-step" fashion in order to deliver water where it is needed.

According to the applicant, fourteen (14) Counties and more than thirty (30) Municipalities in two (2) States depend on the following critical benefits provided by the CWHP:

- Energy for 116,000 homes and water to support over 8,100 megawatts of fossil and nuclear-fueled power plants
- A reliable drinking water supply for over 1.3 million people
- A water supply vital to the operations of a number of large industrial facilities

B. Fill

1. Is fill required? () Yes (x) No If no, proceed to Section II. C.
2. Is the fill temporary? () Yes () No

C. Excavation

1. Is excavation required? () Yes (x) No If no, proceed to Section II. D.
2. Is spoil site adequately sized for amount of material? () Yes, see Section VI for specific detail () No

D. Other Impacts: () Yes (x) No () Mechanically cleared wetlands () Flooded wetlands

E. Project Modification

Was the project modified from the original public notice? () Yes (x) No

F. Compensatory Mitigation

Is compensation required by the SCDHEC?

() Yes, a detailed description of the applicant's compensation is located in Section VIII. (x) No () N/A
See discussion in Section VI under the heading "Compensatory Mitigation."

G. Remediation

Is remediation required? () Yes () No (x) N/A

H. Nonpoint Source Concerns

1. Are water quality impacts from nonpoint sources expected? () Yes (x) No () Temporary
2. Has the applicant addressed nonpoint source concerns? () Yes () No (x) N/A
3. Are any enforceable nonpoint controls required by the SCDHEC? (x) Yes () No
Water quality impacts from nonpoint sources will be minimized and should not contravene the water quality standards or existing and classified uses of the involved waterbody, if the applicant adheres to the conditions in Section VIII.

III. Environmental Assessment

A. Is the proposed activity water dependent? (x) Yes () No

B. Are there feasible alternatives to the proposed activity? () Yes (x) No, See discussion in Section VI under the heading "Alternatives."

C. Water Quality Assessment

Numeric Standards Contraventions? () Yes (x) No () Temporary
See discussion in Section VI under "Water Quality."

IV. Public Comments Received and Summary of Comments

A. S. C. Department of Natural Resources

Date: October 10, 2008

- ☒ (x) Does not object provided the applicant adheres to recommendations, see discussion in Section VI.
- ☐ () No objection.
- ☐ () Objects to the project as proposed (and made recommendations), see discussion in Section VI.
- ☐ () Other.

The SCDNR is a signatory to the CRA and Accord and listed resource agreements and appendices of the CRA that addressed relevant and significant aspects of the WQC application. The SCDNR's list differed from the applicant's list in section 3.5 of the SIP by including Resource Agreements 3.0 Recreation Flow Agreements. However, the applicant did list Appendix A-2.0, which includes the proposed Recreation Flow Article.

B. U. S. Fish and Wildlife Service (USFWS)

Date: October 7, 2008

- ☒ (x) Other

The USFWS stated that the agency is not a signatory to the CRA due to inconsistencies with mandated statutory obligations; however, the agency is a signatory to the Accord; and, the Terms and Conditions and Preliminary Prescriptions for Fishways filed with the FERC are consistent with the Accord. The USFWS made the following recommendations in order to protect and enhance the aquatic resources of the Catawba and Wateree Rivers:

- All developments meet and sustain water quality standards;
- All developments provide minimum flows (that appeared to be consistent with the CRA);
- At the Wylie Development, Great Falls Long bypass, and Wateree Development, minimum continuous flows for diadromous fish be provided (that appeared to be consistent with the "Wylie High Inflow Protocol" (WHIP), "Wateree Spring Stable Flows," and related CRA provisions, including consultation ten (10) years after the "Flow and Water Quality Implementation Plan" (FWQIP) modifications regarding a proposed license article;
- Implementation of the "Low Inflow Protocol" (LIP) as proposed in the WQC application/SIP and CRA;
- The SCDHEC include provisions consistent with and identical to the Accord and Preliminary Prescription for Fishways (USFWS's FERC filing referenced above), in any WQC issued for the CWHP.

C. National Marine Fisheries Service (NMFS)

Date: October 2, 2008

- ☒ (x) Other.

The NMFS is not a signatory to the CRA or Accord. The NMFS enclosed a copy of their Preliminary Recommendations, Terms, Conditions, and Reservation of Authority to Prescribe Fishways filed with the FERC.

- The NMFS was in agreement with the proposed LIP and requested to be included in the "Drought Management Advisory Group" (DMAG).
 - The NMFS did not object to the MEP and requested to be consulted during development and implementation of the proposed "Maintenance and Emergency Protocol" (MEP).
 - The NMFS supports the FWQIP as a license article and expected to be consulted during preparation of the plan for submittal to the FERC.
 - The NMFS accepted the instream flow recommendations in the CRA for initial implementation of a new license, but recommended inclusion of a provision to reevaluate flows should future prescriptions for fish passage be issued.
 - The NMFS also recommended specific flows to be implemented when upstream passage for diadromous species is prescribed at each reach.
 - The NMFS also supported the "Wateree Spring Stable Flows and Protocol" proposal, and the "Wateree Flood Plain Inundation" proposal, and associated provisions proposed in the CRA.
 - The NMFS recommended establishment of a CWHP "Fisheries Technical Committee" and annual meetings.
- The NMFS stated that consultation under Section 7 of the Endangered Species Act (ESA) had not been initiated at the time of filing. The NMFS stated that all recommendations were given in consideration of CWHP effects on shortnose

sturgeon. The NMFS reserved the right to revise all recommendations based on new information or the analyses the FERC will complete as required by the National Environmental Policy Act (NEPA).

D. S. C. Dept. of Parks, Recreation & Tourism (SCDPRT)

Date: October 2, 2008

(x) No objection.

The SCDPRT is a CRA signatory and supports the applicant's request.

E. S.C. Office of the Attorney General (SCOAG)

Date: October 6, 2008

(x) Other.

The SCOAG commented that South Carolina is engaged in litigation before the U. S. Supreme Court over the issues of water allocation and water quality in the Catawba River Basin, and requested the SCDHEC consider the State's extraordinary interest in water quality and quantity in the basin when issuing any permit (WQC) related to this basin.

F. N. C. Dept. of Environment and Natural Resources (NCDENR)

Date: October 3, 2008

(x) No objection.

The NCDENR is a signatory to the CRA and stated that the WQC application is consistent with conclusions reached during the relicensing process. In particular, the NCDENR concurred with flows described in the following sections:

- 5.1.4.2 – Wylie – continuous minimum year-round flow of 1,100 cfs, and the WHIP and LIP provisions;
- 5.3.3 – Great Falls bypassed reaches – Table 18 and page 82 of the WQC application;
- 5.5.3 – Wateree – Table 24 on page 112 of the WQC application and the LIP provisions; and
- The LIP from the CRA and referenced on pages 14 and 129 of the WQC application.

The NCDENR commented that these flows in conjunction with the LIP would maintain and significantly enhance habitat for aquatic communities downstream of the Wylie, Great Falls-Dearborn, and Wateree Developments. The NCDENR also provided extensive background information regarding the process used to determine recommended flows, including a discussion of Instream Flow Incremental Methodology (IFIM) and the metric known as "Index C," and communicated to the SCDHEC regarding additional data that could be provided as needed.

G. Lugoff-Elgin Water Authority (LEWA)

Date: August 19, 2008

(x) No objection.

The LEWA is a CRA signatory and supports the applicant's request.

H. Abitibi Bowater, Catawba Operations (Bowater)

Date: September 29, 2008

(x) Does not object provided the applicant adheres to recommendations, see discussion in Section VI.

Bowater is a signatory to the CRA and supports the applicant's request for a WQC and recommends the SCDHEC include applicable sections of the CRA, as identified in Section 3.5 of the SIP, in any WQC issued for the project.

I. American Whitewater (AW)

Date: October 6, 2008

(x) Does not object provided the applicant adheres to recommendations, see discussion in Section VI.

AW commented that staff and/or volunteers paddled every flowing reach of the Catawba during the relicensing study process and were very involved with the negotiation of the CRA, to which AW is signatory. AW stated that the flows, public information, access, and riparian conservation initiatives prescribed by the CRA will adequately support public recreation and asked that the SCDHEC include and not deviate from the CRA in the forthcoming WQC.

J. American Rivers and The Coastal Conservation League (AR&CCL)

Date: October 7, 2008

(x) Objects to the project as proposed and made recommendations, see discussion in Section VI.

The AR&CCL stated that this WQC will protect the rivers and associated reservoirs, support designated uses, provide

suitable habitat for aquatic species, and provide clean water well into the future provided the SCDHEC incorporates the following recommendations as conditions of the WQC:

- SCDHEC should require the applicant to comply with specific recommendations (detailed in their letter and discussed throughout Section VI) for waters and lands affected by the CWHP; and for Landsford Canal State Park;
- SCDHEC should require the applicant to provide adequate flows and water quality to protect and enhance designated uses of waters affected by the project, to prevent harm to any endangered species that rely on those waters, and to enhance the habitat for aquatic species in those waters;
- SCDHEC should require the applicant to provide sufficient flows in the Wateree River to mimic natural flow conditions to the greatest extent possible and not impair water quality in Congaree National Park;
- SCDHEC should reject the applicant's flow mitigation proposal;
- SCDHEC should not incorporate the CRA *in toto* into the WQC;
- SCDHEC should include reopener language in the WQC;
- SCDHEC should establish a 5-year review cycle for the WQC in coordination with the terms of National Pollutant Discharge Elimination System (NPDES) permits issued in the basin.

K. Catawba Riverkeeper Foundation, Inc. (CRFI)

Date: October 6, 2008

(x) Objects to the project as proposed, see discussion in Section VI.

The CRFI is not a signatory to the CRA and commented that the applicant's request should be denied due to the inability of the project to consistently meet State water quality standards. According to them, proposed flows under the LIP would impact aquatic life in the State Scenic River portion of the Catawba River and adversely affect downstream uses and assimilative capacity. Decreased flows would also increase concentrations of parameters for which Total Maximum Daily Loads (TMDLs) have been or are being developed. According to the CRFI, many project waters, particularly reservoirs, have chronic eutrophic conditions that are not adequately addressed by the CRA. The CRFI recommended SCDHEC require the applicant to operate and/or modify dams in whatever manner necessary to meet standards for DO, pH, total phosphorous, total nitrogen and any unnamed parameters established by the State throughout the CWHP.

L. J. D. Wellman

Date: August 14, 2008

(x) No objection.

Mr. Wellman supports the applicant's request for a new license. However, Mr. Wellman recommended the local, county, and federal government, and perhaps the applicant, undertake an ongoing project to clean rivers and creeks of silt deposits, and enlarge and expand the reservoirs through dredging, particularly in the area of Crowders Creek.

M. Carol Butler

Date: August 15, 2008

(x) Objects to the proposed project, see discussion in Section VI.

Ms. Butler objected. Her concerns included: drought procedures, trash, erosion and siltation in the Crowders Creek area, and *Hydrilla*. Ms. Butler recommended the SCDHEC survey property owners.

N. Richard D. Foote, Chairman of the Water Watch Advisory Committee of the Wateree Homeowners Association and Lake Wateree Association (LWA) [CRA signatory groups], and trained member of the CRFI Covekeeper Program

Date: September 16, 2008

(x) Does not object provided the applicant adheres to recommendations, see discussion in Section VI.

Mr. Foote's concerns included: sustainability of the watershed as a source of clean, safe water for public use and aquatic life use; proper oversight of the applicant's water quality monitoring efforts; rejection of privately collected monitoring data by the applicant; DO, nitrogen, phosphorous, copper, mercury, and fecal coliform, etc. levels in reservoirs; and flows that are insufficient to dilute contaminants. Mr. Foote recommended the applicant contribute funds annually to LWA to aid private monitoring efforts. He also recommended the applicant be required by license to enforce shoreline management plans (SMPs), and to require deed restrictions to protect buffer zones in any land sales.

O. Sarah Williams

Date: October 1, 2008

(x) Other.

Ms. Williams' concerns included: protection of the quantity and quality of water in the Catawba-Wataree Rivers and lakes, proper enforcement of SMPs, a lack of balance between public and private access, and adequate habitat and buffer protection. Ms. Williams recommended the applicant require protection of shoreline through buffers in exchange for docks. She also asked SCDHEC to require annual contributions from the applicant in the amount of \$100,000.00 to fund an organization like the CRFI to be environmental stewards and, e.g. train people to patrol shorelines.

V. Consistency with the Coastal Zone Management Program, R. 48-39-10 *et seq.*

Did staff of the Office of Ocean and Coastal Resource Management (OCRM) find the project consistent with the S.C. Coastal Zone Management Program (CZMP)? () Yes () No (x) N/A Date:
() Per revisions () Per conditions included in Section VIII. () If no, provide Sections of CZMP cited.

VI. Conclusion on Water Quality Impacts and Classified Uses

When evaluating the proposed work, the SCDHEC followed procedures for implementing State 401 WQC regulations pursuant to Section 401 of the federal Clean Water Act (33 U.S.C. 1341), and the requirements of South Carolina's Water Quality Certification Regulations (R.61-101, *et. seq.*, 1976 S.C. Code of Laws, as amended). In response to public notice of the WQC application, the SCDHEC received several letters from commenters who objected to issuance of a WQC and listed their concerns. Numerous commenters also wrote in support of the applicant's request and/or recommended conditions to be placed on the WQC.

Public Participation

Ms. Butler recommended the SCDHEC survey property owners in the project area. However, R. 61-101, "Water Quality Certification," while requiring public notice of all applications for certification of Federal licenses, does not require surveys of property owners in the project area. In addition, the SCDHEC does not have the resources to conduct such a survey, particularly for such a large project. When issuing public notice, if the SCDHEC determines that an application involves a major activity, the notice period may be extended up to sixty (60) days from the date of the initial public notice.

- In fact, the SCDHEC placed this WQC application on public notice for 60 days, posting the complete WQC application (including the SIP, 317 pages/70 MB) on the SCDHEC website as an added courtesy. The notice included the SCDHEC webpage URL and was mailed to approximately five thousand (5,000) adjacent property owners and other interested parties. In addition, the applicant placed notices in newspapers of general circulation in each county affected by the CWHP, providing the SCDHEC with affidavits that met regulatory requirements. The SCDHEC webpage, which included links to the applicant's CWHP relicensing webpage and the FERC e-library webpage where one can obtain other documents such as the CRA and Accord, was still active and available when this was written. Note also that the SCDHEC received no requests for a public hearing.

The SCDHEC believes that all regulatory requirements were met and that the public had adequate opportunity for participation.

Water Quality

Pursuant to R.61-101.F.1, the SCDHEC addresses water quality impacts of the project and makes conclusions concerning compliance with water quality standards, R. 61-68.

Exceedences of the DO Standard

Numerous commenters were concerned with the applicant meeting water quality standards in all CWHP waters, particularly for DO. One commenter recommended the SCDHEC require the applicant to operate and/or modify dams in whatever manner necessary to meet the DO standard throughout CWHP waters. As indicated above in

Section I (pages 2-3), there are three (3) water quality monitoring stations within CWHP waters listed on the 2008 303(d) list as impaired for DO, and discharges from CWHP developments (i.e. from dams/powerhouses) have historically shown exceedences of the DO standard during warmer months at all SC developments. DO was the only parameter identified during consultation, and during prior and subsequent study, as being out of compliance in discharges and was targeted for being brought into compliance. As stated above in Section I, the SCDHEC believes that by addressing compliance in discharges, there is reasonable assurance that continued operation of the CWHP will not contribute to the listed DO impairments. An explanation of the studies that were completed, the CRA proposal, and measures the applicant has already implemented follows.

The applicant monitored CWHP discharges between May 1 and November 30 continuously for a ten-year period, computing hourly and daily averages for DO. Percent exceedences ranged from a low of 4.3% during generation at the Fishing Creek Development to a high of 56.2% during generation plus leakage at the Great Falls/Dearborn Development (see Table E2.7-1 from Exhibit E in Book 2 of the Application for New License). These exceedences during warmer portions of the year are the result of deep-water withdrawal of the hydroelectric turbines. From late spring to early fall, many large reservoirs in the southeast, become stratified. The hypolimnion, or bottom zone, is the coolest layer. Because this layer does not come into contact with air, the DO is used up by natural processes and soon depleted.

As stated in Section I, a primary focus of the CRA was water quality. The applicant sought to develop a plan to implement proposed increased minimum flows, and also any measures necessary to ensure compliance with water quality standards in CWHP discharges. The CRA "Flow and Water Quality Implementation Plan" (FWQIP – Appendix L of the CRA) includes modifications to equipment and operations, interim measures, and a compliance schedule. The equipment modifications proposed in the FWQIP include replacing one existing unit at Wylie and one at Wateree with a smaller unit with aerating capability.

The applicant applied a model (the Discrete Bubble Model or DBM) to each turbine at each development as a tool to predict the effectiveness of existing and future (after implementation of the FWQIP) turbine aeration capabilities to meet DO standards. The analysis applied calibrated turbine aeration models to multi-year, hourly historical records of DO, flow, and temperature to predict future DO levels in tailraces below the hydros. The SCDHEC reviewed the DO analysis presented in the SIP, as well as additional information provided by the applicant in response to information requests. The findings indicate that the applicant's approach is sound and assumptions valid, and the analysis sufficiently demonstrates that the applicant can achieve the DO standard during generation with existing equipment (Fishing Creek, Dearborn, and Cedar Creek) or with planned upgrades (Wylie and Wateree). In addition, based on the historical record and aeration performance curves for individual units, the SCDHEC found that the applicant can achieve the DO standard when generating using existing equipment at Wylie and Wateree during the interim period prior to full implementation of the FWQIP. In fact, the applicant states in response to a February 5, 2009 information request, "Duke believes it will comply with state (DO) standards while pulsing existing units during the interim period." Based on the historical record and aeration performance curves for individual units at Wylie and Wateree and the applicant's commitment to use all available capability, the SCDHEC expects these projects to meet the DO standard more than 99 percent of the time the applicant is generating with at least one unit.

The equipment modifications mentioned above will also allow the applicant to implement the continuous minimum flows called for in CRA Resource Agreements 4.0 Habitat Flow Agreements in addition to meeting the DO standard in discharges. Currently, the two regulated river reaches below Wylie and Wateree (other existing CWHP discharges are essentially reservoir to reservoir) receive minimum flows on a daily average basis. This has the potential to contribute to stagnant, low-DO conditions below dams at times when there is no generation or other releases and only leakage. Delivering minimum flows on a continuous basis rather than as a daily average will help ensure that suitable DO levels are maintained in the future. See complete discussion of minimum flows below in Section VI. Conclusions, under the heading "Minimum Instream Flow Needs and Aquatic Habitat."

Equipment Redundancy and Measures the Applicant Has Already Implemented

The AR&CCL also recommended the applicant be required to implement equipment redundancy and any other measures necessary to ensure compliance under all operating conditions. The applicant, as part of

upgrades and replacements, evaluated and installed various turbine-venting modifications at some stations to increase DO in discharges. These are detailed in the WQC application in Table 3 in part (d).

- According to the applicant, "Turbine technology has proven to be very reliable and there is no need for a redundant minimum flow aerating unit. DO standards can still be met absent the new minimum flow aerating unit because the other units also feature aerating turbines."

In addition, the CRA includes a "Maintenance and Emergency Protocol" or MEP (Appendix D). The MEP will establish communications protocols and foster mitigation planning for protection of resources potentially affected by CWHP maintenance, emergency conditions, or other unusual events. CRA Resource Agreements 13.0 Water Quality Agreements establish non-compliance contingencies procedures.

- The SCDNR listed both of these as addressing relevant and significant aspects of the WQC application and concurred with each.

For these reasons, the SCDHEC will require implementation of these portions of the CRA as a condition of the WQC.

Numerous provisions in the CRA support water quality in CWHP discharges and downstream riverine waters, particularly 1) Resource Agreements 13.0 Water Quality Agreements and the associated appendices, and 2) Resource Agreements 5.0 Water Use Agreements and Appendix N, which establish the Catawba-Watauga Basin Water Management Group (CWBWMG). The CWBWMG is expected to contribute more than \$500,000 per year into a fund that is to be used for water quantity and quality improvement projects in North Carolina and South Carolina. Item number one above includes a "Water Quality Monitoring Plan" or WQMP for monitoring compliance. The WQMP also references a "Quality Assurance Project Plan" or QAPP. The SCDHEC project file contains a copy of the SCDHEC-approved QAPP that follows SCDHEC/EPA guidelines, Unsigned Copy, Revision 0, dated January 6, 2009 (an unnumbered draft was included as Appendix A to the WQC application SIP). The SCDHEC will require the applicant to keep the QAPP up-to-date and send current copies to the SCDHEC to ensure the quality and reliability of the data.

- The USFWS did not object to any site specific measures proposed for meeting water quality standards, or the schedule proposed for interim and permanent measures as described in the WQC application and CRA (referring to the FWQIP).
- The NMFS supported the FWQIP as a (FERC) license article and expects to be consulted during preparation of the plan for submittal to the FERC, which is proposed to take place within 180 days of issuance of a new license.
 - The applicant will consult with the NMFS, which is one of the agencies listed in part B of the FWQIP Article in Appendix A: Proposed License Articles, A-2.0 Flow Articles.

The 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. Numerous provisions of the CRA address water quality in CWHP waters. The SCDHEC will include all applicable portions of the CRA (listed under condition number one in Section VIII) as conditions of the WQC. Other sections, while not being required by the SCDHEC as conditions of the WQC, may be required by the FERC and/or will be implemented by the applicant to fulfill CRA obligations.

Other Impairments

Several commenters were concerned with levels of nutrients such as phosphorous and with other water quality parameters such as pH in CWHP waters. As indicated above in Section I. Background Information in Table 1, there are a number of impaired water quality monitoring stations within CWHP waters. All but one of these are within reservoirs, and the most frequent cause listed is TP or total phosphorous. The riverine station below Lake Wateree is impaired for fish consumption due to mercury.

pH

During the ten-year monitoring period described above, the general trend of pH recorded in the tailraces of CWHP hydros was higher in the winter than in the summer (related to DO and carbon dioxide). This difference diminished as the conductivity (and buffering capacity) increased going downstream, with the Wylie Development having the only tailrace in South Carolina showing very infrequent and minor pH

exceedences (0.10% of hourly means were just below 6.0 - the pH standard for freshwaters is between 6.0 and 8.5 or circumneutral). Table 1 in Section I above (pages 2-3) lists pH impairments in Fishing Creek Reservoir, Cedar Creek Reservoir and Lake Wateree, with no stations listed in the Great Falls Reservoir. There are several SCDHEC water quality monitoring stations on the Catawba River between Wylie and Fishing Creek. The pH standard for freshwaters is the same for lentic and lotic waters and none of these stations are listed for any impairments. In addition, this segment was recently designated a State Scenic River. The downstream reservoir impairments are probably related to nutrient levels and algal productivity. Furthermore, pH in the Wylie discharge should improve when DO is in compliance; therefore, the Wylie discharge will not contribute to pH impairments and no pH monitoring is required.

Nutrients, Mercury and other Pollutants

Pursuant to R.61-68.E.11, and "in order to protect and maintain lakes and other waters of the State, consideration needs to be given to the control of nutrients reaching the waters of the State." In this regard, the only "discharges" associated with operation of the CWHP are from the dams/powerhouses. The term discharges is placed in quotation marks here because these are discharges in the sense that water is being diverted/held and then discharged. However, none of the pollutants listed as causes of impairments in Table 1 in Section I above (pages 2-3), such as phosphorous or mercury, are introduced into the water as a result. So the CWHP discharges are not discharges of (a) pollutant(s). These pollutants are introduced into the watershed through point and nonpoint sources not associated with operation of the CWHP; therefore, CWHP discharges will not contribute to these impairments.

The SCDHEC will include all applicable portions of the CRA as conditions of the WQC. Other sections, while not being required by the SCDHEC as conditions of the WQC, may be required by the FERC and/or will be implemented by the applicant to fulfill CRA obligations. Additionally, during facility operation and maintenance, fuel, oil, tar, trash, debris and other pollutants may result in water quality impacts in the adjacent waters through contamination of stormwater runoff or accidental spills, etc. Appropriate containment measures and other Best Management Practices (BMPs), including a spill prevention plan and clean up materials, will prevent fuel, oil, etc. and other pollutants from entering adjacent waters or wetlands and the SCDHEC will require these as a condition of the WQC.

Water Quality Monitoring

Mr. Foote expressed concern regarding rejection of privately collected monitoring data by the applicant and regarding proper oversight of the applicant's water quality monitoring efforts. They also recommended the applicant contribute funds annually to aid in private monitoring efforts.

- According to the applicant, they "met at least monthly with representatives from the Lake Wateree area during the relicensing stakeholder process from August 2003 through August 2006 and can find no record of such data being offered by Lake Wateree area residents."
- Note also that the SCDHEC is responsible for preparing the Integrated Report Part I: Listing of Impaired Waters or 303(d) list.
 - The SCDHEC solicits and considers all existing and readily available water quality data, including non-SCDHEC data, in developing the 303(d) list.
- Also according to the applicant, "On September 9, 2008, Duke provided [the commenter] with detailed instructions on how to apply for grant funding from the Duke Energy Foundation."

Pursuant to R.61-101.A.5, the SCDHEC has authority to set forth any monitoring requirements necessary to assure maintenance of classified or existing water uses and standards, and compliance with other requirements of these regulations or other appropriate requirements of State law. As discussed above under "Water Quality" the CWHP has historically shown exceedences of the state DO water quality standard during warmer months at all SC developments. The CRA includes a plan (FWQIP) for achieving compliance. The CRA also includes a WQMP, both for monitoring compliance with water quality standards and WQC/FERC License conditions, and monitoring regional water quality trends. The proposed monitoring would support CWHP operations, and the ongoing efforts of the SCDHEC to manage point and nonpoint sources. Data collection associated with compliance monitoring also includes temperature monitoring and is accompanied by a recently SCDHEC-approved QAPP that follows SCDHEC/U.S. Environmental Protection Agency guidelines. Since continued operation of the CWHP will not contribute to any impairments, no other water

quality monitoring is required. The SCDHEC will include all applicable portions of the CRA as conditions of the WQC and will also require the applicant to keep the QAPP up-to-date and send current copies to the SCDHEC.

Alternatives

Throughout their comment letter, the AR&CCL recommended alternative flows/operating regimes. Pursuant to R.61-101.F.5(b), the SCDHEC will deny WQC if there is a feasible alternative to the activity, which reduces adverse consequences on water quality and classified uses. The applicant and stakeholders used the Computer Hydro Electric Operations Performance Software (CHEOPS) Model, developed to evaluate operations of all developments simultaneously under various scenarios, to determine the feasibility and cost of providing various flow recommendations. Input to the CHEOPS model came from the following studies:

- LIP Study (Drought Management Study),
- Water withdrawal projections from the Water Supply Study,
- Critical reservoir elevations from the Water Supply Study,
- Recreation flow levels and schedules from the Recreation Flow Study,
- Minimum continuous aquatic flows from the Instream Flow Study,
- Critical flows for aquatic life and for downstream dischargers and withdrawers,
- Hydro unit performance,
- Reservoir bathymetry,
- Sedimentation projections,
- and 51-year inflow history provided by the applicant.

The applicant proposes to continue operating the CWHP in the same general manner as in the past under a new FERC license and consistent with the CRA. The applicant's proposal is the result of a multi-year, bi-State, stakeholder process that involved numerous iterations and that delicately balanced the needs of multiple categories of sometimes competing users for the finite resource of CWHP waters.

- Bowater commented that changing elements of the CRA, particularly flow releases and reservoir level provisions, could upset the delicate balance that stakeholders worked so hard to achieve.

The final proposal is robust and includes new equipment and operational modifications that will raise minimum instream flows, enhance water quality, provide drought protection, and anticipate and accommodate regional growth based on 50-year projections. Implementation of the applicant's proposal will reduce peak generating capability in order to protect/enhance other resource values. As stated above in Section I, several South Carolina and North Carolina agencies are signatories to the CRA.

- SCDAH
- SCDNR
- SCDPRT
- NCDENR
- NCWRC

The NMFS, USFWS, and SCDHEC participated in the development of the CRA but are not signatories.

The SCDHEC believes the final proposal was carefully considered and represents the least damaging feasible alternative to meet overall basinwide interests without damaging individual current or future water use interests during continued operation of the CWHP. The proposed activity should not cause adverse impacts to water quality and will enhance classified uses if the applicant adheres to the conditions listed in Section VIII, which include all applicable sections of both the CRA and Accord.

Minimum Instream Flow Needs and Aquatic Habitat

The current license requires minimum average daily flows (MADF) at the Wylie (411 cfs), Fishing Creek (440 cfs), Great Falls-Dearborn (444 cfs), Rocky Creek-Cedar Creek (445 cfs), and Wateree Developments (446 cfs), but does not require continuous minimum flows at any South Carolina developments, even those that discharge into river reaches (Wylie and Wateree – other developments essentially discharge reservoir to reservoir). The current license also requires no minimum flow in the Great Falls/Dearborn Long and Short bypasses, and in the Wateree bypass, also known as the Wateree spillway. The required MADFs are met through a combination of leakage and operations and result in variable and unstable instream habitat. When evaluating an application for WQC, and in assessing water quality impacts, the SCDHEC must address and consider water quality impacts of the project, including biological impacts (pursuant to R.61-

101.F.3(c)(2)). The SCDHEC is also charged through the Water Classifications and Standards (R.61-68) to maintain and improve all surface waters to a level to provide for the survival and propagation of a balanced indigenous aquatic community of flora and fauna. Improved instream flows would maintain and possibly benefit existing communities but would not address ecological issues associated with habitat fragmentation. The issue of habitat fragmentation is discussed below under "Habitat Fragmentation"

To address instream flow needs and habitat, and thus biological impacts, the applicant convened a bi-State, multiple resource interest stakeholder team to design study plans, interpret results, and make recommendations. The SCDHEC and SCDNR, along with many other stakeholders including the USFWS and NMFS, participated on the team, which held more than 50 meetings over a 3-year period.

- The USFWS commented that they were focused on the aquatics studies meetings, particularly the Instream Flow Team, and attended its approximately 70 meetings.

The studies employed standard field procedures and modeling techniques of the Instream Flow Incremental Methodology. This methodology, originally developed by the USFWS, involves modeling stream hydraulics of a study area and quantifying habitat values associated with alternative flow regimes using habitat suitability criteria for selected evaluation species/life stages/guilds. Habitat suitability criteria are generally based on depth, velocity, substrate, and cover preferences of the evaluation species. Project tailraces, bypassed reaches and regulated river reaches were investigated and analyses completed included Weighted Usable Area (WUA), habitat duration, effective habitat analyses, navigation analyses, and wetted perimeter analyses. The team used an interactive spreadsheet to analyze multiple flow regimes and identify the species/life stages/guilds that were most sensitive to changes in flow. A complete description of field methods and analytical techniques can be found in Aquatics 04: Instream Flow Assessment in Book 2 of the Application (FERC) for New License (2006). The analysis considered several habitat targets and included flows necessary to provide 80% of the habitat that would have been available if no dams were present and the river were unregulated, and also flows necessary to provide a significant increase in habitat compared to existing conditions. Other considerations were also included in the overall assessment of instream flows and the CHEOPS Model was used to determine the feasibility and cost of providing various flow recommendations. A major goal of the team was to develop recommendations to provide 80% of the available habitat, based on WUA, for the maximum number of fish species.

- According to the SCDNR, recommendations requiring excessive water were eliminated from consideration. The CRA flow proposal is discussed below by development; developments where discharges were essentially reservoir-to-reservoir are not discussed. The flow requirements at these developments (Fishing Creek and Rocky Creek/Cedar Creek) will remain the same. The SCDHEC will include all applicable portions of the CRA as conditions of the WQC.

Wylie Development Discharge into the Regulated Catawba River Reach

Based on the Instream Flow Assessment, the applicant proposed 1,100 cubic feet per second (cfs) of year-round minimum continuous flows in the Catawba River below the Wylie Development, with higher releases when the Wylie High Inflow Protocol (WHIP) is triggered. In addition to minimum continuous year-round flows, the CRA includes the following flow-related provisions for this reach:

- WHIP
- Flows Supporting Public Water Supply and Industrial Processes
- Recreational flows
- Low Inflow Protocol (LIP)
- Maintenance and Emergency Protocol (MEP)
- Flow and Water Quality Implementation Plan (FWQIP)
- Flow and Reservoir Elevation Monitoring Plan (FREMP)

The WHIP will provide higher minimum continuous flows of 1,300 cfs part of the year (spawning season) during years when inflow to Lake Wylie is above normal.

- On average this occurs at least once every four (4) years according to the SCDNR.

The FWQIP includes replacement of one existing unit with a smaller unit with aerating capability. The smaller unit will be able to deliver the proposed minimum flow continuously without pulsing, yielding a further gain in habitat quantity/quality. The FREMP has reporting provisions that have been incorporated into the approved QAPP that will ensure compliance.

- According to the SCDNR, while the proposed minimum flow does not meet the 80% habitat goal for striped bass (spawning) and shortnose sturgeon, it does significantly increase available habitat for these species/life

stages over existing conditions (411 cfs MADF), will provide habitat for a balanced, indigenous aquatic community, and is consistent with all policy recommendations presented in the State Water Plan. The SCDHEC believes the CRA flow proposal is acceptable for habitat for this reach and will include all applicable portions of the CRA as conditions of the WQC.

Great Falls/Dearborn Development Discharge into the Long and Short Bypasses

Based on the Instream Flow Assessment, the applicant proposed seasonal minimum continuous flows of 450 cfs from May 16 through February 14, and 850 cfs from February 15 through May 15 in the Long bypassed reach and a year-round minimum continuous flow of 100 cfs in the Short bypassed reach provided through a combination of notches/gates and/or bladder dam per the FWQIP. Recreational Flows, LIP, MEP, and FREMP provisions will also apply to this development. The SCDNR indicated restoring flow to these areas will significantly enhance aquatic habitat and the associated recreational uses as well as aesthetics. The SCDHEC believes the CRA flow proposal is acceptable for habitat for this reach and will include all applicable portions of the CRA as conditions of the WQC.

Wateree Development

Discharge into the Regulated Wateree River Reach

A proposal for minimum continuous flows for the Wateree River that do vary seasonally were developed using the same procedures as described above. The applicant will provide 930 cfs from June 1 to February 14, 2,400 cfs from February 15 to February 29, 2,700 cfs from March 1 to April 30, 2,400 cfs from May 1 to May 15, and 1,250 cfs from May 16 to May 31. Recreational Flows, Flows Supporting Public Water Supply and Industrial Processes, LIP, MEP, and FREMP provisions described above will also apply to this development. Additionally, the FWQIP includes replacement of one existing unit with a smaller unit with aerating capability. The smaller unit will be able to deliver the proposed minimum flow continuously without pulsing, yielding a further gain in habitat quantity/quality. As signatory to the CRA, the applicant also agreed to the goal of providing 2 (two) 10-day periods of flow stabilization during the spring in the Wateree River, and to manage flood spills in order to gradually reduce floodplain inundation in a more natural manner. The purpose of the stabilization period is to provide flows to enhance fish spawning habitat, and the purpose of the flood spill management is to extend the period of over bank flooding by gradually reducing floodplain water levels. The CRA also contains provisions for potentially amending the license to include the agreements on these issues as license articles in the future.

- According to the SCDNR, these provisions represent enhancements over existing operations (446 cfs MADF) and provide habitat to support a balanced, indigenous community of aquatic organisms.

The SCDHEC believes the CRA flow proposal is acceptable for habitat for this reach and will include all applicable portions of the CRA as conditions of the WQC.

Discharge into the Wateree Bypass/Spillway

The AR&CCL stated that the bladder dam, which the applicant proposes for flood management at the Wateree Development in the event of a 50-year license (see discussion under "Circulation Patterns and Water Movement"), should be evaluated as a means to provide minimum flows in the Wateree bypass. The relationship between project operation flows, wetted area, and physical habitat in the Wateree bypass were determined using visual assessment, depth analysis, and PHABSIM (Physical Habitat Simulation) 1-dimensional instream flow study methods. Details are provided in Aquatics 04: Instream Flow Assessment: Wateree Dam Spillway Channel Assessment. The results of the studies indicated that the average ratio of habitat in the spillway channel versus the tailrace for tentative driver species was approximately two per cent for both existing and unregulated flows.

- According to the applicant, the stakeholder team agreed not to provide flows in this reach because of the high cost to other users of providing these flows versus the benefits gained.
- The SCDNR (CRA signatory) and USFWS concurred with the minimum flow proposal for all developments that included no minimum flow for this reach.
- The NMFS accepted the instream flow recommendations in the CRA for initial implementation of a new license, but recommended inclusion of a provision to reevaluate flows should future prescriptions for fish passage be issued. However, they offered no objection to not providing a minimum flow in this area and stated that the CRA flood spill management proposal for this development has the potential to support natural ecological processes, floodplain spawning, and survival of blueback herring (a diadromous species) and other species.

- Note that this reach does receive spill flows.

The SCDHEC believes that the cost of providing flows versus the benefits gained does not warrant a minimum flow condition for this area. The SCDHEC also notes that flows in this reach will likely be enhanced due to the proposed flood spill management proposal discussed above, even though no minimum flow is proposed.

Flows for Diadromous Fish

Diadromous fish were considered during the flow analysis described above, particularly at the Wateree Development.

- According to the NMFS, CWHP dams presently block upstream migrations for diadromous species to the entire Catawba River Basin above the Wateree Dam, including over 225 miles of habitat formerly available to riverspawning species. This issue is discussed below under "Habitat Fragmentation."

The SCDNR, USFWS, and the applicant are working together toward restoration of diadromous fish in the Santee Basin through the Accord.

- According to the USFWS adequate spawning flows are a necessary element of restoration efforts.

Wylie Development Discharge into the Regulated Catawba River Reach

According to the AR&CCL, higher flows are necessary in the Catawba River below the Wylie Development to improve spawning habitat, particularly in spring and particularly for diadromous fish. In addition, they believe the SCDHEC should evaluate the applicant's claims that the 1,100 cfs minimum flow will cause a "significant" increase in habitat for aquatic species such as sturgeon and striped bass (diadromous species). Shortnose sturgeon are also discussed below under "Rare, Threatened or Endangered Species."

It will be many years before diadromous fish are restored to this reach. The WHIP proposal will provide higher minimum continuous flows of 1,300 cfs part of the year (spawning season) during years when inflow to Lake Wylie is above normal.

- On average WHIP conditions will occur at least once every four (4) years according to the SCDNR.
- The USFWS recommended the applicant provide flows for diadromous fish at this development in accordance with the WHIP as proposed.
- The NMFS concurred with all of the proposed minimum flows for initial implementation of the license, including those proposed for this development, but commented that instream flows upstream of the Wateree Development are a compromise among competing management objectives and do not adequately support protection and restoration of spawning habitat for American shad and sturgeon. (Note the commenter mentioned above did not list American shad, as the habitat goal for this species was met for this reach)

As stated previously, the SCDNR is a CRA and Accord signatory and concurred with the CRA flow proposal. In addition, the SCDNR did not support a recommendation for higher minimum flows at this development for the following reasons:

- The striped bass population in the Catawba River is a stocked population depending completely on hatchery production for support,
- There is not a sufficient quantity of spawning and nursery habitat in the Catawba River to support successful striped bass spawning even if flows were provided on a regular basis,
- No evidence was collected during relicensing studies or during the past 50 years documenting the presence of any sturgeon species in the Catawba River,
- Providing flows high enough to meet the 80% habitat goal for striped bass and sturgeon would negatively impact existing species requiring lower flows, and
- Modeling demonstrated minimum flows needed to meet the 80% habitat goal for striped bass and sturgeon could not be provided without an unacceptably high cost to one or more of the other water users.

The SCDHEC believes the CRA flow proposal is acceptable for diadromous fish for this reach and will include all applicable portions of the CRA as conditions of the WQC.

Great Falls/Dearborn Development Discharge into the Long and Short Bypasses

The AR&CCL were also critical of flows proposed for Great Falls/Dearborn bypasses, saying they would not be sufficient when diadromous fish restoration occurs at this development. They recommended specific minimally adequate flows (similar to the USFWS recommendations, except that 1,500 cfs was recommended for the whole months of March and April), saying they were based on studies included in the record before the FERC.

- The USFWS did call for flows of 1,500 cfs for diadromous fish from May 1 to May 15 at the Great Falls Long bypass (inconsistent with the CRA).
- As above, the NMFS concurred with the CRA proposal for initial implementation, but recommended higher flows for when fishway prescriptions are issued.
- Based on current science and technology, the SCDNR did not support higher flow recommendations for diadromous fish spawning and commented that restoring flows to this area as proposed would significantly enhance aquatic habitat and associated recreational uses as well as aesthetics over existing minimum flow conditions (unmeasured leakage and accretion).

The SCDHEC believes the CRA flow proposal is acceptable for this reach and higher flows for diadromous fish are not necessary or warranted. The SCDHEC will include all applicable portions of the CRA as conditions of the WQC.

Wateree Development

Discharge into the Regulated Wateree River Reach

A proposal for minimum continuous flows that vary seasonally was developed for the Wateree River. As signatory to the CRA, the applicant also agreed to the goal of providing 2 (two) 10-day periods of flow stabilization during the spring in the Wateree River, and to manage flood spills in order to gradually reduce floodplain inundation in a more natural manner. The purpose of the stabilization period is to provide flows to enhance diadromous fish spawning habitat, and the purpose of the flood spill management is to extend the period of over bank flooding by gradually reducing floodplain water levels. The CRA also contains provisions for potentially amending the license to include the agreements on these issues as license articles in the future.

- The USFWS recommended the Wateree Spring Stable Flow Periods proposal of the CRA for diadromous fish.
- The NMFS supported both of these CRA provisions and stated that the flood spill management proposal has the potential to support natural ecological processes, floodplain spawning, and survival of blueback herring (a diadromous species) and other species. However, the NMFS recommended higher flows to provide adequate instream habitat conditions for diadromous fish once fishways are prescribed at this development, giving the corresponding expected percent WUA for shad and sturgeon.
- The SCDNR stated that the CRA flow provisions for the Wateree Development represent enhancements over existing operations (446 cfs MADF) and provide habitat to support a balanced, indigenous community of aquatic organisms.

The SCDHEC believes the CRA flow proposal is acceptable because it will provide habitat to support a balanced, indigenous community of aquatic organisms in this reach. The SCDHEC will include all applicable portions of the CRA as conditions of the WQC.

Discharge into the Wateree Bypass/Spillway

The AR&CCL were also critical of the CRA for proposing no flows for this reach. They were supportive of the approach of trying to mimic natural seasonal flow patterns; but, because of concerns over potential shortnose sturgeon habitat in this reach and because of concerns with the CRA not taking an integrated approach to operations, they recommended a specific schedule of higher continuous minimum flows that vary seasonally in this reach.

As stated above under "Minimum Instream Flow Needs and Aquatic Habitat," the SCDHEC believes that the cost of providing flows versus the benefits gained does not warrant requiring a minimum flow condition for this area. The SCDHEC also notes that flows in this reach will likely be enhanced due to the proposed flood spill management proposal discussed above, even though no minimum flow is proposed. The SCDHEC will include all applicable portions of the CRA as conditions of the WQC.

Habitat Fragmentation

There are some segments of waterbodies that include both freshwater and saltwater and that constitute the habitat range for certain species of diadromous fish such as American shad (*Alosa sapidissima*), blueback herring (*Alosa aestivalis*), hickory shad (*Alosa mediocris*), striped bass (*Morone saxatilis*), American eel (*Anguilla rostrata*), Atlantic sturgeon (*Acipenser oxyrinchus*), and shortnose sturgeon (*Acipenser brevirostrum*). These segments form distinct aquatic ecosystems. Furthermore, it is necessary for these species to traverse these segments in order to maintain equilibrium in

these aquatic ecosystems, e.g. maintenance of a species in the ecosystem. If these segments cannot be traversed (if they become fragmented and impassable as a result of dams) then reproductive success of the species declines, as does the overall size of the population; and also the species' production of food (eggs, larvae, etc.) at the bottom of the food chain declines.

- According to the NMFS, CWHP dams presently block upstream migrations for diadromous species to the entire Catawba River Basin above the Wateree Dam, including over 225 miles of habitat formerly available to riverspawning species.

The inability of diadromous species to traverse these segments has an adverse impact on these aquatic ecosystems.

- According to the NMFS, the continued impacts of habitat blockage in CWHP waters severely and adversely depresses diadromous fish populations; and, depression of diadromous fish populations and migrations, particularly for alosine species (like American Shad), also adversely affects marine and estuarine food webs because these fish serve as prey for birds, marine mammals, estuarine fish, and marine fish.

Blocking of downstream migration, delays, injury and/or mortality caused by turbine entrainment at hydroelectric developments can negate benefits from upstream passage. Inadequate flow can also negate benefits. These impacts can be cumulative. Therefore, upstream fish passage, downstream fish passage and protection, and adequate instream flows are all integral to minimizing adverse impacts to the aquatic ecosystem.

- The SCDNR acknowledged that improved instream flows will enhance the existing aquatic community but will not address ecological issues associated with fragmentation.

Pursuant to R.61-101.F.6, WQC will not be issued unless the SCDHEC is assured appropriate and practical steps will be taken to minimize adverse impacts on water quality and the aquatic ecosystem.

The applicant addressed habitat fragmentation issues through the Accord, included as Appendix D of the SIP. The Accord represents a collaborative approach among utilities that operate hydroelectric projects in the Santee River Basin (including the Catawba and Wateree Rivers and CWHP reservoirs) and State (SCDNR & NCWRC) and Federal (USFWS) resource agencies to protect, enhance and restore diadromous fish.

- The USFWS stated that their preliminary prescription for fishways is consistent with the Accord and they recommended the SCDHEC include provisions consistent with and identical to the Accord and the preliminary prescription for fishways, in the WQC.

The NMFS commented that there is not yet a consensus among the resource agencies on fish passage goals, management objectives, and timing. According to them, the resource agencies and the applicant will conduct further monitoring and study of the remnant diadromous fish populations and their limiting factors on an annual basis in the future. The NMFS expects the results of these studies, implementation of instream flows, water quality improvements, and interagency coordination to provide for development of future action plans focused on restoration of diadromous fish. According to the NMFS, these action plans may include new or modified prescriptions during the license term and the NMFS requested the FERC include a condition in the license reserving the NMFS's authority to do so. The NMFS also recommended the formation of a CWHP "Fisheries Technical Committee" with annual meetings to review monitoring and evaluation studies, operating plans, and maintenance issues in order to more effectively implement resource management.

- Note that while the NMFS did not sign the Accord, that agency's preliminary recommendations filed with the FERC do not conflict with the Accord, and the NMFS is not excluded from becoming a signatory in the future. Note also that the Accord follows and supports the Santee-Copper Basin Diadromous Fish Passage Restoration Plan, which was authored by the NMFS, USFWS and SCDNR in 2001, and accepted by the FERC as a comprehensive plan. The NMFS may participate in the Accord technical committee by becoming a signatory to the Accord. The NMFS may also provide consultation to the SCDNR and/or USFWS. The FERC may also require the applicant to implement NMFS' recommendation.

Approval of the Accord by State (SCDNR & NCWRC) and Federal (USFWS) resource agencies and the applicant indicates to the SCDHEC that the terms are appropriate and practical. The SCDHEC will include all applicable portions of the Accord as conditions of the WQC. Likewise, the SCDHEC will also include all applicable portions of the CRA as conditions of the WQC.

The Accord

One commenter was concerned with the Accord, asserting that it addresses important issues outside of the regulatory process and perhaps outside of any public process. According to the commenter, the Accord specifically precludes non-governmental organizations and members of the general public from being members of the Cooperative Accord Partnership (Board), and provides no meaningful means for them to participate in future Board decisions. They were also concerned with the limits it places on governmental entities to meet statutory responsibilities.

- However, the Accord allows for the general public to attend all meetings, make oral and written statements, and consult with members. Upon consensus, the general public may be able to do more. See under the heading "General" on page 1 of the Accord - Appendix D of the SIP. While membership in the Accord is conditional, there is nothing in the Accord that would prevent any State or Federal agency from meeting any statutory responsibility.

The commenter also noted that neither the SCDHEC nor the NMFS signed the Accord.

- However, both agencies participated in the development of the Accord, and the Accord follows and supports the Santee-Cooper Basin Diadromous Fish Passage Restoration Plan, which was authored by the NMFS, USFWS and SCDNR in 2001, and accepted by the FERC as a comprehensive plan.

The SCDHEC will also include all applicable portions of the Accord as a condition of the WQC.

Rare, Threatened or Endangered Species

The AR&CCL were concerned with RTE species. Pursuant to R.61-101.F.5(c), the SCDHEC will deny WQC for a proposed project if "the proposed activity adversely impacts waters containing state or federally recognized rare, threatened, or endangered (RTE) species."

Rocky Shoals Spider Lilly

The AR&CCL recommended the SCDHEC require the applicant to develop species protection plans for the Rocky Shoals Spider Lilly (RSSL) and other RTE species for all CWHP lands. They also asked the SCDHEC to require the applicant to fund South Carolina's Habitat Enhancement Program. According to the SCDNR website, which the commenter referenced, the RSSL has a State rank of S2, or imperiled statewide because of rarity or factor(s) making it vulnerable. The RSSL's national rank is NC or Of Concern, National (unofficial- plants only).

- The SCDNR made no comments or recommendations regarding the RSSL.
- The USFWS, which submitted comments in accordance with, among others, the provisions of Section 7 of the Endangered Species Act (ESA), made no recommendations regarding any RTE species.
- The AR&CCL acknowledged that the applicant proposes to implement both of the above recommendations (The applicant will implement the AR&CCL recommendations through CRA 11.0 Species Protection Agreements and associated appendices, and CRA 14.2 Fish and Wildlife Habitat Enhancements).

While the SCDHEC will not require these measures as conditions of the WQC, they may be required by the FERC and/or will be implemented by the applicant to fulfill CRA obligations.

Shortnose Sturgeon

According to a report that the NMFS included in an attachment to their comments, shortnose sturgeons presently pass above the fishway at St. Stephen giving them access to the Wateree River below the CWHP. The NMFS is the federal agency with jurisdiction over the shortnose sturgeon. They commented that the FERC had not initiated consultation under Section 7 of the ESA at the time they filed preliminary terms and conditions, adding that reinitiating of consultation is required whenever conditions or listings change.

- An April 23, 2009 letter from the FERC to the NMFS requested concurrence on the FERC staff determination that licensing the CWHP with staff recommended measures is not likely to adversely affect the species or its habitat, indicating that they would not initiate formal consultation on this species for the CWHP.

The CRA includes a species protection plan for the shortnose sturgeon (requested by the AR&CCL), proposed to become a license article, implemented within 60 days of a new license, reviewed and updated annually, in consultation with appropriate agencies (including the NMFS), when there is any change to the status of the species or a new listing.

The NMFS preliminary terms and conditions included higher minimum flows to be implemented when upstream passage for diadromous species is prescribed at each reach, saying they were necessary to provide adequate instream habitat conditions for all diadromous fish species present in the Wateree River (not just the sturgeon).

- However, the NMFS has not issued a fishway prescription yet, and only reserved authority to do so.
- The USFWS preliminary prescription for fishways did not list sturgeon as a target species for fish passage at any CWHP development including Wateree, and only reserved authority to prescribe fishways for shortnose sturgeon.
- The Accord, to which the SCDNR, NCWRC, and USFWS are signatory, addresses sturgeon through research. While the NMFS did not sign the Accord, the NMFS preliminary terms and conditions did not appear to conflict with the Accord.

The agencies have acknowledged through their actions that it will most likely be many years before any fishway prescriptions are issued for shortnose sturgeon for the CWHP, and the research that will be undertaken through the Accord will serve to inform these. The SCDHEC will include all applicable portions of the Accord as a condition of the WQC to avoid any adverse impacts to waters containing state or federally recognized RTE species.

The NMFS also provided an expected percent WUA that would result from implementation of the higher minimum flows, giving numbers for sturgeon below the Wateree Development.

- The SCDNR also provided comments on flows and shortnose sturgeon. They noted that the tentative driver species/life stages/guilds (those most sensitive to changes in flow) from the flow analysis discussed above included sturgeon spawning and incubation life stages. Resource agencies realize that optimal flows are not necessarily required to sustain fish populations and that species life stages may noticeably vary in their habitat flow relations. The SCDNR concurred with the CRA flow proposal and did not recommend higher minimum flows for any development, including the Wateree Development, which discharges into the regulated river reach that may presently contain sturgeon. Regarding minimum flows at the Wylie Development (the most upstream development in South Carolina and the other development that discharges into a regulated river reach), they stated that assuming sturgeon are eventually restored to the Catawba River, current science supports the idea of self-sustaining sturgeon populations not requiring high flows every year (referring to the WHIP) because they are a long-lived species.

The shortnose sturgeon was considered during the flow analysis and the SCDHEC believes that the proposed minimum flows, along with other provisions of the CRA (including the WHIP, spring flow stabilization period at Wateree, flood spill management at Wateree, etc.) and Accord are adequate to avoid any adverse impacts to waters containing the shortnose sturgeon. The SCDHEC will include all applicable portions of the CRA as conditions of the WQC. Other portions of the CRA, while not being required as conditions of the WQC, may be required by the FERC and/or will be implemented by the applicant to fulfill CRA contractual obligations.

The AR&CCL also commented that the applicant proposes no flows for the Wateree spillway/bypass, adding that this area contains extensive shoals that have been identified by federal resource agencies as high priority habitat for the shortnose sturgeon.

- However, neither the NMFS nor USFWS identified this area as high priority habitat in their comments to the SCDHEC.

The AR&CCL also stated that the minimum flows needed to comply with the ESA have not been finally identified (by the NMFS). They were also concerned with the sustainability of the CRA; because, according to them, it allows the applicant to withdraw or reallocate CRA benefits if additional flows are required for RTE species.

- According to the applicant, the CRA does include provisions (refer to Sections 20, 21, 22, and 23) that describe the recourse that Parties will follow should a jurisdictional agency render a requirement that is inconsistent with the terms of the CRA.
- However, as stated above, the SCDHEC anticipates the NMFS will concur with the determination of the FERC staff, and FERC staff did not recommend minimum flows higher than those proposed by the applicant in the CRA and WQC application.

The NMFS reserved the right to revise all recommendations (based on new information or analyses the FERC will complete as required by the NEPA) and also reserved authority to make or modify fishway prescriptions (which could

address shortnose sturgeon passage). The SCDHEC reserves the right to impose additional conditions on this WQC/License to respond to unforeseen, specific problems that might arise and to take any enforcement action necessary to ensure compliance with State water quality standards.

Designated State Scenic Rivers

Pursuant to R.61-101.F.5(b), the SCDHEC will deny WQC if the proposed activity adversely impacts special or unique habitats, such as designated State Scenic Rivers, etc. The SCDNR stated that significant CWHF waters include the Catawba River, a 32-mile stretch of river flowing from Lake Wylie to Fishing Creek Reservoir, recently designated as a State Scenic River in recognition of unique ecologic and scenic characteristics. One commenter stated that proposed flows under the LIP would impact aquatic life in this portion of the Catawba River and adversely affect downstream uses and assimilative capacity.

- The SCDNR stated "The LIP will result in a fair allocation of water resources during period of low inflow, will be adequate to provide assimilative capacity, and is consistent with the State Water Plan."

The SCDHEC will include all applicable portions of the CRA as conditions of this WQC and believes that by issuing the WQC with these conditions, there will be no adverse impacts to this special habitat

National Parks

The AR&CCL stated that one of the most significant aspects of the CWHF is that it controls the flow of surface water into over 60,000 acres of floodplain below the Wateree Development, including the Congaree National Park (CNP), and that adequate flows from the Wateree Development must occur to provide the necessary inundation and to maintain the water quality in the CNP. They recommended the SCDHEC require the applicant to provide sufficient flows in the Wateree River to mimic natural flow conditions to the greatest extent possible so as not to impair water quality in the CNP.

- According to the applicant "the Wateree Development began commercial operation in 1919, and was licensed as part of the Project in 1958. Thus, the Wateree Development was regulating flows in downstream reaches of the Wateree River for 57 years prior to Congress' creation of the Congaree Swamp National Monument in 1976, and for 84 years prior to Congress' redesignation of the Swamp as the CNP in 2003. Since the Wateree Development was in existence and regulating flows long before the National Monument and CNP were established, the resource values which formed the basis for their creation were those in existence with the Wateree Development in operation. Operation under the new license, anticipated to incorporate terms of the CRA would enhance resource values downstream of the Wateree Development."

One CRA provision in particular, 4.9, supports inundation to the floodplain below the Wateree Development. Other portions of the CRA address minimum flows and water quality, etc. at the Wateree Development.

- The SCDNR stated that 4.9 of the CRA is an enhancement over current operations and is fully consistent with the State Water Plan.
- The NMFS also supported this section.

The SCDHEC will include the entire Resource Agreements 4.0 Habitat Flow Agreements of the CRA, as well as the associated appendices as conditions of the WQC and believes that by issuing the WQC with these conditions, there will be no adverse impacts to this unique habitat.

Compensatory Mitigation

The SCDHEC received several comments pertaining to compensatory mitigation. For example, the AR&CCL recommended the SCDHEC reject the applicant's proposal to mitigate project impacts on flow-dependent resources with out-of-kind, land protection at various places along the Catawba and Wateree Rivers that have no geographic nexus to the project, and money to the resource agencies to conduct studies

The SCDHEC will not require compensatory mitigation because the CRA will result in enhancement over existing conditions, even without mitigation. Any shortfall identified in the WQC application and by the CRA/stakeholders/commenters is only theoretical relative to instream flow/aquatic habitat goals and does not represent any real loss of functions and services over existing conditions. As a result of this conclusion, most of the other objections raised by the AR&CCL become moot points and are not discussed.

Sedimentation

Two commenters were concerned with sedimentation, particularly in the area of Crowders Creek. One commenter recommended the local, county, and federal government, and perhaps the applicant, undertake an ongoing project to clean rivers and creeks of silt deposits, and enlarge and expand the reservoirs through dredging.

- Sedimentation is not a result of operations of the CWHP; rather, it is a result of natural processes and nonpoint source pollution. See also "Shoreline Management" below.

Another commenter stated that land protection would be appropriate to mitigate for certain water quality impacts such as nonpoint source runoff and erosion, provided it was provided in the affected areas.

- According to the applicant, the CRA contains the following features that should directly and indirectly reduce future sedimentation impacts:
 - \$6 million (CRA 14.5.2) that may be used by South Carolina resource agencies (\$5 million has been used to-date) to purchase land in the Catawba-Wateree River Basin for public recreation, gamelands and/or compatible permanent conservation (CRA 14.6.2.3 - plus another \$1.5 million in the event of a 50-year New License term).
 - The Water Management Group (CRA 5.0 & Appendix N) is expected to contribute more than \$500,000 per year into a fund that is to be used for water quantity and quality improvement projects in North Carolina and South Carolina, which can include sediment reduction initiatives.
 - A mitigation package proposed for South Carolina (CRA 4.6) that will protect miles of stream bank (plus an additional 4.7 acres of land adjoining Lake Wateree in the event of a 50-year New License - CRA 14.6.2) with a 100-ft wide buffer.
 - Land donations to South Carolina (CRA 4.6, 14.5, & 14.6).

Nonpoint source runoff is not a result of operation of the CWHP. While the SCDHEC will not require some of the above measures as conditions of the WQC, they may be required by the FERC and/or will be implemented by the applicant to fulfill CRA obligations.

Shoreline Management

Two commenters recommended the applicant require protection of shoreline through buffers, for example in land sales or in exchange for docks. The Shoreline Management Agreements of the CRA address shoreline protection appropriately and support development and enforcement of protection mechanisms upland of the project boundary, such as buffer ordinances. These agreements include a provision for a Memorandum of Understanding (MOU) with Municipalities, Counties and State stakeholders including the SCDHEC to facilitate coordination of overlapping efforts related to shoreline management. Revisions to the previous Shoreline Management Plans and Shoreline Management Guidelines voluntarily implemented in 2006 have generally resulted in more restrictions in use and more protection of established and emerging resources. The MOU will enhance enforcement of the SMP as well as related State laws and County ordinances (e.g. buffer) by facilitating sharing of data relevant to the SMP and State's and Counties' planning and enforcement needs, coordinating permit review, and clearly delineating scopes of authority. The above agreements are also supportive of public participation. The FERC process allows additional opportunities for public participation. In addition, the Habitat Enhancement Program and other provisions of CRA 14.0 also address and support land protection upland of the project boundary, including tributaries to project waters. While the SCDHEC will not require these as conditions of the WQC, they may be required by the FERC and/or will be implemented by the applicant to fulfill CRA obligations.

Circulation Patterns and Water Movement

The SCDNR commented that the WQC would address many water resource issues including flood management. The SCDNR also provided some background on CWHP waters, stating: "Frequent flooding of the Wateree River below the Wateree dam maintains an active floodplain most of which is protected from development by the Clean Water Act and other regulatory mechanisms, and in some cases, conservation easements. This floodplain is a vital acreage for resident and migratory avian species to use for foraging, nesting, migrating and wintering habitats." When evaluating an application for WQC, and in assessing water quality impacts, the SCDHEC must also address and consider water quality impacts of the project, including the effect on circulation patterns and water movement (pursuant to R.61-101.F.3(c)(3)).

The AR&CCL made several comments and recommendations concerning flood management issues. At the Wateree Development, they recommended the applicant:

1. Construct and operate a bladder dam of appropriate size to alleviate flooding of property and septic fields around the lake.

According to the applicant, no reports or data were brought forward documenting water quality damage due to occasional high water events at Lake Wateree since the relicensing process began in 2003. The applicant stated that they contacted local septic tank service companies by phone in 2005 but were not advised of any repair calls for septic systems following high water events. The parties most immediately affected - The Lake Wateree Association and The Wateree Homeowners Association, signed the CRA. The CRA includes a provision requiring the applicant to install 10,000 cfs of additional water release capacity at Wateree Dam in the event the FERC grants the applicant a new license for a term of 50 years.

2. Mitigate for lost stream flows at the Highway 378 Bridge in sufficient quantity to restore dewatered wetlands adjacent to the bridge.

While this does represent an opportunity for a restoration project, the remediation of this past impact by another party is not the responsibility of the applicant and the SCDHEC will not require this as a condition of the WQC.

3. Release flows from the Wateree Development sufficient to ensure the floodplain is adequately inundated. The commenter was also very critical of the agreement in the CRA (4.9.2) related to a possible new license amendment concerning a Wateree floodplain inundation protocol.

- However, the SCDNR concurred with the provisions described in the CRA to manage flood spilling and stated that they are enhancements over current operations.
- The NMFS also supported these proposed measures and stated that this action has the potential to support natural ecological processes, floodplain spawning, and survival of blueback herring and other species.

The SCDHEC will include all applicable sections of the CRA as conditions of the WQC.

Compliance and Enforcement of WQC Conditions

Mr. Foote recommended the applicant be required by license to enforce SMPs. Ms. Williams expressed concern regarding proper enforcement of SMPs and asked the SCDHEC to require annual contributions from the applicant to fund an organization to carry out environmental stewardship and, for example, train people to patrol shorelines. According to the applicant, "compliance with all aspects of its FERC licenses is among Duke's highest priorities. Allegations of noncompliance should be communicated to Duke and to the FERC along with information sufficient to describe any alleged noncompliance in detail. Duke takes its FERC license compliance very seriously and dedicates trained professional staff to fulfill these responsibilities."

The SCDHEC WQC conditions will become a part of the FERC license and the FERC will ultimately be responsible for ensuring compliance with license terms and conditions, including those associated with the WQC. State and federal agencies, including the SCDHEC, play an important role in this process. In some circumstances, review and comment by the State is required by the FERC. The SCDHEC has evidence of the applicant cooperating in and initiating investigations of incidents of noncompliance, including taking appropriate enforcement action. Furthermore, the SCDHEC does not believe it is necessary to require what the commenters are requesting in the WQC.

Adaptive Management of the CWWP

The AR&CCL recommended the SCDHEC include language in the WQC to reopen the certification during the term of the license if flow needs change, such as when fish prescriptions are issued or modified and diadromous fish are restored to certain reaches. They also recommended the SCDHEC establish a 5-year review of the WQC in coordination with NPDES permits issued in the basin.

The issue of flows required for diadromous fish has been fully addressed and is discussed above under the heading "Flows for Diadromous Fish." As stated in that section, the SCDHEC will include all applicable sections of the CRA as conditions of the WQC.

As stated above under "Alternatives," the applicant's proposal is the result of a multi-year, bi-State, stakeholder process that involved numerous iterations and that delicately balanced the needs of multiple categories of sometimes competing

users for the finite resource of CWHP waters. The SCDHEC has reasonable assurance that the water quality standards of Regulation 61-68 will not be contravened as a result of the proposed work. The SCDHEC reserves the right to impose additional conditions on this WQC/License to respond to unforeseen, specific problems that might arise and to take any enforcement action necessary to ensure compliance with State water quality standards.

Conclusions on Water Quality Impacts and Classified Uses

There will be no adverse water quality impacts from the proposed project provided the applicant adheres to the conditions in Section VIII of this staff assessment. The SCDHEC has reasonable assurance that the water quality standards of Regulation 61-68 will not be contravened as a result of the proposed work. The proposed activity will result in no significant degradation to the aquatic ecosystem, will enhance existing and classified uses of the Catawba and Wateree Rivers and reservoirs, and is in compliance with the above regulations provided the applicant adheres to the conditions in Section VIII of this staff assessment. The above assessment also ensures that the proper sequencing of avoidance, minimization, and appropriate compensation for unavoidable impacts has been demonstrated. Information about the technical aspects of this application is available from Rusty Wenerick, the project manager, by calling 803-898-4266 or by e-mailing weneriwr@dhec.sc.gov.

The SCDHEC reserves the right to impose additional conditions on this WQC/License to respond to unforeseen, specific problems that might arise and to take any enforcement action necessary to ensure compliance with Statewater quality standards.

VII. Staff Recommendation

Issue 401 Water Quality Certification with conditions.

VIII. Conditions to be Placed on Water Quality Certification When Issued

- 1) Duke Energy Carolinas, LLC (applicant) must operate the Catawba-Wateree Hydroelectric Project (CWHP) in accordance with portions of the Comprehensive Relicensing Agreement for the CWHP, FERC Project No. 2232; December 22, 2006; Signature Copy; Revision 1 (CRA). The following portions of the CRA as applicable to South Carolina Developments of the CWHP are hereby incorporated into this 401 Water Quality Certification (WQC) by reference:
 - a) CRA - Resource Agreements
 - i) 2.0 Reservoir Elevation Agreements
 - ii) 3.0 Recreation Flow Agreements
 - iii) 4.0 Habitat Flow Agreements
 - iv) 6.0 Low Inflow Protocol (LIP) Agreements
 - v) 7.0 Maintenance and Emergency Protocol (MEP) Agreements
 - vi) 13.0 Water Quality Agreements
 - vii) 15.0 Gaging and Monitoring Agreements (15.1-15.5 only, 15.6 Groundwater Monitors is excluded)
 - b) CRA - Appendices:
 - i) A: Proposed License Articles
 - (1) A-1.0 Reservoir Elevation Articles
 - (a) Reservoir Elevations
 - (b) Spring Reservoir Level Stabilization Program
 - (2) A-2.0 Flow Articles
 - (a) Recreational Flows
 - (b) Minimum Flows
 - (c) Wylie High Inflow Protocol (WHIP)
 - (d) Flows Supporting Public Water Supply and Industrial Processes
 - (e) Flow and Water Quality Implementation Plan (FWQIP)
 - (3) A-3.0 LIP Article

- (a) LIP for the Catwaba-Wateree Project
 - (4) A-4.0 MEP Article
 - (a) MEP for the Catwaba-Wateree Project
 - (5) A-5.0 Water Quality Article
 - (a) Water Quality Monitoring Plan (WQMP)
 - (6) A-6.0 Gaging and Monitoring Article
 - (a) Flow and Reservoir Elevation Monitoring
 - (b) Funding for USGS Streamflow Gages
 - ii) C: LIP for the Catwaba-Wateree Project
 - iii) D: MEP for the Catwaba-Wateree Project
 - iv) F: WQMP
 - v) L: FWQIP
- 2) The applicant must follow the Quality Assurance Project Plan; Revision #0; January 6, 2009 (QAPP) while the CWHF FERC license is valid. If changes are proposed to the QAPP, they must be submitted to the SCDHEC for review and written approval before being implemented.
- 3) The applicant must provide for upstream fish passage and downstream fish passage and protection at the CWHF in South Carolina consistent with the "Santee River Basin Accord for Diadromous Fish Protection, Restoration, and Enhancement" (Accord), unless it conflicts with other requirements of State or Federal laws and regulations.
- 4) The applicant must take all necessary measures during CWHF facility operation and maintenance to prevent fuel, oil, tar, trash, debris and other pollutants from entering the adjacent waters or wetlands.

Prepared by: _____

Will R. Smith

Date: _____

5/14/09

Reviewed &
Approved by: _____

Chuck Hight

Date: _____

5/14/09

NEXSEN|PRUET

James W. Potter
Member
Admitted in SC, AL

September 4, 2009

Jana E. Shealy, Clerk
Administrative Law Court
Edgar Brown Building
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

Re: *Duke Energy Carolinas, LLC v. South Carolina Department of
Health and Environmental Control*

Dear Ms. Shealy:

Pursuant to the Rules of Procedure for the Administrative Law Court, please find enclosed the original and one copy of Notice of Request for Contested Case Hearing in the above-referenced matter along with a check in the amount of \$250.00 for the filing fee. Please return a clocked-in copy to us via our courier.

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

Very truly yours,

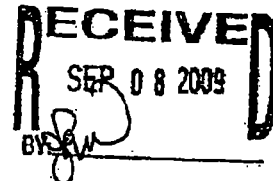
James W. Potter

JWP/fwt

NPCOL1:1774129.1-LT-(JWP) 700263-00291

1230 Main Street
Suite 700 (29201)
PO Drawer 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803.253.8213
F 803.253.8277
E JPotter@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law



STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Duke Energy Carolinas, LLC
(Your name)

South Carolina Department of

Health and Environmental Control
(The name of the agency you are appealing)

**NOTICE OF REQUEST FOR CONTESTED
CASE HEARING**

DATE: _____

DOCKET NO. _____-ALJ-_____
(to be assigned by ALC)

Notice is hereby given that **Duke Energy Carolinas, LLC** does hereby appeal the decision issued by the above named agency and received on August 10, 2009, a copy of which is attached.

On June 5, 2008, Duke Energy Carolinas, LLC ("Duke") submitted an application for a Water Quality Certification ("WQC") pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341, to the South Carolina Department of Health and Environmental Control ("SCDHEC"). This submittal was required as part of a relicensing application with the Federal Energy Regulatory Commission for the existing hydropower facilities on the Catawba and Wateree rivers. On May 15, 2009 the SCDHEC Staff issued a proposed decision to grant the WQC. This final Staff decision would only become a final agency decision fifteen days after notice of the decision had been filed with the SCDHEC, unless during that fifteen day period the applicant, permittee, licensee, or any affected person filed a request for Final Review. On May 29, 2009, the South Carolina Coastal Conservation League and American Rivers, as "affected persons," exercised their right to appeal and jointly and timely requested that the SCDHEC Board conduct a Final Review of the SCDHEC's Staff decision regarding the WQC for Duke's Project. On July 9, 2009 the SCDHEC Board held a Final Review meeting. On August 6, 2009 the SCDHEC Board issued its FINAL AGENCY DECISION denying the WQC for which Duke applied on June 5, 2008.

The SCDHEC Board's decision is arbitrary and capricious, is not supported by the record and the evidence, and is otherwise contrary to law. Duke's application for water quality certification fully meets all water quality certification criteria set forth in S.C. Code Regs. 61--101, and Duke is entitled to issuance of the water quality certification proposed by the SCDHEC Staff. The SCDHEC Board's finding ignored the record of evidence demonstrating that Duke's proposed discharge would meet water quality standards for the river as initially validated by SCDHEC staff's proposed decision of May 15, 2009, which included an evaluation of increased flow releases for shortnose sturgeon as requested by American Rivers. The DHEC Board did not adopt the increased flows requested by American Rivers and South Carolina Coastal Conservation League, but denied the certification at least in part because of the South Carolina Attorney General's irrelevant claims that approving the certification "will be jeopardizing that case and economic, cultural, social, environmental future and growth of this State. It would be a drastic mistake to do so." (Reference enclosed transcript page 19, lines 20-24). Jeopardizing the Attorney General's Supreme Court case against North Carolina is not a lawful basis to deny the water quality certification.

For the reasons set forth herein, Duke requests a contested case review of the SCDHEC decision and requests the WQC be issued in the form that the SCDHEC staff drafted.

Enclosed is a ☒ check _____ money order _____ cash in the amount of \$ \$250 for the applicable filing fee in this matter.

Duke Energy Carolinas, LLC
Print your name
526 South Church Street - Legal Affairs - EC03T
Charlotte, North Carolina 28202
Mailing Address
704-382-8111
Telephone Number

Sign your name (Attorney)

City, State, Zip Code

County of residence or of permit/license at issue

Are you represented by an attorney? ☒ Yes ☐ No

James W. Potter

Nexsen Pruet, LLC

Attorney's name

P.O. Drawer 7426

Mailing Address

Columbia, SC 29201

City, State, Zip code

(803) 771-8900

Telephone Number

Are you represented by a CPA? ☐ Yes ☒ No

CPA's name

Mailing Address

City, State Zip Code

Telephone Number

CERTIFICATE OF SERVICE

I hereby certify that I, Felicia W. Turner, on the 4th day of September, 2009, in Columbia, South Carolina, served a copy of the foregoing Request for Contested Case Hearing on all parties to this matter by depositing the same in the United States Mail, postage paid, and addressed as follows:

Name of person/Agency served: Lisa Lucas Longshore

South Carolina Department of Health and Environmental Control

Address: 2600 Bull Street

City, State, Zip Code: Columbia, South Carolina 29201

Felicia W. Turner

Print your name

Felicia W. Turner

Sign your name

Julie Youngman, Esquire
Southern Environmental Law Center
200 West Franklin Street, Suite 330
Chapel Hill, NC 27516-2559

Christopher K. DeScherer, Esquire
Southern Environmental Law Center
38 Broad Street, Suite 200
Charleston, SC 29401

ADMINISTRATIVE LAW COURT

STATE OF SOUTH CAROLINA

Duke Energy Carolinas, LLC,

Petitioner,

vs.

South Carolina Department of Health and
Environmental Control,

Respondent.

Docket No.: 09-ALJ-07-0377-CC

**ORDER GRANTING INTERVENTION
TO AMERICAN RIVERS AND SOUTH
CAROLINA COASTAL
CONSERVATION LEAGUE**

Southern Environmental Law Center, representing American Rivers and South Carolina Coastal Conservation League, filed a Motion to Intervene on October 16, 2009. Petitioner responded to the Motion on October 22, 2009, and again on October 30, 2009. A telephone conference call was held on November 2, 2009 on this matter.

After hearing from all parties and the proposed Intervenors, the undersigned hereby orders that:

1. American Rivers and South Carolina Coastal Conservation League are allowed to intervene pursuant to Rule 20 of the Administrative Law Court. As a condition of Intervention, these two organizations shall be treated as one party for purposes of discovery and submitting pleadings and shall be represented by the same legal counsel pursuant to Rule 20 D.
2. The Intervenors may participate in the November 5, 2009 mediation and shall prepare a Pre-Hearing Statement within thirty (30) days of this Order responding to Judge McLeod's September 24, 2009 request for a Pre-Hearing Statement.

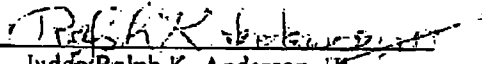
FILED

NOV 09 2009

SC ADMIN. LAW COURT

3. The Intervenor is subject to the October 19, 2009 Scheduling Order entered in this case.

AND IT IS SO ORDERED


Judge Ralph K. Anderson, III
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy herof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 9th day of November, 2009
By: Wesley M. Scott
Judicial Law Clerk

ADMINISTRATIVE LAW COURT

STATE OF SOUTH CAROLINA

Duke Energy Carolinas, LLC,

Petitioner,

vs.

South Carolina Department of Health and
Environmental Control,

Respondent.

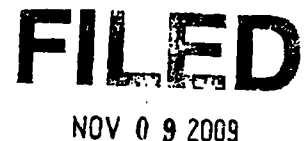
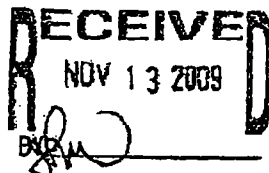
Docket No.: 09-ALJ-07-0377-CC

**ORDER GRANTING LIMITED
INTERVENTION TO THE ATTORNEY
GENERAL OF THE STATE OF SOUTH
CAROLINA**

On October 30, 2009 the Attorney General sought to Intervene in this case asserting that this contested case could adversely impact the pending litigation between the States of South Carolina and North Carolina in a lawsuit in the original jurisdiction of the United States Supreme Court. The Attorney General, representing the State of South Carolina as parens patriae in the Supreme Court litigation seeks to intervene in this case to protect the State's interests. A telephone conference call was held on November 2, 2009 in which Petitioner objected on several grounds to the Attorney General's Intervention.

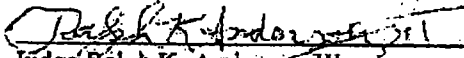
After hearing from all parties and the proposed Intervenor, I find the following:

1. The South Carolina Department of Health and Environmental Control, which is already a party to this contested case, represents the state in administering the Section 401 certification program.
2. The Attorney General, in order to protect the State's interests in its ongoing interstate litigation, may participate in this proceeding as a party to that extent.



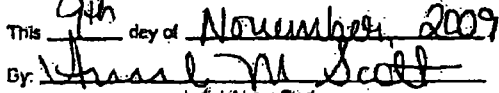
3. Pursuant to Rule 20 of the Administrative Law Court, I grant the Attorney General limited Intervention as a party in this matter as specified above. The Attorney General may participate in the November 5, 2009 mediation hearing as a party and shall file within thirty (30) days of this Order a Pre-Hearing Statement responding to the September 24, 2009 Request for a Pre-Hearing Statement issued by Judge McLeod.
4. The Attorney General is subject to the existing October 19, 2009 Scheduling Order in this case. The Attorney General cannot undertake discovery but may participate in depositions noticed in this case by other parties. As a party, the Attorney General is entitled to receive all discovery.

AND IT IS SO ORDERED


Judge Ralph K. Anderson, III
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 9th day of November, 2009
By: 
Judicial Law Clerk

NEXSEN|PRUET

James W. Potter
Member
Admitted in SC, AL

January 21, 2010

The Honorable Ralph K. Anderson, III
Chief Administrative Law Judge
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: *Duke Energy Carolinas, LLC v. South Carolina Department of
Health and Environmental Control – Docket No: 09-ALL-07-0377-
CC*

Dear Judge Anderson:

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

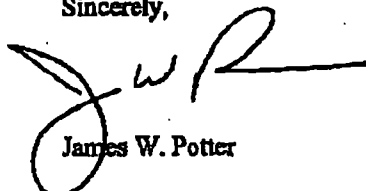
Myrtle Beach

Raleigh

Please find enclosed for filing a Motion for Summary Judgment by Petitioner along with a check for \$25.00. The attached affidavit is electronically signed; an original affidavit will be filed with the Court shortly.

All parties have been served with this Motion. Please let me know if you have any questions on this filing.

Sincerely,


James W. Potter

JWP/fwt

Enclosure

1200 Main Street
Suite 700 (29201)
PO Drawer 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803.253.1213
F 803.253.1277
E JPotter@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

JAN 25 2010

STATE OF SOUTH CAROLINA
BEFORE THE ADMINISTRATIVE LAW COURT

Duke Energy Carolinas, LLC

Petitioner,

v.

South Carolina Department of
Health and Environmental Control,

Respondent,

South Carolina Attorney General,
American Rivers, and the South
Carolina Coastal Conservation League

Respondent-Intervenors.

Docket No. 09-ALJ-07-0377-CC

**PETITIONER'S MOTION FOR
SUMMARY JUDGMENT AND
MOTION FOR DECLARATORY
JUDGMENT**

TO: STEPHEN P. HIGHTOWER, ESQUIRE, COUNSEL FOR SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; CHRISTOPHER K. DESCHERER, ESQUIRE, COUNSEL FOR SOUTH CAROLINA COASTAL CONSERVATION LEAGUE AND AMERICAN RIVERS; AND CHILDS CANTEY, ESQUIRE, COUNSEL FOR HENRY McMASTER, SOUTH CAROLINA ATTORNEY GENERAL.

You will please take notice Petitioner Duke Energy Carolinas, LLC ("Duke"), in accordance with Rules 19 and 68 of the Rules of Procedure for the Administrative Law Court ("RPALC") and Rule 56 of the South Carolina Rules of Civil Procedure ("SCRCP"), respectfully moves this Court to enter an order granting summary judgment in favor of Duke for the reasons stated in Petitioner's Memorandum of Law in Support of this Motion for Summary Judgment and Motion for Declaratory Judgment ("Memorandum"), which is attached hereto and incorporated by reference.

As explained in the attached Petitioner's Memorandum of Law in Support of its Motion for Summary Judgment and Motion for Declaratory Judgment ("Memorandum"),

FILED

JAN 21 2010

the May 15, 2009 Notice of Department Decision – Water Quality Certification and the August 6, 2009 Final Agency Decision by the Board of Health and Environmental Control cannot be sustained as a matter of state law, and, therefore, Petitioner also moves this Court for an order declaring the State waived its right to issue or deny Duke's application for a Water Quality Certification for the new license for the Catawba-Wateree Hydroelectric Project ("Project").

This Motion is based on the administrative record in this action, responses to discovery requests, the affidavit of E. Mark Oakley, and such other materials and authorities as may be submitted hereafter. For the reasons stated herein and further set forth in the Memorandum, an order granting summary judgment should be issued in favor of Duke declaring the State has waived its right to issue or deny Duke's application for a Water Quality Certification for the new license for the Project.

Respectfully submitted,



James W. Potter
W. Thomas Lavender, Jr.
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
Attorney for Petitioner
Duke Energy Carolinas, LLC

Nash E. Long, III
(Admitted pro hac vice)
Winston & Strawn LLP
214 North Tryon Street
Charlotte, North Carolina 28202
(704) 350-7700
(704) 350-7800 (fax)

Attorney's for Petitioner
Duke Energy Carolinas, LLC

January 21, 2010
Columbia, South Carolina

STATE OF SOUTH CAROLINA
BEFORE THE ADMINISTRATIVE LAW COURT

Duke Energy Carolinas, LLC)
)
Petitioner,)
)
v.)
)
South Carolina Department of)
Health and Environmental Control,)
)
Respondent,)
)
South Carolina Attorney General,)
American Rivers, and the South)
Carolina Coastal Conservation League)
)
Respondent-Intervenors.)
_____)

Docket No. 09-ALJ-07-0377-CC

**PETITIONER'S MOTION FOR
SUMMARY JUDGMENT AND
MOTION FOR DECLARATORY
JUDGMENT**

RECEIVED

JAN 25 2010

**DHEC
OFFICE OF GENERAL COUNSEL**

TO: STEPHEN P. HIGHTOWER, ESQUIRE, COUNSEL FOR SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; CHRISTOPHER K. DESCHERER, ESQUIRE, COUNSEL FOR SOUTH CAROLINA COASTAL CONSERVATION LEAGUE AND AMERICAN RIVERS; AND CHILDS CANTEY, ESQUIRE, COUNSEL FOR HENRY MCMASTER, SOUTH CAROLINA ATTORNEY GENERAL

You will please take notice Petitioner Duke Energy Carolinas, LLC ("Duke"), in accordance with Rules 19 and 68 of the Rules of Procedure for the Administrative Law Court ("RPALC") and Rule 56 of the South Carolina Rules of Civil Procedure ("SCRCP"), respectfully moves this Court to enter an order granting summary judgment in favor of Duke for the reasons stated in Petitioner's Memorandum of Law in Support of this Motion for Summary Judgment and Motion for Declaratory Judgment ("Memorandum"), which is attached hereto and incorporated by reference.

As explained in the attached Petitioner's Memorandum of Law in Support of its Motion for Summary Judgment and Motion for Declaratory Judgment ("Memorandum"),

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the May 15, 2009 Notice of Department Decision – Water Quality Certification and the August 6, 2009 Final Agency Decision by the Board of Health and Environmental Control cannot be sustained as a matter of state law, and, therefore, Petitioner also moves this Court for an order declaring the State waived its right to issue or deny Duke's application for a Water Quality Certification for the new license for the Catawba-Wateree Hydroelectric Project ("Project").

This Motion is based on the administrative record in this action, responses to discovery requests, the affidavit of E. Mark Oakley, and such other materials and authorities as may be submitted hereafter. For the reasons stated herein and further set forth in the Memorandum, an order granting summary judgment should be issued in favor of Duke declaring the State has waived its right to issue or deny Duke's application for a Water Quality Certification for the new license for the Project.

Respectfully submitted,



James W. Potter
W. Thomas Lavender, Jr.
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
Attorney for Petitioner
Duke Energy Carolinas, LLC

Nash E. Long, III
(Admitted pro hac vice)
Winston & Strawn LLP
214 North Tryon Street
Charlotte, North Carolina 28202
(704) 350-7700
(704) 350-7800 (fax)

Attorney's for Petitioner
Duke Energy Carolinas, LLC

January 21, 2010
Columbia, South Carolina

STATE OF SOUTH CAROLINA
BEFORE THE ADMINISTRATIVE LAW COURT

Duke Energy Carolinas, LLC

Petitioner,

v.

South Carolina Department of
Health and Environmental Control,

Respondent,

South Carolina Attorney General,
American Rivers, and the South
Carolina Coastal Conservation League

Respondent-Intervenors.

Docket No. 09-ALJ-07-0377-CC

**PETITIONER'S MEMORANDUM
OF LAW IN SUPPORT OF
ITS MOTION FOR
SUMMARY JUDGMENT AND
MOTION FOR DECLARATORY
JUDGMENT**

Petitioner Duke Energy Carolinas, LLC ("Duke"), respectfully submits this Memorandum of Law in Support of Its Motion for Summary Judgment and Motion for Declaratory Judgment filed with the Administrative Law Court (ALC or "Court") pursuant to Rule 19 of the Rules of Procedure for the Administrative Law Court ("RPALC"). There are no material facts in dispute and Duke's claims rest on a plain reading of the applicable state regulation and South Carolina precedent. Accordingly, Summary Judgment in favor of Duke and a Declaratory Judgment are appropriate in this case.

The South Carolina Department of Health and Environmental Control ("DHEC" or "Department") exceeded its statutory authority and committed an error of law when it issued the "Notice of Department Decision – Water Quality Determination" on May 15, 2009. Under operation of South Carolina law, the State waived its opportunity to issue

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or deny Duke's application for water quality certification when the Department failed to issue a proposed decision to issue or deny the application within 180 days of receipt of the application.

Additionally, the Board of Health and Environmental Control ("Board") exceeded its statutory authority and committed an error of law when it attempted to deny Duke's application for water quality certification during a review of the May 15, 2009, Notice of Department Decision because, under State law, the State had already waived its right to issue or deny Duke's application for water quality certification. The Board's decision also was the result of unlawful procedure because it reviewed and denied an improperly issued Department staff decision on certification.

The Court has the authority to decide contested cases on motions for summary judgment pursuant to Rule 56, South Carolina Rules of Civil Procedure ("SCRCP") and Rule 68, RPALC (applying the SCRCP to resolve questions not specifically addressed by the ALC Rules) when there is no genuine issue as to any material fact as determined in the light most favorable to the nonmoving party. See *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991), quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323, 106 S. Ct. 2548, 2552 (1986). "Summary judgment is particularly appropriate where claims rest on issues of legal interpretation and application of appropriate legal standards." *Johnson v. Collins Entertainment Co.*, 88 F. Supp. 2d 499, 504 (D.S.C. 1999) (citations omitted). The Court also has the authority under S.C. Code Ann. § 1-23-360 to issue a declaratory judgment in order to give effect to an Order granting Summary Judgment.

LEGAL FRAMEWORK FOR WATER QUALITY CERTIFICATIONS

Section 401 of the federal Clean Water Act (CWA), 33 U.S.C. §1341 ("CWA Section 401") requires an applicant for a Federal license for any activity which may result in any discharge into a navigable water to provide the federal licensing authority a certification from the state in which the discharge originates confirming the discharge will comply with applicable provisions of the CWA. This type of certification is known as a Water Quality Certification (WQC). A WQC is not a permit and does not authorize the applicant to discharge to the navigable water; it only gives the State the opportunity to provide input and propose license conditions to the federal licensing agency during the licensing process. The final federal licensing decision is made by the federal agency.

States are required to establish procedures for public notice of all applications for certification and procedures for public hearings to the extent the state deems hearings appropriate. CWA Section 401. CWA Section 401 also requires states to act on a request for certification within a reasonable period of time after receipt of such request, or the certification requirements of CWA Section 401 shall be waived. *Id.* The federal agency may issue the federal license if the state either: (1) issues the certification; or (2) waives its right to issue or deny the certification. *Id.* The federal agency may not grant a license if certification has been denied by the state. *Id.* Section 401 states:

If the State . . . fails or refuses to act on a request for 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. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State . . .

CWA, Section 401(a)(1).

To meet the state's obligations under Section 401, the Department promulgated a regulation entitled *Water Quality Certification*, 25A S.C. Code Ann. Regs. 61-101 ("R.61-101") pursuant to its authority under granted to the Department by the South Carolina Pollution Control Act.¹ R.61-101 establishes procedures and policies for implementing State water quality certification requirements of Section 401. R.61-101.A.1. The General Assembly approved R.61-101 as a comprehensive regulatory scheme to insure the State of South Carolina meets its obligation to issue, deny or waive certification required under Section 401. S.C. Reg., Vol. 14, Issue 3, p. 143 (February 23, 1990).

In adopting R.61-101, the General Assembly established the reasonable period of time for the State of South Carolina to issue a proposed decision on a water quality certification application to be within 180 days of acceptance or an application:

6. The Department is required by Federal law to issue, deny, or waive certification for Federal licenses or permits within one (1) year of acceptance of a completed application unless processing of the application is suspended. If 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. Unless otherwise suspended or specified in this regulation, the Department shall issue a proposed decision on all applications within 180 days of acceptance or an application.

R.61-101.A.6. (emphasis added).

¹ The S.C. Pollution Control Act ("PCA") is at S.C. Code Ann. §§ 48-1-10 thru 48-1-350. The PCA requires the Department to promulgate regulations governing the procedures of the Department with respect to meetings, hearings, filing of reports, the issuance of permits, and all other matters relating to procedure. S.C. Code Ann. § 48-1-30.

FACTUAL BACKGROUND

Duke operates the Catawba-Wateree Hydroelectric Project ("Project") pursuant to a license issued by the Federal Power Commission (now the Federal Energy Regulatory Commission (FERC)) in 1958. Affidavit of E. Mark Oakley, ("Aff.") ¶ 4-5. **Exhibit 1.** On August 29, 2006, Duke submitted an Application for New License to FERC in order to continue operating the Project. Aff. ¶5.

On April 7, 2008, FERC issued a "Ready for Environmental Analysis" (REA) notice on Duke's application for a new license for the Project, which started the clock running for Duke to provide FERC with a WQC from the State of South Carolina or evidence that it had applied for a WQC. Aff. ¶7. Duke submitted its application for a WQC to DHEC on June 5, 2008. Aff. ¶8.

DHEC did not issue any decision related to Duke's WQC application until May 15, 2009, when DHEC issued a document titled "Notice of Department Decision – Water Quality Certification" in which DHEC stated "the Department proposes to certify the project with conditions" Public Notice #DHEC 08-C-001, May 15, 2009, p.1. ("Notice"); Aff. ¶13. On May 29, 2009, the South Carolina Coastal Conservation League and American Rivers filed a Request for Final Review of the Notice with the Board. The Board held a Final Review Conference on July 9, 2009 and issued a document titled "Final Agency Decision" on August 6, 2009 denying the WQC. On September 4, 2009, Duke filed its request for a contested case hearing of the Board's decision.

On December 15, 2009, Duke served Requests to Admit ("Admit") on the Department's attorney pursuant to Rule 21, RPALC and Rule 36, SCRCP. **Exhibit 2.** The Department did not serve written answers or objections to the Requests to Admit

within the time requirements established in Rules 36(a) and 6 of the SCRCP.² Accordingly, by application of Rule 36(a), SCRCP, the Department admits the following:³

a. Respondent did not request additional information within ten (10) days of receipt of Petitioner's application and the application is deemed complete for processing under SC Regulation 61-101 C.2.

b. The Respondent never notified Petitioner that the processing of Petitioner's application was suspended pursuant to SC Regulation 61-101 C.4.

c. Respondent's issuance of a proposed decision on Petitioner's Section 401 water quality application took greater than 180 days of acceptance of the application. SC Regulation 61-101 A.6.

d. Issuance or denial of Petitioner's Section 401 water quality application was waived by operation of SC Regulation 61-101 A.6 and SCDOT v. SCDHEC, 06ALJ-07-0804-CC (April 29, 2008).

e. Nothing in SC Regulation 61-101 specifies the Department shall have greater than 180 days to issue a proposed decision after acceptance of an application, other than in the case of suspension in R.61-101.C.4.

f. The proposed decision requiring by SC Regulation 61-101.A.6 was issued May 15, 2009.

² Rule 26, SCRCP requires service of answers or objections within 30 days after service of the request and Rule 6(e) adds an additional five days to the prescribed period because the Request to Admit was served by mail. Accordingly, the Department had until January 19, 2010, i.e. 35 days from December 15, 2009 to submit answers or objections.

CURRENT STATUS OF FEDERAL LICENSE

While the question currently before this Court is whether South Carolina waived its opportunity to issue or deny Duke's WQC for the Project under State law, specifically under R.61-101, FERC is currently reviewing whether South Carolina waived certification for the Project under the federal Clean Water Act. On August 11, 2009, five days after the Board issued its decision denying WQC, Duke filed a Petition for Declaratory Order with FERC asking FERC to find South Carolina waived making a certification decision under CWA Section 401, because neither the Board nor the Department took any final action to deny or to grant certification prior to the expiration of the reasonable time period under § 401(a)(1) of the CWA, i.e., not to exceed one year. The Attorney General, joined by the Department, Coastal Conservation League, and American Rivers, opposed Duke's Petition for Declaratory Order.

ARGUMENT

It is clear from the plain reading of R.61-101.A.6. that the Department was required to issue a proposed decision on Duke's WQC application within 180 days of receiving the application on June 5, 2008. When the Department's failed to either issue or deny Duke's WQC on or before December 2, 2008, by operation of state law, South Carolina waived its right to issue or deny a WQC for the Project. Because, by operation of state law, the State waived its right to issue or deny a WQC, the Department did not have legal authority to issue the Notice and the Board did not have legal authority to deny the WQC.

³ "The matter is admitted unless, within 30 days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney. . ." Rule 36(a), SCRCP.

I. The State waived its right to issue or deny Duke's WQC when it did not issue a proposed decision within 180 days of accepting Duke's application.

The Federal Clean Water Act provides that a state must act on a request for certification within a reasonable period of time, or the certification is deemed waived under Section 401. See 33 U.S.C. § 1341(a)(1). See also, *South Carolina Department of Transportation v. South Carolina Department of Health and Environmental Control and Friends of Congaree Swamp, Wildlife Federation, and Audubon South Carolina*, Docket No. 06-ALJ-07-0804-CC (Judge Anderson, April 29, 2008) ("*DOT v. DHEC*")⁴; See also *Triska v. South Carolina Department of Health and Environmental Control, et al.*, 292 S.C. 190, 195, 355 S.E.2d 531, 533 (1987). R. 61-101 states, "unless otherwise suspended or specified in this regulation, the department shall issue a proposed decision on all applications within 180 days of acceptance or an application." R.61-101.A.6. Therefore, to the extent South Carolina issues a decision on water quality certification, it must do so within 180 days of acceptance or an application. Otherwise, certification is waived under state law. The Department admits nothing in R.61-101 specifies the Department shall have greater than 180 days to issue a proposed decision after acceptance of an application, other than in the case of suspension in R.61-101.C.4. Admit ¶8. The Department admits it never notified Duke that the processing of the application was suspended. Admit, ¶5.

A. The plain language of R.61-101 required the Department to issue a proposed decision within 180 days of accepting Duke's WQC application.

The language of R.61-101 is clear and unambiguous, yielding only one possible interpretation: DHEC is required to issue a proposed decision on WQC applications within 180 days of acceptance or an application. "The term 'shall' in a statute means that the action is mandatory." *Wigfall v. Tideland Utils., Inc.*, 354 S.C.100, 111, 580 S.E.2d 100, 105 (2003). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Johnston v. S.C. Department of Labor, Licensing, and Regulation*, 365 S.C. 293, 297, 617 S.E.2d 363, 364 (2005), (citing *Carolina Power & Light Co. v. City of Bennettsville*, 314 S.C. 137, 442 S.E.2d 177 (1994)).

A regulation authorized by the legislature has the force of law. *Goodman v. City of Columbia*, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995); See also S.C. Code Ann. § 1-23-160. R.61-101, which was approved by the Legislature, limits DHEC's authority to issue a proposed WQC decision to the 180-day time period.⁵ See S.C. Reg., Vol. 14, Issue 3, p. 143 (February 23, 1990).

B. The 180-day time period is a substantive requirement.

The proposed decision required by R.61-101.A.6. to be issued by the Department within 180 days is not just a "procedural step" inserted in the regulation to encourage the Department to meet the more lenient, federal "not to exceed one year" language in CWA Section 401. This conclusion is supported by the actions the law requires the Department to take when it issues the proposed decision, the right to appeal the proposed decision, and the result if no timely appeal is filed. R.61-101.G.

⁴ The undisputed facts and circumstances in the instant case relevant to the 180-day requirement in R.61-101.A.6 are remarkably similar to the facts and circumstances in *DOT v. DHEC*.

The Department must include proposed conditions in the proposed decision. R.61-101.G.1. The Department must mail notice of the proposed decision to the applicant, agencies having jurisdiction or interest over the activity site, owners or residents of property adjoining the area of the proposed activity, and persons providing comment in response to the initial notice of application. *Id.* Persons with legal standing to contest the WQC may appeal the proposed decision, R.61-101.G.2., and, if no appeal is timely received, the proposed decision shall become the final decision on the WQC application. R.61-101.G.3.

The Department and the South Carolina Attorney General ("Attorney General") also recognize the proposed decision required to be issued within 180-days by R.61-101 is a substantive decision. In documents filed with FERC in September, 2009, opposing Duke's Petition for Declaratory Order, the Department joined the Attorney General in his assertion that the proposed decision required by R.61-101.A.6. is "the required certification decision," AG Response, p.26, and "[u]nder South Carolina law, a "department decision" has the legal effect of "either issuing or denying the permit." AG Response at p. 22, and AG's Pre-hearing Statement, p. 3. (citing *South Carolina Coastal Conservation League*, 669 S.E.2d at 906). If the Attorney General's assertion is correct⁶, then it is clear the proposed decision required by R.61-101.A.6. is a substantive and not just a procedural requirement under South Carolina law.

⁶ R.61-101 provides for three instances when the 180-day period may be suspended, none of which were invoked in this case.

⁶ For purposes of this Motion for Summary Judgment, it is not necessary for Duke to agree or disagree with the Attorney General's assertion, but only point out to the Court the position taken by the Department and the Attorney General as to the substantive nature of the proposed decision.

The Coastal Conservation League and American Rivers also recognize the proposed decision required by R.61-101.A.6. is a substantive decision. In their support of the AG before FERC, the two intervenors state:

[T]he state interprets "proposed decision," to be SCDHEC's final decision subject only to administrative appeal. The South Carolina Attorney General has confirmed that, even though the staff decision is labeled "proposed" by the regulations, it is the Department's final decision. . . . The Commission has itself stated that it must defer to the state's interpretation; it is not charged with interpreting the meaning of South Carolina's laws and regulations.

Conservation Groups Opp'n to Petition for Declaratory Order, p. 5.

If assertions made by Respondent and Intervenor before FERC are accepted (which Duke does not contest for purposes of this Motion for Summary Judgment only⁷), it is clear the proposed decision required by R.61-101.A.1. to be made within 180 days is a substantive decision on an application for certification.

Therefore, by default, the Respondent and Respondent-Intervenor's position is that the May 15, 2009 proposed decision was required to be issued within one year under federal law and within 180 days under state law. Admit ¶¶8-9.

C. The Department's failure to either issue the WQC or deny the WQC within the 180 day time period constitutes a waiver of the State's right to issue or deny certification.

It is clear the Department was required to issue a proposed decision on Duke's WQC application within the 180-day period. Admit ¶8. It is undisputed the Department

⁷ Duke would point out that the position taken by Respondent and Respondent-Intervenor essentially results in the Agency making two final agency decisions, one when the proposed [final] decision is issued by the Department and one when the Board issues the final agency decision. However, in this matter, neither the proposed decision nor the final agency decision was issued within the 180-day period.

did not issue a proposed decision within the 180-day time limit. Admit ¶¶4-6; Aff. ¶¶8-13. Upon expiration of the 180-day time period, by operation of law, the State waived its right to issue or deny certification. Admit ¶7.

1. CWA Section 401 anticipates states may not act on WQC applications within a reasonable period of time.

CWA Section 401, referred to in R.61-101.A.1., provides that if a state fails or refuses to act on a request for a water quality certification within a reasonable time after it receives the application, the state certification requirements of federal law are waived with respect to the federal license. That provision states:

If the State . . . fails or refuses to act on a request for 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."

CWA, §401(a)(1), 33 U.S.C.A. §1341(a)(1) (emphasis added). Thus, CWA Section 401 recognizes states may either fail or refuse to act on a request for certification. The language of CWA Section 401 provides not only for express waivers by a state, but also for waivers by silence. See, *City of Olmstead Falls v. EPA*, 435 F.3d 631, 636 (6th Cir. 2006). In either case, the state waives its certification rights under Federal law.

Even though a state waives its right to issue or deny a WQC, a state may still submit comments related to conditions to be included in the federal license. "[A] state's waiver of its right to dictate 401 permit terms does not affect the federal government's authority to place conditions on the permit in accordance with federal law. . . [F]inding that DHEC has waived its right to act does not mean that the public's interests will go wholly unprotected." *DOT v. DHEC* at 17 (internal citation omitted).

Additionally, a state that waives its right to issue or deny a WQC may still investigate suspected violations of state water quality standards by the license holder and take state enforcement actions independent of the federal license for violations of state laws and regulations. The S.C. Supreme Court has already spoken to the Department's ability to protect the public health, safety, and welfare without the issuance of a WQC. "The power of DHEC to continuously *monitor* projects and to notify the permitting agencies of changes in water quality so that an investigation can be held should provide adequate protection to the public health, safety and welfare of the people of the State of South Carolina." *Triska v. DHEC*, 292 S.C. 190, 196, 355 S.E. 2d 531,534 (1987).

2. R.61-101 provides for waiver of certification rights.

R.61-101 contemplates waiver of water quality certifications by the Department. The first sentence of R.61-101.A.6. states, "The Department is required by Federal law to issue, deny, or waive certification . . ." This concept was discussed by this Court in *DOT v. DHEC*:

While it is true that Regulation 61-101 does not expressly set forth consequences for DHEC's failure to timely issue its NOPD, Regulation 61-101 does refer to the waiver provision of 33 USCA § 1341. See 25A S.C. Code Ann. Regs. §61-101(A)(6) (Supp. 2006). Therefore, it would be misleading to claim that "there is no language" in Regulation 61-101 regarding the consequences of DHEC's failure to timely act. In fact, a reasonable interpretation of Regulation 61-101 is that the legislature intended to incorporate the waiver provisions of 33 USCA § 1341 into Regulation 61-101.

DOT v. DHEC, at 16.

While R.61-101 establishes when the Department may grant or deny certification, there is no procedure or scope of review in the regulation for the Department to

affirmatively waive WQC. Because there is no procedure in the regulation for the Department to affirmatively grant a waiver, by default, the only time a waiver is imposed under the regulation is when the Department fails to affirmatively grant or deny the WQC within 180 days. A waiver must be imposed at the end of the 180-day period when the Department remains silent and fails to issue or deny the WQC. Otherwise, a WQC could never be waived under state law, a concept not keeping with R. 61-101 and Federal law, as paraphrased in R.61-101.A.6.

If a waiver is not imposed by operation of R.61-101, there would not be a consequence of the Department not issuing a proposed decision within the time period established by the Legislature. Reading the waiver provision out of R.61-101 would allow the Department to issue a proposed decision at any time, which would be inconsistent with the reasonable time requirements of CWA Section 401 and R.61-101.A.6.

Hence, by promulgating and adopting R.61-101.A.6, the State of South Carolina established in state law that the "reasonable time" within which the Department must issue or deny certification is 180 days, and if the Department fails or refuses to act on a request for certification within the 180 day time period, the state certification requirement with respect to the Federal permit application is waived. Admit ¶7.

D. South Carolina waived its certification rights when the Department failed to issue a proposed decision within the 180-day period.

The Department's decision to remain silent at the 180th day following receipt of Duke's application resulted in the State, by operation of state law, foregoing its right to issue or deny Duke's WQC.

At the end of the 180-day time limit the Department had not made a decision to issue the WQC and had not made a decision to deny the WQC. Aff. ¶¶8-13; Admit ¶¶6,9. Instead the Department remained silent. CWA Section 401 "provides not only for express waivers by a state, but also for waivers by silence." See *City of Olmstead Falls v. EPA*, 435 F.3d 631, 636 (6th Cir. 2006). This concept is carried over into South Carolina law by acknowledgment in R.61-101 of the State's right to waive certification, but providing no provision for an affirmative waiver by the Department. Therefore, the Department's silence and failure to make any affirmative decision is, by operation of law, a waiver of the State's right to do so.

II. The Department Exceeded Its Statutory Authority when it issued a proposed decision on May 15, 2009

The Department admits it did not issue a proposed decision within the 180-day period required by state law. Admit ¶¶6,9. The Department has no authority to issue a proposed decision after the 180-day time period and has no authority to reverse or ignore the waiver imposed by operation of state law at the end of the 180-day period.

A. By operation of State law, the Department had no authority to issue a proposed decision after the 180-day time limit.

The Department attempts to expand the authority granted to it by state law by arbitrarily extending the time limits imposed by the state's Water Quality Certification regulation. The regulation is clear: "the Department shall issue a proposed decision on all applications within 180 days of acceptance or an application." R.61-101.A.6. (emphasis added). Admit ¶8. No statute or regulation grants the Department the power to extend the deadlines established in R.61-101, other than in the case of suspension in

R.61-101.A.6. The Department admits the processing of Duke's WQC application was never suspended. Admit ¶5.

The Department lacked statutory authority to issue a proposed decision after the 180-day time period established in R.61-101.A.6. It is well established an administrative agency only has the authority granted to it by the legislature. "A regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged." *Captain's Quarters Motor Inn v. South Carolina Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991). "An administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose." *Bazzle v. Huff*, 319 S.C. 443, 445, 462 S.E.2d 273, 274.

The South Carolina State Register, when noticing the final adoption of R.61-101, cites Sections 48-1-30 and 48-1-50 of the South Carolina 1976 Code as the statutory authority for R.61-101. S. C. Reg., Vol. 14, Issue 3, p. 143.⁸ Section 48-1-30 requires the Department to promulgate regulations to govern the procedure of the Department with respect to the issuance of permits and all other matters relating to procedure and Section 48-1-50 lists twenty-five powers granted to the Department. No provision in either of these two sections authorizes the Department to extend the time period for issuing a proposed decision on a WQC application, and neither section gives the Department discretion to extend time restrictions established in regulations adopted by the legislature. Accordingly, under *Bazzle* and *Captain's Quarters Motor Inn* the Department did not have authority to extend the 180-day time period established in R.61-101.

⁸ Sections 48-1-30 and 48-1-50 are sections of the Pollution Control Act.

As discussed above, the Legislature provides an alternative in the event the Department does not issue or deny the WQC within the 180-day period. By operation of R.61-101.A.6., if no proposed decision is issued at the end of the 180-day period, the State waives its opportunity to issue or deny the WQC. Admit ¶7. The Department has no statutory authority to reverse or ignore such waiver imposed by law.

When the Department failed to either issue the WQC or deny the WQC within 180 days, state law imposed a waiver of the state's right to issue or deny the WQC application. The Department's attempt to issue a notice of proposed WQC decision on May 15, 2009, well after the running of the 180-day period, exceeds DHEC's statutory authority and is arbitrary or capricious.

B. The Department has no authority to reverse or ignore a waiver imposed by law.

"DHEC is a state administrative agency and can only exercise those powers which have been conferred upon it by the South Carolina General Assembly. . . Any action taken by DHEC outside of its statutory and regulatory authority is null and void." *Triska* at 195, 355 S.E. 2d at 533.

The Supreme Court opined in *Triska* that DHEC does not have statutory, regulatory or federal authority to suspend or revoke a WQC after it has been granted by the agency and the appeals process expired. *Id.* (holding that a certification is not a permit and the Department's authority under Section 48-1-50(5) of the PCA to suspend and revoke a permit does not apply to certifications). Although R.61-101 was promulgated and approved after *Triska* and provides that the Department's proposed decision to issue or deny a WQC is subject to a contested case hearing, state law was

not amended to grant DHEC authority to suspend or revoke a certificate after the WQC decision becomes final.

Just as the Department under *Triska* does not have statutory, regulatory or federal authority to revoke a WQC after it has been granted by the agency and the appeals process expires, the Department does not have statutory, regulatory or federal authority to reverse or ignore the waiver of Duke's WQC imposed by State law. The waiver of Duke's WQC was final at the moment it was imposed by operation of law, and the Department has no legal authority to reverse, ignore, or otherwise impact the waiver. The waiver imposed by State law is not a Department decision and is not, therefore, subject to administrative review or appeal under R.61-101 or the Administrative Procedure Act. Issuance of the May 15, 2009 Notice was outside the Department's authority and it is therefore, null and void.

III. The Board Exceeded its Statutory Authority and Committed an Error of Law When It Attempted to Deny Duke's WQC.

The Board exceeded its statutory authority when it issued a Final Agency Decision denying Duke's application for WQC after the State had already waived its right to issue or deny certification. The Board's action was an error of law and the result of unlawful procedure because the Board reviewed and reversed an improperly issued Department staff decision on certification.

A. The Board did not have authority to conduct a final review conference of the Notice.

The Board had no authority to conduct a final agency review conference in this matter because the Department did not issue a valid department decision giving rise to

a contested case. The Notice issued by the Department after state law waived the State's right to issue or deny the WQC was issued without authority and, therefore, could not give rise to a contested case.

The authority of the Board to conduct final review conferences is limited to reviewing those Department decisions which the law requires the Board to review and those Department decisions which may give rise to a contested case.

The board may conduct such administrative reviews as may be required by law, as considered necessary by the board to render a final agency determination in matters involving the issuance, denial, renewal or revocation of permits, licenses, or other actions of the department which may give rise to a contested case pursuant to Chapter 23 of Title 1.

S.C. Code Ann. § 44-1-50.

There is no statutory provision authorizing the Board to conduct a final review conference when the Department fails to take an action. A Department decision which may give rise to a contested case is a prerequisite for the Board to conduct a final review conference. In this case, the State waived its right to issue a WQC, so there was no Department decision which gave rise to a contested case, and no Department decision for the Board to review.

B. The Board did not have authority to deny Duke's WQC.

Because the Department failed to issue a proposed decision on Duke's WQC application within the time period established by law, the State's right to issue or deny a WQC was waived by operation of state law. Therefore, there was no legal WQC for the Board to review, and no legal WQC for the Board to reverse and deny. Because a waiver was imposed by law when the Department did not issue a proposed decision,

there was no WQC for the Board to review, and since there was no WQC under review, the Board had no authority to deny certification.

C. The Board's decision to deny Duke's WQC was an error of law because it was unlawful for the Board to reverse a waiver imposed by state law.

The Board does not have statutory, regulatory or federal authority to ignore or revoke the waiver of a WQC imposed by State law. The waiver imposed by State law is not subject to administrative review or appeal as a Department decision; hence, it is final at the moment it is imposed by operation of law and the Board has no legal authority to ignore, reverse, revoke or otherwise impact the waiver.

Summary Judgment In Favor of Duke Is Appropriate

For the foregoing reasons, Summary Judgment is appropriate in this case.

Issuance of a Declaratory Judgment is Appropriate

Declaratory judgment is also appropriate in this case. This Court has the power to issue such remedial writs as may be necessary to give effect to its jurisdiction in contested cases. See, S.C. Code Ann. § 1-23-630 (Supp.2008); See also, Rule 16, RALC. This authority includes the power to issue declaratory relief. See Conclusion of Law 16, Order Granting Summary Judgment, ALJD Docket Nos. 98-ALJ-07-0267-CC and 98-ALJ-07-0585-CC (Chief Administrative Law Judge Marvin F. Kittrell, September 22, 1999) p. 37, *rev'd on other grounds* by the Board in *Western Carolina Regional Sewer Authority, et al. v. S.C. DHEC, et al.*, Order 00-2-B (February 24, 2000).

Declaratory judgment is necessary in this case to clearly define the State's position with regard to Duke's WQC request. FERC has been advised that the Board denied certification of the Project. Because certification or waiver of certification is required for issuance of a new Federal license for the Project, as things currently stand, issuance of Duke's Federal license for the Project is being delayed.

Therefore, Duke respectfully requests this Court declare the State waived its right to issue or deny the CWA Section 401 water quality certification for the Project when the Department failed to issue a notice of proposed decision within 180 days of application.

CONCLUSION

South Carolina law requires the Department to issue a proposed decision on an application for a Water Quality Certification within 180 days of acceptance or an application. 24A S.C. Code Reg. §61-101.A.6. The regulation limits the Department's proposed decision to two possibilities:

1. issue the requested certification, or
2. deny the requested certification.

In the instant case it is undisputed that the Department did not issue or deny the requested certification within 180 days of the date the Department accepted Duke's application. Because the Department did not issue or deny certification within 180 days, the State waived its right to issue or deny Duke's WQC application and the Department no longer had the legal authority to issue a proposed decision on Duke's application for certification.

Accordingly, the May 15, 2009 Notice of Department Decision – Water Quality Certification and the August 6, 2009 Final Agency Decision by the Board of Health and Environmental Control cannot be sustained as a matter of state law and Petitioner is entitled to a declaration that the State has waived its right to either issue or deny Duke's application for a WQC.

Based on the foregoing reasons, Petitioner respectfully requests the Court grant Duke's Motion for Summary Judgment and issue a Declaratory Judgment that, under state law, by not issuing a proposed decision within 180 days of accepting Duke's WQC application the State waived its right to issue or deny Duke's WQC application.

Respectfully submitted,



James W. Potter
W. Thomas Lavender, Jr.
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202

Nash E. Long, III
(Admitted pro hac vice)
Winston & Strawn LLP
214 North Tryon Street
Charlotte, North Carolina 28202
(704) 350-7700
(704) 350-7800 (fax)

Attorney's for Petitioner
Duke Energy Carolinas, LLC

January 21, 2010

Columbia, South Carolina

EXHIBIT 1

STATE OF SOUTH CAROLINA
BEFORE THE ADMINISTRATIVE LAW COURT

COUNTY OF MECKLENBURG

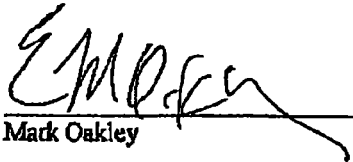
AFFIDAVIT OF E. MARK OAKLEY

I, B. Mark Oakley, being duly sworn, both depose and say;

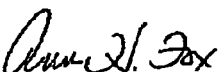
1. I am a resident of Matthews, North Carolina.
2. I am of legal age, am competent to testify, and have personal knowledge of the matters contained in this Affidavit.
3. I am, and have since June 1, 1978 been, an employee of Duke Energy Carolinas, LLC, including its predecessor companies ("Duke Energy").
4. Duke Energy operates the Catawba-Wateree Hydroelectric Project ("Project"), which is licensed as Federal Energy Regulatory Commission ("FERC") Project No. 2232.
5. Duke Energy submitted an Application for New License to the FERC on August 29, 2006.
6. I am currently, and was at all times relevant to this matter, the Project Manager for the Project relicensing which is the subject of the Application for New License.
7. On April 7, 2008, FERC issued a "Ready for Environmental Analysis" for the Project relicensing.
8. Duke Energy submitted an application for water quality certification for the Project relicensing to the South Carolina Department of Health and Environmental Control ("SCDHEC") on June 5, 2008 ("401 WQC Request").
9. I personally delivered the 401 WQC Request to Mr. Chuck Hightower, Manager of the SCDHEC Water Quality Certification and Wetlands Section on June 5, 2008, and Mr. Hightower stamped the 401 WQC Request "Received - June 5, 2008."

10. Duke Energy did not receive any request for additional information from SCDHEC concerning the 401 WQC Request within ten (10) days after June 5, 2008.
11. Duke Energy was never notified by SCDHEC that processing of the 401 WQC Request was suspended pursuant to South Carolina Regulation R.61-101.C.4 or otherwise.
12. Duke Energy did not receive a proposed decision from SCDHEC on the 401 WQC Request within 180 days after June 5, 2008.
13. On May 15, 2009, I obtained an electronic copy of a document from the SCDHEC website dated May 15, 2009 and entitled "Notice of Department Decision - Water Quality Certification" ("Notice of Department Decision").
14. Duke Energy later received the Notice of Department Decision from SCDHEC via United States mail.

FURTHER AFFIANT SAITH NOT.


E. Mark Oakley

SWORN TO and subscribed to before me
this 21 day of January 21, 2010.



Notary Public for the State of North Carolina L.S.
My Commission Expires: 6/10/2014

EXHIBIT 2

NEXSEN|PRUET

James W. Potter
Member
Admitted in SC, AL

December 15, 2009

Stephen Hightower, Esquire
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

Re: Duke Energy Carolinas, LLC v. SC Department of Health and
Environmental Control, Docket No. 09-ALJ-07-0377-CC

Dear Mr. Hightower:

Please find enclosed the following discovery requests in the above referenced matter:

Charleston	1. Petitioner's Request to Admit to South Carolina Department of Health and Environmental Control;
Charlotte	
Columbia	2. Petitioner's Request for Production of Documents to South Carolina Department of Health and Environmental Control; and
Greensboro	
Greenville	3. Petitioner's Interrogatories to Respondent.
Hilton Head	
Myrtle Beach	If you should have any questions, please let me know.
Raleigh	Sincerely,


James W. Potter

JWP/fwt

Enclosures

cc: Bob Cook, Esquire
Christopher K. DeScherer, Esquire

1230 Main Street
Suite 700 (2B201)
PO Drawer 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803.253.8213
F 803.253.8277
E JPotter@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

NPCOL1:1894859.1-LT-(JWP) 700263-00291

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Carolinas, LLC,

Petitioner,

vs.

South Carolina Department of Health and
Environmental Control, et al

Respondents.

Docket No.: 09-ALJ-07-0377-CC

**PETITIONER DUKE ENERGY
CAROLINA'S LLC REQUEST TO
ADMIT TO RESPONDENT SOUTH
CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL
CONTROL**

TO: STEPHEN HIGHTOWER, ESQUIRE:

The Petitioner, pursuant to Rule 21 of the Rules of Procedure for the Administrative Law Court and Rule 36 of the South Carolina Rules of Civil Procedure, request that Respondent, South Carolina Department of Health and Environmental Control admit or deny each of the following facts, separately and fully, in writing and under oath within thirty (30) days from the date of service hereof.

REQUEST TO ADMIT

1. The genuineness of the Administrative Record (pgs 1-338) prepared by Ms. Lisa Lucas, Clerk of the Board, for the Final Review Conference of July 9, 2009.
2. The genuineness of the Staff position document prepared by the Respondent and submitted by Stephen Hightower to the Board on July 6, 2009.
3. The genuineness of the transcript of the Board hearing of July 9, 2009.

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DRAFT 12/14/09 10:36 AM

4. Respondent did not request additional information within ten (10) days of receipt of Petitioner's application and the application is deemed complete for processing under SC Regulation 61-101 C.2.

5. The Respondent never notified Petitioner that the processing of Petitioner's application was suspended pursuant to SC Regulation 61-101 C.4.

6. Respondent's issuance of a proposed decision on Petitioner's Section 401 water quality application took greater than 180 days of acceptance of the application. SC Regulation 61-101 A.6.

7. Issuance or denial of Petitioner's Section 401 water quality application was waived by operation of SC Regulation 61-101 A.6 and SCDOT v. SCDHEC, 06ALJ-07-0804-CC (April 29, 2008).

8. Nothing in SC Regulation 61-101 specifies the Department shall have greater than 180 days to issue a proposed decision after acceptance of an application, other than in the case of suspension in R.61-101.C.4.

9. The proposed decision required by SC Regulation 61-101.A6 was issued May 15, 2009.



James W. Potter
W. Thomas Lavender, Jr.
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803.771.8900

Attorney for Petitioner
Duke Energy Carolinas, LLC

December 15, 2009
Columbia, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Carolinas, LLC,

Petitioner,

vs.

South Carolina Department of Health and
Environmental Control,

Respondent.

Docket No.: 09-ALJ-07-0377-CC

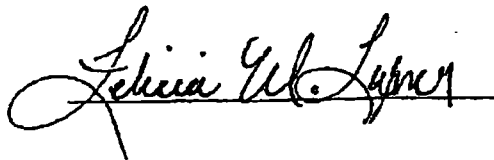
CERTIFICATE OF SERVICE

This is to certify that the foregoing *Petitioner's Request to Admit to South Carolina Department of Health and Environmental Control, Petitioner's Request for Production of Documents to South Carolina Department of Health and Environmental Control and Petitioner's Interrogatories to Respondent* has been served on the counsel of record in this matter by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 15th day of December, 2009:

Stephen Hightower, Esquire
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

Christopher K. DeScherer, Esquire
Southern Environmental Law Center
P.O. Box 609
Charleston, SC 29402

Mr. Bob Cook
Attorney General's Office
Post Office Box 11549
Columbia, SC 29211



CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing upon each of the parties in this lawsuit by U.S. mail, first class, postage prepaid, in envelope(s) addressed as follows:

Robert D. Cook
Deputy Attorney General
T. Parkin Hunter
Assistant Attorney General
L. Childs Cantey
Assistant Attorney General
Elizabeth H. Smith
Assistant Attorney General
STATE OF SOUTH CAROLINA
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 11549
Columbia, SC 29211
*Attorneys for the Office of the Attorney
General of the State of South Carolina*

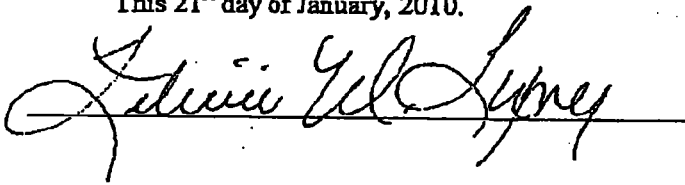
Christopher K. DeScherer
SOUTHERN ENVIRONMENTAL LAW
CENTER
38 Broad Street, Suite 200
Charleston, SC 29402-0609

Julia F. Youngman
SOUTHERN ENVIRONMENTAL LAW
CENTER
200 West Franklin Street, Suite 330
Chapel Hill, NC 27516

*Attorneys for Southern Environmental
Law Center*

Stephen P. Hightower
Office of General Counsel
SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL
2600 Bull Street
Columbia, SC 29201
*Attorney for South Carolina Department
of Health and Environmental Control*

This 21st day of January, 2010.



FILED

JAN 21 2010

SC ADMIN. LAW COURT

BOARD:

Paul C. Aughry, III
Chairman

Edwin H. Cooper, III
Vice Chairman

Steven G. Kiser
Secretary



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

BOARD:

Henry C. Scott

M. David Mitchell, MD

Glenn A. McCall

Coleman F. Buckhouse, MD

February 12, 2010

Honorable Ralph King Anderson, III
Chief Administrative Law Court Judge
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

Re: Duke Energy Carolinas, LLC vs. South Carolina Department
of Health and Environmental Control
Docket No. 09-ALJ-07-0337-CC
OGC #20887.1

Dear Judge Anderson:

Enclosed please find an original and two (2) copies of the Respondent South Carolina Department of Health and Environmental Control's *Response to Petitioner's Motions for Summary Judgment and Declaratory Judgment* to be filed in connection with the above-referenced case. I would appreciate you returning the two copies in the self-addressed inter-agency envelope I have enclosed.

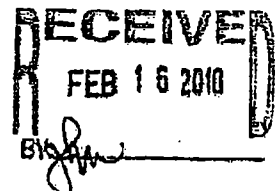
Should you have any questions, please do not hesitate to contact our office.

Sincerely,

Sandra R. Wessinger
Paralegal to Stephen P. Hightower
DHEC Staff Attorney

Enclosures

cc: James W. Potter, Esquire
Julie Youngman, Esquire
Christopher K. DeScherer, Esquire
L. Childs Cantey, Esquire



SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Office of General Counsel

Columbia Office • 2600 Bull Street • Columbia, SC 29201 • Phone: (803) 898-3350 • Fax: (803) 898-3367 • www.scdhec.gov

Duke Energy Carolinas, LLC,
Petitioner,
vs.
South Carolina Department of Health and
Environmental Control,
Respondent,
South Carolina Attorney General,
American Rivers, and the South Carolina
Coastal Conservation League,
Respondent-Intervenors.

**RESPONDENT'S MEMORANDUM
OF LAW IN SUPPORT OF
MOTION TO ENLARGE TIME TO
ADMIT AND IN OPPOSITION
TO PETITIONER'S MOTIONS FOR
SUMMARY JUDGMENT AND
DECLARATORY JUDGMENT**

1

appellate body was acting within the scope of its authority when it denied Duke's application for a water quality certification.

FACTUAL BACKGROUND

The Department's Review

On May 5, 2008 the Department received an application from Duke for a water quality certification pursuant to 25A S.C. Code Ann. Regs. 61-101. Affidavit of William R. Wenerick, ("Wenerick Aff.") attached hereto as Exhibit 1, ¶ 5. Duke required the certification as a part of its licensing requirements from the Federal Energy Regulatory Commission (FERC) for the Catawba - Wateree Hydroelectric Project pursuant to the federal Clean Water Act Section 401 (hereinafter referred to as "401 Certification"). Id. The application was received without the application fee required under 24A S.C. Code Ann. Reg. 61-30. Id. The application also did not include in a list of adjacent property owners entitled to have the Department mail notice of Duke's 401 Certification application as required under 25A S.C. Code Ann. Reg. 61-101(D)(4)(a) and the newspaper notice Duke was required to place in a newspaper of general circulation reasonably expected to cover the area affected by the activity as required under 25A S.C. Code Ann. Reg. 61-101(D)(4)(b). Affidavit of Charles Hightower ("Hightower Aff.") attached hereto as Exhibit 2, ¶ 4. On July 29, 2008, Mr. Oakley sent a series of emails to the Department that contained lists of the names and mailing addresses for all property owners adjacent to the Catawba-Wateree project. Hightower Aff. ¶ 8. Also on the day, the Department sent written notification to Duke's representative, Mark Oakley, that the Department would be issuing a public notice notifying the public of Duke's water quality certification application. Wenerick Aff. ¶ 7. The notification also stated that the public notice would include the following information:

Fee: Pursuant to R. 61-30, Environmental Protection Fees, the SC Department of Health and Environmental Control is authorized to collect application fees for Water Quality Certification. The following fee is now due to the Department of Health and Environmental Control.

Applicant:
Public Notice Number:
Issue Date:
Total Due: \$ 1,000.00

The Depart has 180 days to complete action I the application for 401 Water Quality Certification or the assessed fee must be returned. The 180 days includes only those days in which the application is actively being reviewed by the Department, the clock stops when information is requested and the SC Department of Health and Environmental Control is waiting on a response. Accordingly, the 180 day clock will not start until we have received an affidavit of publication and the appropriate fee.

Wenerick Aff. ¶ 7 (emphasis in original). The Department followed up Mr. Wenerick's e-mail with the issuance of Public Notice No. DHEC 08-C-001 for the Duke 401 Certification on August 8, 2008. Wenerick Aff. ¶ 8. The Public Notice included the language on the application fee and the procedures for computing the running of time for the 180 time period that the Department has sent to Duke on July 29, 2008 to preview and comment. Wenerick Aff. ¶¶ 7, 8.

The Department sent its first letter requesting additional information/clarification ("RAI") to Duke on August 19, 2008. Wenerick Aff. ¶ 9. In addition to specifying the information that the Department need in order to review the application, the letter also notified Duke of the following: 1) that its response should be received by the Department on or before October 19, 2008; 2) that the Department was awaiting Duke's submittal of the application fee and affidavit of publication; 3) that pursuant to 4A S.C. Code. Ann. Regs. 61-30, the Department's time to review the application within 180 days would not start until receipt of the fee and affidavit; and 4) that pursuant to the regulation cited above, the 180 day time clock

would run only while the Department was actively reviewing and would be stopped when the Department requested information from Duke and was awaiting a response. Wenerick Aff Exhibit 3. By August 25, 2008, the Department had received the application fee and affidavit of publication from Duke and the 180 day time clock officially started; however, the clock remained stopped because the Department was waiting for a response from Duke to its first RAI letter. Wenerick Aff. ¶ 10. Duke's response to the Department's first RAI letter was received by the Department on January 12, 2009. Wenerick Aff. ¶ 18. Fifteen days later, the Department sent Duke a written request for information; this request stopped the 180 day clock. Wenerick Aff. ¶ 20.

Duke responded to the request in two days and on January 30, 2009, the 180 day clock started again. Id.

On February 5, 2009, the Department sent another written request to Duke for information, which stopped the 180 day clock. Wenerick Aff. ¶ 21; Exhibit 14. Duke responded to the Department's February 5, 2008 request on February 27, 2009, restarting the 180 day clock after 22 days. Wenerick Aff. ¶ 22. The Department made two more written requests to Duke for information that stayed the running of the 180 day clock during the pendency of Duke's responses. The first request was made on March 5, 2009 and Duke responded on March 9, 2009. Wenerick Aff. ¶ 23. The last request was made on March 25, 2009 and Duke responded the next day, March 26, 2009. Wenerick Aff. ¶ 24.

From the date in which the 180 day clock was deemed to have commenced, August 25, 2008, until the date that the Department issued Notice of Department Decision – Water Quality Certification for Public Notice No. DHEC 08-C-001 on May 15, 2009 is 242 days. Wenerick Aff. ¶ 25. Of that time period, 107 days (August 25, 2008 to January 12, 2009) is excludible

because the Department had requested information from Duke, which was not provided to the Department until January 12, 2009. Wenerick Aff. ¶ 25. Similarly, the time periods between January 28, 2009 to January 30, 2009, 2 days; February 5, 2009 to February 27, 2009, 22 days; March 5, 2009 to March 9, 2009, four (4) days; and March 25, 2009 to March 26, 2009, one (1) day) are all excludible because the Department was awaiting responses to its inquiries from Duke: Id. Thus, out of the 242 days from August 25, 2008 to May 15, 2009, the Department is charge with only 94 days in which it was actively reviewing Duke's application.

The Appeal

The Department's issuance of Notice of Department Decision – Water Quality Certification for Public Notice No. DHEC 08-C-001 on May 15, 2009 to Duke was appealed by the Respondent-Intervenors American Rivers and South Carolina Coastal Conservation League (collectively the "Environmental Groups") by their timely filing on May 28, 2009 of a request for a final review conference pursuant to the statute governing appeals of decisions issued by the Department, S.C. Code Ann. § 44-1-60. Duke did not file an appeal of the Department's decision challenging the Department's issuance of the water quality certification on the ground that the Department had waived its right to issue the certification because it had failed to do so within 180 days of its submittal of the application. Duke did file on June 9, 2009 a response to the Environmental Groups' request for a final review. In its response, a copy of which is attached hereto as Exhibit, Duke did not raise any claim that the Department's issuance of the water quality certification was faulty. In fact, Duke makes various statement such as the following: "Purpose of this Document [-] Duke wishes to ensure that the Board has access to all information pertinent to the Petitioner's Request for Final Review (Request) as it considers whether or not to grant the Request," page 1 (emphasis in the original); and "South Carolina

Department of Health and Environmental Control staff issued its water quality certification for the Catawba-Watercree Project only after a thorough and exhaustive evaluation and analysis of Duke's application for water quality certification including requesting additional data and model information," page 2 (emphasis in original).

Further, at the final review conference, which was held before the Board on July 9, 2009, Duke, who was represented by counsel representing it in this contested case proceeding, James w. Potter, Esquire, and Mr. Oakley, did not raise the claim that Duke claims in its Motion for Summary Judgment and Motion for Declaratory Judgment. It did not raise this claim despite the fact that its attorney strenuously objected to the Board's decision to allow the Henry McMaster, the South Carolina Attorney General to address the Board as an interested non-party.

The Board issued a Final Agency Decision pursuant to S.C. Code Ann. § 44-1-60 on August 6, 2009, over ruling the Department Decision. On September 4, 2009, Duke filed a request for a contested case proceeding in accordance with S.C. Code Ann. § 44-1-60.

Requests to Admit

Counsel for the Department, Stephen P. Hightower, Esquire, received an omnibus motion from Duke, requesting the production of documents, interrogatories, and a request to admit on December 17, 2009. It was the Department's understanding that its time to respond to the Requests to Admit was January 18, 2010. However, Monday, January 18, 2011, was a State Holiday, thereby making the response to the requests to admit due on Tuesday, January 19, 2010. Pursuant to Rule 3(C) of the Administrative Law Court Rules, "...after the service of a notice or other paper upon him and the notice or paper is served upon him by mail or upon a person designated by statute to accept service, five days shall be added to the prescribed period."

Therefore, the Department's time for responding to Duke's Request to Admit was Monday, January 25, 2010 and was noted on counsel's calendar.

In order to respond to the requests to counsel had to discuss the matter with several members of the Department staff who either reviewed the Duke water quality certification or were familiar with the facts surrounding the Department's review. During the December holidays it was impossible to schedule meetings with staff. It was not until after New Years that staff was available. However, counsel was ill over the New Year's period and did not return to work immediately after the holiday. Thereafter on the date that Duke alleges was the due date for the return of the Department's responses to the request to admit, counsel daughter fell ill at school and counsel received an emergency call to pick his child. Counsel took his daughter, who was experiencing severe abdominal pain, to see her primary care physician. The physician, after examining my daughter, recommended that she go to the emergency room at Palmetto Health Richland Hospital to be seen by a surgical resident. The doctor recommended the course of action because my daughter had had an emergency appendectomy performed on December 10, 2009, at the hospital.¹ After an evaluation by the resident, the child was admitted to the hospital and was not discharged until later Sunday afternoon on, January 24, 2010. I remained with my daughter throughout her hospitalization, sleeping when possible on a chair in her room. On January 25, 2010, counsel, working from home, oversaw the submission of the submission of the Department's responses to Duke's requests to admit.

The Department's responses to Duke's requests to admit are as follows:

1. The genuineness of the Administrative Record (pgs 1-338) prepared by Ms. Lisa Lucas, Clerk of the Board, for the Final Review Conference of July 9, 2009.

¹ This surgical procedure necessitated counsel receiving an emergency continuance during the lunch break on the second day of a trial that counsel was trying had before the Honorable John McCloud, Administrative Law Judge.

Response: Admitted

2. The genuineness of the Staff position document prepared by the Respondent and submitted by Stephen Hightower to the Board on July 6, 2009.

Response: Admitted

3. The genuineness of the transcript of the Board hearing of July 9, 2009.

Response: The Department can not verify the genuineness of the transcript. Only the court reporter can verify the genuineness. The Department admits that the July 9, 2009 Board hearing was recorded by a court reporter for the purposes of creating a transcript.

4. Respondent did not request additional information within ten (10) days of receipt of Petitioner's application and the application is deemed complete for processing under SC Regulation 61-101 C.2.

Response: The Department admits that no additional information was requested within 10 days of Petitioner's application; however SC Regulation 61-101 C.2. also states that additional information may still be requested of the applicant within 60 days of receipt of the application. The Department requested additional information within 60 days of receipt of the application.

5. The Respondent never notified Petitioner that the processing of Petitioner's application was suspended pursuant to SC Regulation 61-101 C.4.

Response: Denied. The Department sent several letters to Petitioner requesting additional information. These letters stated that the Department has 180 days to complete its action, but that "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.”

6. Respondent’s issuance of a proposed decision on Petitioner’s Section 401 water quality application took greater than 180 days of acceptance of the application. SC Regulation 61-101 A.6.

Response: The Department issued its decision after more than 180 calendar days but within the 180 day timeframe allowed by SC Regulation 61-101 A.6 and C.4, under which certification processing is suspended upon requests for additional information, as stated in response 5.

REGULATORY FRAMEWORK

The Department conducts reviews of water quality certifications for federal license and permits pursuant to the Water Quality Certification regulation, 25A S.C. Code Ann. Reg. 61-101 ("Reg. 61-101") and the Environmental Protection Fees regulation, 24A S.C. Code Ann. Regs. 61-30 ("Reg. 61-30"). With regard to the issue of the time frame in which the Department must conduct a review, Reg. 61-101 provides that

The Department is required by Federal law to issue, deny, or waive certification for Federal licenses or permits within one (1) year of acceptance of a completed application unless processing of the application is suspended. If the Federal permitting or licensing agency suspends processing of the application on request by the applicant or the Department on its own volition, suspension of processing of application for certification will also occur, unless specified otherwise in writing by the Department. 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.

Reg. 61-101(A)(6). Reg. 61-101, which became effective February 23, 1990, was last amended effected June 23, 1995.

Reg. 61-30, however, places additional requirements upon the Department that affect the time frame in which it must conduct a review of a water quality certification for a federal license.

Reg. 61-30 governs Environmental Protection Fees. The regulation states, in pertinent part, that

Pursuant to South Carolina Code Sections 48-2-50 (1993) and 48-39-145, the Department of Health and Environmental Control shall charge fees for environmental programs it administers pursuant to federal and state law and regulations. This regulation prescribes those fees applicable to applicants and holders of permits, licenses, certificates, certifications, and regulations (hereinafter "permits") and establishes schedules for timely action on permit applications . . .

Reg. 61-30(A) (emphasis added). It also states that “[a]pplication fees shall be due when the application is submitted. The Department shall not process an application until the application fee is received. Reg. 61-30(C)(1)(b) (emphasis added). Moreover, the regulation provides as follows: “Water Quality Certification Application Fees. Certification of major activities requiring federal or state permits [-] \$ 1000.00.” Reg. 61-30 (G)(1)(b)(i). Finally, the regulation sets forth an alternative and more specific 180 day time period than that found in Reg. 61-101. Specifically, the regulation provides that

The 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. If an applicant fails to respond to such a request within 180 days, the Department will consider the application withdrawn and the application fee will be forfeited. The Department shall notify the applicant no later than 10 days prior to expiration of the 180-day period.

Reg. 61-30(H)(1)(c) (emphasis added). Reg. 61-30 became effect on June 23, 1995 and in 1998 subsections (G)(1), Schedule of Fees, and (H)(1), Time Schedules were reworded. Further, in 2002, subsection (G)(1) was amended. Reg. 61-30 was last amended in 2008.

ARGUMENT

Summary judgment is a drastic remedy that should be granted only when the facts clearly warrant its issuance. Guinan v. Tenet Health Systems of Hilton Head, Inc., 383 S.C. 48, 53, 677 S.E.2d 32, 35 (Ct. App. 2009). The grant of summary judgment is appropriate where there are no genuine issues of material fact and it is clear that the moving party is entitled to such relief as a matter of law. Rule 56(c), South Carolina Rules of Civil Procedure (SCRPC). Specifically, summary judgment is appropriate when “plain, palpable and indisputable facts exist on which reasonable minds cannot differ.” Byerly v. Conner, 307 S.C. 441, 445, 415 S.E.2d 796, 799 (1992). “In determining whether any triable issues of fact exist, the evidence and all inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” Sapp v. Ford Motor Company, S.C. , 687 S.E.2d 47, 48 (2009) citing Koester v. Carolina Rental Center, 313 S.C. 490, 493, 443 S.E.2d 332, 334 (1994). If further inquiry into the facts would be helpful in clarifying the application of the law, summary judgment is not warranted. Englert, Inc. v. Leafguard USA, Inc., 377 S.C. 129, 134, 659 S.E.2d 496, 498 (2008) citing Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991); McKnight v. South Carolina Department of Corrections, 385 S.C. 380, 386, 684 S.E.2d 566, 568 (Ct App. 2009) (citations omitted). Moreover, “[s]ummary judgment should not be granted even when there is no dispute as to the evidentiary fact if there is dispute as to the conclusion to be drawn from those facts.” Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009) quoting Brockbank v. Best Capital Corporation, 341 S.C. 372, 378, 534 S.E. 2d 688, 692 (2000). Further, the summary judgment should not be granted if the nonmoving party has not had a full and fair opportunity to complete discovery. Guinan, 383 S.C. at 53-54, 677 S.E.2d at 35-36.

Applying these standards to the facts and the law in this case, it is clear that Duke is not entitled to summary judgment on its claim that the Department waived its right to issue the water quality certification that the Board rejected. As will explained in detail below, summary judgment is not proper for the following reasons: 1) Duke's request for summary judgment conveniently omits the fact that water quality certifications are governed by Reg. 61-30 as well as Reg. 61-101 and that the Department is legally bound to give effect to and harmonize the requirements of both regulations; 2) pursuant to both regulations the evidence establishes the Department did not violate the 180 day time period that is common to both regulations; 3) Duke has waived its right to claim that the Department's water quality certification was issued untimely and therefore waived since Duke failed to raise this argument during the final review conference, which is the initial step to challenge a Department decision; and 4) to the extent that Duke's summary judgment motion rests on the admission of facts pursuant to 36(a) SCRPC, Duke has not demonstrated that Department is not entitled to a withdrawal thereof pursuant to 36(b) SCRPC given the documented extenuating circumstances.

**Department review of Water Quality Certifications
is governed by Regs. 61-101 and 61-30**

As a regulatory body, the Department possesses "only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged." Captain's Quarters Motor Inn v. South Carolina Coastal Conservation Council, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991) As set forth in the Regulatory Framework section, it is clear the legislature has enacted two regulations that the Department must apply when it review water quality certification. It must apply the substantive law contained within Reg. 61-101, which sets forth the purpose and standards that the Department must apply during its review of a water quality certification. For example, Reg. 61-101, provides in part that "Certification will be denied if

there is a feasible alternative to the activity, which reduces adverse consequences on water quality and classified uses; [or] the proposed activity adversely impacts waters containing State or Federally recognized rare, threatened, or endangered species.” Reg. 61-10(F)(5)(b) and (c).

The 180 day time period is not substantive law, rather it is a procedural device established by the legislature to give effect to the federally mandated “reasonable period of time (which shall not exceed one year)” language contained in Clean Water Act, Section 401(a)(1). Simply put it establishes how long the review should take and when an applicant might expect a decision, and not what the Department must consider as part of its review. Indeed, the procedural nature of the 180 day time period is highlighted by Duke in its claims in its Memorandum of Law that the 180 day time period impacts appellate rights. There, Duke cites Reg. 61-10(G), which sets forth steps to appeal a decision. To the extent these provisions remain applicable to appeals of a water quality certification since the enactment of S.C. Code Ann, 44-1-60, which sets forth the exclusive method to appeal any decision made by the Department, the provision have no bearing on the Department’s decision-making process, which is the quintessential aspect of a substantive law. Thus, since the 180 day time period does not impact the matters that the Department must consider in its review it is a procedural requirement.

Under the rules of statutory construction the Department’s use of the 180 day time period in Reg. 61-30 to modify the 180 day time period in Reg. 61-101 is warranted.

It is a cardinal rule of statutory construction that where two regulations conflict when both are interpreted reasonably, the regulations enacted last shall prevail. Porter v. South Carolina Public Service Commission, 327 S.C. 220, 224, 489 S.E.2d 467, 469 Fn3. Reg. 61-101 provides that the 180 day time period commences upon the Department’s acceptance of the certification application Reg. 61-101(A)(6). However, Reg. 61-30 provides that the “Department

will not process and application until the application fee is received." Reg. 61-30(C)(1)(b). When, as in this case, the application fee is not submitted with the application, it is clear that Reg. 61-101 and Reg. 61-30 cannot be reconciled except by divining legislative intent from when the regulation was enacted or amended. As set forth in the Regulatory Framework section, 61-101 predates the legislative enactment of Reg. 61-30 and its amendments. Given this fact is local to conclude the legislature was aware that Reg. 61-30 might conflict with time periods governing the environmental permits and other approvals that are subject to the imposition of fees under Reg. 61-30 and chose to have the time period in Reg. 61-30 take precedent over the time period in the earlier enacted regulations. Therefore, since water quality certifications are expressly placed within the ambit of Reg. 61-30 and the regulations were enacted after the water quality certification regulation it is clear that the Department's use of the fee regulation time period, which is more specific than the one in Reg. 61-101 is warranted and necessary to ensure that the legislative mandate in each regulation is met.

**Duke is not entitled to summary judgment on the ground of waiver
Because it failed to raise the claim in the appellate proceeding below.**

Duke for the first time raises the claim of waiver on the ground that the Department allegedly failed to complete its review of the water quality certification application and render a decision by December 2, 2008, 180 days after the Department accepted submission of the application. The initial step in the appellate process surrounding the Department's issuance of its Decision on May 1, 2009 was the final review conference held on July 9, 2009. At that conference, the Board acting in its first level of appellate review of the Department's Decision pursuant to S.C. Code Ann. § 44-1-60 heard arguments presented by the parties, which included Duke. Despite this opportunity to raise the claim of waiver that it not trumpets, Duke remained silent. Indeed, in its written response to the Environmental Groups' request for a final

review conference Duke stated that the purpose of the response to ensure that the Board had all the relevant facts upon which it render its decision. Notwithstanding, this statement Duke was silent on this alleged claim and only raises not that the Board, after reviewing the documents submitted for it for review and hearing from the parties, overturned the Department Decision in an exercise of the power granted it by S.C. Code Ann. § 44-1-60. Duke had an obligation and duty to provide the Board with all the facts so that it could render a proper decision. See Divine v. Robbins, 385 S.C. 23, 44, 683 S.E.2d 286, 297 (2009) Fn4 (stating "'An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant's brief.'").

**The Department is entitled to withdraw
its admissions since Duke has not been prejudiced.**

It is the Department's position that it has not admitted the matters contained in Duke's Request to Admit. The responses were due on January 25, 2010 and the Department served them on that date. However, even if the Department was late, the length of the Department's tardiness was minimal time frame was and Duke was not prejudiced. A party can only admit facts tangential to the ultimate issues in a case. Banco Popular v. Beneficial System, Inc., 335 Ill. App. 3d 196, 209 Ill Dec. 389, 780 N.E.2d 1113 (2002). Here, Duke has sought in its request to have the Department admit what are essential issued of law. The Department as note above believes that it is mandated by the legislature to give effect to Reg. 61-30 as well as Reg. 61-10. Whether the Department's interpretation is reasonable and is not a question of fact but one of law. Thus, the fact that the Department may have failed to serve its response to Duke's requests six days late is not prejudicial given the reason for the Department's failure and the fact that the admissions sought are of law and not fact.

CONCLUSION

For the reasons set forth in this Memorandum of Law and the affidavits in support the Department Respectfully request that the Court deny the Petitioner's motion for summary judgment and deny Petitioner's request to have the matters contained in its Requests to Admit deemed admissions against the Department.

Respectfully submitted,



for: Stephen P. Hightower
DHEC Staff Attorney
SC Department of Health and
Environmental Control
2600 Bull Street
Columbia, South Carolina 29201
TEL: 803.898.3349
FAX: 803.898.3367
EMAIL: hightosp@dhec.sc.gov
Attorney for Respondent SC DHEC

February __, 2010
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Duke Energy Carolinas, LLC.,	)	Docket No. 09-ALJ-07-0377-CC
	)	
Petitioner,	)	
	)	
vs.	)	CERTIFICATE OF SERVICE
	)	
South Carolina Department of Health and	)	
Environmental Control,	)	
	)	
Respondent.	)	
	)	
South Carolina Attorney General, American	)	
Rivers, and the South Carolina Coastal	)	
Conservation League,	)	
	)	
Respondent-Intervenors.	)	
	)	

I, Sandra R. Wessinger, Paralegal for the South Carolina Department of Health and Environmental Control, hereby certify that I have on this 12th day of February, 2010, served a copy of *Respondent South Carolina Department of Health and Environmental Control's Response to Petitioner's Motions for Summary Judgment and Declaratory Judgment* upon all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid, addressed as follows:

James W. Potter, Esquire
Nexsen Pruet
Post Office Drawer 2426
Columbia, South Carolina 29202

Julie Youngman, Esquire
Southern Environmental Law Center
200 West Franklin Street, Suite 330
Chapel Hill, North Carolina 27516-2559

Christopher K. DeScherer, Esquire
Southern Environmental Law Center
Post Office Box 609
Charleston, South Carolina 29402

L. Childs Cantey, Esquire
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211


Sandra R. Wessinger

February 12, 2010
Columbia, South Carolina

EXHIBIT 1

Duke Energy Carolinas, LLC.,	)	Docket No. 09-ALJ-07-0377-CC
	)	
Petitioner,	)	
	)	
vs.	)	Respondent South Carolina Department
	)	of Health and Environmental Control's
South Carolina Department of Health and	)	<i>Affidavit in Support of Response to</i>
Environmental Control,	)	<i>Petitioner's Motions for Summary Judgment</i>
	)	<i>and Declaratory Judgment</i>
Respondent,	)	
	)	
South Carolina Attorney General,	)	
American Rivers, and the South	)	
Carolina Coastal Conservation League	)	
	)	
Respondent-Intervenors.	)	
	)	

2. I am a resident of Lexington County, South Carolina and am over the age of 18.
3. I am employed by the South Carolina Department of Health and Environmental Control (SCDHEC or Department) as a Project Manager in the Water Quality Certification and Wetlands Section of the SCDHEC Bureau of Water, Division of Water Quality since 2005. As a part of my duties as a Project manager, I am fully familiar with the law governing water quality certifications in South Carolina and the process in which the Department performs its review of

water quality certification applications. All facts contained in this affidavit are based upon my personal knowledge and my review of the Department's documents.

4. The Department conducts reviews of water quality certifications for federal license and permits pursuant to the Water Quality Certification regulation, 25A S.C. Code Ann. Reg. 61-101 and the Environmental Protection Fees regulation, 24A S.C. Code Ann. Regs. 61-30. The Department is required by these regulations to complete its review of an application within 180 days of the Department's receipt of payment of the applicable fee of \$1,000.00 for a major activity and \$100.00 for a minor activity. Further, under these regulations, if the Department notifies the applicant in writing that additional information is required all time between the date of the request and the date when the Department receives the information or response is excluded from the 180 day review period. Nevertheless, the Department must complete its review and issue its decision within one year of its acceptance of the application or the Department's authorization to issue a certification for the project is deemed waived under the regulation and the federal Clean Water Act. The Department's decision is timely if the decision is issued so that the last day for a party to appeal the decision falls on or before the expiration of the time period.

5. On June 5, 2008, the Department received Duke Energy Carolinas, LLC's (Duke) application for a 401 Certification. An environmental protection fee application processing fee was not included with the application. The application was assigned to me by my Supervisor, Charles Hightower.

6. Between the date that Duke filed its application and the date that the application was placed on public notice, I had conversations with Duke's representative, Mark Oakley, regarding the date the application was accepted by the Department. Accordingly to Mr. Oakley,

Duke's position is that the one year time period commenced upon the Department's acceptance of the application. The Department's position is that the one year time period commenced on the date that the public was notified of the application and project. The vast majority of water quality certification reviews performed by the Department, are certifications for federal permits issued by the United States Army Corps of Engineers ("Corp"). The Department has an arrangement with the Corps whereby the Corps issues a Joint Public Notice that serves as an application for a water quality certification. In accordance with this agreement, the Joint Public Notice starts the one year review period as specified by state and Federal law.¹ The Department, however, has no such arrangement with the Federal Energy Regulatory Commission (FERC) regarding the activities that it licenses in the State. Since there are few FERC projects in general and fewer yet that are licensed in any given year, the Department has agreed that, in this situation, the date that the Department received Duke's application would be the start date for the one year time period. The Department's decision did not apply to the 180 day time period and, subsequently, the Department gave notice thereof to Duke in writing.

7. On July 29, 2008, I sent an e-mail to Mr. Oakley regarding the Public Notice information for the Duke 401 Certification application. The e-mail contained a preview of language that the Department intended to include in the Public Notice. In particular, I included the language regarding when the 180 day time period starts to run and how the time period is calculated. The pertinent information in the e-mail is as follows:

- a. Fee: Pursuant to R. 61-30, Environmental Protection Fees, the SC Department of Health and Environmental Control is authorized to collect application fees for Water Quality

¹ The Joint Public Notice (JPN) is a document providing notice to the public and adjoining land owners of the application, proposed activity and other information, and provides the public with a time period in which to submit public comments to the Department. The JPN complies fully with all the notice requirements contained in 25A S.C. Code Ann. Regs. 61-101(D).

Certification [(sic)]. The following fee is now due to the Department of health and Environmental Control.

Applicant:
Public Notice Number:
Issue Date:
Total Due: \$ 1,000.00

- b. The Department has 180 days to complete action on an application for 401 Water Quality Certification or the assessed fee must be returned. The 180 days includes only those days in which the application is actively being reviewed by the Department, the clock stops when information is requested and the SC Department of Health and Environmental Control is waiting on a response. **Accordingly, the 180 day clock will not start until we have received an affidavit of publication and the appropriate fee.**

(Emphasis in original). A copy of this e-mail is attached hereto as Exhibit 1.

8. Public Notice No. DHEC 08-C-001 was issued by the Department on August 8, 2008. Pertinent to this matter, the notice informed the public that the Department would accept comments received on or before October 7, 2008. Also pertinent to this matter, the Public Notice included the language quoted above in paragraph 6. A copy of Public Notice No. DHEC 08-C-001 is attached hereto as Exhibit 2.

9. The Department's first letter requesting additional information/clarification (RAI) was mailed to Duke on August 19, 2008. In that letter, I notified Mr. Oakley that the Department had comments on the draft Quality Assurance Program Plan (QAPP) and that the Department was requesting that Duke submit all the requested information by October 19, 2008. Additionally, included the following language in the letter:

Pursuant to Regulation 61-30, the Department had 180 days to complete action on an application for 401 Water Certification or the assessed fee must be returned. Once the fee and affidavit of publication is received (requested 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.

A copy of my first RAI letter to Mr. Oakley is attached hereto as Exhibit 3.

10. The Department received Duke's 401 Certification application fee on, or about, August 25, 2008, which would have started the 180 day time period. However, the clock remained stopped because Duke had not submitted its response to matters contained in the Department's August 19, 2008 RAI.

11. On October 8, 2008, I sent a second RAI letter to Mr. Oakley requesting Dukes response to 12 comments letters received by the Department in response to the Public Notice.

The letter contained the following paragraph:

Please submit your responses by November 8, 2008 so that we may expedite the review process. Pursuant 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 awaiting on a response.

(Emphasis in original). A copy of my second RAI letter is attached hereto as Exhibit 4. Additionally, on this date I sent an e-mail to Mr. Oakley notifying him that "I have the 180-day clock stopped with no days elapsed." (Emphasis added). A copy of this e-mail is attached hereto as Exhibit 5.

12. Following receipt of the above, I had a conversation with Mr. Oakley regarding the 180 day time period. Mr. Oakley notified me via e-mail that based on the fee letter and the first RAI letter (QAPP), the Department's position on time was correct. However, he asked for clarification on the start date in light of 25A S.C. Code Ann. Regs. 61-101(C)(2), which states that the application is complete within ten (10) days of receipt of the application. Further, on

October 21, 2008, Mr. Oakley sent me an e-mail inquiry about the effect a statement in a comment letter from Respondent-Intervenor American Rivers had upon the Department's ability to meet the one year time period imposed by federal law. A copy of these e-mails is attached hereto collectively as Exhibit 6.

13. A third RAI letter was sent to Duke on October 21, 2008 requesting responses to four matters. The letter contained the following paragraph:

Please submit your response by November 21, 2008 so that we may expedite the review process. Pursuant to Regulation 61-30, the Department has 180 days to complete act 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.

(Emphasis in original). A copy of the third RAI letter is attached hereto as Exhibit 7.

14. Subsequent to the date of Mr. Oakley's e-mails I contacted the Program's Staff Attorney for guidance on the issue raised by Mr. Oakley in his October 13, 2008 e-mail

15. On November 10, 2008, the Department received Duke's responses to the second RAI. However, since Duke still had not provided the information requested in the first RAI, the 180 day clock remained stopped. Duke did not include, as part of its responses, any objection to the Department's review of the application and the 180 day clock. A copy of Duke's notification to the Department is attached hereto as Exhibit 8.

16. Duke submitted a partial response to the Department's third RAI letter on November 21, 2008. The clock remained stopped because Duke has still not provided a response to the first RAI letter. A copy of this correspondence is attached hereto as Exhibit 9.

17. Duke completed its response to the Department's third RAI letter on December 12, 2008. Duke's correspondence contained a thank you to the Department for granting Duke

extra time to submit its response, and notify the Department that is "targeting to submit a revised QAPP by December 19." The QAPP was the subject of the Department first RAI letter on August 19, 2008. The response contained no challenge to the Department's review of the application and the 180 clock. A copy of Dukes correspondence is attached hereto as Exhibit 10.

18. Duke's response to the Department's first RAI regarding the QAPP was received by the Department on January 12, 2009. I notified Mr. Oakley of the fact by an e-mail dated January 13, 2009. The receipt of this response started the 180 day clock on the Department's review of the Duke application. A copy of this response is attached hereto as Exhibit 11.

19. Also on January 13, 2009, I notified Mr. Oakley and Tami Styer, a Project Manager that the attached comment letter I was sending Duke had been inadvertently left out the batch of public comments that I had sent in November 2008. Since Duke's failure to respond to this new comment was the Department's fault, I notified Mr. Oakley and Ms. Styer that the 180 clock was not being stopped pending Duke's response to this comment. A copy of this e-mail is attached hereto as Exhibit 12.

20. On January 28, 2009, the Department sent an e-mail request to Mr. Oakley for clarification on herbicide use or other activities that could potentially affect the quality of water being withdrawn from water supply intakes. This request suspended the 180 clock. Duke restarted the clock by submitting its response to the Department's request in an e-mail January 30, 2009. Also on that day, Mr. Oakley acknowledged my thanks for the quick response by stating "... [g]otta keep that ol' clock running!!!" A copy of these e-mails is attached hereto as Exhibit 13.

21. The Department sent an e-mail request to Duke on February 5, 2009 seeking information on dissolved oxygen exclusion of low flow data related to the Department's first RAI dated October 21, 2008. This request stopped the 180 day clock. A copy of the Department's e-mail request is attached hereto as Exhibit 14.

22. Duke responded to the Department's February 5, 2008 request on February 27, 2009. The Duke response restarted the 180 day clock. A copy of Dukes response to the Department's request is attached hereto as Exhibit 15.

23. The Department sent another e-mail request to Duke on March 5, 2009. The Department was requesting that Duke respond to the comment letter from the Office of the South Carolina Attorney General. This request stopped the 180 day clock. Duke responded to the Department's request on March 9, 2009, and the 180 day restarted. A copy of the e-mails containing Department's request and Duke's response is attached hereto as Exhibit 16.

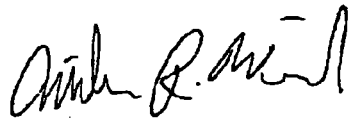
24. The Department's final e-mail request was sent to Duke on March 25, 2009. The 180 day clock was stopped, and the next day Duke submitted its response. A copy of the Department's request and Duke's response is attached hereto as Exhibit 17.

25. The Department issued its Notice of Department Decision – Water Quality Certification for Public Notice No. DHEC 08-C-001 on May 15, 2009. Between the dates that the Department received the application fee from Duke until the date that the Department Decision was issued 242 days elapsed (August 25, 2008 to May 15, 2009). Of the 242 days, a period of 109 days (August 25, 2008 to January 12, 2009) did not count because Duke had not submitted its response to the Department's first RAI letter until January 12, 2009. Thereafter, the following time periods are excludible because the Department was awaiting responses to its inquiries from Duke: January 28, 2009 to January 30, 2009, 2 days; February 5, 2009 to

February 27, 2009, 22 days; March 5, 2009 to March 9, 2009, four (4) days; and March 25, 2009 to March 26, 2009, one (1) day). Accordingly, the Department's review of the Duke 401 application used only 94 days out of a regulatory maximum 180 days.

26. Thorough out the pendency of the Duke 401 Certification application I had constant communication with Duke's representative Mr. Oakley and Ms. Styer. At no time during these communication, whether written or orally, did Duke's representatives question the Department's suspension of the time period while it was awaiting responses from Duke for any of the requests discussed above was inappropriate or incorrect.

FURTHER AFFAINT SAITH NOT.



William R. Wenerick

Sworn to and subscribed to before me
this 12th day of February 2010.



Notary Public

My Commissions Expires: 2-17-2015

EXHIBIT 1

William "Rusty" Wenerick - Public Notice Info for Catawba Wateree FERC 401

From: William "Rusty" Wenerick
To: Mark Oakley
Date: 7/29/2008 10:29 AM
Subject: Public Notice Info for Catawba Wateree FERC 401
CC: Hightower, Charles

Mark,

Below is what the letter we'll be sending you will say. Chuck is in a meeting and will call you when he gets out. I would say the brief description of the work should be something like the continued operation of the project under a new license and subject to the terms of the CRA. Duke is a private company so it would be for private use. The name and location of the waterbody would be a description of all waterbodies within the FERC project boundary. You can reword this section of the template as long as these three elements are covered. I suggest you submit a draft to us for review.

Rusty

Before the SC Department of Health and Environmental Control (SC DHEC) can act on your application for Water Quality Certification you are required to publish notice of the application in a newspaper and submit the required fee. Details of each of these requirements follow:

1. **Public Notice:** Pursuant to R. 61-101, Water Quality Certification, a notice in the newspaper must contain information explaining the location, nature and extent of the proposed activity. The notice must indicate a fifteen (15) day comment period and be published in a newspaper of local or general circulation in the county where the activity is proposed to take place for one day. You must provide SC DHEC with an affidavit of publication from the newspaper within fifteen (15) days of publication. You must publish the following notice and submit an affidavit of publication before SC DHEC can continue processing your application.

PUBLIC NOTICE P/N: I'll give you this number when we assign one
 (Applicant) has applied to the South Carolina Department of Health and Environmental Control for a Water Quality Certification to (Brief description of work) for (Public/Private) use in (Name and Location of Waterbody). Comments will be received by the South Carolina Department of Health and Environmental Control at 2600 Bull St, Columbia SC 29201, Attn: Rusty Wenerick, Division of Water Quality until (Insert Date - 15 days from date of this notice).

2. **Fee:** Pursuant to R. 61-30, Environmental Protection Fees, the SC Department of Health and Environmental Control is authorized to collect application fees for Water Quality Certification. The following fee is now due to the Department of Health and Environmental Control:

Applicant:
 Public Notice Number:
 Issue Date:
 Total Due: \$ 1,000.00

- The Department has 180 days to complete action on an application for 401 Water Quality Certification or the assessed fee must be returned. The 180 days includes only those days in which the application is actively being reviewed by the Department; the clock stops when information is requested and the SC Department of Health and Environmental Control is waiting on a response. Accordingly, the 180 day clock will not start until we have received an affidavit of publication and the appropriate fee.

- If you have questions regarding this 401 Water Quality Certification public notice requirement, please contact the Project Manager, Rusty Wenerick, at 803-898-4266 or other available 401 Water Quality Certification staff at 803-898-4300.
- D H E C
PROMOTE PROTECT PROSPER

William R. "Rusty" Wenerick
Project Manager
Bureau of Water
2600 Bull Street, Columbia, SC 29201-1708
Phone: (803) 898-4266 / Fax: (803) 898-7344
Email: weneriwr@dhec.sc.gov

1. Avoid 2. Minimize 3. Compensate
No Net Loss!

SOUTH CAROLINA DEPARTMENT OF HEALTH
AND ENVIRONMENTAL CONTROL

EXHIBIT 2

BOARD:
Paul C. Aughey, III
Chairman
Edwin H. Cooper, III
Vice Chairman
Steven G. Kiser
Secretary



C. Earl Hunter, Commissioner
Promoting and protecting the health of the public and the environment

BOARD:
Henry C. Soren
M. David Mitchell, MD
Glenn A. McGill
Colman E. Buckshus, MD

PUBLIC NOTICE

State of South Carolina
Department of Health and Environmental Control
Bureau of Water
2600 Bull Street
Columbia, SC 29201

Public Notice Number DHEC-08-C-001

August 8, 2008

The South Carolina Department of Health and Environmental Control (SCDHEC) has received an application for a Water Quality Certification (WQC) pursuant to Section 401 of the Clean Water Act (33 U.S.C. 1341).

Duke Energy Carolinas, LLC (Duke) operates the Catawba-Watauga Hydroelectric Project (Project), which is licensed as Federal Energy Regulatory Commission (FERC) Project No. 2232. Duke is required to obtain a new license from the FERC in order to continue operating the Project. The current license expires August 31, 2008.

The Application for a new license was submitted to the FERC on August 29, 2006, along with a Comprehensive Relicensing Agreement (CRA), signed by 70 stakeholder organizations. The subject of this WQC is the continued operation of the Project under a new FERC-issued license and consistent with applicable sections of the Catawba-Watauga CRA.

More information, including a copy (PDF) of Duke's complete WQC application package with maps and a detailed description of the project can be found at the link below. You may also request a copy of the application package on CD. Duke's License Application to the FERC and the CRA are available on the FERC e-library webpage by using the Project No. 2232.

<http://www.scdhec.gov/environment/water/cwferc401.htm>

This public notice is being distributed to interested persons and agencies to gain comments, which will aid the SCDHEC in making a final decision regarding the project. All comments and data in support or opposition to the project should be submitted in writing to:

SC Department of Health and Environmental Control
Division of Water Quality
Attn: Rusty Wenerick
2600 Bull St
Columbia SC 29201

Comments will be received at the above address until October 7, 2008.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
2600 Bull Street • Columbia, SC 29201 • Phone: (803) 898-5432 • www.scdhec.gov



Bureau of Water
2600 Bull St
Columbia SC 29201

Water Quality Certification

Applicant: Duke Energy Carolinas LLC P/N: DHEC 08-C-001

Before the SC Department of Health and Environmental Control (SC DHEC) can act on your application for Water Quality Certification you are required to publish notice of the application in a newspaper and submit the required fee. Details of each of these requirements follow:

1. **Public Notice:** Pursuant to R. 61-101, Water Quality Certification, a notice in the newspaper must contain information explaining the location, nature and extent of the proposed activity. The notice must indicate a fifteen (15) day comment period and be published in a newspaper of local or general circulation in the county where the activity is proposed to take place for one day. You must provide SC DHEC with an affidavit of publication from the newspaper within fifteen (15) days of publication. You must publish the following notice and submit an affidavit of publication before SC DHEC can continue processing your application.

PUBLIC NOTICE P/N: DHEC 08-C-001
(Applicant) has applied to the South Carolina Department of Health and Environmental Control for a Water Quality Certification to (Brief description of work) for (Public/Private) use in (Name and Location of Waterbody). Comments will be received by the South Carolina Department of Health and Environmental Control at 2600 Bull St, Columbia SC 29201, Attn: Rusty Wenerick, Division of Water Quality until (Insert Date - 15 days from date of this notice).

2. **Fee:** Pursuant to R. 61-30, Environmental Protection Fees, the SC Department of Health and Environmental Control is authorized to collect application fees for Water Quality Certification. The following fee is now due to the Department of Health and Environmental Control:

Duke Energy Carolinas LLC
Joint Public Notice Number: DHEC 08-C-001
Issue Date: August 15, 2008
Total Due: \$ 1,000.00

- The Department has 180 days to complete action on an application for 401 Water Quality Certification or the assessed fee must be returned. The 180 days includes only those days in which the application is actively being reviewed by the Department; the clock stops when information is requested and the SC Department of Health and Environmental Control is waiting on a response. Accordingly, the 180 day clock will not start until we have received an affidavit of publication and the appropriate fee.
- If you have questions regarding this 401 Water Quality Certification public notice requirement, please contact the Project Manager, Rusty Wenerick, at 803-898-4266 or other available 401 Water Quality Certification staff at 803-898-4300.

For
some
reason
this
is dated
the 15th
in EFTS,

but
it would've
gone out
some day
as PN 8/15/08

401 Water Quality Certification Application Fee

Duke Energy Carolinas LLC
Joint Public Notice Number: DHEC 08-C-001
Issue Date: August 15, 2008
Total Due: \$ 1,000.00

Please return this page with your check (made payable to SC Department of Health and Environmental Control) and your affidavit of publication to:

SC Department of Health and Environmental Control
Bureau of Water
Attn: Rusty Wenerick, Project Manager
2600 Bull St
Columbia SC 29201

EXHIBIT 3

August 19, 2008

Duke Energy Carolinas, LLC
c/o Mark Oakley, P.E.
526 South Church Street
PO Box 1006
Mail Code EC12Y
Charlotte, NC 28201-1006

REF: Catawba-Wataree Hydroelectric Project, PN# DHEC-08-C-001
401 Water Quality Certification

Dear Mr. Oakley:

Please review the enclosed comments on the draft QAPP and respond to the deficiencies. Coordinate with the reviewer, Nydia F. Burdick, M.S. (Manager, Quality Assurance Office, 803-896-0862), as necessary until the QAPP is acceptable. SCDHEC's guidance document for preparing QAPPs is also enclosed. The Division of Water Quality has reviewed probe placements and determined they are logical and seem to best fit the unique physical conditions at each facility. We have no recommendations to improve them. We are continuing to review your application and will request more information very soon.

Please submit all requested information by October 19, 2008 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 (requested 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.

Additional information regarding State Water Quality Standards or the 401 Certification process can be found on the Bureau of Water's website at: <http://www.scdhec.gov/environment/water/401.htm>. If you have any questions, please call me at (803) 898-4266 or e-mail weneriwr@dhec.sc.gov. Thank you for your time and consideration.

Sincerely,

William R. "Rusty" Wenerick, Project Manager
SCDHEC Bureau of Water, Division of Water Quality
Water Quality Certification and Wetlands Section
2600 Bull Street
Columbia, SC 29201-1708
Fax: (803) 898-7344

Enclosures: QAPP Review Checklist
Guidance Document for preparing QAPPs

cc w/out enclosures:

Nydia F. Burdick
EQC Laboratories, Building 9

Columbia EQC Field Office
Bldg #5 / PO Box 156
State Park, SC 29147-0156

Lancaster EQC Field Office
2475 DHEC Road
Lancaster, SC 29720

Sumter EQC Field Office
185 Magnolia Street
PO Box 1628
Sumter, SC 2915

EXHIBIT 4

October 8, 2008

Duke Energy Carolinas, LLC
c/o Mark Oakley, P.E.
526 South Church Street
PO Box 1006
Mail Code EC12Y
Charlotte, NC 28201-1006

REF: Catawba-Wateres Hydroelectric Project (FERC Project No. 2232), PN# DHEC-08-C-001
401 Water Quality Certification

Dear Mr. Oakley:

The Bureau of Water at the South Carolina Department of Health and Environmental Control (SCDHEC) would like to request additional information in order to continue a technical review of your application and complete the 401 Water Quality Certification. Additional information will be requested again in the near future after the SCDHEC reviews your application further.

Response to comment letters: Please provide a response to the 12 comment letters received to date as a result of the public notice (copies of 10 letters enclosed – you were copied on letters from SCDPRT and NCDENR).

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.

Additional information regarding State Water Quality Standards or the 401 Certification process can be found on the Bureau of Water's website at: <http://www.scdhec.gov/environment/water/401.htm>. If you have any questions, please call me at (803) 898-4266 or e-mail wenerlwr@dhec.sc.gov. Thank you for your time and consideration.

Sincerely,

William R. "Rusty" Wenerick, Project Manager
SCDHEC Bureau of Water, Division of Water Quality
Water Quality Certification and Wetlands Section
2600 Bull Street
Columbia, SC 29201-1708
Fax: (803) 898-7344

Enclosure: copy of 10 comment letters

cc w/out enclosure:

Columbia EQC Field Office
Bldg #5 / PO Box 156
State Park, SC 29147-0156

Lancaster EQC Field Office
2475 DHEC Road
Lancaster, SC 29720

Sumter EQC Field Office
105 Magnolia Street
PO Box 1628
Sumter, SC 29155

file

EXHIBIT 5

William "Rusty" Wenerick - RE: CWFERC.401

From: "Oakley, Mark" <emoakley@duke-energy.com>
To: "William Rusty Wenerick" <WENERIWR@dhec.sc.gov>
Date: 10/13/2008 10:34 AM
Subject: RE: CWFERC 401

Thanks, Rusty. I appreciate it.

I got your letter today containing the public comment letters. Most appear to be straightforward to answer. The American Rivers letter is pretty long, so it will take some time to get through it and drive out all the issues to address.

We met again internally on the QAPP this morning and believe we are on a track to deliver a revised QAPP to you and Nydia on Monday Oct 20. I'll advise if this changes. It has proven to be a good exercise for us and we feel good about the resulting product we are going to deliver.

From: William Rusty Wenerick [mailto:WENERIWR@dhec.sc.gov]
Sent: Monday, October 13, 2008 10:19 AM
To: Oakley, Mark
Subject: RE: CWFERC 401

Mark,
I'm working on a response to your questions. Thanks for your patience.
Rusty

>>> On 10/8/2008 at 2:17 PM, "Oakley, Mark" <emoakley@duke-energy.com> wrote:

Thanks, Rusty. Based on the dates of the fee letter and the QAPP letter, I agree with your assessment.

However, I need your help to reconcile your explanation of start date with another regulation that I was advised of that says in effect that the application is deemed complete if the "Department does not request additional information within ten (10) days of receipt of the application (S. C. Reg. 61-101.C.2). I am being advised that "complete" by this definition starts the clock. Can you explain how all this fits together?

From: William Rusty Wenerick [mailto:WENERIWR@dhec.sc.gov]
Sent: Wednesday, October 08, 2008 12:31 PM
To: Oakley, Mark
Subject: CWFERC 401

Mark,

I have the 180-day clock stopped with no days elapsed.

Rusty

EXHIBIT 6

William "Rusty" Wenerick - RE: CWFERC 401

From: "Oakley, Mark" <emoakley@duke-energy.com>
To: "William Rusty Wenerick" <WENERIWR@dhec.sc.gov>
Date: 10/21/2008 1:14 PM
Subject: RE: CWFERC 401
CC: "Styer, Tami C" <tsstyer@duke-energy.com>

Hey, Rusty. The following statement was included in American Rivers' comment letter.

(c) permits or licenses issued by the Federal Energy Regulatory Commission, 16

U.S.C. Section 1791, et seq."

South Carolina Code of Regulations 56 1-1 01A.2(c).

The Department has one year from the date of the application's filing to act on a request for certification. See South Carolina Code of Regulations § 61-101A.6. If the Department denies the certification, FERC cannot issue a license for the Project. See 33

U.S.C. § 1341(a)(1).

Unfortunately, I think this translates into yet a third "clock start" date. Can you please add this to the other two statements that we are trying to reconcile? Thanks for your research on this. Let me know how I might be able to assist.

From: William Rusty Wenerick [mailto:WENERIWR@dhec.sc.gov]
Sent: Monday, October 13, 2008 10:19 AM
To: Oakley, Mark
Subject: RE: CWFERC 401

Mark,
I'm working on a response to your questions. Thanks for your patience.
Rusty

>>> On 10/8/2008 at 2:17 PM, "Oakley, Mark" <emoakley@duke-energy.com> wrote:

Thanks, Rusty. Based on the dates of the fee letter and the QAPP letter, I agree with your assessment.

However, I need your help to reconcile your explanation of start date with another regulation that I was advised of that says in effect that the application is deemed complete if the "Department does not request additional information within ten (10) days of receipt of the application (S. C. Reg. 61-101.C.2). I am being

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advised that "complete" by this definition starts the clock. Can you explain how all this fits together?

From: William Rusty Wenerick [mailto:WENERIWR@dhec.sc.gov]
Sent: Wednesday, October 08, 2008 12:31 PM
To: Oakley, Mark
Subject: CWFERC 401

Mark,

I have the 180-day clock stopped with no days elapsed.

Rusty

EXHIBIT 7

October 21, 2008

Duke Energy Carolinas, LLC
c/o Mark Oakley, P.E.
526 South Church Street
PO Box 1006
Mail Code BC12Y
Charlotte, NC 28201-1006

REF: Catawba-Watree Hydroelectric Project (FERC Project No. 2232), PN# DHEC-08-C-001
401 Water Quality Certification

Dear Mr. Oakley:

The Bureau of Water at the South Carolina Department of Health and Environmental Control (SCDHEC) would like to request additional information in order to continue a technical review of your application and complete the 401 Water Quality Certification. Additional information may be requested again in the future.

Please provide a response to the following questions:

1. It is not clear how initial DO in turbine inflows was determined for Discrete Bubble Model (DBM) calibration. Two different approaches are mentioned: (1) measured DO in turbine inflow (Sec. 5.1.4.1, p. 51 and Appendix C, General Calibration Procedure) and (2) measured DO in tailrace without airflow to the turbine (Appendix B, p. 16). Please clarify which approach was used for each turbine model.
2. Confirm for each modeled turbine that, except during test periods when the calibration data were collected, there was no significant airflow into the turbines, i.e. the historical datasets represent air valves closed conditions. If this is not the case, then describe conditions for each modeled turbine, i.e. evaluate the degree to which potential DO benefit may already be reflected in the historical data.
3. The application contains the historical hourly data for each project in spreadsheet format on an attached disc, which is helpful; however, the complete DBM model input, equations, and output data are also needed for each project. Please provide in spreadsheet format.
4. It is not clear how the historical data provided on disc was analyzed to produce the without aeration frequency plots (Sec. 5.1.4). Similar plots of the historical record provided by Duke during the stakeholder negotiations process showed lower DO levels at all projects using the period May 1st through November 31st for both all flows and generation flows than are shown here. Please describe how the historical dataset was analyzed to generate the without aeration frequency plots.

If you have questions about this particular request, you may contact Wade Cantrell of the Water Quality Modeling Section directly at cantrewwm@dhec.sc.gov or (803) 898-3548.

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.

Additional information regarding State Water Quality Standards or the 401 Certification process can be found on the Bureau of Water's website at: <http://www.scdhec.gov/environment/water/401.htm>. If you have any questions, please call me at (803) 898-4266 or e-mail weneriwr@dhec.sc.gov. Thank you for your time and consideration.

Sincerely,

William R. "Rusty" Wenerick, Project Manager
SCDHEC Bureau of Water, Division of Water Quality
Water Quality Certification and Wetlands Section
2600 Bull Street
Columbia, SC 29201-1708
Fax (803) 898-7344

cc:

Columbia EQC Field Office
Bldg #5 / PO Box 156
State Park, SC 29147-0156

Lancaster EQC Field Office
2475 DHEC Road
Lancaster, SC 29720

Sumter EQC Field Office
105 Magnolia Street
PO Box 1628
Sumter, SC 2915

Larry Turner, Manager
Water Quality Modeling Section
SCDHEC Bureau of Water, Division of Water Quality

401 file

EXHIBIT 8

William "Rusty" Wenerick - Duke Responses to Public Comments Received on the Catawba-Wateree 401 WQC Application

From: "Oakley, Mark" <emoakley@duke-energy.com>
To: "William Rusty Wenerick" <WENERIWR@dhec.sc.gov>
Date: 11/10/2008 2:57 PM
Subject: Duke Responses to Public Comments Received on the Catawba-Wateree 401 WQC Application
CC: "Styer, Tami C" <tstyer@duke-energy.com>
Attachments: CW 401 public comment responses.pdf

Rusty, as we discussed, attached is a .pdf file of Duke's public comment response letter. We are following up by sending a hardcopy by overnight delivery tonight. Thanks for your cooperation and let us know if we can clarify any of our responses or provide additional information.

EXHIBIT 9

William "Rusty" Wenerick - Duke Energy Responses to SCDHEC Information Request Dated October 21, 2008

From: "Oakley, Mark" <cmoakley@duke-energy.com>
To: "William Rusty Wenerick" <WENERIWR@dhec.sc.gov>, Wade Cantrell <CANTREWM@dhec.sc.gov>
Date: 11/21/2008 2:00 PM
Subject: Duke Energy Responses to SCDHEC Information Request Dated October 21, 2008
CC: "Styer, Tami C" <tstyer@duke-energy.com>, "Fletcher, Scott" <Scott.Fletcher@devinetarbell.com>, "Knight, Jon" <Jon.Knight@devinetarbell.com>, "Gaffney, Steve" <Steve.Gaffney@devinetarbell.com>
Attachments: SCDHEC C-W 401 AIR response 11 21 08.pdf

Rusty and Wade,

Attached is Duke's letter dated November 21, 2008 responding to questions 1, 2, and 3 of your letter dated October 21, 2008. We will follow up by sending a hardcopy via overnight delivery. This hardcopy will include the CD containing Discrete Bubble Model (DBM) files that is referred to in the cover letter and in Appendix A.

Please note that we are available at your convenience to either visit your office or to conduct a conference call to review the DBM files and ensure that they execute properly.

Thanks for the opportunity to coordinate with you both.

EXHIBIT 10

William "Rusty" Wenerick - Duke Energy Response to SCDHEC Additional Information Request

From: "Oakley, Mark" <moakley@duke-energy.com>
To: "William Rusty Wenerick" <WENERIWR@dhec.sc.gov>
Date: 12/12/2008 3:49 PM
Subject: Duke Energy Response to SCDHEC Additional Information Request
CC: "Styer, Tami C" <tstyer@duke-energy.com>, "Fletcher, Scott" <Scott.Fletcher@devinetarbell.com>, "Knight, Jon" <Jon.Knight@devinetarbell.com>, "Gaffney, Steve" <Steve.Gaffney@devinetarbell.com>, Nydia Burdick <BURDICNF@dhec.sc.gov>
Attachments: DHEC AIR#4 response.pdf

Duke Energy Carolinas, LLC (Duke) submits the attached letter to complete our response to the South Carolina Department of Health and Environmental Control's (SCDHEC) request for additional information dated October 21, 2008.

On November 21, 2008 Duke submitted its response to three of the four questions posed in SCDHEC's October 21, 2008 letter. Our response to Question 4 is provided in the attached letter. Duke is also providing Supplemental Analyses results on CD. A hardcopy of the attached letter along with the accompanying CD is being sent to SCDHEC via overnight delivery.

Duke appreciates the additional time allowed by SCDHEC in order to prepare this information.

Duke has begun preparing its response to the most recent set of QAPP comments received from Nydia Burdick and is targeting to submit a revised QAPP by December 19.

EXHIBIT 11

William "Rusty" Wenerick - RE: Updated QAPP

From: "Oakley, Mark" <emoakley@duke-energy.com>
To: "William Rusty Wenerick" <WENERIWR@dhec.sc.gov>, Nydia Burdick
<BURDICNF@dhec.sc.gov>
Date: 1/13/2009 2:22 PM
Subject: RE: Updated QAPP
CC: "Styer, Tami C" <tssstyer@duke-energy.com>

Great. Thanks for noting this.

From: William Rusty Wenerick [mailto:WENERIWR@dhec.sc.gov]
Sent: Tuesday, January 13, 2009 2:16 PM
To: Nydia Burdick; Oakley, Mark
Cc: Styer, Tami C
Subject: RE: Updated QAPP

Mark,

This is just a note to let you know that DHEC considers the RAI associated with the QAPP to be complete as of the date of Nydia's approval email below, since the point of that request was to get something that met with approval and was ready for signature.

Thanks,

Rusty

>>> On 1/13/2009 at 2:06 PM, "Oakley, Mark" <emoakley@duke-energy.com> wrote:

Thank you, Nydia.

You have a good plan for getting the QAPP signed. I need to give John Dorney (NC Division of Water Quality) a chance to review and agree to the latest QAPP since we want the same requirements in NC and SC. Then Duke will initiate the signature process.

We appreciate your patience and counsel as we worked through developing this document.

—Original Message—

From: Nydia Burdick [mailto:BURDICNF@dhec.sc.gov]
Sent: Monday, January 12, 2009 12:53 PM
To: Oakley, Mark
Cc: William Rusty Wenerick; Styer, Tami C
Subject: Updated QAPP

Mark,

Looks great. Please print and get all internal signatures. If you can also get John Dorney's

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signature at this point. Then send it to Rusty, who will sign and send it to me. I'll be responsible for sending the signed copy back to you—I just need to know if the address is the POB 1006 in Charlotte or what.

Thanks!

Nydia F. Burdick, M.S., Mgr
Quality Assurance Office
803-896-0862

EXHIBIT 12

William "Rusty" Wenerick - FW: American Whitewater comment letter

From: "Styer, Tami C" <tsstyer@duke-energy.com>
To: "William Rusty Wenerick" <WENERIWR@dhec.sc.gov>
Date: 1/13/2009 3:54 PM
Subject: FW: American Whitewater comment letter
CC: "Oakley, Mark" <emoakley@duke-energy.com>, "Lineberger, Jeffrey G" <jglineberger@duke-energy.com>, "Jester, Steve" <sdjester@duke-energy.com>, "Rice, Garry S" <gsrice@duke-energy.com>, "kevin@amwhitewater.org" <kevin@amwhitewater.org>
Attachments: 2008.10.01 AW Catawba 401 Cmmts.pdf

Rusty,

Per your request in the email below, Duke Energy Carolinas, LLC (Duke) has reviewed the attached letter provided by American Whitewater submitted to SCDHEC in response to the 401 Water Quality Certification application for the Catawba-Watauga Hydroelectric Project. Duke expresses its appreciation for and concurrence with the comments filed by American Whitewater. This organization participated extensively in the Catawba-Watauga relicensing process along with many others who support the long-term sustainable balance of water uses achieved in the Catawba-Watauga Comprehensive Relicensing Agreement.

Thank you for the opportunity to reply these comments. Please contact me (704.382.0293) or Mark Oakley (704.382.5778) if you have questions or need additional information.

Sincerely,

Tami Styer, Project Manager

Duke Energy Hydro Licensing

From: William Rusty Wenerick [mailto:WENERIWR@dhec.sc.gov]
Sent: Tuesday, January 13, 2009 10:40 AM
To: Oakley, Mark; Styer, Tami C
Subject: American Whitewater comment letter

Mark/Tami,

I inadvertently left out the attached comment letter back in November when I sent you a batch of comments and asked you to respond. Please provide a response to the attached comments as soon as possible. I will keep this request informal and not stop the dock, since it was my oversight.

Thanks in advance for your cooperation in providing a response as soon as possible,

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Rusty

file://C:\Documents and Settings\WENER\WR\Local Settings\Temp\XPgrpwise\49D07641... 1/8/2010

EXHIBIT 13

William "Rusty" Wenerick - Re: question

From: "Oakley, Mark" <emoakley@duke-energy.com>
To: "WENERIWR@dhec.sc.gov" <WENERIWR@dhec.sc.gov>, "Styer, Tami C" <tssstyer@duke-energy.com>
Date: 1/30/2009 11:50 AM
Subject: Re: question

No problem. Gotta keep that ol' clock running!!!

From: William Rusty Wenerick
To: Oakley, Mark; Styer, Tami C
Sent: Fri Jan 30 11:46:35 2009
Subject: RE: question

Thanks for the quick response

>>> On 1/30/2009 at 11:21 AM, "Oakley, Mark" <emoakley@duke-energy.com> wrote:

Hi, Rusty. Thanks for your patience as we consulted with our internal program managers to answer your question. Duke operates two on-lake programs, described below, that relate to your question. Due to the primary use of grass carp, the use of only approved herbicides, limits on where the herbicides may be applied, consultation and cooperation with multiple South Carolina and federal agencies, and voluntary communication and coordination with intake owners, none of these activities mentioned below will impact the quality of the water withdrawn for public water supply.

Duke Energy's current Integrated Pest Management strategy for the reservoir management of invasive aquatic weeds is based on the long-term use of herbivorous sterile Asian grass carp. These fish feed on invasive aquatic weeds and have been shown to effectively control the growth of weed beds. Until the grass carp can be stocked, Duke, working in cooperation with the South Carolina Department of Natural Resources' (SCDNR) aquatic plant management program and using South Carolina and Environmental Protection Agency (EPA) approved aquatic herbicides, may utilize a limited initial short term application of approved aquatic herbicides. These approved herbicides have historically been used in Lakes Wateree and Keowee for hydrilla management.

These herbicides are not applied within one-half mile of a public water intake structure. Also, intake owners are notified of herbicide use and usually chose to not make any withdrawals for several hours before and after application. In 2008, limited applications of herbicides for hydrilla control were used on hydrilla infestations found in the North Carolina portion of Lake Wylie. Both Rock Hill (South Carolina) and Belmont (North Carolina) municipal water supply departments were notified of pending herbicide use prior to applications. During 2009, Asian grass carp will be used for hydrilla management in both the North Carolina and South Carolina portions of Lake Wylie. It is not anticipated that aquatic herbicide applications will be used for hydrilla control in Lake Wylie in 2009.

Boat-based mosquito larvicide control operations are conducted annually from May through October in Lakes Wylie, Wateree, and Keowee. Duke has continuously operated this program for over 85 years and it is believed to be the longest-running environmental program in the country. These mosquito control activities are conducted in shallow coves and are conducted in consultation with the South Carolina Department of Health and Environmental Control-Division of General Sanitation.

From: William Rusty Wenerick [mailto:WENERIWR@dhec.sc.gov]
Sent: Wednesday, January 28, 2009 2:15 PM
To: Oakley, Mark; Styer, Tami C
Subject: question

Mark/Tami,

Does Duke have any plans to use herbicides for vegetation clearing or to conduct other activities that could potentially affect the quality of the water being withdrawn for water supply?

Rusty

EXHIBIT 14

From: Wade Cantrell
To: Oakley, Mark
CC: Wenerick, William "Rusty"
Date: 2/5/2009 9:03 AM
Subject: Re: Duke Energy Responses to SCDHEC Information Request Dated October 21, 2008

Mark:

Thanks for the clarification and new information. I have pretty much worked through it and have a couple of questions before proceeding.

First, what is the rationale for excluding historical DO data for Fishing Creek, Bearborn, and Cedar Creek? It looks like flows below 1500 cfs (FC and CC) and 1900 cfs (DB) were not included in the modeling and resulting compliance statistics. I'm sure there is a reason, and it may be explained in the report.

Regardless of why, the result of excluding the low-flow data is to bias the model results toward the higher-DO cooler months. This is not necessarily a problem, and depending on the rationale for excluding this data, it may be unavoidable, but it is something we will have to take into account when evaluating the results.

Second, by excluding the low-flow data, does this mean Duke does not expect to meet the standard under these flow conditions? The table in Appendix L states "Beginning within 60 days following the date of closure of the New License, operate existing... (units)... as needed to meet state standards for DO" for FC, DB, and CC. As acknowledged throughout the report, the critical factor for future compliance is operational decisions by Duke. Does this statement mean Duke will operate these hydros to meet state DO standards under all flow conditions?

Third, I am a little concerned about expectations for Wylie during the interim period. I realize full compliance depends on installation of the new aerating turbine, but it would be helpful to see model results for the existing equipment to understand what could be achieved in the interim.

Fourth, how is the model set up for the new turbines at Wylie and Wateree? Are the measured data for the aerating runner turbine at Wateree used or other assumptions? What is the maximum DO gain predicted for the new turbines?

Thanks for your help,
Wade

>>> "Oakley, Mark" <mooakley@duke-energy.com> 11/21/2008 1:59 PM >>>
Rusty and Wade;

Attached is Duke's letter dated November 21, 2008 responding to questions 1, 2, and 3 of your letter dated October 21, 2008. We will follow up by sending a hardcopy via overnight delivery. This hardcopy will include the CD containing Discrete Bubble Model (DBM) files that is referred to in the cover letter and in Appendix A.

Please note that we are available at your convenience to either visit your office or to conduct a conference call to review the DBM files and ensure that they execute properly.

Thanks for the opportunity to coordinate with you both.

EXHIBIT 15

William "Rusty" Wenerick - Duke Responses to February 11, 2009 and February 17, 2009 Conference Calls

From: "Oakley, Mark" <emoakley@duke-energy.com>
To: "William Rusty Wenerick" <WENERIWR@dhec.sc.gov>, Wade Cantrell <CANTREWM@dhec.sc.gov>
Date: 2/27/2009 5:15 PM
Subject: Duke Responses to February 11, 2009 and February 17, 2009 Conference Calls
CC: "Styer, Tami C" <tstyer@duke-energy.com>, "Knight, Jon" <Jon.Knight@DevineTarbell.com>, "scott.fletcher@devinetarbell.com" <scott.fletcher@devinetarbell.com>
Attachments: Wateree Flow and Aeration Performance Curves for SCDHEC.xls; Wylie Flow and Aeration Performance Curves for SCDHEC.xls

Rusty and Wade, the following note and attached files are provided in response to our two most recent conference calls. I believe this delivers all the information requested to-date. As always, please contact us if there are questions or if more information is needed.

Action Items Resulting from February 11, 2009 and February 17, 2009 Conference Calls with South Carolina Department of Health and Environmental Control (SCDHEC), Devine Tarbell Associates (DTA), and Duke Energy (Duke)

On February 11, 2009, Duke agreed to provide SCDHEC with maximum and minimum flow rate information for the existing units at Wylie Hydro and Wateree Hydro and aeration curves for the existing units at Wylie and Wateree. On February 17, 2009, Duke advised SCDHEC that Duke wanted to clarify that in the analyses of Wylie Hydro and Wateree Hydro, future flow rates projected by the CHEOPS model (incorporating all Comprehensive Relicensing Agreement (CRA) operating provisions) were used as input to the Discrete Bubble Model (DBM) models rather than historical flows as described in the Supplemental Information Package to Duke's 401 Water Quality Certification application. Duke agreed to document the clarification of the flows used in the Wylie and Wateree DBM models and also address the suitability of these flows for use in the DBM models.

Duke Energy Responses:

Aeration Curves and Unit Flow Information

The maximum and minimum flow rate information for the existing units at Wylie and Wateree are provided in the attached spreadsheets on the tab marked "Flow Descriptions". Note that various flows are provided. For DBM analyses, the "lowest gate setting" flow was used as the minimum unit flow limit and the "gate setting for best efficiency" flow was used as the maximum unit flow limit.

Also in the attached spreadsheets on the tab marked "DBM output sorted by flow" are the unit aeration curves including DBM output data for specific unit flows and total plant flows.

Note that the DBMs used to develop the aeration curves calculate the dissolved oxygen (DO) output for each specific unit, not the total station DO output. This is unlike the DBM used in the Supplemental Information Package which calculates the dissolved oxygen output for the total station output under different total flows. The data provided in the spreadsheets allows evaluation of each individual unit's DO output under different flow rates and incoming DO.

file://C:\Documents and Settings\WENERIWR\Local Settings\Temp\XPgrpwise\4A0BC91... 1/8/2010

CHEOPS Model Flows Used Rather than Historic Flows in the 401 Supplemental Report

To evaluate turbine venting for future compliance with the state water quality standards for DO at the Catawba-Wateree hydro stations a calibrated DBM is used to predict the DO in the released water. These results are presented in the 401 Certification Supplemental Information Package. The input variables to the DBM are the historic flows and dissolved oxygen concentrations measured hourly at each of the Catawba-Wateree hydro stations. This is the method described in the Supplemental Information Package for all of the projects except Wylie and Wateree. At these stations however, future operations involve new generating units and new continuous minimum flow requirements that are significantly different from historic unit flow releases and cannot be accurately represented using historic data. Therefore, both hourly DO concentrations and the hourly unit flows had to be selected to represent future conditions.

The inflow DO used as an input variable to the DBM is calculated as described in the Supplemental Information Report, Section 4.2.5. That section also describes how historical flows were reallocated in the new unit configuration to represent the new continuous minimum flow. However, Duke wants to clarify that at Wylie and Wateree the hourly flow predictions produced by the CHEOPS model are used in the DBMs, not flows derived from historic flows. CHEOPS flow predictions are more representative of future flow patterns and operational requirements and are more appropriate to use in the Wylie and Wateree DBM analyses for the following reasons:

- First, the use of CHEOPS flows reflects a reduced number of hours used to generate electricity in the future. Less water will be available in the future for peaking generation use since more water will be used for minimum continuous flows, recreational flows, and other commitments made in the CRA.
- Second, minimum continuous flows would characteristically have less oxygen since a smaller volume is withdrawn from the reservoir and the withdrawal zone would be smaller. Duke utilized two conservative methods to represent future incoming DO concentrations by modeling both the minimum recorded daily DO concentration for all hours and unit operating combinations and the flow-weighted hourly DO concentrations.
- Third, the allocation of historical flows among the new unit configuration based on the methodology described in Section 4.2.5 would have led to many hours of flows not being compatible with unit flow limits and therefore not able to be analyzed by the DBM.

Therefore, the use of CHEOPS-predicted flows in the Wylie and Wateree DBM analyses, coupled with the use of minimum daily DO concentrations and flow-weighted DO concentrations derived from the historical data is more representative of future operations than the use of historic flow and utilizes more conservative DO data.

EXHIBIT 16

William "Rusty" Wenerick - RE: SCOAG letter attached

From: "Styer, Tami C" <tstyer@duke-energy.com>
To: "William Rusty Wenerick" <WENERIWR@dhec.sc.gov>
Date: 3/9/2009 9:59 AM
Subject: RE: SCOAG letter attached
CC: "Oakley, Mark" <emoakley@duke-energy.com>
Attachments: CW 401 response to AGs comments.pdf

Hi Rusty,

I hope you had a nice weekend. Here is Duke's response to the public comments provided by the Attorney General's office. We'll send you a copy in the mail also.

Thanks. Please let me know if you have questions or need additional information.

Tami

From: William Rusty Wenerick [mailto:WENERIWR@dhec.sc.gov]
Sent: Thursday, March 05, 2009 8:48 AM
To: Oakley, Mark; Styer, Tami C
Subject: SCOAG letter attached

Here's the letter.
Rusty

EXHIBIT 17

William "Rusty" Wenerick - RE: DO question

From: "Oakley, Mark" <emoakley@duke-energy.com>
To: "William Rusty Wenerick" <WENERIWR@dhec.sc.gov>, "Styer, Tami C" <tssstyer@duke-energy.com>
Date: 3/26/2009 11:11 AM
Subject: RE: DO question

Hi Rusty,

The LIP is the Low Inflow Protocol and the MEP is the Maintenance and Emergency Protocol. These are explained in detail in the Comprehensive Relicensing Agreement (CRA) in Section 6 and Appendix C (LIP) and Section 7 and Appendix D (MEP). These two sections basically outline how the project will be operated during drought conditions (LIP) and during times when either maintenance or emergency situations arise that result in unusual operating requirements. I think we've sent you a copy of the CRA but if you need these specific sections, I can cut them from the CRA and send them to you.

Regarding the language beginning with the last bullet on pg 12 of the SIP, Duke is describing how we will operate our existing aerating units under normal conditions during the time period between when the New License is issued (and the closure of appeals and challenge periods) and when all unit flow/water quality modifications and/or equipment replacements have been completed. The objective of the described operating protocol is to most effectively deploy all the aeration capacity of our current units in order to enhance DO even though all the equipment modifications and replacements needed to consistently comply with state DO standards will not have not been implemented. However, when Duke is operating under the LIP the amount of water that Duke releases will be different than for normal conditions. In addition, if the MEP is in effect then the units available to operate and the order in which Duke may operate the units may vary from this protocol due to the extenuating MEP circumstances. However, Duke should be able to continue to aerate the units that are able to operate when they are running. This is taken from CRA Section 13.7.

I trust that this helps answer your question. Let me know if you need us to provide more details.

From: William Rusty Wenerick [mailto:WENERIWR@dhec.sc.gov]
Sent: Wednesday, March 25, 2009 2:07 PM
To: Oakley, Mark; Styer, Tami C
Subject: DO question

Mark and Tami,

on page 12 of the SIP

you qualify the paragraph at the bottom of the page by saying first...unless operating in accordance with the LIP and/or MEP...

what do you mean? can you explain this some more?

Rusty

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EXHIBIT 2

Duke Energy Carolinas, LLC.,
Petitioner,
vs.
South Carolina Department of Health and
Environmental Control,
Respondent,
South Carolina Attorney General,
American Rivers, and South Carolina
Coastal Conservation League,
Respondent-Intervenors.

2. I am a resident of Calhoun County, South Carolina and am over the age of 18.
3. I am employed by the South Carolina Department of Health and Environmental Control (SCDHEC or Department) and am the Supervisor of the Water Quality Certification and Wetlands Section ("WQC Section") of the SCDHEC Bureau of Water, Division of Water Quality. As Supervisor of the WQC Section, I am fully familiar with the laws governing water quality certifications in South Carolina and the process in which the Department performs its

review of water quality certification applications. All facts contained in this affidavit are based upon my personal knowledge and my review of the Department's documents.

4. On June 27, 2008, I discussed by phone with Duke's representative, Mark Oakley, matters under the public notice requirements contained in State Water Quality Certification regulation, 25A S.C. Code Ann. Reg. 61-101(D)(4)(a) and (b)—a list of adjacent property owners entitled to have the Department mail notice of Duke's 401 Certification application and the newspaper notice Duke was required to place in a newspaper of general circulation reasonably expected to cover the area affected by the activity.

5. I informed Mr. Oakley that after reviewing the application, I noticed that it did not include a list of adjacent property owners and that this list would be necessary in order for the 401 certification to go on public notice. I also discussed with Mr. Oakley the need for a newspaper affidavit and which newspapers would need to be included in publication. Mr. Oakley informed me that he would provide that information the same day as our conversation, June 27, 2008.

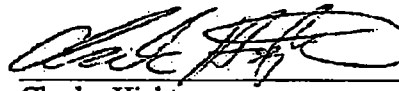
6. Later in the day of June 27, 2008, Mr. Oakley sent me two follow up emails. Mr. Oakley attached a list of newspapers in which to include the public notice. He also attached Duke's Catawba-Wateree Distribution List and the Comprehensive Relicensing Agreement email list. These lists contained names of interested citizens and stakeholders who had asked Duke to be notified about the Catawba-Wateree FERC relicensing. These lists did not contain the names and addresses of all property owners adjacent to the project. Copies of Mr. Oakley's email responses are attached hereto as Exhibit 1.

7. During a subsequent phone conversation, between June 27, 2008 and July 29, 2008, I informed Mr. Oakley that the previously provided lists did not contain the names and

addresses of all property owners adjacent to the project. As he had done previously in our conversations on June 27, 2008, Mr. Oakley expressed his feeling that to gather a list of all adjacent property owners would be difficult. I informed him that for another similar project a list of approximately 4,000 adjacent property owners and their mailing addresses was compiled by another applicant.

8. On July 29, 2008, Mr. Oakley sent me a series of emails that contained lists of the names and mailing addresses for all property owners adjacent to the Catawba-Wateree project. A copy of one of these emails is attached as Exhibit 2.

FURTHER AFFIANT SAITH NOT.


Charles Hightower

Sworn to and subscribed to before me
this 12th day of February 2010.


Notary Public

My Commissions Expires: 2-17-2015

EXHIBIT 1

From: "Oakley, Mark" <emoakley@duke-energy.com>
To: "Oakley, Mark" <emoakley@duke-energy.com>, "Charles Hightower" <HIGHTOCW...
CC: "Styer, Tami C" <tssstyer@duke-energy.com>
Date: 6/27/2008 12:51 PM
Subject: RE: Catawba-Wataree Notification Lists

FYI, I'm also asking our Lake Services group and Real Estate Department (working through county GIS property records) if they have some viable options for pulling together adjacent property owner info. I'll let you know what we find out.

From: Oakley, Mark
Sent: Friday, June 27, 2008 10:55 AM
To: Charles Hightower
Cc: Styer, Tami C
Subject: Catawba-Wataree Notification Lists

Hi, Chuck, Thanks for the conversation this morning. I'm sending three lists, as we discussed:

The newspaper list includes 6 SC newspapers. Conspicuously absent is The State newspaper in Columbia, which I'm pretty sure has run notices for us in the past and should be included. Duke will be glad to have notices published in these papers as well as any others that SCDHEC wants to list. We can provide affidavits from all papers to SCDHEC.

The CW Distribution List is the same list we copy on all Catawba-Wataree relicensing documents we file with the FERC. It includes the FERC service list, our agreement parties, and other interested parties. If we send notices to the SC entities on this list via Fed Ex, we can track deliveries and send copies of delivery confirmations to SCDHEC. If the SCDHEC posted the 401 application on a web page that could be referenced in the notice, it could make this much easier.

The CRA Parties Distribution List is a list of e-mail addresses (not very descriptive on names) that we use to send alerts and updates to the agreement parties and some interested others. Duke would normally send an e-mail to this list advising them of the publishing of a public notice. This list is smaller than the FERC distribution list.

I've been thinking about the "property owners adjacent to the proposed activity" as you described this morning. I'm not confident we can

literally reach every property owner on all the reservoirs and riverine sections of the Catawba-Wataree. The concept of "adjacent to the proposed activity" also seems to me to be pretty hard to define. There is no physical activity associated with implementing parts of the 401 application (related to changes in operation) proposals. The bulk of physical work at Wylie and Wataree will be done inside our powerhouses and just downstream of the Fishing Creek Powerhouse on the Great Falls Long Bypass Diversion Dam.

I don't personally think that a 401 such as this fits the mold of traditional 401 certifications that are processed by the SCDHEC. The relicensing process has certainly generated its own share of public notice both literally via newspaper notices and by extensive media coverage. In terms of the intent of the notice requirement, I recommend that your folks consider the CW Distribution List. It includes all who have chosen to follow relicensing activities and have expressed an interest in being notified of events such as this.

Don't hesitate to contact me if I can be of help.

EXHIBIT 2

From: "Oakley, Mark" <emoakley@duke-energy.com>
To: "Charles Hightower" <HIGHTOCW@dhec.sc.gov>
CC: <wenertwr@dhec.sc.gov>, "Heather Preston" <PRESTOHS@dhec.sc.gov>, "Styer...
Date: 7/29/2008 10:18 AM
Subject: Mailing Addresses for Property Owners Adjacent to the Catawba-Wataree Project
Attachments: FishingCreek.pdf, Mailers_72708_SC_CW.xlsx, GFRC.pdf

In order to continue the process of public notification of the application for Section 401 Water Quality Certification that Duke has filed with the SCDHEC, Duke agreed to provide SCDHEC with a list of mailing addresses for property owners adjacent to the Catawba-Wataree Hydroelectric Project. This e-mail is 1 of 3 that are being used to transmit mailing addresses to SCDHEC along with maps showing the parcels represented by those addresses.

The attached Mailers file contains two tabs. One of the tabs consolidates the duplicate addresses that appear in the other tab. I believe there are 4,839 addresses after duplicate addresses are consolidated. The addresses are based on the latest GIS property parcel data maintained by counties in South Carolina.

I appreciate the SCDHEC's work to make sure the Catawba-Wataree certification process meets all regulatory requirements related to public notice. I hope that this information will allow us to move the process forward. In order to do so, Duke is willing to provide logistical assistance (that the SCDHEC would deem appropriate) to expedite the process of printing and mailing the public notices.

In earlier conversations, Chuck and I discussed Duke's responsibility to publish public notices in several South Carolina newspapers. In order to do so, Duke requests that the SCDHEC provide the wording for such a notice that meets all regulatory stipulations as well as a list of newspapers to run the public notices in. Duke would also like to coordinate the publishing of the public notices with SCDHEC's mailing to adjacent property owners.

Please contact me if there are questions or if further information is needed.

File attachment: Mailers_72708_SC_CW.xlsx/printerSettings/printerSettings1.bin
The file attached to this email was removed
because the file name is not allowed.

EXHIBIT 3

NEXSEN|PRUET

James W. Potter
Member
Admitted in SC, AL

June 8, 2009

VIA HAND DELIVERY

Ms. Lisa Longshore
Clerk of the Board
South Carolina DHEC
2600 Bull Street
Columbia, South Carolina 29201

RECEIVED

JUN 9 2009

DHEC
OFFICE OF GENERAL COUNSEL

Re: SCDHEC-08-C-001

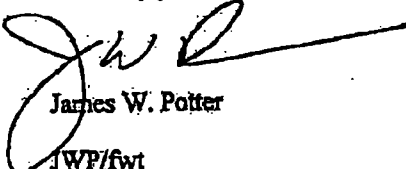
Dear Ms. Longshore:

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

Please find enclosed eight (8) copies of Duke Energy Carolinas, LLC's Response to the South Carolina Coastal Conservation League and American Rivers Request for Final Review. I would appreciate if copies could be distributed to Board members in advance of the June 11 Board Meeting.

By copy of this letter, I am providing copies to other listed parties. Thank you for your assistance.

Sincerely yours,


James W. Potter

JWP/fwt

Enclosures

cc: Stephen Hightower, Esquire
Gerrit Jobsis
Patrick Moore

1230 Main Street
Suite 700 (28201)
PO Drawer 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803.253.8213
F 803.253.8277
E JPotter@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

**BEFORE THE SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL
CONTROL**

	)	
Duke Energy Carolinas, LLC	)	
Catawba Wateree Hydroelectric Project	)	DHEC 08-C-001
	)	

**DUKE ENERGY CAROLINAS, LLC RESPONSE TO THE REQUEST FOR FINAL REVIEW
BY THE SOUTH CAROLINA COASTAL CONSERVATION LEAGUE AND AMERICAN
RIVERS**

Introduction

Duke Energy Carolinas, LLC (Duke) in partnership with 84 other entities in North Carolina and South Carolina began the Catawba-Wateree relicensing process in 2003. Collaboration during this licensing process with over 160 individual stakeholders has led to a Comprehensive Relicensing Agreement (CRA) which was filed with the Federal Energy Regulatory Commission (FERC) along with Duke's License Application in August, 2006. South Carolina stakeholders were well-represented in this process, including the active involvement of the South Carolina Department of Health and Environmental Control (SCDHEC), the South Carolina Department of Natural Resources (SCDNR), the South Carolina Department of Parks, Recreation, and Tourism (SCDPRT), the South Carolina Department of Archives and History (SCDAH), private industry, counties and municipalities, non-governmental interest groups, and citizens (SCDHEC did not sign the CRA in order to avert any conflicts of interest during its deliberation of the Catawba-Wateree water quality certification). The CRA contains the consensus recommendations of 70 signatory stakeholder organizations and individuals for benefits that will improve, balance and help sustain future power and non-power uses of the Catawba-Wateree Hydroelectric Project. The license application incorporates the consensus recommendations of the CRA as proposed future operational changes and resource protection, mitigation, and enhancement (PM&E) measures that will secure the operation of hydroelectric facilities on the Catawba and Wateree rivers and enable Duke to continue to meet regional interests for the next 50 years.

Purpose of this Document

First of all, Duke wishes to ensure that the Board has access to all information pertinent to the Petitioners' Request for Final Review (Request) as it considers whether or not to grant the Request.

In addition, Duke takes the liberty of stating the regulatory context of the Request. The certification being sought is for the continued operation of the Catawba- Wateree Hydroelectric Project under a new FERC license that is consistent with applicable sections of the CRA. All water quality certification requirements identified in the applicable regulations are expected to be met or exceeded under the proposed continued operation of the Project.

Duke asserts that the Petitioners' statement on page 4 of their Request that the December 28, 2006¹ CRA "largely supersedes the measures proposed in the license application" is unsupported and mistaken. Two and one half years of review by various agencies including FERC as well as CRA Parties since the CRA was filed have found no such conflicts between the license application and the CRA. Based on the explanations presented in the following sections, Duke respectfully requests that the Board not grant the Petitioners' Request for Final Review

Petitioners Fail to Meet Their Burden of Proof

Under S.C. Code §44-1-60 (F)(1) the burden of proof in a Final Review Conference is upon the moving parties (the Coastal Conservation League and American Rivers). Duke, in this Response, shows that these parties cannot meet their burden of proof.

Catawba-Wataree CRA Provisions Have Already Passed Four Major Tests

Catawba-Wataree Stakeholders reached consensus agreement on all provisions of the CRA including operational aspects such as flow release, bypass flow, lake level, recreation flow, water quality, and drought management provisions. This process of data gathering, analysis, and negotiation lasted three years.

Subsequent to execution of the CRA, the U.S. Fish and Wildlife Service, SCDNR, the NC Wildlife Resources Commission, South Carolina Electric and Gas, and Duke signed an agreement on diadromous fish restoration known as *THE SANTEE RIVER BASIN ACCORD FOR DIADROMOUS FISH PROTECTION, RESTORATION, AND ENHANCEMENT* (Accord) in which they agreed to no changes to the continuous minimum instream flows or bypass flows proposed in the Catawba-Wataree CRA. SCDHEC and NOAA Fisheries also contributed to this agreement.

The Federal Energy Regulatory Commission in its Draft Environmental Impact Statement (DEIS) accepted the flow release, bypass flow, lake level, recreation flow, and drought management provisions of the CRA.

The South Carolina Department of Health and Environmental Control staff issued its water quality certification for the Catawba-Wataree Project only after a thorough and exhaustive evaluation and analysis of Duke's application for water quality certification including requesting additional data and model information.

¹ The CRA was originally signed in August, 2006 and submitted to FERC with the license application. The CRA was amended in December, 2006. The Revised CRA differs from the version filed on August 29, 2006 in the following ways:

- The CRA was modified to remove from the list of Parties those entities and individuals that decided not to become Parties;
- The CRA was modified to remove actions that were contingent upon an entity becoming a Party where such an entity elected not to become a Party;
- The CRA was modified to reflect those actions that have already occurred such as the filing of the Application for New License; and,
- Minor typographical and grammatical errors were corrected

No Mitigation is Required by Regulation

The Petitioners distort the need for, development of, and purpose of the mitigation package. SCDHEC has assessed several criteria as they evaluated Duke's water quality certification, including a criterion that continued Project operation minimize adverse impacts to existing uses (such as aquatic communities) under the proposal presented in Duke's water quality certification application. The adverse impacts criterion is easily met and even surpassed via the minimum flow increases and water quality improvements proposed in the CRA, which is the basis for the certification. CRA measures will significantly enhance aquatic communities, even without any form of mitigation package. This mitigation is not being provided because Duke and stakeholders failed to meet any water quality certification criterion, but rather to provide additional benefit for situations in which, even with the higher amount of habitat achieved by higher dedicated minimum flow releases, resource agency goals for further habitat enhancement were not fully met. It should be noted that there are no regulatory-defined requirements for habitat restoration and that habitat restoration goals are determined via the technical expertise of state and federal resource agencies.

Petitioners' mischaracterize Duke's application and CRA as "trading flows for land protection." Water-use and flow-related needs were balanced to make sure that all needs and future demands could be sustained by the amount of water in the Catawba-Watauga Basin. This balancing was done without considering land protection. Balancing water uses was accomplished using the CHEOPS™ model to analyze numerous operating scenarios of instream flows, bypass flows, recreation flow releases, drought management procedures known as the Low Inflow Protocol (LIP), and reservoir levels. Results of each scenario were measured against an array of Performance Measures that were defined by stakeholders. In order to be considered successful, an operating scenario had to avoid entering LIP Stage 4 (Emergency Conditions) under observed drought conditions and future higher water demands. No part of this process included riparian land conservation or funding for land protection as a scenario factor or a Performance Measure. After flows were finalized, aquatic habitat results were evaluated and where they did not fully meet resource agency habitat enhancement goals, mitigation packages consisting of protective conservation easements, and funding for additional land protection were developed.

Flow and Water Quality Proposals Enhance Classified Uses

Flow increases, renewed flow into currently dewatered bypassed river sections (at Great Falls), and water quality enhancements contained in the CRA all serve to enhance existing and classified uses. No degradation is caused by Project operation under the CRA, and Petitioners' arguments with respect to anti-degradation standards are baseless.

The Petitioners raise issues with the Watauga Spring Stable Flow Protocol (two 10-day periods of continuous steady flow release each spring for fish spawning) which is intended to enhance fish habitat below the Watauga Development. All Parties, including Duke, indicated their willingness to develop this protocol into an enforceable FERC license requirement. However, during a series of meetings of fishery resource parties in 2005, utility, state agency, federal agency, consultants, and *American Rivers* could not craft clearly enforceable language that would be resilient through all expected operating situations and compatible with other CRA requirements.

This protocol is an agreement among experts to attempt to gain operating experience and then to develop enforceable language to describe this requirement. Should this effort prove successful, then the new language will be pursued as a new license requirement through established public processes for FERC license amendments. The provision would then be enforceable via an amended FERC license.

Shortnose Sturgeon are not a Factor

Endangered species such as the shortnose sturgeon are important environmental resources. However, in this specific case there is no record of shortnose sturgeon utilizing the Wateree River below the Wateree Development, and the Petitioners' representation of their existence as a classified use is a mischaracterization of the facts.

- a) The 1997 North American Journal of Fisheries Management contains a Management Brief (17:995-1000) entitled "Distributions of Shortnose and Atlantic Sturgeons in South Carolina" that was prepared by the South Carolina Marine Resources Research Institute with support from the SCDNR and the National Marine Fisheries Service (NMFS). The purpose of the brief was to compile and analyze the available information on occurrences of sturgeon in South Carolina. Documents from as early as 1896 show no record of sturgeon occurrence in the Wateree River from the Congaree River through Lake Wateree. It is significant that 1896 (and the lack of recorded sturgeon occurrences) predates even the earliest of the Catawba-Wateree hydroelectric stations (built at the site of the current Wylie Hydro in 1904). Petitioners cannot make the case that impacts affecting shortnose sturgeon populations are attributable to Catawba-Wateree flow releases.
- b) A number of past fish sampling studies on the Wateree River conducted by the South Carolina Department of Natural Resources (SCDNR), South Carolina Electric and Gas (SCE&G), and Duke discovered no shortnose sturgeon.
- c) Radio tracking (unpublished data) by the SCDNR of resident shortnose sturgeon migrating upstream from Lake Marion and Lake Moultrie found that only one tagged sturgeon entered the Wateree River for a brief period only and then moved back to the Congaree River. The data do not indicate that any significant numbers of sturgeon migrated into or utilized the Wateree River for any significant period of time.
- d) No shortnose sturgeon were collected during extensive fish sampling studies (electrofishing and gill-netting as requested by resource agencies) of the Wateree River which were conducted for the Catawba-Wateree Relicensing Process from 2004 through 2007.

Throughout the relicensing process, the Petitioners have offered no data to the contrary. In addition, their Request is not consistent with the fact that no critical habitat for shortnose sturgeon has been designated by NMFS (the federal agency responsible for managing the endangered shortnose sturgeon and its habitat on the Wateree River) between Wateree Hydro and the Congaree River. Furthermore, higher flow release rates that can create more fish habitat do not guarantee any actual increase in fish populations. The response of fish populations to habitat gains or losses is speculative and no guarantee can be provided that fish populations will actually grow.

Even if shortnose sturgeon were to become present in the river below Wateree Hydro (which they have not been), their habitat would be significantly and sustainably enhanced by the higher continuous minimum flows, spring stable flow releases, floodplain inundation provisions, drought protection provisions, and water quality improvements proposed in the CRA.

The Petitioners' Request for Relief Harms Other Interests

The CRA includes a High-Inflow Protocol (HIP) in the CRA in which incoming stream flows are monitored and when above-normal flows permit, minimum flows from the Wylie Development are increased from 1,100 cubic feet per second to 1,300 cubic feet per second. Despite this benefit, the flow requests of the Petitioners are singly focused on creating the highest achievable amount of fish habitat in river sections with no regard for impacts that these high flow release rates may have on other water needs and uses in the Catawba-Wateree Basin. Petitioners do not meet the burden of proof necessary to quantify any benefit to be realized from their recommendations and to reconcile the cost and strain that such a high loss of water from the basin will have on other water needs and uses. Flow rates requested by the Petitioners were analyzed and results were reported to relicensing stakeholders in February 2006. The Petitioners' flow request provided negligible habitat gains (0.2% increase in shortnose sturgeon habitat) compared to CRA flow provisions and caused a substantial loss of power generation – equivalent to an additional loss of 48,796 mwh/yr or enough electricity to power about 3,700 average homes). Petitioners' proposal contains the following deficiencies.

1. Petitioners' requested flows significantly exacerbate low inflow conditions, triggering three Stage 4 occurrences that do not occur under CRA proposed flows. Stage 4 occurrences are severe and indicate Emergency Conditions which are to be avoided whenever possible. Three predicted Stage 4 occurrences are an unacceptable impact of the Petitioners' requested flows.
2. The Petitioners' request for additional flow for aquatic habitat is self-defeating when drought conditions approach. It is fundamental and undisputed that releasing extra water in advance of an unforeseen drought will trigger drought restrictions sooner and will activate water-use restrictions sooner, resulting in reduced minimum instream aquatic habitat flows basin-wide for a longer period of time.
3. Petitioners' requested flows would significantly lower reservoir levels at lakes James, Hickory, Norman, Wylie and Wateree.
4. Petitioners' requested flows provide less stable reservoir levels during the spring spawning season at Lakes Rhodhiss, Hickory, Wylie, and Wateree.
5. Petitioners' requested flows would increase the number of days of restricted operation of intakes on Lake Wylie compared to CRA flows.
6. Petitioners' requested flows would increase the number of days of reservoir shoreline fish habitat loss on Lake Wylie compared to CRA flows.
7. Petitioners' requested flows would increase the number of days of flooding of developed areas at Lake Wateree compared to CRA flows.

The Petitioners have not acknowledged this critical balance of basin-wide stakeholder interests and often competing water-use needs.

Waiver

Duke points out to the Board that South Carolina in 2006 amended its process for reviewing permits and certifications. As a result of these changes, the Petitioners' Request may prevent this certification from being considered by FERC to be final prior to the one-year anniversary of Duke's application (June 5, 2009). Thus, the Petitioners' request may result in FERC determining that DHEC has waived issuance of the 401.

Conclusion

Duke and stakeholders representing a spectrum of river interests in both North Carolina and South Carolina have collaborated to develop a CRA to operate the Catawba-Wateree Project in a manner that is equitable, sustainable, and balanced for all relicensing-related water use interests in the future. The Staff of the South Carolina Department of Health and Environmental Control carefully examined all water quality impacts after receiving public comment. The changes requested by the Petitioners upset that balance for the sake of a narrowly-focused single interest and do not acknowledge the significant fish habitat gains that would be achieved by the CRA.

Due to the Petitioners' misrepresentation of the record in their Request for Final Review and the lack of Petitioners' consideration of other vital basin water needs and uses, Duke respectfully requests that the Petitioners' Request for Final Review be denied.

Respectfully Submitted,



E. Mark Oakley, P.E.
Catawba-Wateree Relicensing Project Manager
Duke Energy Carolinas, LLC

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Carolinas, LLC,

Petitioner,

vs.

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

Respondents.

Docket No. 09-ALJ-07-0377-CC

**RESPONDENT-INTERVENORS'
MEMORANDUM IN OPPOSITION
TO PETITIONER DUKE ENERGY'S
MOTION FOR SUMMARY
JUDGMENT AND MOTION FOR
DECLARATORY JUDGMENT**

Respondent-Intervenors American Rivers and South Carolina Coastal Conservation League ("Conservation Groups") hereby submit the following Response in Opposition to Petitioner Duke Energy Carolinas, LLC's ("Duke's") Motion for Summary Judgment and Motion for Declaratory Judgment ("Motion for Summary Judgment"), pursuant to Rule 56 of the South Carolina Rules of Civil Procedure and Rules 19 and 68 of the South Carolina Rules of Procedure for the Administrative Law Court.

INTRODUCTION

Through its Motion for Summary Judgment, Duke urges this Court to find that the South Carolina Department of Health and Environmental Control ("DHEC") waived its authority to issue the water quality certification (the "WQC") at issue in this case. In support of its motion, Duke relies almost exclusively upon its "Request to Admit" served upon DHEC, which it asks this Court to deem admitted by operation of law as a result of DHEC's alleged failure to respond timely. Duke claims that those purported admissions establish that DHEC failed to decide whether to grant Duke's application for a WQC within the timeframe prescribed by law. Duke

contends that, as a consequence, it is entitled to summary judgment and a declaratory judgment that DHEC waived its authority to issue or deny the WQC.

Duke's Motion for Summary Judgment, however, is premature, rests on flawed assumptions, and turns upon disputed issues of fact in need of further development through discovery. As a result, Duke's motions for summary judgment and declaratory relief should be denied.

First, implicit in Duke's Motion for Summary Judgment is the assumption that the alleged admissions by operation of law will bind all of the other parties to the action. Duke provides no legal support for this assumption, and as set forth below, the prevailing law supports the conclusion that only an admitting party is bound by requests for admission. Thus, putting aside that there are sound reasons for the Court to decline to deem Duke's Request to Admit admitted by operation of law, such admissions would not be binding upon the Conservation Groups in any event.

Next, Duke's Motion for Summary Judgment wholly fails to address, much less acknowledge, documentary evidence that contradicts the substance of the requests for admissions and affidavit that Duke relies upon. Ample evidence establishes that DHEC sent Duke numerous requests for additional information to support its WQC application, which had the effect of suspending processing of the application. The Conservation Groups expect to obtain more such evidence during discovery, which is ongoing. While the parties have exchanged initial written discovery, additional written discovery remains to be answered, no depositions have been taken, document productions are in progress, and the remaining expert disclosures are forthcoming. The Conservation Groups have served supplemental written discovery addressed to Duke specifically seeking communications related to DHEC's requests for additional information.

However, even the incomplete evidentiary record reveals the existence of genuine issues of material fact, which should be resolved, if at all, against movant Duke.

Moreover, even if the Court were to view the disputed issues of fact in Duke's favor, summary judgment should be denied nonetheless because Duke's legal arguments misconstrue controlling law. Duke wholly fails to address the effect of the tolling provision in Regulation 61-30 on the 180 days allotted for DHEC's review of an application and seems to suggest, erroneously, that only a request for additional information within 10 days of an application – but not later requests for additional information – can suspend DHEC's time for reviewing the application.

Finally, Duke's motions improperly seek relief not requested in Duke's pleadings in this case. Duke seeks a declaratory judgment that the WQC has been waived; its Notice of Request for Contested Case Hearing seeks an order requiring issuance of the WQC in the form approved by DHEC staff. Because Duke is attempting to rely upon an operation-of-law theory for summary judgment, it should be precluded from seeking relief outside of that pled in its Notice of Request for Contested Case Hearing.

PROCEDURAL BACKGROUND

Through their intervention in this contested case hearing, the Conservation Groups are supporting DHEC's decision to deny Duke's application for a WQC. The WQC, if allowed to stand, would have permitted Duke to operate its Catawba-Wateree Hydroelectric Project (the "Project")¹ for the next 50 years in a manner that violated several state water quality standards.

¹The Project comprises 11 reservoirs and 13 hydroelectric stations, along with associated dams and other infrastructure, on the Catawba-Wateree River in North and South Carolina.

Duke currently operates the Project pursuant to a 50-year license issued by the Federal Energy Regulatory Commission ("FERC") in 1958.² On August 29, 2006, Duke submitted an application for a new 50-year license to FERC, along with a Comprehensive Relicensing Agreement for FERC to consider as the basis for a new license.

As a part of its application for a new federal license, Duke is required to obtain a WQC under Section 401 of the Clean Water Act from each state in which the Project operates, certifying that operation of the Project for the new license term will protect water quality and designated uses in the Catawba-Waterree River and will not degrade water quality or otherwise violate water quality standards. See 33 U.S.C. § 1341; S.C. Code Ann. Regs. 61-101. Duke submitted an application for a WQC to DHEC on June 5, 2008. The time for DHEC to issue a proposed decision on Duke's application was tolled as DHEC sought additional information from Duke and Duke provided the requested information (the correspondence is described in more detail in the Argument, Section III infra).

On May 15, 2009, DHEC issued a notice of its decision to issue a WQC, well within the one-year deadline under federal law (33 U.S.C. § 1341(a)(1)) and the 180-day deadline under state law. See S.C. Code Ann. Regs. 61-101, 61-30. On May 29, 2009, the Conservation Groups filed a Request for Final Review with the South Carolina Board of Health and Environmental Control ("Board"), pursuant to S.C. Ann. Code § 44-1-60, challenging the WQC on the grounds that it would permit Duke to operate the Project in violation of water quality standards. All parties to this contested case participated in the final review conference before the Board on July 9, 2009. After announcing its decision orally at the conclusion of the conference, the Board

² As discussed in Section V, infra, in the event a new license does not issue prior to the expiration of the existing license, FERC issues an annual license from year to year which incorporates the conditions of the expired license.

issued a written order reversing DHEC staff and denying the WQC on August 6, 2009, finding that the WQC failed to provide reasonable assurance that water quality standards would be met.

Duke then filed a Notice of Request for Contested Case Hearing on September 4, 2009, seeking issuance of the WQC in the form approved by DHEC staff. The Administrative Law Court entered a Consent Scheduling Order on October 19, 2009, setting various dates for discovery, including that written discovery would begin on December 15, 2009, and end on April 16, 2010. The Court thereafter entered orders allowing the Conservation Groups and the South Carolina Attorney General to intervene in the matter on November 9, 2009.

The parties began exchanging written discovery in mid-December 2009. They also began the process of exchanging documents and arranging depositions in December 2009 and January 2010. In addition, the following motions related to the scope of discovery have been filed and are still pending, set to be heard by the Court on March 31, 2010: (1) the South Carolina Attorney General's Motion for Protective Order (to quash the deposition of the Office of the South Carolina Attorney General) (opposed by Duke); (2) the South Carolina Attorney General's Motion to Prohibit or Limit Discovery (opposed by Duke); and (3) the Conservation Groups' Motion for Additional Discovery (consented to by DHEC and consented to in part, and opposed in part, by Duke).

On January 21, 2010, mid-stream in discovery and only two days after Duke contends DHEC's responses to the requests for admission were even due to be deposited in the mail, Duke filed its motions for summary judgment and declaratory judgment.

STANDARD OF REVIEW

In order to prevail on its Motion for Summary Judgment, Duke "has the burden of clearly establishing" the lack of any triable issue of fact. See, e.g., Brandt v. Gooding, 368 S.C. 618,

626, 630 S.E.2d 259, 263 (S.C. 2006) (citing Baughman v. AT&T, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (S.C. 1991)); Singleton v. Sherer, 377 S.C. 185, 197, 659 S.E. 2d 196, 202 (S.C. Ct. App. 2008). As set forth in Rule 56, summary judgment is properly granted only when the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” S.C. R. Civ. Pro. 56 (c). “[T]he evidence must be construed in the light most favorable to respondent.” Montgomery v. CSX Transp., Inc., 376 S.C. 37, 53, 656 S.E.2d 20, 28 (S.C. 2008). Even where the facts are not necessarily disputed but the resolution of the motion depends on the inferences to be drawn from the facts, the application of law to the facts, or a novel issue of law, a motion for summary judgment should be denied to allow for further development of the case. Id. 376 S.C. at 53, 656 S.E.2d at 29; Schmidt v. Courtney, 357 S.C. 310, 318-20, 592 S.E.2d 326, 331 (S.C. Ct. App. 2003).

ARGUMENT

L. The Motion for Summary Judgment Should Be Denied Pursuant to Rule 56(f).

Duke’s Motion for Summary Judgment is premature because its resolution will require this Court to resolve disputed factual issues prior to the completion of most of the discovery in the case, including discovery on the very issues Duke’s motion asks the Court to resolve by summary judgment. As the South Carolina Supreme Court has explained, since summary judgment is such “a drastic remedy,” it must “be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues.” Schmidt, 357 S.C. at 318, 592 S.E.2d at 331 (citing numerous cases); Baughman v. AT&T, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (S.C. 1991) (quoting Watson v. Southern Ry. Co., 420 F. Supp. 483, 486 (D.S.C. 1975) and citing Holloman v. McAllister, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986)); accord HK New

Plan Exch. Prop. Owner I, LLC v. Coker, 375 S.C. 18, 22, 649 S.E.2d 181, 183 (S.C. Ct. App. 2007) (citing Murray v. Holnam, Inc., 344 S.C. 129, 138, 542 S.E.2d 743, 747 (S.C. Ct. App. 2001)).

South Carolina courts routinely deny summary judgment motions made prematurely, before discovery is complete and before all parties have been able to investigate the facts and fully develop their cases. Indeed, summary judgment should “not be granted until the opposing party has had a ‘full and fair opportunity to complete discovery.’” Schmidt, 357 S.C. at 319, 592 S.E.2d at 331 (emphasis added) (citing numerous cases); Baughman, 306 S.C. at 112, 410 S.E.2d at 543 (emphasis added) (citing 10A Wright & Miller, Federal Practice and Procedure § 2741, p. 543 (1983); 6 Moore’s Federal Practice ¶ 56.02[6], p. 56-39 (2d ed. 1990) and numerous federal and state cases); accord Doe v. Batson, 345 S.C. 316, 321-22, 548 S.E.2d 854, 857 (2001) (quoting Baughman). In particular, Rule 56(f) of the South Carolina Rules of Civil Procedure provides that a trial tribunal may deny a motion for summary judgment “to permit . . . depositions to be taken or discovery to be had or may make such other order as is just.” S.C. R. Civ. P. 56(f).

Denial of Duke’s Motion for Summary Judgment is appropriate under the circumstances of this case, as Duke is seeking summary judgment on disputed factual issues that have not been fully developed by the parties through discovery. Discovery in this action is ongoing, and the Conservation Groups have been particularly diligent in seeking it. On December 16, 2009, within one day of the date that discovery was first permitted under the Consent Scheduling Order, the Conservation Groups served written discovery requests on Duke, and the Conservation Groups received partial responses in the mail on January 22, 2010. Shortly after receiving Duke’s first responses, the Conservation Groups promptly requested supplementation

of the responses on January 27, 2010. On the same date, January 27, 2010, the Conservation Groups also served follow-up discovery requests, some of which specifically request additional information regarding issues addressed by Duke's Motion for Summary Judgment. Duke's responses are due in early March. Given the complexity of the case and the large amount of information to be discovered on many issues, on January 21, 2010, the Conservation Groups also moved for leave to propound additional discovery, including additional interrogatories, requests for admissions, and depositions. (See Mot. Add'l Discovery.) That motion is still pending. No depositions have been taken, although the Conservation Groups are working with Duke's attorneys to identify dates for depositions of its fact and expert witnesses. (See Youngman Aff. ¶¶ 6-7, attached hereto as Ex. 1.)

The completion of the above-described discovery in this action is necessary to illuminate the factual issues underlying Duke's Motion for Summary Judgment. Documents and information sought in the Conservation Groups' pending discovery requests are directly relevant to the issues addressed by Duke's Motion for Summary Judgment and are necessary to the resolution of the factual issues raised therein, including the timing of DHEC's correspondence with Duke regarding its application for a WQC, DHEC's requests for additional information, and the effects of these events on tolling the time period under S.C. Code Ann. Regs. 61-30 as discussed below in Section III. In addition, the parties have identified a number of witnesses who will offer testimony on the same disputed factual issues that Duke seeks to have resolved by summary judgment, including the DHEC and Duke employees who were involved in making and responding to DHEC's requests for additional information. (Youngman Aff. ¶ 8.)

Duke, as the WQC applicant, is in control of virtually all of the relevant evidence: the materials it presented in support of its WQC application; documentation of its efforts to respond

to DHEC's requests for additional information; and the correspondence between itself, DHEC, and FERC on these issues. It is asking the Court to resolve material, disputed facts on the basis of several requests for admissions addressed to DHEC that were not affirmatively admitted by DHEC but which Duke seeks to have deemed admitted by operation of law, along with the affidavit of a single, non-expert witness: its own employee Mark Oakley. It has cited no other evidence in its Motion for Summary Judgment. In contrast, although the Conservation Groups have obtained some contravening evidence (discussed in Section III *infra*), they need to obtain their requested discovery to uncover additional evidence to contradict Duke's version of events.

Duke's Motion for Summary Judgment should therefore be denied as premature, until all parties have a full opportunity to complete discovery on the very issues that the motion raises.

II. Resolution of the Motion for Summary Judgment Depends on Requests for Admissions that Should Not Be Deemed Admitted.

Duke's Motion for Summary Judgment relies almost exclusively on facts that it claims are undisputed because they were the subject of requests for admissions addressed to DHEC. Duke served the requests for admissions on DHEC by mail on December 15, 2009, and argues that the responses were due on January 19, 2010. DHEC meanwhile argues that the responses were timely served on January 25, 2010, or, in the alternative, that any tardiness in its responses was the result of a medical emergency. Regardless of whether the responses were, indeed, timely, the admissions need not be deemed admitted by DHEC and, in any event, cannot operate to the prejudice of the remaining parties to the case.

First, although Rule 36 provides that a "matter is admitted unless, within 30 days after service of the request, . . . the party to whom the request is directed serves . . . a written answer or objection," Rule 36 goes on to provide that the court may allow a longer time for responding and may allow a party to withdraw or amend its admission. S.C. R. Civ. P. 36(a), (b). DHEC's

Motion to Enlarge Time to Respond to Petitioner's Request to Admit, filed on January 25, 2010, addresses this issue, and the Conservation Groups consent to any request to extend the time or amend the responses made by DHEC. Withdrawal or amendment of responses to requests to admit are allowed when "the presentation of the merits of the action will be subserved thereby and the party who obtained the admissions fails to satisfy the court that withdrawal or amendment will prejudice him." S.C. R. Civ. P. 36(b) (quoted in Tuomey Reg'l Med. Ctr. v. McIntosh, 315 S.C. 189, 191, 432 S.E.2d 485, 487 (S.C. 1985)); see Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., 347 S.C. 545, 555-57, 556 S.E.2d 718, 723-25 (S.C. Ct. App. 2001) (allowing party that satisfied both prongs of test to amend its admissions, offer evidence to support the new responses, and explain its amendments to the jury).

In Baughman v. AT&T, the court ruled that a party satisfied the Rule 36 test and that its late responses to requests to admit should have been allowed and should have been given the effect of withdrawing and replacing the deemed admissions. 306 S.C. at 106-10, 410 S.E.2d at 540-42. The Baughman court explained that the resolution of the case on its merits would be furthered because the issues addressed by the admissions were either "dispositive" or at least "involve[d] key factual elements" of the claims in the case, and because the responses had been "filed even before the requests were ordered admitted," so that the other party's case "could not possibly have been prejudiced." Id., 306 S.C. at 110, 410 S.E.2d at 542. Similarly, in the present case, DHEC responded on January 25, before any order was entered deeming Duke's requests for admissions admitted by DHEC. (See DHEC Resp. Req. Admit.) Moreover, by Duke's own admission, the issues addressed by the admissions are either dispositive or at least involve key factual elements. (See, e.g., Mot. Summ J. at 11-12.) Accordingly, DHEC's

responses, if late, should be accepted and treated as having the effect of withdrawing and replacing any deemed admissions.

Second, regardless whether the admissions are judicially deemed admitted against DHEC, they should not be deemed admitted as against the other parties to the case. In other words, the Conservation Groups should still be able to introduce evidence to contradict the admissions, thereby precluding summary judgment. The Conservation Groups have an interest in the outcome of the case – the protection of the river from water quality violations caused by the Project's operation. Their interest is both distinct from DHEC's interest, justifying their intervention, and so significant that it led them to initiate the challenge that persuaded DHEC to deny the WQC. Thus, even if DHEC is deemed to have made admissions and is thereby precluded from introducing evidence on the propriety of its denial of the WQC, the Conservation Groups should nevertheless be allowed to introduce such evidence, and their interests will be prejudiced if they cannot. Although no reported South Carolina decision appears to have addressed the issue, the courts of other states have specifically held that a "Rule 36 admission . . . only binds the party to which it is directed." In re Real Estate of Michele S. Burns v. Marinis, No. 11671-NC, 2006 Del. Ch. LEXIS 51 at *5 (Del. Ch. Mar. 1, 2006) (unpublished). One court explained, "Although not expressly stated, implicit in the nature of [Rule 36] is the limitation that such an admission will bind only the party making it. Common sense suggests that the action or inaction of one party ought not bind any other party." Harrison v. Porsche Plus, 520 A.2d 346, 347 (Me. 1987); see also Platz Assocs. v. Finley, 973 A.2d 743, 748 n.5 (Me. 2009) (stating same); Chickey v. Watts, 2005 Ohio 4974, at ¶23 (Ohio Ct. App. 2005) (citing several federal courts for proposition that a Rule 36 admission "binds only the party to whom the request for admission was directed and not a co-party").

Accordingly, the Conservation Groups should not be bound by DHEC's purported admissions and should be allowed to conduct discovery and introduce evidence on the issues addressed by Duke's request for admissions, including the documentary evidence discussed below.

III. Duke's Argument That DHEC Waived the 401 Certification Turns on a Question of Material Fact.

The evidence available at this early stage reveals numerous requests for additional information from DHEC, which had the effect of suspending processing of Duke's WQC application and, at a minimum, create a question of material fact, rendering summary judgment inappropriate. Duke's Motion for Summary Judgment wholly fails to acknowledge the existence of DHEC's requests for additional information or Duke's responses to them, relying instead on an admission by operation of law theory – a theory which only applies to DHEC. So too, Duke's motion fails even to acknowledge the tolling provision of Regulation 61-30(H)(1)(c), much less to analyze its applicability to these facts. Instead, Duke argues that this case can be summarily resolved solely under Regulation 61-101 and based on admissions by operation of law and an affidavit, both of which simply ignore documentary evidence that contradicts Duke's position. Completion of discovery would permit the Court to assess fully DHEC's compliance with the processing requirements in Regulations 61-101 and 61-30, but an assessment at this time is premature. Even at this time, however, the trail of correspondence and exchange of information between DHEC and Duke indicates that DHEC complied with the processing requirements of Regulations 61-101 and 61-30 or, at a minimum, creates a genuine issue of fact.

South Carolina law requires DHEC to issue a proposed decision on an application for a WQC within 180 days of acceptance of an application. See S.C. Code Regs. 61-101(A)(6); 61-30(H)(2)(a)(vii). Regulation 61-101 also states that federal law requires DHEC to "issue, deny,

or waive certification" within one year of "acceptance of a completed application unless processing of the application is suspended." *Id.* Whether DHEC complied with the one-year requirement is not at issue in Duke's Motion for Summary Judgment; rather, Duke contends DHEC failed to comply with the 180-day processing requirement.

Regulation 61-101(C) sets forth the minimum requirements for the contents of a WQC application and addresses requests for additional information. According to the regulation, an applicant "must provide a complete application" to DHEC, and "DHEC may require additional information to make the application complete." Reg. 61-101(C)(1). If DHEC does not request additional information within 10 days of "receipt of the application or joint public notice," the application is considered complete for processing; however, DHEC may still request additional information within 60 days of "receipt of the application." S.C. Code Regs. 61-101(C)(2).

In addition, DHEC may suspend processing of the application while waiting for information necessary to reach a certification decision, which effectively tolls the 180-day time schedule. According to Regulation 61-30, which establishes schedules for DHEC's timely action on permit applications, "[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." Reg. 61-30(H)(1)(c) (emphasis added). Regulation 61-101 similarly recognizes that DHEC may suspend processing of an incomplete WQC while awaiting information, and in the event that information is not provided by a date specified, DHEC may deny the certification altogether. The regulation states:

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.

S.C. Code Regs. 61-101(C)(4).

It is undisputed that Duke submitted an application for WQC on June 5, 2008. (Duke's Mot. Summ. J. 5). However, the documents collected thus far by the Conservation Groups reveal that the application did not contain the minimum information required.³ For example, the application did not contain "the names and addresses of adjacent property owners" as required by Regulation 61-101(C)(1)(f). Correspondence as early as June 27, 2008, shows DHEC's attempts to obtain that information from Duke, and Duke appears to have submitted that information by e-mail on July 29, 2008. See e-mails between Mark Oakley, Duke, and Chuck Hightower, DHEC, Ex. 2. Also on July 29, 2008, DHEC sent an e-mail to Duke that made clear that an application fee, in addition to an affidavit of publication, would be required before DHEC would process Duke's WQC application. The e-mail stated, in part:

The Department has 180 days to complete action on an application for 401 Water Quality Certification or the assessed fee must be returned. The 180 days includes only those days in which the application is actively being reviewed by the Department; the clock stops when information is requested and the SC Department of Health and Environmental Control is waiting on a response. **Accordingly, the 180 day clock will not start until we have received an affidavit of publication and the appropriate fee.**

See E-mail from William "Rusty" Wenerick, DHEC, to Mark Oakley, Duke (July 29, 2008) (emphasis in original), Ex. 3 (previewing the contents of the notification that would follow public notice). Likewise, Regulation 61-30 states that DHEC "will not process an application until the application fee is received." S.C. Code Regs. 61-30 (C)(1)(b) (emphasis added).

Duke's WQC application was noticed for public comment on August 8, 2008. See Public Notice (Aug. 8, 2008), Ex. 4. Subsequently, Duke again received notification that DHEC had not received the application fee and that Duke was required to publish the notice of application in newspapers in affected counties. See Notification to Duke Energy Carolinas, LLC, Joint Public

³ Documents cited herein are true and accurate copies of documents provided by DHEC or documents from the Administrative Record prepared for the Board. (Youngman Aff. ¶ 10.)

Notice Number DHEC 08-C-001 (issue date August 15, 2008) (hereinafter "Notification"), Ex.

5. The Notification included the same language as the July 29 e-mail, making it clear that the application fee was required before DHEC would start processing the application and the 180-day period would begin. See id.

The forecast of evidence shows that DHEC followed that Notification with a series of formal additional information requests (or "AIRs") that set dates for compliance – which the evidence also shows Duke routinely exceeded. Pursuant to these additional information requests, review of the WQC application appears to have been halted for a span of several months, and the 180-day clock tolled, while DHEC sought further information.

For example, on August 19, 2008, DHEC sent an additional information request regarding the draft Quality Assurance Protection Plan ("QAPP") that had been attached to Duke's 401 Application. See Letter from Wenerick to Oakley (Aug. 19, 2008), Ex. 6. This request, as with the prior notice, stated that review of the application would not occur until requested information was provided:

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 (requested 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.

Id.; see also DHEC's Resp. Pet'r's Req. Admit ¶ 5 (describing tolling language in DHEC's letters). In this request, DHEC asked that Duke submit all requested information by October 19, 2008. After receiving a revised QAPP on January 9, 2009, DHEC notified Duke that the additional information request associated with the QAPP was satisfied as of January 12, 2009.

See Letter from Oakley to Quality Assurance Office, DHEC (Jan. 9, 2009) and e-mail from Wenerick to Oakley (Jan. 13, 2008), Ex. 6.

During the pendency of this August 19 request, DHEC sent separate additional information requests on October 8, 2008, and October 21, 2008. The former sought Duke's responses to public comments by November 8, 2008; the latter sought Duke's responses to technical questions by November 21, 2008. See Letters from Wenerick to Oakley (Oct. 8 & Oct. 21, 2008), Exs. 7-8. Both included language similar to the prior additional information request about processing the application, stating "the clock stops when information is requested and the Department is waiting on a response." Id. In addition, to the extent there was any confusion regarding the status of DHEC's processing of the application at this point, an e-mail from Rusty Wenerick (DHEC) to Mark Oakley (Duke) on October 8, 2008, further confirms that DHEC suspended review while seeking additional information: "I have the 180-day clock stopped with no days elapsed." Ex. 7. Duke provided responses to the public comments sought pursuant to the October 8 request on November 10, 2008, and again on March 9, 2009. See Ex. 7. Duke made responses to the technical request sent October 21 on November 21, 2008, and December 12, 2008, and the exchange of information stemming from this request continues through February 2009. See Ex. 8. Thus, Duke missed the deadlines set by DHEC for the responses to its August 19 and October 21 additional information requests, and may have exceeded the timeframe for the October 8 request. Moreover, DHEC sent – and Duke responded to – additional e-mails seeking further information as evidenced, for example, by e-mails dated January 12, 2009, January 28, 2009, and March 25, 2009. See Ex. 9. DHEC issued the 401 Certification on May 15, 2009.

Consequently, the evidence available, taken in the light most favorable to non-movants, shows there were large spans of time following the submission of Duke's WQC application during which DHEC was waiting for additional information and the 180-day timeframe was tolled. In addition, the evidence shows that even Duke's initial application to DHEC was incomplete, lacking required information to notify adjacent property owners (Reg. 61-101) and the requisite fee for processing (Reg. 61-30), and that DHEC notified Duke of these deficiencies well within 60 days of its initial submission. See Exs. 2-3, 5-6; DHEC's Resp. Pet'r's Req. Admit ¶ 4. Evidence of the incomplete application submitted on June 5 and correspondence showing that DHEC first requested missing information on June 27 or earlier, DHEC's requests for payment of the application fee in order to begin processing (July 29, August 15, and August 19), and numerous overlapping additional information requests (e.g., August 19, October 8, October 21), at a minimum, create a question of fact as to the length of time processing of the application was tolled. Viewed in the light most favorable to non-movants, the evidence supports the conclusion that DHEC, in fact, complied with the processing requirements of Regulations 61-101 and 61-30.

Duke's perfunctory analysis, however, wholly omits reference to these additional information requests and the operative language within them that had the effect of stopping DHEC's review and tolling the 180-day clock. Notwithstanding that these documents show that Duke was notified no less than five times that "the clock stops when information is requested and the Department is waiting on a response" (Exs. 3, 5-8), Duke disingenuously asserts that DHEC "never notified Duke that processing of the application was suspended." (Duke's Mot. S. J. 3 (citing Req. Admit ¶ 5).) Such conflicting evidence renders summary judgment inappropriate, especially where, as here, discovery has not been completed. See discussion supra at Section I.

In addition, contrary to Duke's assertion otherwise (Duke Mot. Summ. J. at 8-9 & n.4), the facts of this case are not analogous to the facts of South Carolina Department of Transportation v. South Carolina Department of Health and Environmental Control, No. 06-ALJ-07-0804-CC, 2008 ENV LEXIS 24 (Apr. 29, 2008) ("SCDOT"). The most obvious difference is that the ruling in SCDOT was not based on admissions secured as a discovery sanction for failure to timely respond to requests for admissions, but rather, appears to be premised upon review of evidence in the administrative record. In addition, the very factors that persuaded the court to rule that DHEC had waived the WQC in SCDOT are not present here. Unlike DHEC's notifications to Duke in this case, the court noted in SCDOT that "DHEC never notified DOT at anytime that the processing of its application was suspended." Id. at *35. As a result, the court had due process concerns regarding appropriate notice to the applicant of the status of its application that are not present here. See id. ("The essential requirements of due process . . . are notice and an opportunity to respond.") (citation omitted, alteration in original). Moreover, the court noted that DHEC "did not establish that there was any meaningful length of time when information was not provided." Id. Here, however, that is precisely what the evidence reveals – meaningful lengths of time when DHEC was awaiting responses from Duke. For these reasons, the holding in SCDOT is not dispositive of the issues in this case.

The evidence available at this early stage shows that DHEC complied with the processing requirements of Regulations 61-101 and 61-30. Thus, Duke has failed to meet its burden of establishing the lack of any triable fact, and summary judgment should be denied.

IV. The Motion for Summary Judgment Should Be Denied Because It Seeks Relief Never Requested in Duke's Pleadings in this Case.

Duke's Motion for Summary Judgment also improperly seeks relief that it failed to request in its initial pleading or at any earlier stage in this matter. Rule 11 of the Rules of

Procedure for the Administrative Law Court sets forth the required contents of a request for a contested case hearing. See ALC Rule 11(D). The rule provides, among other things, that the request “shall contain . . . [t]he relief requested.” Id. Particularly where, as here, a party seeks judgment by operation of law for failure of a party to deny requests for admissions, it should not be able to recover relief in excess of the relief it requested in its Notice. In its Notice of Request for Contested Case Hearing, Duke did not seek waiver of the WQC certification, but rather asked only that “the WQC be issued in the form that the SCDHEC staff drafted.” (Not. Req. Contested Case Hr’g (emphasis added); cf. SCDOT, 2008 ENV LEXIS at * 4 (noting SCDOT’s request for contested case hearing “asked for a determination of its rights because DHEC failed to act in a timely manner on the permit application”).) Indeed, by confining its request for relief to issuance of the WQC, Duke implicitly waived its right to assert that DHEC had waived its authority over the WQC.

Accordingly, it would be inequitable for Duke to recover a remedy at summary judgment that it did not seek when it initiated the case.

V. Duke’s Request for Declaratory Judgment Overstates Any Delay from 401 Decision and Misrepresents the Status of the Federal License.

Finally, Duke represents to the Court in its request for declaratory relief that a declaratory judgment is necessary “to define the State’s position with regard to Duke’s WQC request” (Duke’s Mot. Summ. J. 21). According to Duke, “[b]ecause certification or waiver of certification is required for issuance of a new Federal license for the Project, as things currently stand, issuance of Duke’s Federal license for the Project is being delayed.” Id. In fact, the state’s position is clear; DHEC denied the 401 Certification. Duke simply ignores the fact that a State is entitled to deny certification altogether if the applicant does not demonstrate the activity will comply with water quality standards. See 33 U.S.C. § 1341(a)(1) (noting the applicant must

provide a certification from the state that the discharge will comply with the Clean Water Act but that no license shall be granted "if certification has been denied by the State . . .").

The effect of a denial of a WQC puts the responsibility back on Duke to re-file its WQC application if it still wishes to pursue a new license from FERC. Thus, any supposed delay at this point is the result of Duke's failure to re-file an application that provides adequate assurance the proposed activity will comply with water quality standards.

In addition, in contrast to Duke's assertion that the WQC simply provides a means for a state to "provide input" on a federal license (Duke's Mot. Summ. J. 3), under federal law, FERC must include any conditions of a WQC in the new license; it may not amend or delete conditions. See 33 U.S.C. § 1341(d); American Rivers v. FERC, 129 F.3d 99, 107 (2d Cir. 1997). Such conditions imposed by a state may, for example, require changes in the storage and release requirements, as needed, to ensure that the project will comply with water quality standards over the term of any new license. See 33 U.S.C. § 1341(a)(1) and (d); S.D. Warren Co. v. Maine Board of Envtl. Prot., 547 U.S. 370 (2006); American Rivers, 129 F.3d 99.

Further, the water quality certification is not the only outstanding permitting requirement for Duke's new license. Under the Endangered Species Act Section 7(a)(2), 16 U.S.C. § 1536(a)(2), FERC must consult with the National Marine Fisheries Service ("NMFS") prior to making a final relicensing decision to assure the proposed new license is not likely to jeopardize the continued existence of the federally listed endangered shortnose sturgeon. See Letter from NMFS to FERC (Aug. 31, 2009), FERC e-library Accession No. 20090910-0237 (requiring formal consultation on shortnose sturgeon). To date, consultation has not been completed, and NMFS has not issued a Biological Opinion for the proposed new license.

Lastly, Duke should not be harmed if FERC does not issue a new license prior to expiration of the existing license. In that event, FERC must issue an annual license from year to year which incorporates the same conditions as the expired license. See, e.g., FPA § 15(a)(1), 16 U.S.C. § 808(a)(1); Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 876 F.2d 109, 114 (D.C. Cir. 1989). Given that it will be more expensive for Duke to operate the project under the proposed new license than the existing license, Duke may even benefit economically from the delay.

Thus, contrary to Duke's representation, a declaratory judgment is unnecessary to clarify the state's position or to remedy any alleged delay or harm to Duke in the context of its application for a new federal license.

CONCLUSION

For the reasons stated herein, the Conservation Groups respectfully request that Duke's Motion for Summary Judgment and Motion for Declaratory Judgment be denied.

This 12th day of February, 2010.



Christopher K. DeScherer
SOUTHERN ENVIRONMENTAL LAW CENTER
43 Broad Street, Suite 300
Charleston, SC 29401
Tel: (843) 720-5270
Fax: (843) 720-5240
cdescherer@selcsc.org

Julia F. Youngman, admitted *pro hac vice*
SOUTHERN ENVIRONMENTAL LAW CENTER
200 West Franklin Street, Suite 330
Chapel Hill, NC 27516

Tel: (919) 967-1450
Fax: (919) 929-9421
jyoungman@selcnc.org

Counsel for Respondent-Intervenors American Rivers and
South Carolina Coastal Conservation League

CERTIFICATE OF FILING BY MAIL AND OF SERVICE

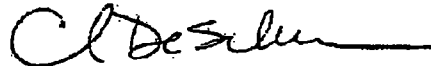
I hereby certify that I am counsel for Respondent-Intervenors South Carolina Coastal Conservation League and American Rivers in the above-captioned matter, and that on the 12th day of February, 2010, the original of the foregoing Respondent-Intervenors' Memorandum in Opposition to Duke's Motion for Summary Judgment was filed with the Court via U.S. Mail, first-class postage prepaid, and copies were served on the following persons via U.S. Mail, first-class postage prepaid:

James W. Potter, Esq.
W. Thomas Lavender, Jr., Esq.
Nexsen Pruet, LLC
1230 Main Street, Suite 700
P.O. Drawer 2426
Columbia, SC 29202

Nash E. Long, III, Esq.
Winston & Strawn LLP
214 N. Tryon Street
Charlotte, NC 28202

Stephen P. Hightower, Esq.
Office of General Counsel
S.C. Department of Health and
Environmental Control
2600 Bull Street
Columbia, SC 29201

Henry McMaster, S.C. Attorney General
C. Havird Jones, Jr., Esq.
Childs Cantey, Esq.
P.O. Box 11549
Columbia, SC 29211



Christopher K. DeScherer
SOUTHERN ENVIRONMENTAL LAW CENTER
43 Broad Street, Suite 300
Charleston, SC 29401



HENRY McMASTER
ATTORNEY GENERAL

February 12, 2010

VIA HAND DELIVERY

The Honorable Ralph King Anderson, III
Chief Administrative Judge
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

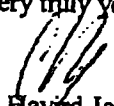
Re: Duke Energy Carolinas, LLC v. South Carolina Department of Health and
Environmental Control
Docket No. 09-ALJ-07-0377-CC
Response Of The State Of South Carolina To Petitioner's Motion For Summary
Judgment

Dear Judge Anderson:

Enclosed for filing in the above-referenced matter, please find the Response Of The State Of
South Carolina To Petitioner's Motion For Summary Judgment.

Please do not hesitate to contact me at (803) 734-3654 with any questions.

Very truly yours,


C. Havard Jones, Jr.
Counsel for the State of South Carolina

Enclosure
cc via U.S. Mail:

James W. Potter, Esquire
W. Thomas Lavender, Jr., Esquire
Nash E. Long, III, Esquire
Stephen P. Hightower, Esquire
Christopher K. DeScherer, Esquire
Julia F. Youngman, Esquire

FILED

FEB 12 2010

SC ADMIN. LAW COURT

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Carolinas, LLC,

Petitioner

vs.

South Carolina Department of Health
and Environmental Control,

Respondent

And

The State of South Carolina as *parens
patriae* by Henry McMaster, South
Carolina Attorney General, American
Rivers and the South Carolina Coastal
Conservation League,

Intervenors

Docket No.: 09-ALJ-07-0377-CC

**RESPONSE OF
THE STATE OF SOUTH CAROLINA
TO PETITIONER'S MOTION
FOR SUMMARY JUDGMENT**

Summary of Argument

The State of South Carolina, as Intervenor, hereby responds to the Motion for Summary Judgment and Motion for Declaratory Judgment of Petitioner Duke Energy Carolinas, LLC ("Duke"), dated January 21, 2010 ("Duke's motion"). We disagree that the South Carolina Department of Health and Environmental Control ("DHEC") missed the 180-day deadline imposed by state regulations on reviewing a Water Quality Certification application. In our view, Duke misperceives the 180-day time limit imposed by state law, as well as its effect. Further, we also disagree that Summary Judgment should be granted based upon DHEC's responses to Duke's Requests to Admit.

Regulation 61-101 provides in pertinent part as follows:

6. The Department is required by Federal law to issue, deny, or waive certification for Federal licenses or permits within one (1) year of acceptance of a completed application unless processing of the application is suspended. If 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. 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.

R.61-101.A.6. However, other portions of this Regulation, as well as other Regulations promulgated by DHEC, make it clear that DHEC may toll the 180-day period when it seeks additional information from the applicant. As R.61-101.C.1 specifies, "[u]pon receipt of an application, the Department may require additional information to make the application complete." Furthermore, 61-101.C.4 states that

[w]hen the Department requests additional information it will specify the 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.

And, also pertinent to the situation here, R.61-30.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. If an applicant fails to respond to such a request within 180 days, the department will consider the application withdrawn, and the application fee will be forfeited. The Department will notify the applicant no later than 10 days prior to expiration of the 180-day period.

Thus, DHEC, realizing that it has only one year under the CWA to complete the 401 certification, has mandated that it has 180 days to complete review of the application; however, also realizing that the processing of the application will usually require the request for and submission of additional information, DHEC has logically provided for a tolling of the time period while that additional

information is requested and received, giving the applicant no more than 180 days to provide that information. This entire timeline is aimed toward meeting the one year limit which the federal government has imposed pursuant to the Clean Water Act.

Duke's motion, taking an absolutist approach, however, claims that the State of South Carolina has waived its right to issue or deny Duke's application for a Water Quality Certification for Duke's proposed new license for the Catawba-Wateree Hydroelectric Project because DHEC missed what Duke contends is the absolute 180-day deadline. (See *Petitioner's Motion for Summary Judgment and Motion for Declaratory Judgment* filed January 21, 2010.) This argument is based primarily upon what Duke claims to be the plain reading of the applicable state regulation. (See *Petitioner's Memorandum of Law in Support of its Motion for Summary Judgment and Motion for Declaratory Judgment* at 1.) In addition, Duke contends that the DHEC Board "... exceeded its statutory authority and committed an error of law when it attempted to deny Duke's application for water certification during a review of the May 15, 2009, Notice of Department Decision, because, under State law, the State had already waived its right to issue or deny Duke's application for water quality certification." *Duke Motion* at 2.

However, Duke's reading of the Regulation – founded upon this "180 days, or else" construction – is unreasonable and thus inconsistent with federal law, as well as DHEC's regulations providing for a tolling of the time while additional information is sought and received. Thus, the State of South Carolina, through the Office of the Attorney General in its capacity as *parens patriae*, disagrees with Duke's interpretation and agrees with DHEC that all deadlines were met. In our view, DHEC's authority to deny Duke's application for Water Quality Certification under the Clean Water Act was not waived.

Background

By way of background, Duke is seeking a new license for its Catawba-Wateree Hydroelectric Project, located in South Carolina and North Carolina. Before any such license may be issued, Duke is required to obtain a Water Quality Certification from DHEC pursuant to § 401 of the Federal Clean Water Act. 33 U.S.C. § 1341(a). The Clean Water Act provides that “[n]o license or permit shall be granted until the certification . . . has been obtained or has been waived” by the State’s failure to “act” within one year of the application, and that “[n]o license or permit may be granted if certification has been denied by the State....” *Id.* However, whether or not there has been a waiver is a question of federal law under the Clean Water Act. Moreover, courts will read the waiver provision as a “sensibly flexible one” *See, Puerto Rico Sun Oil Co. v. U.S.E.P.A.*, 8 F.3d 73, 80 (1st Cir., 1993) [EPA possesses discretion to allow certification even after one year expiration has occurred].

Duke’s Argument Regarding DHEC’s Exceeding The 180-Day Time Limit Is Without Merit

Summary Judgment is inappropriate and must be denied “if the pleadings and the evidentiary matter in support of summary judgment do not establish the absence of a genuine issue of material fact ... even if no opposing evidentiary matter is presented.” *Murray v. Holnam, Inc.*, 344 S.C. 129, 138, 542 S.E.2d 743, 747 (Ct. App. 2001). Summary judgment “is a drastic remedy [and] ... should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues.” *Id.* The nonmoving party need only submit a mere scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid-South Mgmt Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). In this instance, Duke’s interpretation of R.61-101 is not only incorrect as a matter

of law, but the facts demonstrate a material dispute as to whether or not DHEC met the 180-day time limitation imposed by R.61-101.

The State of South Carolina promulgated the Water Quality Certification Regulation, R.61-101, which established procedures for implementing the CWA water quality certification requirements. In its motion for summary judgment, Duke points to R. 61-101 A.6, which sets forth the 180-day time limit as follows: "Unless otherwise suspended . . . the Department shall issue a proposed decision on all applications within 180 days of acceptance or [sic] an application." (R.61-101 A.6). This same 180-day deadline is also reiterated in R.61-30 H.2.a.vii. It is Duke's contention that DHEC literally did not meet this 180-day state-imposed deadline in making its decision with regard to Duke's Water Quality Certification Application and that DHEC has thus waived its right to establish water quality standards. According to Duke, "[t]his conclusion is supported by the actions the law requires the Department to take when it issues the proposed decision, the right to appeal the proposed decision, and the result if no timely appeal is filed." Duke, *Motion* at 9. However, what Duke ignores is that R.61-101.C.4 and R.61-30.H.1.C provide that the 180-day deadline is suspended when the Department (DHEC) requires additional information. Further, DHEC informed Duke that the 180-day time limit was suspended during those periods while DHEC was waiting on requested information from Duke.

This suspension of the 180-day time clock in this instance is well documented, and thus it is our information that DHEC acted upon the Duke application within the time specified by R.61-101 and R.61-30. As an illustration of multiple letters from DHEC seeking additional information from Duke is the following example:

"[T]he 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 . . . 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. (See attached, Exhibit A, letter from Mr. William R. "Rusty" Wenerick, DHEC to Mr. Mark Oakley, Duke Energy, dated August 19, 2008.)

Both this example, as well as others, attached hereto as Exhibits B and C, make it clear that DHEC acted pursuant to and within the discretion granted by Regulation 61-101 and Regulation 61-30 which authorize DHEC to suspend the 180-day time constraint in order to obtain additional information as part of the 401 certification process. As discussed more fully below, this Court has generally recognized the validity of such a "suspension for further information process" in *SCDOT v. DHEC*, 06ALJ-07-0804-CC (April 28, 2008).

DHEC possesses the authority and duty to administer the state regulation at issue here, which governs its review of the certification requested by Duke. Under South Carolina law, "construction of a statute by an agency charged with its administration will be accorded the most respectful deference and will not be overruled absent compelling reasons." *South Carolina Coastal Conservation League v. South Carolina DHEC*, 669 S.E.2d 899, 362-63 (S.C. Ct. App. 2008) (internal quotation marks omitted). Further, "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792, 801 (1965).

DHEC staff issued its "Department Decision" on May 15, 2009, well within the one-year time period imposed by the CWA. It is our information that DHEC was within the 180-day time period imposed by R.61-101 and R.61-30. The May 15, 2009 decision was reversed by the DHEC Board on July 9, 2009, and a written order denying the certification was issued on August 6, 2009.

Duke, however, construes Regulation 61-101 inflexibly as operating in literal fashion, allowing for no time allotted to DHEC to seek additional information from Duke as provided in Regulation 61-30. In other words, according to Duke, if DHEC does not meet the state-imposed 180 day time limitation (with no suspension of that limitation allowed for DHEC to seek additional information), waiver has automatically occurred. The result, according to Duke, is that the State has forfeited its right to establish water quality criteria altogether. As noted, however, the "power to issue the [water quality] certification is solely a creature of federal law; the state agencies are controlled by that law in their decisions on applications." *Arnold Irrigation Dist. v. Dept. of Environmental Quality*, 717 P.2d 1274, 1278 (Ore. 1986). In short,

[t]he CWA is a federal act in which Congress has provided for significant state involvement. 33 U.S.C. § 1341 gives the states a veto over federal actions. What criteria the states may consider, in exercising that veto is a matter of federal, not state law. The states, in passing on applications for certificates, act in part as agents of the federal government, and they may act only where Congress has permitted.

Id., n. 4.

Congress, in the Clean Water Act, has expressly specified that the State waives its certification rights if it fails to issue or to deny a certification "*within a reasonable period of time* (which shall not exceed one year) after receipt of such request." 33 U.S.C. § 1341(a)(1) (emphasis added). Regulation 61-101 has further mandated the 180-day limitation as applicable to a 401 certification, but has also, in order to meet the "reasonableness" requirement of the Clean Water Act, required that time frame may be suspended by DHEC where "specified otherwise in writing by the Department." This Court has squarely recognized that a request by DHEC for additional information from the applicant, as clearly occurred here, is the "specific instance in the Regulation as to when application is suspended for the 180 day time frame." *SCDOT v. DHEC*, *supra* at 17. Thus,

inasmuch as Congress has established the outer limits of the 401 certification time period at one year, and DHEC has specified that 180 days is not sufficient time to complete the 401 process – when more information is needed (as was the case in this instance) – Duke’s position that DHEC has only 180 days – and no more – to process the 401 application is “unreasonable” pursuant to the Clean Water Act.

Accordingly, South Carolina law, as well as federal law, support the conclusion that DHEC acted “reasonably” pursuant to federal law, and, based upon DHEC’s documentation, within the 180-day deadline imposed by R. 61-101 A.6.

Duke’s Argument Regarding DHEC’s Requests To Admit Is Also Without Merit

We also strongly disagree with Duke’s contention that its “Requests to Admit served on DHEC were admitted by rule for failure to respond as an apparent result of DHEC’s miscalculation of the due date,” and thus summary judgment should be granted Duke, based upon DHEC’s miscalculation. In Duke’s view, “it is Petitioner’s position that DHEC should be bound by its admission as provided in Rule 36(a) and should not be permitted to now deny those requests.” According to Duke, the Requests to Admit to DHEC are an essential part of its *Motion for Summary Judgment*, and Duke “is prejudiced if the Court allows ... [DHEC’s] January 25th denials to be allowed in this matter.” *Letter from James W. Potter, Esquire to the Honorable Ralph K. Anderson, III, dated January 27, 2010.*

Duke’s argument for summary judgment thus essentially comes down to this: DHEC admitted, by its failure to timely respond to Duke’s requests to admit, that it violated S.C. Regulation 61-101’s imposed 180-day time restriction for processing and acting upon the Section 401 Water Quality Certification. Duke thus contends that DHEC has now admitted that “[i]ssuance or denial

of Petitioner's Section 401 water quality application was waived by operation of SC Regulation 61-101 A.6 and *SCDOT v. DHEC*, 06 ALJ-07-0804-CC (April 29, 2008)." According to Duke, because nothing in Regulation 61-101 allows DHEC any time beyond 180 days, "[t]he proposed decision requiring [sic] by S.C. Regulation 61-101.A.6 was issued May 15, 2009." *Petitioner's Motion for Summary Judgment* at 6.

Duke, in essence, contends that the DHEC staff essentially wasted its time and effort in considering the 401 application and that the DHEC Board's efforts in hearing the appeal were for naught. In Duke's words, failure to meet 180-day limit literally meant that "if no appeal is timely received, the proposed decision shall become the final decision on the WQC application." *Duke Motion* at 10. According to Duke, DHEC's failure timely to respond to its requests for admission granted Duke its 401 certification by default. Such a "gotcha" approach by Duke to this litigation is without merit, as set forth for the reasons below.

Our courts have consistently emphasized that a failure to respond in a timely manner to requests to admit is "akin to the doctrine of judicial estoppel," and an "admission precludes the admitting party from arguing *facts* contrary to its responses to a request to admit, absent an amendment to or revocation of the admission as allowed under the rules." *Commerce Center of Greenville, Inc. v. McElveen & Associates*, 347 S.C. 545, 554, 556 S.E.2d 718, 723 (Ct. App., 2001) (emphasis added). Admissions are thus used to resolve factual issues, not the ultimate legal issues in the case. Accordingly, our courts have never concluded that a party's failure to timely respond to requests for admit may be used to resolve ultimate legal issues on summary judgment against the party making the admissions.

Indeed, in *Hinson-Barr, Inc. v. Pinckard*, 292 S.C. 267, 356 S.E.2d 115 (1987), our Supreme

Court refused to uphold the trial court's grant of summary judgment on this very basis. In *Pinckard*, the pivotal ground for the granting of summary judgment was that the buyer was liable for the invoice price because he did not timely object after receiving the goods. Notwithstanding Buyer's failure to respond to requests to admit, thereby admitting that it "accepted the equipment and goods supplied by [the Seller] as reflected in the invoices," the majority of the Court, over a vigorous dissent, concluded that there remained material facts in dispute. Thus, summary judgment was improper.

It is well recognized elsewhere as well that requests to admit cannot be used to resolve legal issues or the ultimate issue in the case. As the Illinois Court stated in *Banco Popular v. Beneficial Systems, Inc.*, 335 Ill. App. 3d 196, 209, Ill. Dec. 389, 780 N.E.2d 1113 (2002), "if the request seeks the admission of a conclusion of law, the request is improper in form and the opposing party's failure to respond does not result in an admission." And, as the Pennsylvania Supreme Court held in *Brindley v. Woodland Village Restaurant, Inc.*, 652 A.2d 865 (Pa. 1995), requests for admission that accident was caused solely by the negligence of the defendants and that plaintiff was not negligent in any manner whatsoever were improper requests for admissions of these legal conclusions.

Likewise, Duke's argument here that DHEC did not abide by Regulation 61-101 – which Duke asserts limits DHEC's time to process the 401 certification to 180 days, and no more – and thus Duke is entitled to its 401 certification by default, is purely a legal conclusion; indeed, it is one of Duke's grounds for appeal to this Court. That DHEC plans vigorously to challenge Duke's legal argument is squarely set forth in DHEC's Prehearing Statement, as DHEC asserts that the Department's "decision complied in all respects with the regulation [61-101], including time periods" DHEC *Prehearing Statement* at 3. Moreover, in its Responses to Duke's Requests to

Admit, DHEC consistently contends that it complied fully with Regulation 61-101, having sought additional information from Duke, which, pursuant to this Regulation and others, tolls the 180-day period. *See, DHEC Responses to Duke's Requests to Admit*, particulars Nos. 5 and 6.

Moreover, even assuming *arguendo* that DHEC's non-responses to Duke's requests to admit may be used against the agency, such admissions certainly may not be used against *the other parties* in this litigation. As the Court concluded in *Rowe v. State Bank of Lombard*, 617 N.E.2d 520 (Ill. 1993), "[t]he simple fact that any party may request an admission does not mean that the admission can then be used *against* any other party." The Court went on to say that it had found no cases allowing the use of a request to admit offensively against *other parties*. The State of South Carolina certainly contests and disagrees with Duke's contention that the 401 certification was granted by DHEC by default because of any failure by DHEC to follow Regulation 61-101 and the time requirements contained therein. Any admissions by DHEC cannot bind the State in its *parens patriae* capacity, as represented by the Attorney General.

Moreover, as discussed above, DHEC's position regarding its interpretation of Regulation 61-101 and its compliance therewith is set forth in the letters the agency sent to Duke seeking more information processing Duke's 401 certification application. Suffice it to say that these documents, *which are public records*, speak for themselves. Such documents may not be impeached, altered or modified by responses to Requests to Admit. It is well recognized in South Carolina that a writing or written documents which are clear and unambiguous may not be varied or contradicted by extrinsic evidence of statements of any of the parties to the writing, absent fraud, accident or mistake in the writing's procurement. *Montalbano v. Automobile Ins. Co. of Hartford, Conn.*, 217 S.C. 157, 60 S.E.2d 77 (1950). Thus, we submit that DHEC's public position, clear on its face, in documents

that DHEC sent to Duke – that “the clock stops” upon DHEC’s request for additional information, may not be altered by Requests to Admit.

Finally, Duke’s argument that DHEC failed to meet the 180-day time limitation imposed by Regulation 61-101 is unavailing for another reason, as well. Even assuming *arguendo* that DHEC waived its right to impose conditions upon the WQC, as Duke contends, see *SCDOT v. DHEC*, 06ALJ-07-0804-CC (April 28, 2008), such conclusion accomplishes nothing more than what in fact occurred – *the DHEC staff issued the 401 certification*. However, contrary to Duke’s contention, this *did not negate* the action of the DHEC Board in hearing the timely appeals filed from the DHEC staff decision. Thus, contrary to Duke’s assertions, the DHEC Board did not exceed its statutory authority in so acting.

DHEC’s authority is governed by statutory law. As our Supreme Court recently emphasized, “[a]s a creature of statutes, regulatory bodies like DHEC have only the authority granted them by the legislature.” *Responsible Econ. Development v. SCDHEC*, 371 S.C. 547, 641 S.E.2d 425 (2007). And, as our Court of Appeals recognized in *S.C. Coastal Conservation League v. SCDHEC*, 380 S.C. 349, 669 S.E.2d 899 (2008), S.C. Code § 44-1-60 governs the time periods regarding review of Department decisions concerning permits, licenses or other actions by the DHEC Board. Section 44-1-60(E) expressly provides that

Notice of the department decision must be sent to the applicant, permittee, licensee, and affected persons who have asked to be notified by certified mail, return receipt requested. *The department decision becomes the final decision fifteen days after notice of the department decision has been mailed to the applicant, unless a written request for final review is filed with the department by the applicant, permittee, licensee, or affected person.*

(emphasis added).

Thus, Duke's reliance upon Regulation 61-101 to conclude that DHEC somehow waived the 401 certification altogether, thus resulting in issuance of the WQC by default – and yet no notice was given of that waiver in order for interested parties to file an objection thereto to the DHEC Board – flies in the face of fundamental due process. Moreover, such an argument is in direct contravention of the express language of § 44-1-60(E) that the agency decision does not become final *except upon written notice of the decision* to interested parties. As the Court of Appeals stated in *Coastal Conservation League, supra*,

[a]n interested party must be given notice "reasonably calculated under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

380 S.C. at 382, 669 S.E.2d at 916. *See also*, S.C. Const. Art. I, § 22; *State v. Brown*, 178 S.C. 294, 182 S.E. 838 (1935), appeal dismissed by, 298 U.S. 639 (1936) [due process requires a person shall have a reasonable opportunity to be heard before a legally appointed and qualified impartial tribunal before any offer can be made affecting his rights to life, liberty, or property]. In *Lake v. Moore*, 12 S.C. 563, 1879 WL 5874 (1879), our Supreme Court rejected the argument that an appeal was not timely filed because the appeal time expired prior to written notice of the order from which appeal was taken. Accordingly, any default on the part of the DHEC staff, resulting in a waiver because of expiration of the 180-day time period cannot eviscerate the timely filed appeals to the DHEC Board which were taken pursuant to S.C. Code § 44-1-60.

Indeed, this Court recognized in *SCDOT v. DHEC, supra*, that § 44-1-60 still requires notice to necessary or interested parties, notwithstanding any waiver by DHEC based upon the 180-day limit. In *SCDOT*, the Court stated:

DOT had 30 days to file a request for review from the date of notice. The

notice was mailed on June 23, 2006 and DOT filed a cross-appeal and opposition to the Environmental Groups' challenge to the permit on July 19, 2006. That filing thus complied with the thirty day time frame.

Furthermore, I find that DOT established that it did not receive notice of the NOPD until June 26, 2006 via an e-mail. That day Berry Still, an employee of DOT, requested a formal copy of the permit by mail. DOT filed its request for a hearing to DHEC within one day of receiving a copy of the NOPD by mail. Therefore, I find that, under the circumstances, DOT timely requested a Final Review Conference.

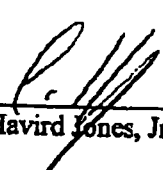
Id. at 25.

For all the foregoing reasons, Duke is not entitled to judgment as a matter of law, and Duke's Motion for Summary Judgment should be denied.

Conclusion

Duke is not entitled to judgment as a matter of law based upon its 180-day default argument, nor upon its argument concerning the Requests to Admit. There being material disputes of fact, summary judgment is therefore not appropriate.

Respectfully submitted this 12th day of February, 2010.


C. Havird Jones, Jr.

Counsel for the State of South Carolina
Office of the Attorney General
State of South Carolina
P. O. Box 11549
Columbia, South Carolina 29211
Tel: (803) 734-3654

Exhibit A

August 19, 2008

Duke Energy Carolinas, LLC
c/o Mark Oakley, P.E.
526 South Church Street
PO Box 1006
Mail Code EC12Y
Charlotte, NC 28201-1006

REF: Catawba-Wataree Hydroelectric Project, PN# DHEC-08-C-001
401 Water Quality Certification

Dear Mr. Oakley:

Please review the enclosed comments on the draft QAPP and respond to the deficiencies. Coordinate with the reviewer, Nydia F. Burdick, M.S. (Manager, Quality Assurance Office, 803-896-0862), as necessary until the QAPP is acceptable. SCDHEC's guidance document for preparing QAPPs is also enclosed. The Division of Water Quality has reviewed probe placements and determined they are logical and seem to best fit the unique physical conditions at each facility. We have no recommendations to improve them. We are continuing to review your application and will request more information very soon.

Please submit all requested information by October 19, 2008 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 (requested 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.

Additional information regarding State Water Quality Standards or the 401 Certification process can be found on the Bureau of Water's website at: <http://www.scdhec.gov/environment/water/401.htm>. If you have any questions, please call me at (803) 898-4266 or e-mail wenerickw@dhcc.sc.gov. Thank you for your time and consideration.

Sincerely,

William R. "Rusty" Wenerick, Project Manager
SCDHEC Bureau of Water, Division of Water Quality
Water Quality Certification and Wetlands Section
2600 Bull Street
Columbia, SC 29201-1708
Fax: (803) 898-7344

Enclosures: QAPP Review Checklist

Guidance Document for preparing QAPPs

cc w/out enclosures

Nydia F. Burdick
EQC Laboratories, Building 9

Columbia EQC Field Office
Bldg #5 / PO Box 156
State Park, SC 29147-0156

Lancaster EQC Field Office
2475 DHEC Road
Lancaster, SC 29720

Sumter EQC Field Office
105 Magnolia Street
PO Box 1628
Sumter, SC 2915

Exhibit B

October 8, 2008

Duke Energy Carolinas, LLC
c/o Mark Oakley, P.E.
526 South Church Street
PO Box 1006
Mail Code EC12Y
Charlotte, NC 28261-1006

REF: Catawba-Wataree Hydroelectric Project (FERC Project No. 2232), PN# DHEC-08-C-001
401 Water Quality Certification

Dear Mr. Oakley:

The Bureau of Water at the South Carolina Department of Health and Environmental Control (SCDHEC) would like to request additional information in order to continue a technical review of your application and complete the 401 Water Quality Certification. Additional information will be requested again in the near future after the SCDHEC reviews your application further.

Response to comment letters: Please provide a response to the 12 comment letters received to date as a result of the public notice (copies of 10 letters enclosed – you were copied on letters from SCDPRT and NCDENR).

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.

Additional information regarding State Water Quality Standards or the 401 Certification process can be found on the Bureau of Water's website at: <http://www.scdhec.gov/environment/water/401.htm>. If you have any questions, please call me at (803) 898-4266 or e-mail weneriwr@dhec.sc.gov. Thank you for your time and consideration.

Sincerely,

William R. "Rusty" Wencrick, Project Manager
SCDHEC Bureau of Water, Division of Water Quality
Water Quality Certification and Wetlands Section
2600 Bull Street
Columbia, SC 29201-1708
Fax: (803) 898-7344

Enclosure: copy of 10 comment letters

cc w/out enclosure:

Columbia EQC Field Office
Bldg #5 / PO Box 156
State Park, SC 29147-0156

file

Lancaster EQC Field Office
2475 DHEC Road
Lancaster, SC 29720

Sumter EQC Field Office
105 Magnolia Street
PO Box 1628
Sumter, SC 2915

Exhibit C

October 21, 2008

Duke Energy Carolinas, LLC
c/o Mark Oakley, P.E.
526 South Church Street
PO Box 1006
Mail Code EC12Y
Charlotte, NC 28201-1006

REF: Catawba-Wateree Hydroelectric Project (FERC Project No. 2232), PN# DHEC-08-C-001
401 Water Quality Certification

Dear Mr. Oakley:

The Bureau of Water at the South Carolina Department of Health and Environmental Control (SCDHEC) would like to request additional information in order to continue a technical review of your application and complete the 401 Water Quality Certification. Additional information may be requested again in the future.

Please provide a response to the following questions:

1. It is not clear how initial DO in turbine inflows was determined for Discrete Bubble Model (DBM) calibration. Two different approaches are mentioned: (1) measured DO in turbine inflow (Sec. 5.1.4.1, p. 51 and Appendix C, General Calibration Procedure) and (2) measured DO in tailrace without airflow to the turbine (Appendix B, p. 16). Please clarify which approach was used for each turbine model.
2. Confirm for each modeled turbine that, except during test periods when the calibration data were collected, there was no significant airflow into the turbines, i.e. the historical datasets represent air valves closed conditions. If this is not the case, then describe conditions for each modeled turbine, i.e. evaluate the degree to which potential DO benefit may already be reflected in the historical data.
3. The application contains the historical hourly data for each project in spreadsheet format on an attached disc, which is helpful; however, the complete DBM model input, equations, and output data are also needed for each project. Please provide in spreadsheet format.
4. It is not clear how the historical data provided on disc was analyzed to produce the without aeration frequency plots (Sec. 5.1.4). Similar plots of the historical record provided by Duke during the stakeholder negotiations process showed lower DO levels at all projects using the period May 1st through November 31st for both all flows and generation flows than are shown here. Please describe how the historical dataset was analyzed to generate the without aeration frequency plots.

If you have questions about this particular request, you may contact Wade Cantrell of the Water Quality Modeling Section directly at wcantrell@dhec.sc.gov or (803) 898-3548.

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.

Additional information regarding State Water Quality Standards or the 401 Certification process can be found on the Bureau of Water's website at: <http://www.scdhec.gov/environment/water/401.htm>. If you have any questions, please call me at (803) 898-4266 or e-mail weneriwr@dhec.sc.gov. Thank you for your time and consideration.

Sincerely,

William R. "Rusty" Wenerick, Project Manager
SCDHEC Bureau of Water, Division of Water Quality
Water Quality Certification and Wetlands Section
2600 Bull Street
Columbia, SC 29201-1708
Fax: (803) 898-7344

cc:

Columbia EQC Field Office
Bldg #5 / PO Box 156
State Park, SC 29147-0156

Lancaster EQC Field Office
2475 DHEC Road
Lancaster, SC 29720

Sumter EQC Field Office
105 Magnolia Street
PO Box 1628
Sumter, SC 2915

Larry Turner, Manager
Water Quality Modeling Section
SCDHEC Bureau of Water, Division of Water Quality

401 file

CERTIFICATE OF SERVICE

I hereby certify that I am counsel for the State of South Carolina, Intervenor in the above-captioned matter, and that on the 12th day of February, 2010, in Columbia, South Carolina, I served a copy of the foregoing Response of the State of South Carolina to Petitioner's Motion for Summary Judgment on the following persons by depositing the same in the United States Mail, postage prepaid, and addressed as follows:

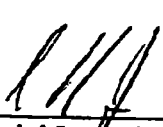
James W. Potter, Esquire
W. Thomas Lavender, Jr., Esquire
Nexsen Pruet, LLC
1230 Main Street, Suite 700
P. O. Drawer 2426
Columbia, South Carolina 29202

Christopher K. DeScherer, Esquire
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, South Carolina 20401-3051

Nash E. Long, III, Esquire
Winston & Strawn LLP
214 N. Tryon Street
Charlotte, North Carolina 28202

Julia F. Youngman, Esquire
Southern Environmental Law Center
200 West Franklin Street, Suite 330
Chapel Hill, North Carolina 27516

Stephen P. Hightower, Esquire
Office of General Counsel
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201



C. Havird Jones, Jr.

Counsel for the State of South Carolina
Office of the Attorney General
State of South Carolina
P. O. Box 11549
Columbia, South Carolina 29211

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FEB 12 2010

SC ADMIN. LAW COURT

March 9, 2010

The Honorable Ralph K. Anderson, III
Chief Administrative Law Judge
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: *Duke Energy Carolinas, LLC v. South Carolina Department of
Health and Environmental Control – Docket No: 09-ALJ-07-0377-
CC*

Dear Judge Anderson:

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

Please find enclosed Petitioner's Reply to Respondent's and Respondent-Intervenors' Responses to Petitioner's Motion for Summary Judgment and Motion for Declaratory Judgment.

The Court has rescheduled a hearing for Motions from March 31, 2010 to May 6, 2010. We are requesting a separate hearing at an earlier date (mid March if possible) on just the Summary Judgment Motion. This should take approximately two hours at the most and could be done by phone if necessary. Alternatively, the Court could decide Petitioner's Motion without oral argument.

The advantage to an earlier hearing on just the Motion for Summary Judgment is it may potentially avoid the need for extensive and expensive discovery and trial preparations under the Consent Scheduling Order and may also make the May 6th hearing on the remaining motions moot if the requested relief is granted.

1230 Main Street
Suite 700 (29201)
PO Drawer 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803.253.8213
F 803.253.8277
E JPotter@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

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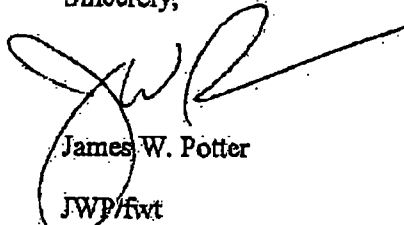
MAR 09 2010

SC ADMIN. LAW COURT

The Honorable Ralph K. Anderson, III
March 9, 2010
Page 2

Thank you for your consideration of our request.

Sincerely,



James W. Potter
JWP/fwt
Enclosure

cc: Stephen Hightower, Esquire
Christopher DeScherer, Esquire
Robert Cook, Esquire

STATE OF SOUTH CAROLINA
BEFORE THE ADMINISTRATIVE LAW COURT

Duke Energy Carolinas, LLC,

Petitioner,

v.

South Carolina Department of Health and
Environmental Control,

Respondent,

South Carolina Attorney General, American
Rivers, and the South Carolina Coastal
Conservation League,

Respondent-Intervenors.

Docket No. 09-ALJ-07-0377-CC

**PETITIONER'S REPLY TO
RESPONDENT'S AND RESPONDENT-
INTERVENORS' RESPONSES TO
PETITIONER'S MOTION FOR
SUMMARY JUDGMENT AND MOTION
FOR DECLARATORY JUDGMENT**

Petitioner Duke Energy Carolinas, LLC ("Duke"), respectfully submits Petitioner's Reply to Respondent's and Respondent-Intervenors' Responses to Petitioner's Motion for Summary Judgment and Motion for Declaratory Judgment ("Reply").

In their respective Responses, the South Carolina Department of Health and Environmental Control ("DHEC" or "Department"), the South Carolina Attorney General ("Attorney General") and American Rivers and South Carolina Coastal Conservation League ("AR/CCL") (collectively, "Respondents") assert that summary judgment is not appropriate because there are material disputes of fact related to whether or not the Department issued the proposed decision required by 25A S.C. CODE REGS. 61-101.A.6. within the 180-day time limit. Respondents base their argument, however, upon a different regulation, the State's *Environmental Protection Fees* regulation, 24A

S.C. CODE REGS. 61-30 ("R.61-30" or "Fee Reg."), which governs the circumstances for refund of an application fee. Duke is not asking for a refund of the application fee. Rather, Duke's Motion for Summary Judgment and Motion for Declaratory Judgment ("Motions") seek application of the law specifically governing the procedures for processing certifications pursuant to 25A S.C. CODE REGS. 61-101, *Water Quality Certification* ("R.61-101" or "WQC Reg"). Respondents cannot defend against application of the WQC Reg by relying upon the tolling procedures of the Fee Reg.

Respondents also seek to raise issues with Duke's use of its Requests to Admit, admitted by rule, as facts to support its Motion for Summary Judgment; with Duke's failure to raise the waiver issue in the agency's Final Review Conference; with Duke's not requesting determination of a waiver in the Request for Contested Case Hearing; and with the need for additional discovery before Summary Judgment can be granted.

The Responses, the exhibits attached to the Responses, the affidavit submitted with the Motion for Summary Judgment, the Department's Answers to the Requests to Admit stated in the Department's Response, and the Department's Answers to Petitioner's Interrogatories and Responses to Petitioner's Request for Production¹ clearly establish there are no facts in dispute which are material to the Motion for Summary Judgment. Thus, Summary Judgment is appropriate whether or not the Court rules the Requests to Admit served by Duke on the Department were admitted by rule.

Because no material facts are in dispute, Duke's Motions are ripe for decision by the Court.

¹ The Department's Answers to the Requests to Admit and the Department's Answers to Petitioner's Interrogatories and Responses to Petitioner's Request for Production were received by Duke after filing of the Motions.

Material Facts Are Not In Dispute

The undisputed facts material to the Motion for Summary Judgment are as follows:

1. Duke submitted its Water Quality Certification (WQC) application ("WQC Application") to DHEC on June 5, 2008.
2. The Department did not request any additional information from Duke within ten (10) days after the WQC Application was submitted.
3. Pursuant to the Fee Reg., the Department, in various letters and e-mails, advised Duke it had 180 days to complete action on an application for 401 Water Quality Certification or the assessed fee must be returned; these 180 days included only those days in which the Department is actively reviewing the application; and, the processing clock stops when information is requested and the Department is waiting for a response from Duke. The contents of the letters and e-mails are not in dispute and speak for themselves.
4. Pursuant to 25A S.C. CODE REGS. 61-101.C.4, the Department did not notify Duke it was suspending processing of the WQC Application as a result of Duke's not timely submitting additional information requested by the Department.
5. The Department issued the proposed decision required by R.61-101 on May 15, 2009.

Legal Issues To Be Decided

The only remaining issues before the Court in the Motion for Summary Judgment are legal issues, to wit:

1. Whether the letters, e-mails, or other correspondence sent by the Department to Duke under the Fee Reg. meet legal requirements necessary to suspend

the 180-day processing period required pursuant to the WQC Reg until or beyond May 15, 2009;

2. Whether the Department has authority to issue a proposed decision to issue or deny a WQC application more than 180 days after submittal of the application if the processing period required in the WQC Reg is not suspended; and

3. Whether the State, by operation of law, waived its right to issue or deny the WQC Application when the Department did not issue a proposed decision to issue or deny the WQC Application within the 180-day time period required by the WQC Reg.

R.61-101 IS THE CONTROLLING LEGAL AUTHORITY FOR
WQC APPLICATION PROCESSING.

A. **R.61-101, Water Quality Certification**

"[R.61-101] 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 REGS. 61-101.A.1 (Supp. 2009).

Section 401 of the Clean Water Act provides, among other things, that:

Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. . . . If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for 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.

§ 401(a)(1) Clean Water Act, 33 USC §1341(a)(1).

In adopting R.61-101, *Water Quality Certification*, the General Assembly set out a comprehensive regulatory scheme to insure the State of South Carolina meets its obligation to issue, deny, or waive certification required under Section 401. The regulation specifically applies to water quality certifications required for "permits

or licenses issued by the Federal Energy Regulatory Commission, 16 U.S.C. § 1791, *et seq.*" 25A S.C. CODE REG. 61-101.A.2.(c) (Supp. 2009). R.61-101 was promulgated under the authority of the South Carolina Pollution Control Act, S.C. CODE ANN. §§ 48-1-30 and 48-1-50. 14 S.C. Reg. (No. 3) 143 (1990).

R.61-101 establishes water quality certification procedures beginning with receipt of an application (Section C) to Enforcement of Certification Decisions and Conditions (Section H). The regulation requires the Department give notice of the application by mail and publication (Section D); conduct a public hearing (Section E); prepare a written assessment addressing the water quality impacts of the project and make the assessment available to the public (Section F); and issue a notice of proposed decision (Section G). The Department is required to comply with these mandatory provisions or face the possibility the Department's decision to issue or deny a water quality certification will be overturned pursuant to the Administrative Procedures Act ("APA").

Significant to the Issue before this Court, the WQC Reg contains a specific provision requiring the Department to issue a proposed decision within 180 days of acceptance of an application "[u]nless otherwise suspended or specified in this regulation" 25A S.C. CODE REG. 61-101.A.6. (Supp. 2009) (emphasis added). Pursuant to the regulation, the 180-day period is suspended "[i]f the Federal permitting ... agency suspends processing of the federal license application on request by the applicant or the Department or of its own volition" *Id.*

The Department may also suspend processing of the WQC application in the event the applicant does not timely submit additional information necessary for the Department to reach a certification decision. 25A S.C. CODE REG. 61-101.C.4 (Supp. 2009). To suspend processing under R.61-101.C.4, three (3) conditions must be met: (1) the Department must specify a time for submittal of the additional information, (2) the

applicant must not have submitted the requested information within the specified time period, and (3) the Department must notify the applicant of the suspension. *Id.* This procedure not only establishes the criteria for suspension but also insures the applicant's right to due process.²

Respondents assert the 180-day time period for issuing a proposed decision under R.61-101.A.6. was suspended pursuant to the Fee Reg. AR/CCL assert, "Duke wholly fails to address the effect of the tolling provision in [the Fee Reg] on the 180 days allotted for DHEC's review of an application." AR/CCL Resp., p. 3. Duke did not address the Fee Reg in its Motions because it is not relevant to suspension or tolling of the time for issuing a proposed decision under the WQC Reg, which is the issue before this Court.

B. R.61-10, Environmental Protection Fees

The Fee Reg was promulgated to implement the South Carolina Environmental Protection Fund Act, S.C. CODE ANN. §§ 48-2-10 thru 48-2-90 (Rev. 2008) ("Act"), specifically § 48-2-50,³ and was not promulgated under authority of the Pollution Control Act. The Fund Act established a special account within the Treasurer's Office in which fees authorized by the Act collected for environmental permits, licenses, certificates, and registration pursuant to seven (7) state environmental statutes, must be deposited. S.C. CODE ANN. § 48-2-30 (Rev. 2008). The Fund Act requires the Department to charge fees for the various services and functions it performs under the seven (7) statutes. These fees include application fees, processing fees, permit maintenance

² Because suspension under this provision is a Department staff decision, the applicant would be entitled to a review of any suspension of its WQC Application pursuant to S.C. Code Ann. § 44-1-60 (Supp. 2009).

³ The Preamble to R.61-30 and R.61-30.A. also cite as statutory authority S.C. Code Ann. § 48-39-145 (Rev. 2008), *Application fee for permit to alter critical area; special provisions as to construction of marina and commercial dock facilities.*

fees, certification fees, license fees, registration fees, plan review fees, facility inspection fees, and emission fees. S.C. CODE ANN. § 48-2-50(A) (Rev. 2008). The Fund Act requires the Department to establish a schedule for timely action by the Department on permit applications. If the Department fails to grant or deny the permit within the relevant time frame, the applicant is entitled to a refund of the application fee. S.C. CODE ANN. § 48-2-70 (Rev. 2008).

The applicability of the Time Schedules in Section H of the Fee Reg are, by definition, limited. "Time Schedules" is defined as follows:

"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 REGS. 61-30.B(22)(Supp. 2009)(emphasis added). Therefore, Time Schedules insure timely action by the Department on an application or a refund of the application fee. The Time Schedule provisions in the Fee Reg do not apply to the 180-day time period in R.61-101.

The Department, as a matter of law in South Carolina, cannot invoke provisions in a regulation promulgated under one Act in an action within the statutory authority of a different Act. See *Responsible Economic Dev. v. S.C. Dep't of Health and Env'tl. Control*, 371 S.C. 547, 553, 641 S.E.2^d 425, 428 (2007) (stating, "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.") "Any action taken by DHEC outside of its statutory and regulatory authority is null and void." *Id.* (citation omitted)

The Department's attempt to use the tolling provisions in the Fee Reg to suspend processing under R.61-101 deprives Duke of its right to due process. See fn. 2 herein, p. 6. "To allow the Department to surreptitiously suspend the processing of an application and thereby its deadline to make an NOPD would be a violation of due process." *S.C. Dep't of Transp. v. S.C. Dep't of Health and Envtl. Control and Friends of Congaree Swamp, Wildlife Fed'n, and Audubon South Carolina*, 2008 WL 1934476 at *13 (SCALC, 2008)("DOT v. DHEC").

THE 180-DAY TIME LIMIT REQUIRED BY R.61-101 WAS NOT SUSPENDED.

The Respondents contend the Department issued its proposed decision within the 180-day time frame required by the WQC Reg because the processing of the application under the Fee Reg was suspended when the Department requested additional information from Duke.

The WQC Reg authorizes the Department to suspend the 180-day time period for issuing a decision only if one (1) of two (2) events occurs – either, (1) FERC suspends processing of the federal license application during the 180 days, or (2) the applicant fails to timely submit requested additional information necessary for reaching a certification decision to the Department *and* the Department notifies the applicant of the suspension. 25A S.C. CODE REG. 61-101.C.4 (Supp. 2009). It is undisputed that neither of these events occurred in this case.

A. FERC Did Not Suspend Processing Of The Federal Permit Application.

It is undisputed that neither Duke nor the Department requested FERC to suspend processing of Duke's license application, and FERC did not suspend processing of the license application of its own volition.

B. Processing Was Not Suspended As Specified In R.61-101.

The WQC Reg allows the Department to suspend processing of an application for a water quality certification if an applicant fails to timely submit additional information requested by the Department and the Department notifies the applicant of the suspension. *Id.* The Department did not notify Duke, at any time, that it was suspending processing of the WQC Application as a result of Duke's not timely submitting additional information to the Department. Respondents fail to produce any affidavit, interrogatory response, document, or other evidence indicating the Department gave Duke any such notice.

The Respondents contend processing of the WQC Application stopped under R.61-101 because the following, or similar, language was inserted by the Department into letters the Department sent to Duke under the Fee Reg:

Please submit your responses by October 19, 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.

See Attorney General Resp., Ex. A-C; RA/CCL Resp., Ex. 2-9; Department Resp. Ex. 1.

While the quoted or similar language was in various letters, e-mails and other correspondence from the Department to Duke, the Department's inclusion of boilerplate language advising Duke of certain provisions of the Fee Reg in correspondence requesting additional information does not meet the legal requirement for suspension pursuant to R.61-101, i.e. notification of suspension *after* the applicant fails to submit information requested pursuant to the WQC Reg in a timely manner.⁴ Obviously, these requests for additional information and their boilerplate language cannot possibly comply with the WQC Reg's suspension requirement because the Department issued them to inform Duke when responses were due. They were not issued after the due date, a prerequisite to the notice of suspension.

**The Other Issues Raised In The Responses Do Not
Warrant Denial Of The Motions.**

A. **Duke Was Not Obligated To Raise The Issue Of Waiver At The Board Of Health
And Environmental Control's Final Review Conference.**

DHEC asserts Duke cannot claim the State waived the 401 WQC because the issue was not raised before the Board during the agency's Final Review Conference. Department Resp., p. 13. We disagree. While "[i]t is well-settled that an issue cannot be raised for the first time on appeal," *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000), this Court is not limited to a review of the issues raised before the Board.

This proceeding is a "contested case hearing before the Administrative Law Court [(ALC)], in accordance with the Administrative Procedures Act." S.C. CODE

⁴ Additionally, as discussed above, the Department cannot use a tolling provision promulgated under the Fund Act to suspend processing of a Water Quality Certification under the Pollution Control Act.

ANN. § 44-1-60(F)(2) (Supp. 2009). The ALC is not restricted to a review of the decision below. *Reliance Ins. Co. v. Smith*, 327 S.C. 528, 534, 489 S.E.2d 674, 677 (Ct. App. 1997). The RPALC require the Court make independent findings of fact and conclusions of law in contested case hearings. See *Reliance*, 327 S.C. at 534, 489 S.E.2d at 677; see also, Rule 29(C), RPALC. "[T]he proceeding before the [ALC] is in the nature of a *de novo* hearing." *Reliance*, 327 S.C. at 534, 489 S.E.2d at 677. "A trial *de novo* is one in which 'the whole case is tried as if no trial whatsoever had been had in the first instance.'" *Blizzard v. Miller*, 306 S.C. 373, 375, 412 S.E.2d 406, 407 (1991)(quoting *National Health Corp. v. S.C. Dep't of Health and Env'tl. Control*, 298 S.C. 373, 378 n.1, 380 S.E.2d 841, 844 n.1 (Ct. App. 1989)).

In 2006, the Legislature reversed the order of review of a department decision, placing review by the Board of Health and Environmental Control ("Board") before trial *de novo* by the ALC. 2006 S.C. Acts 387. While this changed the Board's scope of review from appellate to administrative, Act 387 did not change the nature or scope of the ALC's review. The proceeding before the ALC remains a *de novo* hearing.

Every fact and legal issue relevant to the Board's decision is subject to review by the ALC, regardless of whether or not the fact or issue was raised during the administrative review. Therefore, the issue of whether or not the State waived the 401 WQC because a proposed decision to grant or deny the 401 WQC was not issued within the 180-day period is properly before this Court.

B. Duke Was Not Required To Request A Declaration Of Waiver In Its Notice Of Contested Case Hearing.

AR/CCL contend Duke's "motions improperly seek relief not requested in Duke's pleadings in the case." AR/CCL Resp., p. 3. However, no pleadings have been

ordered by the Court in this matter pursuant to Rule 18, RPALC, so the time for filing Duke's pleadings has not been triggered.

AR/CCL suggest, because the Notice of Request for Contested Case Hearing "did not seek *waiver* of the WQC certification (sic), but rather asked only that 'the WQC be issued in the form that the SCDHEC staff drafted'" (AR/CCL Resp., p. 19) (emphasis in original), the Court cannot find the State waived the WQC decision. However, the Notice of Request for Contested Case Hearing is not intended to be a comprehensive, detailed explanation of all issues related to the case. "The request for a contested case hearing contains basic information so that the matter may be identified." Rule 11, RPALC, 2009 Revised Notes.

Moreover, the Court's Order for Prehearing Statements requires the parties to state, to the best of their ability, the "action requested of the Court" Order for Prehearing Statements, filed September 24, 2009, ¶ 5. Duke's Prehearing Statement requests the Court to issue a 401 Certification as developed by the Department staff or "[a]lternatively, the Court could find that the Department failed to comply with regulatory and statutory requirements to act within 180 days and within one-year" Petitioner's Prehearing Statement, dated October 21, 2009, ¶ 3(f). Therefore, the issue of waiver is properly before the Court.

C. Additional Discovery Is Unnecessary For The Court To Find In Favor Of Duke On Its Motions.

AR/CCL assert additional discovery is necessary on the issue raised in the Motions. (AR/CCL Resp., pp. 2, 6, 7). They also assert "Duke ... is in control of virtually all the relevant evidence" (AR/CCL Resp., p. 8). We disagree.

The relevant issue raised in the Motions is whether or not the Department notified Duke processing of the permit was suspended pursuant to R.61-101. The regulation requires notification by the Department. In Exhibit 1 to the Department's Response, Mr. William R. Wenerick goes into great detail identifying and explaining each piece of correspondence from the Department to Duke that mentions "suspension" or any related term. Copies of the documents are attached to Mr. Wenerick's Affidavit as Exhibits 1-17. Copies of these documents also are attached to the AR/CCL Response as Exhibits 2-9.

All documents related to the issue raised in the Motions have been identified and produced by the Department and AR/CCL. Duke does not have any additional documents related to notification by the Department of suspension pursuant to R.61-101. See Petitioner's Motions, Ex. 1, Affidavit of E. Mark Oakley.

Duke does not dispute the documents attached to the Responses filed by the Department and AR/CCL are true and accurate copies of documents within the possession of the Department and AR/CCL. These documents fail, however, to constitute notification to Duke as required pursuant to R.61-101. Those documents on their face show that the Department never suspended processing of the WQC Application for any failure by Duke to submit timely information necessary for reaching a certification decision.

D. Waiver Of WQC Pursuant To R.61-101 Is A Question Of State Law.

The Attorney General asserts "whether or not there has been a waiver is a question of federal law under the Clean Water Act." AG Resp., p. 4. Duke disagrees with this broad statement. While the question of whether or not there has been a waiver *by operation of federal law* is a matter properly before FERC, the question of whether or

not South Carolina waived its right to issue or deny the WQC *by operation of state law* is properly before this Court.

The Clean Water Act recognizes that states may waive the § 401 certification requirement. The Clean Water Act provides, in relevant part, “[a]ny applicant for a Federal license ... shall provide the licensing or permitting agency a certification from the State in which the discharge originates Such state ... shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. ... If the State ... fails or refuses to act on a request for 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.” 33 U.S.C. §1341(a)(1).

The general assertion by the Attorney General, insofar as it applies to state law, is not only wrong, but is inconsistent with statements made by the Attorney General to FERC in his *Opposition of the State of South Carolina to Duke Energy Carolinas, LLC’s Petition for Declaratory Order*, filed with FERC on September 10, 2009. Relevant portions of the Attorney General’s FERC filing are attached as Exhibit 1. A list of some of the Attorney General’s statements, with emphasis added, includes:

1. “*Questions of State Law Concerning § 401 Certification Are For State Tribunals to Resolve, Not FERC.*” *Id.* at 13.

2. “Because ‘the decision whether to issue a section 401 certification generally turns on *questions of state law*,’ the court concluded, ‘FERC’s role is limited to *awaiting, and then deferring to*, the final decision of the state.’” *Id.* at 14 (citing *City of Tacoma v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006)) (emphasis by Attorney General).

3. "Plaintiffs argued [in *City of Olmsted v. EPA*, 435 F.3d 632, 636 (6th Cir. 2006)] that, 'under Ohio law, the [state agency] cannot issue a section 401 waiver and that the Corps Defendants were aware of that fact.' . . . The court held that the 'Corps Defendants could properly rely on [the] waiver in this case.'" *Id.* at 14 (citation omitted).

4. "Duke can seek to raise any objections to the DHEC Board Decision [as to whether the state agency followed its rules, as well as the legal meaning of those rules under *state law*] in the appeal Duke recently filed with the South Carolina Administrative Law Court." *Id.* at 15-16.

5. "This [Federal Energy Regulatory] Commission's precedent similarly confirms that a state certification is to be taken at face value and not overturned pursuant to the Commission's own independent analysis of *state law*." *Id.* at 16.

6. "Issues concerning *the validity of state actions* under section 401 are for *state courts* to decide, and federal courts and agencies are *without authority* to review these matters." *Id.* at 17-18, (citing Order Denying Rehearing, *FPL Energy Maine Hydro LLC*, 111 FERC 61104 ¶ 7 (2005)) (first emphasis added)(remaining emphasis added by Attorney General).

The issue of whether or not the State of South Carolina, by operation of state law, waived its right to issue or deny § 401 certification is properly before this Court, and the Attorney General's assertion to the contrary is inconsistent with the law and the Attorney General's prior position before the Federal licensing agency.

Clarification of Duke's Legal Arguments

Duke believes it is necessary to restate two (2) of its legal positions that were misstated in the Responses.

A. **The State, Not The Department, Waived The State's Right To Issue Or Deny The WQC Application.**

Duke's position is that *the State*, by operation of state law, waived *the State's* right to issue or deny the WQC Application. The Respondents misstate Duke's position when they assert Duke's position is that "the Department had waived its right to issue " (Dept. Resp., pp. 5, 13); "DHEC has thus waived its right" (AG Resp., p. 5); "DHEC waived its right" (AG Resp., p. 12); "DHEC somehow waived the 401 certification" (AG Resp., p. 13); "any waiver by DHEC" (AG Resp., p. 13); "[DHEC] waived its authority to issue" (AR/CCL Resp., p. 1); and "DHEC had waived its authority over the WQC." (AR/CCL Resp., p. 19).

The Department is only authorized by R.61-101 to issue a proposed staff decision on a WQC application within the 180-day period. If it fails to do so, the right to issue or deny the WQC Application is waived by law, and an opportunity for DHEC decision is forfeited.

B. Waiver Does Not Affect The Department's Authority To Promulgate Or Enforce Water Quality Standards.

The Attorney General misstates the effect of a waiver in this case. He asserts the waiver would result in the Department's waiving its "right to establish water quality standards." (AG Resp., pp. 5, 7). Water quality standards are promulgated in 25 S.C. CODE REGS. 61-68, under the authority of the Pollution Control Act, and are not affected by issuance, denial, or waiver of a WQC application. Whether or not the right to issue or deny the WQC Application was waived, Duke is still subject to the water quality standards in R.61-68.

The Clean Water Act expressly states such water quality standards remain enforceable by the Department throughout the term of the license for this project.

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements.

§ 401(b) Clean Water Act, 33 USC § 1341(b). Moreover, as a state regulatory requirement, the water quality standards in Reg. 61-68 remain enforceable by the Department under state law in the event practices of Duke in the future violate the water quality standards for which the license is applicable and certify compliant. 25 S.C. CODE ANN. REGS. 61-68.E.1-2 (1976, as amended).

CONCLUSION

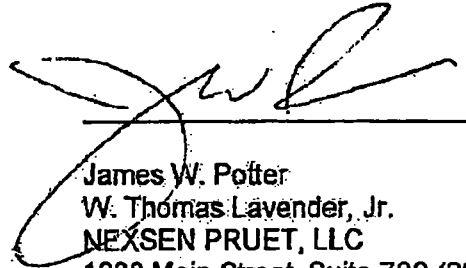
It is undisputed the Department did not make a proposed decision within 180 days after it received the WQC Application. It is also clear that the 180-day time period imposed on DHEC pursuant to R.61-101 was not suspended in accordance with the requirements in R.61-101.

The State waived its opportunity to issue or deny the WQC Application under state law when the Department failed to issue the proposed decision within the 180-day period.

RELIEF

Because there are no material facts in dispute, the Motion for Summary Judgment and Motion for Declaratory Judgment are ripe for hearing and decision. Based on the foregoing reasons, Petitioner respectfully requests the Court grant Duke's Motion for Summary Judgment and issue a Declaratory Judgment that the State waived its right to issue or deny Duke's WQC Application.

Respectfully submitted,



James W. Potter
W. Thomas Lavender, Jr.
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202

Nash E. Long, III
(Admitted pro hac vice)
Winston & Strawn LLP
214 North Tryon Street
Charlotte, North Carolina 28202
(704) 350-7700
(704) 350-7800 (fax)

Attorney's for Petitioner
Duke Energy Carolinas, LLC

Columbia, South Carolina

March 31st, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing upon each of the parties in this lawsuit by U.S. mail, first class, postage prepaid, in envelope(s) addressed as follows:

Robert D. Cook
Deputy Attorney General
STATE OF SOUTH CAROLINA
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 11549
Columbia, SC 29211
*Attorneys for the Office of the Attorney
General of the State of South Carolina*

Stephen P. Hightower
Office of General Counsel
SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL
2600 Bull Street
Columbia, SC 29201
*Attorney for South Carolina Department
of Health and Environmental Control*

Christopher K. DeScherer
Senior Attorney
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401-3051

Julia F. Youngman
SOUTHERN ENVIRONMENTAL LAW
CENTER
200 West Franklin Street, Suite 330
Chapel Hill, NC 27516

*Attorneys for Southern Environmental
Law Center*

This 9th day of March, 2010.

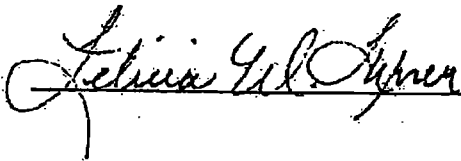


EXHIBIT 1

9-10-09

**BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Duke Power Company, LLC

} Project No. 2232-522.
} North Carolina and South Carolina

**OPPOSITION OF THE STATE OF SOUTH CAROLINA
TO DUKE ENERGY CAROLINAS, LLC'S
PETITION FOR DECLARATORY ORDER**

David C. Frederick
Scott H. Angstreich
Scott K. Attaway
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, P.L.L.C.
1615 M St., N.W., Suite 400
Washington, D.C. 20036
(202)326-7900.

Henry Dargan McMaster
Attorney General
John W. McIntosh
Chief Deputy Attorney General
Robert D. Cook
Assistant Deputy Attorney General
T. Parkin Hunter
Assistant Attorney General
Leigh Childs Cantey
Assistant Attorney General
Elizabeth H. Smith
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3970

September 10, 2009

Counsel for the State of South Carolina

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hereto). "Further," EPA explained, "given the action of the Board, there is no valid section 401 certification from SCDHEC for this project and FERC cannot issue the license until such time that SCDHEC either issues a certification or waives certification." *Id.*

On September 4, 2009, Duke appealed the DHEC Board's denial of certification to the South Carolina Administrative Law Court. *See* Ex. 9 hereto.

Argument

I. SOUTH CAROLINA'S § 401 CERTIFICATION DECISION WAS TIMELY

A. Duke's Petition Is Filed In the Wrong Forum And Should Therefore be Dismissed

1. Questions of State Law Concerning § 401 Certification Are For State Tribunals To Resolve, Not FERC

FERC's ability to inquire into a State's "compliance with the terms of section 401" is limited to "confirm[ing] that the state has *facially satisfied* the express requirements of section 401." *City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006) (emphasis added). But that "obligation does not require FERC to inquire into every nuance of the state law proceeding, especially to the extent doing so would place FERC in the position of applying state law standards." *Id.*

In *City of Tacoma*, a challenger claimed that the state's § 401 certification was issued without compliance with the State's public notice requirements, which § 401 requires all States to establish. *See* 33 U.S.C. § 1341(a)(1) (States shall "establish procedures for public notice in the case of all applications for certification"). The State of Washington had promulgated the required public notice rules, and the question before the D.C. Circuit was the extent of FERC's duty to confirm the certifying state agency's compliance with those state rules. *See City of Tacoma*, 460 F.3d. at 68. The court held that FERC had a duty "to obtain some minimal

confirmation of such compliance," but that it would be satisfied by merely "obtaining an assertion of compliance from the relevant state agency." *Id.*

The court reasoned that such deference to States is proper because, "[i]n most cases, if a party seeks to challenge a state certification issued pursuant to section 401, it must do so through the state courts." *Id.* at 67. The D.C. Circuit explained that "[t]he reason for this rule is plain enough. The Clean Water Act gives a primary role to states 'to block . . . local water projects' by imposing and enforcing water quality standards that are more stringent than applicable federal standards." *Id.* (quoting *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991)). Because "the decision whether to issue a section 401 certification generally turns on questions of state law," the court concluded, "FERC's role is limited to *awaiting, and then deferring to*, the final decision of the state. Otherwise, the state's power to block the project would be meaningless." *Id.* (emphasis added).

In *City of Olmsted Falls v. EPA*, 435 F.3d 632 (6th Cir. 2006), the Sixth Circuit similarly rejected the claim that a federal agency must ensure more than facial compliance with state law. There, the state agency held hearings on a § 401 certification application and expressed concerns over the environmental impacts of the proposed project. *See id.* at 634. Eventually, however, the agency "expressly waived its authority to act on the Section 401 application," and the Army Corps of Engineers issued a federal permit in reliance on that waiver. *Id.* Plaintiffs argued that, "under Ohio law, the [state agency] cannot issue a section 401 waiver and that the Corps Defendants were aware of that fact." *Id.* at 636. The court held that the "Corps Defendants could properly rely on [the] waiver in this case." *Id.* The court reasoned that, "[i]f Corps Defendants cannot rely on the state agency to properly follow its own laws and regulations with respect to issuing waivers, the Section 401 waiver procedure would, in effect, require Corps

Defendants to engage in an analysis of each state's rules and regulations on the issuing of Section 401 waivers [and] come to an independent assessment as to whether the state agency followed those rules." *Id.* The court found that "[s]uch a procedure, in addition to being cumbersome and duplicative of effort, would undermine the role that state environmental agencies play in the Section 401 process." *Id.*

2. FERC Has Satisfied Its Minimal Duty To Ensure South Carolina's Facial Compliance With § 401 Certification Requirements

a. To ensure South Carolina's compliance with § 401 certification requirements, FERC need only "obtain[] an assertion of compliance from the relevant state agency." *City of Tacoma*, 460 F.3d at 68. That standard is easily satisfied here.

On May 20, 2009, DHEC submitted its May 15, 2009 Department Decision as the State's certification. *See* Department Decision. That decision provides that it is "a final staff decision that may be appealed." *Id.* at 2. On that basis, this Commission acknowledged in the Final EIS that the Department Decision constituted the state certifying agency's action in "certifying the project." Final EIS at 133; *see also id.* at 4 ("The South Carolina DHEC 401 certificate was filed on May 20, 2009."). In addition, the DHEC Board's subsequent order reversing the Department Decision recognized that the earlier decision was DHEC's "Water Quality Certification issued[] May 15, 2009." Board Decision at 1.

No further inquiry is required or permitted of the Commission. Duke's request improperly seeks to have the Commission make "an independent assessment as to whether the state agency followed [its] rules," as well as the legal meaning of those rules under state law. *City of Olmsted Falls*, 435 F.3d at 636. The Commission should reject Duke's request and find the § 401 timing requirement satisfied by issuance of the Department Decision. Duke can seek

to raise any objections to the DHEC Board Decision in the appeal Duke recently filed with the South Carolina Administrative Law Court.

This conclusion is fully supported by EPA's opposition to Duke's Petition. As EPA explains, DHEC, by issuing its Department Decision, "has issued the certification in the time frame allowed under the [Clean Water Act]," and the "fact that it was challenged and did not take effect is not relevant" for purposes of compliance with the one-year period. EPA Comments at 4. EPA's conclusion is significant because EPA, unlike FERC, is entitled to judicial deference when construing the Clean Water Act under the doctrine of *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). See *American Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) ("Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency . . . shall administer this chapter.") (quoting 33 U.S.C. § 1251(d)). As EPA further concludes, "given the action of the Board, there is no valid section 401 certification from SCDHEC for this project and FERC cannot issue the license until such time that SCDHEC either issues a certification or waives certification." EPA Comments at 4.

b. This Commission's precedent similarly confirms that a state certification is to be taken at face value and not overturned pursuant to the Commission's own independent analysis of state law. See Order Granting Rehearing and Staying New License, *FPL Energy Maine Hydro LLC*, 108 FERC 61261 (2004); Order Denying Rehearing, *FPL Energy Maine Hydro LLC*, 111 FERC 61104 (2005). In *FPL Energy*, the Maine Department of Environmental Protection ("Maine Department"), acting through its Commissioner pursuant to state law, timely granted the § 401 certification requested by FPL Energy; as a result, FERC granted the federal license. See 111 FERC 61104, ¶¶ 1-2. The Maine Department's decision, however — much like

the DEBC Department decision here – was subject to review on appeal within that agency by the Maine Board of Environmental Protection (“Maine Board”). *See id.* ¶ 6 (“The Maine Department is comprised of the Commissioner of Environmental Protection (Commissioner) and the Maine Board.”). Following expiration of the one-year period and FERC’s issuance of the license, the Maine Board reversed the Maine Department’s decision and denied the § 401 certification. *See id.* ¶ 2. FERC then stayed the license it had previously issued, based on the § 401(a)(1) prohibition that “[n]o federal license or permit may be granted if certification has been denied.” *Id.* ¶ 5.³

FPL Energy argued that the initial “certification decision . . . was not a final decision by the Maine Department, but instead was a preliminary decision of the Commissioner, subject to appeal to the Maine Board.” 111 FERC 61104, ¶ 6. Because the Maine Board decision overturning “the Commissioner’s preliminary decision issuing certification and instead den[ying] certification” came more than one year after the application was submitted, FPL Energy claimed that the Commission “must find that the Maine Department waived certification.” *Id.*

The Commission rejected this argument, finding that the Maine Department’s initial certification decision was a facially valid certification. *See id.* ¶ 7. In doing so, the Commission made clear that whether an agency’s initial decision constitutes a grant or denial of certification is a matter of state law to be decided in state tribunals. The Commission explained that there is “nothing in section 401 that gives the Commission any authority to determine the finality of state-issued certification decisions. Issues concerning the validity of state actions under section

³ See also Order Issuing Stay of New License, *City of Tacoma, Washington*, 99 FERC 61067, at 61309 (2002) (staying FERC license where state hearings board stayed the state agency’s § 401 certification).

401 are for *state courts* to decide, and federal courts and agencies are *without authority* to review these matters." *Id.* ¶ 8 (emphases added).⁴

The Commission also rejected the claim that "states must issue a final certification decision within one year of receiving a certification request" by completing all levels of administrative review within that period. 111 FERC 61104, ¶ 8. The Commission thus credited the initial certifying agency decision, despite the fact that it was subject to further appeal within the agency. As the Commission explained, "[t]here is nothing in the language of section 401 to suggest that a State must not only act on the certification request but also take action on any appeals that might subsequently be filed within one year." *FPL Energy*, 108 FERC 61261, ¶ 7.⁵

Based on those principles, the Commission should hold that DHEC's Department Decision constituted a timely grant of the certification within the one-year period. The DHEC Board's subsequent reversal and denial of the certification, however, compels denial of the license sought by Duke, as the Commission similarly held in *FPL Energy* and as EPA advocates here.

c. Duke seeks to distinguish *FPL Energy*, claiming that the Maine Commissioner's decision nowhere "indicated that it was not a final decision," whereas the DHEC Department Decision was "labeled (repeatedly) as a 'proposed' decision" and, Duke claims, "indicated that a

⁴ See also Order Denying Rehearing and Stay, *Flambeau Hydro, LLC*, 113 FERC 61291, ¶ 8 (2005) (same).

⁵ Prior to 1987, FERC rules provided that the one-year period began when the state water quality agency deemed the application acceptable for processing. FERC later revised that rule to start the one-year period on the date the application was filed with the state agency. See Pet. 6-7. Duke claims this rule change shows that the DHEC Board's action was untimely because it failed to make a "clear decision" before the June 5, 2009 expiration of the one-year waiver period." *Id.* at 7. As *FPL Energy* makes plain, however, the assessment of whether a State has granted or denied the certification under its state-law processes presents a question of state law to be decided by state tribunals. Indeed, the rule change on which Duke relies is based on the same reasoning: FERC found its previous rule to be "unduly burdensome because it put the Commission in the frequently difficult posture of trying to ascertain and construe the requirements of many and divergent state statutes and state agency regulations." Final Rule, FERC, *Regulations Governing Submittal of Proposed Hydropower License Conditions and other Matters* (issued May 8, 1991), 56 Fed. Reg. 23,108, at 23,127 (May 20, 1991).

'final' decision would not occur until later." Pet. at 8. Duke argues further that "South Carolina law itself specifies that such a Staff proposed decision is not a final agency action and has no legal effect in such circumstances." *Id.* at 9; *see also id.* at 4-6.

As an initial matter, Duke ignores that the Department Decision, on its face, provides that "[t]he issuance of this Notice of Department Decision represents a *final staff decision* that may be appealed." Department Decision at 2 (emphasis added). That, along with DHEC's submission of the decision as the required certification, and the DHEC Board's similar understanding of that certification, easily satisfies the Commission's obligation to undertake a "minimal confirmation" of state compliance with § 401 certification requirements. *City of Tacoma*, 460 F.3d at 68. The DHEC Department Decision is thus no different than the Maine Commissioner's certification taken at face value by this Commission.

Duke further ignores its own prior descriptions of the Department Decision as a final decision for purposes of § 401. Although Duke now claims (Pet. at 3) that the May 29, 2009 appeal to the Board prevented the Department Decision "from becoming final and legally effective," Duke repeatedly represented to FERC in three filings submitted June 5 and June 8, 2009 – while that appeal was pending – that the Department Decision in fact constituted "the South Carolina Section 401 Water Quality Certification." Ex. 3 (Duke June 5, 2009 Letter); *see supra* p. 11. The Commission need not credit Duke's sudden change of position following the Board's appellate reversal, which would impermissibly "place FERC in the position of applying state law standards." *City of Tacoma*, 460 F.3d at 68; *cf. Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984) ("A genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct.").

To do so would be especially problematic here. DHEC is charged with administering the state statute at issue, S.C. Code § 44-1-60, which governs its review of all applications for licenses and permits, including a § 401 certification. Under South Carolina law, "construction of a statute by an agency charged with its administration will be accorded the most respectful deference and will not be overruled absent compelling reasons." *South Carolina Coastal Conservation League*, 669 S.E.2d at 906 (internal quotation marks omitted); see also *William C. Logan & Assocs. v. Leatherman*, 351 S.E.2d 146, 148 (S.C. 1986).

Moreover, the South Carolina Supreme Court has noted that the Attorney General acts in a "quasi-judicial position," and any interpretation of state law by the Attorney General is deemed to be "persuasive" authority. *Kalber v. Redfearn*, 54 S.E.2d 791, 796 (S.C. 1949). For these reasons, state agencies typically accept as authoritative a construction of state law by the Attorney General. Moreover, state courts, while not bound by the Attorney General's opinion, often rely upon such advice rendered to a state agency such as DHEC. See, e.g., *South Carolina Dep't of Mental Health v. McMaster*, 642 S.E.2d 552, 554 (S.C. 2007) ("[w]e agree with the Attorney General's opinion"); *Marchant v. Hamilton*, 309 S.E.2d 781, 502 (S.C. Ct. App. 1983) (although "not binding on this Court," opinions of the Attorney General "should not be disregarded without cogent reason"). In analogous circumstances, the Fourth Circuit has relied on a determination by the South Carolina Attorney General in finding that federal actors should abstain from interfering with the state processes. *Johnson v. Collins Ent. Co., Inc.*, 199 F.3d 710, 723-24 (4th Cir. 1999) ("The position of the [South Carolina Attorney General] on the significant enforcement role accorded state regulatory agencies should have discouraged the district court from assuming a substantial enforcement and interpretative role itself").

As explained next, and as concluded by both the Attorney General and DHEC, Duke's reading of the terms of the Department Decision and its legal significance pursuant to South Carolina statute and regulations is erroneous, and the Department Decision constituted the required state action on Duke's § 401 application. But the pertinent point here is that the Commission need not – and should not – even address those arguments, which are for state tribunals to decide. Indeed, in *FPL Energy*, the license applicant challenged the Maine agency's denial of certification in state court and was fully heard by the Maine courts on its claims both that the Maine Board acted after the one-year deadline and that it improperly applied the applicable state water quality standards. See *FPL Energy Maine Hydro LLC v. Maine Dep't of Env't Prot.*, No. Civ. A. AP-04-50, 2006 WL 2587989 (Me. Super. Ct. May 25, 2006) (affirming Maine Board's certification denial), *aff'd*, 926 A.2d 1197 (Me. 2007), *cert. denied* 128 S. Ct. 911 (2008). Duke has likewise sought review of the DHEC Board Decision in the authorized state tribunals. Cf. 40 C.F.R. § 124.55(e) ("Review and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State.") (EPA regulation). Duke can seek to raise its claims in that proceeding, and this Commission should not adjudicate those issues of state law here.

B. In Any Case, Duke's Claims Fail As A Matter Of State Law

Even if the Commission impermissibly were to probe "every nuance of the state law proceeding" and itself "apply[] state law standards," *City of Tacoma*, 460 F.3d at 68, it should hold that the Department Decision was a timely certification decision under § 401, and that the Board's subsequent reversal did not waive South Carolina's § 401 certification authority.

1. Duke claims that the "timely request for final review of the Staff's proposed decision prevented the proposed [Water Quality Certification] issued by the Staff from becoming final and legally effective." Pet. at 3. "Thus," Duke continues, "the Staff's *proposed* decision

SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 843-720-5270

43 BROAD STREET, SUITE 300
CHARLESTON, SC 29401-3051

Facsimile 843-720-5240

April 27, 2010

VIA U.S. MAIL

The Honorable Ralph K. Anderson, III
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

Re: Duke Energy Carolinas, LLC v. S.C. Department of Health and Environmental Control, Docket No. 09-ALJ-07-0377-CC

Dear Judge Anderson:

Additional authority has come to the attention of Respondent S.C. Department of Health and Environmental Control ("DHEC") and Respondent-Intervenors American Rivers and Coastal Conservation League (the "Conservation Groups") in connection with Duke Energy, LLC's Motion for Summary Judgment. As such, DHEC and the Conservation Groups are filing the enclosed Supplemental Response In Opposition to Petitioner Duke Energy Carolinas, LLC's Motion for Summary Judgment and Motion for Declaratory Judgment in the above referenced case to afford Duke an opportunity to respond in writing prior to the hearing should it choose to do so.

I have also enclosed an additional copy of the Supplemental Response. Please date-stamp this copy and return it to me in the enclosed self-addressed, stamped envelope.

Thank you for your assistance. Please do not hesitate to contact me if you have any questions regarding this filing.

Sincerely,



Christopher K. DeScherer

Enclosure

cc: James W. Potter, Esq.
Thomas W. Lavender, Jr. Esq.
Nash Long, Esq.
Stephen P. Hightower, Esq.

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Regulation 61-101, however, does not purport to waive DHEC's authority to protect South Carolina's interests through the Section 401 process. It is true that the federal Clean Water Act explicitly states that "[i]f the State . . . fails or refused to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of [a] request, the certification requirements of this subsection shall be waived." Section 401(a)(1), 33 U.S.C. § 1341(a)(1). Regulation 61-101 also contains a time limit, setting forth a 180-day deadline for staff to issue a proposed decision but, unlike the Clean Water Act, does not specify a consequence for the non-compliance. S.C. Code Regs. 61-101(A)(6); see also SCDOT v. SCDHEC, 06-ALJ-07-0804-CC at 22 (April 29, 2008) (stating that "Regulation 61-101 does not expressly set forth consequences for DHEC's failure to timely issue its NOPD"). Duke presumes from the regulation's silence that when DHEC promulgated and the legislature approved Regulation 61-101, they acted together as "[t]he State" to prospectively waive all future water quality certifications taking DHEC longer than 180 days to process. E.g. Duke Reply Mem. at 15-16. In effect, Duke argues that S.C. Code Regs. 61-101(A)(6) divests DHEC of authority or jurisdiction to act after its 180-deadline has elapsed, no matter how important action by DHEC might be to protect South Carolina's interests from harm by federal regulators.

Duke's assumption in this respect contravenes more than two decades of established precedent in the federal and state courts. As a general rule, "'it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.'" United States v. Wells, 519 U.S. 482, 496 (1997) (quoting NLRB v. Plasterers' Local Union No. 79, 404 U.S. 116, 129 (1971)). And, a "great principle of public policy, applicable to all governments, . . . forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." Brock v. Pierce County, 476 U.S. 253, 260 (1986). Consequently, courts

have proven “most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake.” Id. It is therefore well-established in the federal system that “statutory provisions imposing a mandatory duty on an agency to act before a specific date are not generally construed to remove the agency’s power to act after that date,” Holland v. Pardee Coal Co., 269 F.3d 424, 431 (4th Cir. 2001), and courts may not “impose their own coercive sanction” for non-compliance, United States v. James Daniel Good Real Prop., 510 U.S. 43, 63 (1993). Accord, e.g., Barnhart v. Peabody Coal Co., 537 U.S. 149 (2003); United States v. Montalvo-Murillo, 495 U.S. 711 (1990); GM Corp. v. United States, 496 U.S. 530 (1990); South Carolina v. U.S. Dep’t of Labor, 795 F.2d 375 (4th Cir. 1986).

The South Carolina Supreme Court adopted the same approach in Johnston v. S.C. Dept. of Labor, Licensing, & Reg., 365 S.C. 293, 617 S.E.2d 363 (2005), following the precedent set in Brock to conclude that where a statute does not speak to the consequences of an agency’s failure to comply with a mandatory deadline, the Court would not “assume the Legislature intended [an agency] to lose its power to act for failing to comply with the statutory time limit.” Id. at 298 (holding that failure to comply with statutory deadline did not render administrative order a nullity); accord In re Matthews, 365 S.C. 293, 550 S.E.2d 311 (2005) (concluding that failure to comply with a 60-day time limit to bring a civil commitment case to trial did not automatically divest a court of jurisdiction); In Re: November 4, 2008 Bluffton Town Council Election, No. 26747, 2009 S.C. LEXIS 550 (S.C., Dec. 7, 2009) (reiterating that only positive statutory limits on the class of cases an adjudicatory body can decide implicate subject matter jurisdiction).

Regulation 61-101 does not specify a consequence for non-compliance with the 180-day time limit and provides no indication that the legislature meant to preemptively and uniformly

waive prospective certification decisions or deprive DHEC of the authority to act after the 180-day deadline had elapsed. S.C. Code Regs. 61-101(A)(6). Quite the opposite, the regulation's reference to the one-year deadline for state action set by the Clean Water Act and inclusion of a stricter internal deadline indicate an effort to protect DHEC's authority and ensure that it does not lose the opportunity to safeguard the state's interests. Notably, while we disagree with Duke's suggestion that the automatic tolling provisions of S.C. Code Regs. 61-30 do not apply to WQCs, the only logical reason for such an exemption would be an effort to ensure that the tolling did not lull the agency into inadvertently missing the one-year federal deadline under the Clean Water Act. Regulation 61-101 could easily have set forth waiver as a consequence of non-compliance with its time limit, but did not. This silence stands in sharp contrast not only to the federal Clean Water Act provision Duke claims the regulation was intended to mimic, but also to South Carolina laws, including other DHEC regulations, which demonstrate that when our legislature intends to deprive an agency of jurisdiction to act or to set forth a consequence for delay, it states that consequence explicitly. See, e.g., South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-30(c) (2010) (providing for mandatory fifteen-day deadline and the sanction that, "If written notification of the determination of the public body as to the availability of the requested public record is neither mailed nor personally delivered to the person requesting the document within the fifteen days allowed herein, the request must be considered approved."); S.C. Code Regs. 72-305(B)(2) (2009) (stating that, "[t]he implementing agency will review these submissions within a ten working day period. If action is not taken by the end of the review period, the plan will be considered approved"); S.C. Code Regs. 72-305(M) (2009) (stating that, "[u]pon receipt of a completed application for sediment and stormwater management, the appropriate plan approval agency shall accomplish its review and have either the approval or

review comments transmitted to the applicant within 20 working days. If notice is not given to the applicant or if action is not taken by the end of the 20 working day period, the applicant's plan will be considered approved").

Moreover, in the absence of an explicit statement of intent from the legislature, the Court must defer to DHEC's interpretation of its regulation. See Glover v. Suitt Constr. Co., 318 S.C. 465, 469, 458 S.E.2d 535, 537 (1995) ("[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons"); City of Columbia v. Bd. of Health and Envtl. Control, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987) ("The delegation of authority to an administrative agency is construed liberally when the agency is concerned with the protection of the health and welfare of the public."). DHEC interprets S.C. Code Regs. 61-30 and 61-101 to provide it the authority to toll the review period while awaiting information from an applicant and to retain jurisdiction to issue or deny certification after that period has elapsed.

Finally, Duke does not claim prejudice from the alleged non-compliance with the time limit, nor could it. Duke was in control of the "clock" ticking on the 180-day deadline at all times, and should not be permitted to use its own delay in submitting the required fee and information to prevent DHEC from protecting the state's interests. DHEC informed Duke each time it tolled review of the WQC application, and Duke dragged its feet in providing information DHEC needed rather than asking the agency to expedite review or filing an action under the Administrative Procedure Act, S.C. Code Ann. §§ 1-23-10 to -160 (2010), to compel agency action it now claims was unreasonably delayed. Compare Brock, 476 U.S. at 260 n.7 (explaining that where an APA action to "compel agency action unlawfully withheld or unreasonably

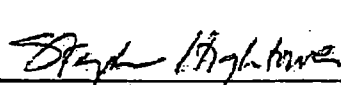
delayed" is available, the legislature has already provided an avenue for relief and a "drastic" judicially-created sanction divesting an agency of authority is unwarranted).

Moreover, as previously explained, there are at a minimum a number of disputed facts dispositive of the application of the time-limit, which, as a non-jurisdictional requirement, is subject to waiver, estoppel, and tolling. In particular, it is well-established that the issue of whether a party is estopped from claiming a limitations defense is a question of fact to be determined by the judge, although summary judgment may be appropriate where there is *no* evidence of conduct on the respondents' part warranting estoppel. Black v. Lexington Sch. Dist. No. 2, 327 S.C. 55, 61-62 n.1, 488 S.E.2d 327, 330, 330-331 n.1 (1997); RWE NUKEM Corp. v. ENSR Corp., 373 S.C. 190, 644 S.E.2d 730 (S.C. 2007). Where a factual question exists whether respondents invited or induced "the very delay they now assert as a defense," judgment as a matter of law is inappropriate. See Dillon County School District v. Lewis Sheet Metal Works, 286 S.C. 207, 332 S.E.2d 555, 562 (Ct. App. 1983); Black v. Lexington Sch. Dist. No. 2, 327 S.C. 55, 488 S.E.2d 327, 330 (1997). Here, Duke has waived any timeliness objection by failing to raise it before the agency, and because Duke was aware of and understood that it was causing the delay through its own recalcitrance in submitting material necessary for DHEC to act on its application, it must be estopped from seeking to void a WQC that it previously defended as consistent with state law, and the deadline must be equitably tolled in any event. Discovery concerning these issues remains ongoing, and Duke and other parties have produced voluminous documents for Respondent-Intervenors' and Respondent DHEC's review, numbering over 130,000 pages, while also noticing depositions. As recently as April 23, 2010 Duke conducted a deposition of DHEC official Rusty Wenerick, at which it asked numerous questions pertaining to the length of time DHEC staff were actively reviewing Duke's WQC application.

CONCLUSION

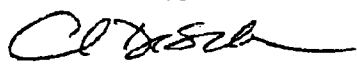
For the foregoing reasons and the reasons stated in Respondent-Intervenors' February 12, 2010 Memorandum in Opposition to Duke's Motion for Summary Judgment and Motion for Declaratory Judgment, Respondent-Intervenors respectfully request that Duke's motions be denied.

This 27th day of April, 2010.

 (by counsel for respondent)

Stephen P. Hightower
Office of General Counsel
S.C. Department of Health and
Environmental Control
2600 Bull Street
Columbia, SC 29201
Tel.: (803) 898-3349
Fax: (803) 898-3367
HIGHTOSP@dhec.sc.gov

*Counsel for Respondent S.C. Department of Health and
Environmental Control*



Christopher K. DeScherer
SOUTHERN ENVIRONMENTAL LAW CENTER
43 Broad Street, Suite 300
Charleston, SC 29401
Tel: (843) 720-5270
Fax: (843) 720-5240
cdescherer@selcsc.org

Julia F. Youngman, admitted *pro hac vice*
SOUTHERN ENVIRONMENTAL LAW CENTER
200 West Franklin Street, Suite 330
Chapel Hill, NC 27516
Tel: (919) 967-1450
Fax: (919) 929-9421
jyoungman@selcnc.org

*Counsel for Respondent-Intervenors American Rivers and
South Carolina Coastal Conservation League*

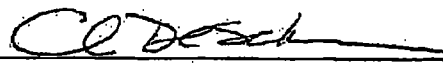
CERTIFICATE OF FILING BY MAIL AND OF SERVICE

I hereby certify that I am counsel for Respondent-Intervenors American Rivers and South Carolina Coastal Conservation League in the above-captioned matter, and that on the 27th day of April, 2010, the original of the foregoing Joint Supplemental Memorandum in Opposition to Petitioner Duke Energy's Motion for Summary Judgment and Motion for Declaratory Judgment filed with the Court via U.S. Mail, first-class postage prepaid, and copies were served on the following persons via U.S. Mail, first-class postage prepaid:

James W. Potter, Esq.
W. Thomas Lavender, Jr., Esq.
Nexsen Pruet, LLC
1230 Main Street, Suite 700
P.O. Drawer 2426
Columbia, SC 29202

Nash E. Long, III, Esq.
Winston & Strawn LLP
214 N. Tryon Street
Charlotte, NC 28202

Henry McMaster, S.C. Attorney General
C. Havird Jones, Jr., Esq.
Elizabeth Smith, Esq..
P.O. Box 11549
Columbia, SC 29211



Christopher K. DeScherer
SOUTHERN ENVIRONMENTAL LAW CENTER
43 Broad Street, Suite 300
Charleston, SC 29401

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 09-ALJ-07-0377-CC

Duke Energy Carolinas, LLC,

Petitioner,

v.

South Carolina Department of Health
and Environmental Control, American
Rivers and South Carolina Coastal
Conservation League,

Respondents.

COPY

MOTION HEARING

Thursday, May 6, 2010
10:00 a.m. - 11:44 a.m.

The hearing before the Honorable Ralph King Anderson, III, was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 6th day of May, 2010 before Cassandra E. Vance, Court Reporter and Notary Public in and for the State of South Carolina.

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APPEARANCES:

James W. Potter, Esquire
 Nexsen, Pruet, Adams, Kleemeier, LLC
 1230 Main Street, Suite 700
 Post Office Drawer 2426
 Columbia, South Carolina 29201
 Attorney for Duke Energy Carolinas, LLC

Nash E. Long, III, Esquire
 Winston & Strawn, LLP
 214 North Tyron Street
 Charlotte, North Carolina 28202-1078
 Co-counsel for Duke Energy Carolinas, LLC

Garry S. Rice, Esquire
 Duke Energy, Legal Department
 526 South Church Street
 Post Office Box 1006, EC03T
 Charlotte, North Carolina 28201-1006
 Co-counsel for Duke Energy Carolinas, LLC

Stephen P. Hightower, Esquire
 South Carolina Department of Health and Environmental
 Control
 Office of General Counsel
 2600 Bull Street
 Columbia, South Carolina 29201
 Attorney for Respondent SC DHEC

Christopher K. DeScherer, Esquire
 South Carolina Environmental Law Project
 43 Broad Street, Suite 300
 Charleston, South Carolina 29401-3051
 Attorneys for American Rivers and SC CCL

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STIPULATIONS

It is stipulated and agreed that this hearing is being taken pursuant to the rules of the Administrative Law Judge Division and the South Carolina Rules of Civil Procedure.

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1 THE COURT: All right. This is a motions hearing in
2 the matter of Duke Energy Carolinas, LLC,
3 Petitioners, versus South Carolina Department
4 of Health and Environmental Control, South
5 Carolina -- well, it was South Carolina
6 Attorney General, but he has apparently
7 withdrawn. He said he has a problem with the
8 summary judgment motion. So now we're down to
9 American Rivers and South Carolina Coastal
10 Conservation League, Respondents. Docket
11 Number 09-ALJ-07-0377-CC.

12 I'll address one matter real quickly and that
13 is, apparently there is a reporter somewhere in
14 this hearing room. That person must turn off
15 their recording device until I can get an order
16 issued allowing them to record this hearing.
17 Is that you, sir?

18 MR. FRETWELL: Yes, sir.

19 THE COURT: All right. That device -- you can
20 record it, it's just I haven't yet issued the
21 order allowing you to do so and they're putting
22 it together or finding it as we speak as the
23 clerk is out right now. So for the time being,
24 you've got to turn it off.

25 MR. FRETWELL: You will issue it, though?

1 THE COURT: Yes, sir, as soon as I can. I told them
2 to bring it in as soon as they get it together,
3 but I don't want to postpone the hearing. It
4 was your responsibility to bring it to my
5 attention. I just don't want to sit here and
6 delay everybody and have a hearing because I
7 find out at the last minute about the
8 recording. I have no problem signing the
9 order; it's just I got to sign it first. I
10 think that's my responsibility.

11 MR. FRETWELL: I've never experienced that.

12 THE COURT: I know. Well, I'm not condemning you or
13 complaining in any way. It's just I'm going to
14 do it by the book.

15 All right. With that said, Mr. Potter?

16 MR. POTTER: Good morning, Your Honor. If I may,
17 I'd like to introduce Mr. Gary Rice, who's
18 in-house counsel with Duke, and you were kind
19 enough to admit him for our admission to this
20 case.

21 THE COURT: Okay.

22 MR. POTTER: And Mr. Nash Long with Winston & Strawn
23 in Charlotte, North Carolina. You also were
24 kind enough to admit him. I'll be making the
25 arguments, but -- the Attorney General had

1 stated -- Mr. Long would have made some
2 arguments on that, but now he's the league of
3 that and I'll be making all the arguments,
4 so ...

5 THE COURT: Okay. All right. I was going to hear
6 your ...

7 MR. POTTER: Okay. The motion for summary judgment,
8 Your Honor?

9 THE COURT: I assume that's what we're here on.

10 MR. POTTER: Well, there's two other motions that
11 are still out there, as well.

12 THE COURT: Oh, I didn't -- I've read the motions
13 for summary judgment and that was enough.

14 MR. POTTER: Okay.

15 THE COURT: But what else are we here on?

16 MR. POTTER: There is a motion by DHEC to extend the
17 period of time to respond to the request for
18 admissions and there is a motion by SCLC (sic)
19 to expand discovery.

20 THE COURT: I saw that motion and I thought -- I
21 honestly thought that was -- had already been
22 dealt with. Hold on a second.

23 When I saw that motion, I just thought it was
24 part of the previous discovery motions that we
25 had had. So that's my fault for ignoring that.

1 I can probably still hear all of it, if it's
2 not that complicated.

3 MR. POTTER: It's not complicated. And you can hear
4 that after the summary judgment motion --

5 THE COURT: Okay.

6 MR. POTTER: -- sticking with one component of the
7 issue.

8 THE COURT: But do we need to hear the request --
9 the motion to expand the request to admit; is
10 that what it was?

11 MR. POTTER: Your Honor, if you recall -

12 THE COURT: First?

13 MR. POTTER: -- in the summary judgment motion, we
14 filed as part of our argument that the
15 deadlines had past.

16 THE COURT: I know. That's what I'm saying, as a
17 component of the summary judgment motion -

18 MR. POTTER: That's right.

19 THE COURT: -- do I need to address that issue so it
20 will further -- or will allow me to further
21 clarify how I want to proceed in the summary
22 judgment motion?

23 MR. POTTER: It might be -- well, it's an alternate
24 ground. I call it the "belt and suspenders"
25 argument. That is one argument of why we

1 believe summary judgment is justified, but we
2 also believe there's undisputed facts
3 associated with certain issues that are
4 directly related to 61-101. But we certainly
5 do not want them relieved of the legal effect
6 of their request for admissions.

7 THE COURT: Okay. Well, I'm going to probably go
8 with the request to admit -- or expand their
9 time frames first.

10 (Off the Record)

11 THE COURT: All right. Mr. Hightower?

12 MR. HIGHTOWER: Yes, Your Honor. The Department has
13 made the motion to expand its time to serve its
14 responses to Petitioner's motion -- excuse me,
15 Petitioner's request to admit based on the
16 ground that counsel -- well, it was basically
17 two issues occurred. Counsel was under the
18 impression that the requests were due to the
19 Petitioner on the 19th of January. On that
20 same day, counsel's child became ill and had to
21 be hospitalized and counsel was out of the
22 office for the next two weeks.

23 As soon as the Department found out about the
24 request, based through this motion, the
25 Department immediately filed its responses to

1 the request. The requests themselves, there
2 were six of them, most of them were actually
3 admitted by the Department. The only one
4 that's really in question really is a factual
5 question. It deals with whether or not under
6 61-101(C)(4) the Department had notified the
7 Petitioner that time would be tolled while
8 information was being gathered by the
9 Petitioner in response to request for
10 clarification.

11 We believe that, in fact, we did do that, even
12 though the documents speak for themselves and
13 they do primarily reference 61-30, which is the
14 fee reg.

15 But as the Department has explained in its
16 papers in response to summary judgment motion,
17 and which I'll go into in great detail at that
18 time, the Department believes that the time
19 frames for 61-101 and 61-30, which are both 180
20 days, merged as a practical effect of the
21 Department having to comply with the fee
22 regulation, which the Legislature has required
23 the Department to act.

24 THE COURT: Let's stay on the --

25 MR. HIGHTOWER: I'm sorry. So that was the one

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1 request that the Department denied. We believe
2 that there's really no prejudice to the
3 Petitioner. The Petitioner could raise its
4 motion without the request to admit. Most of
5 the requests to admit were -- for example, the
6 first one was whether or not the transcript of
7 the review conference before the DHEC board was
8 a true and accurate copy. We stated to that
9 that, you know -- well, we admit that there was
10 actually a reporter present and that the
11 reporter transcribed the events, but we could
12 not certify that, that that's something that
13 the transcript --

14 THE COURT: Have you submitted the amended request
15 to admit -- I mean, the amended responses to
16 the request to admit?

17 MR. HIGHTOWER: We served our actual responses to --

18 THE COURT: Just belatedly. Is that what we're
19 getting at?

20 MR. HIGHTOWER: Yes, it was done belatedly. As I
21 stated, it wasn't done on the 19th; it was
22 actually done on the 25th.

23 THE COURT: Okay.

24 MR. HIGHTOWER: So we did --

25 THE COURT: I know. It was after the date of the --

1 MR. HIGHTOWER: It was after the 30 days, that is
2 correct.

3 THE COURT: So all you're asking is that the belated
4 filing be accepted as --

5 MR. HIGHTOWER: Yes, that is correct, Your Honor.

6 THE COURT: -- a proper filing --

7 MR. HIGHTOWER: We believe that there was no
8 prejudice to the Petitioner. The Petitioner
9 can still raise its issues before this Court.
10 There were -- none of the requests were such
11 that the Petitioner would have had a right to.
12 The one that I did highlight for you is really
13 a question of fact and really an
14 interpretation --

15 THE COURT: Well, do you have those with you?

16 MR. HIGHTOWER: Excuse me, Your Honor?

17 THE COURT: Do you have the response that you
18 submitted with you? I think it was in one of
19 the pleadings, but ...

20 It's in your pleadings, right?

21 MR. POTTER: Your Honor, we did -- the original set
22 that I had filed and time expired on is
23 attached to my motion as Exhibit Two, I
24 believe.

25 THE COURT: Okay.

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1 MR. HIGHTOWER: And we also included in our
2 response, which is the actual request and our
3 responses to each request. And so we believe
4 that there was no prejudice to Duke; that while
5 it is true it says in Rule 36 that after 30
6 days the request can be deemed admitted, but it
7 also says that the Court has the power to amend
8 the time frame. And we believe that in this
9 case given the circumstances that that would --
10 THE COURT: Well, there's also case law on when
11 someone makes a request to admit and thereafter
12 seeks to amend that --
13 MR. HIGHTOWER: Yes.
14 THE COURT: -- that that admission would be allowed,
15 but that you would have to pay the cost for any
16 discovery that would have to be made pursuant
17 to proving the inaccuracy of the change, as I
18 remember. But I'm shooting straight from
19 memory, because I wasn't prepared on all this.
20 MR. HIGHTOWER: Well, Your Honor -
21 THE COURT: But can we just -
22 MR. HIGHTOWER: Yes.
23 THE COURT: Is there anything else on --
24 MR. HIGHTOWER: No, Your Honor.
25 THE COURT: All right. Because right now you're

1 ahead of the game.

2 MR. HIGHTOWER: Okay.

3 THE COURT: You can only kill the horse.

4 All right. Mr. DeScherer?

5 MR. DESCHERER: Your Honor, I would just at least
6 sympathize with Mr. Hightower's situation and
7 support his argument. To the extent the Court
8 deemed the admissions as counting against DHEC,
9 we would ask that they not be deemed a count
10 against our clients. So we would --

11 THE COURT: I read that portion of your arguments.

12 MR. DESCHERER: That's all, Your Honor.

13 THE COURT: Okay.

14 MR. POTTER: Well, Your Honor, we are prejudiced.
15 First of all, there's something in the rules
16 that say you wait until the 35th day or the
17 40th day and respond to requests to admit.
18 This is a very complex case. There was a
19 scheduling order. Discovery began on December
20 15th of the case. We filed promptly that day
21 requests for production, interrogatories and
22 requests to admit. The requests to admit,
23 three or four of them, are critical in arguing
24 a summary judgment motion.

25 THE COURT: Well, I understand that you are

1 prejudiced in that if he gets to amend it hurts
2 your case and that that would be prejudiced.
3 But the prejudice that I'm more looking for is
4 the fact that he has offered a valid reason for
5 failing to comply with the time frame and he is
6 seeking to amend his request to admit. I have
7 the case law on that, but I think I'm accurate
8 on that. Y'all just got to tell me if I'm
9 wrong.

10 MR. POTTER: Well, there has to -- right now they're
11 deemed admitted as a matter of law at this
12 moment.

13 THE COURT: Yes.

14 MR. POTTER: You can relieve them of that if I can
15 show you prejudice.

16 THE COURT: No, I can relieve them of that unless
17 you show me prejudice.

18 MR. POTTER: Right. Excuse me, unless --

19 THE COURT: And even if you show me prejudice,
20 though, I think I can still relieve them of
21 that that has been the burden falls upon them
22 to pay any costs that you may have to prove
23 them wrong.

24 MR. POTTER: Your Honor, it's in the trial court's
25 discretion.

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1 THE COURT: Okay. But go ahead. What I'm getting
2 at is, beyond the prejudice that it hurts me --

3 MR. POTTER: Well, the prejudice, it's -- you know,
4 again, in the framing of our plan about with a
5 summary judgement motion, there are four of
6 those requests to admit that are involved with
7 that issue and we filed our motion for summary
8 motion judgment a couple days after the
9 expiration date of that time. The other
10 prejudice, you know, in establishing that, we
11 have now taken the 30(b)(6) deposition of DHEC,
12 gone into those issues associated with it and
13 production requests to see if there were
14 documents and such. I mean, we can come up
15 with a bill of costs, but I don't want to
16 belabor this. It is in your discretion. I
17 didn't want to take a firm position that I
18 thought these admissions should stay in effect
19 so that if you grant our motion for summary
20 judgment, you have two grounds to go up on
21 appeal.

22 THE COURT: All right. Unfortunately, there are
23 many times where I just try to do the right
24 thing, even if it hurts me. This may be one of
25 them, if I was to decide the case the other

1 way. But I just -- from what I've heard, there
2 are valid reasons for allowing him to amend the
3 request to admit, so I am going to allow the
4 amended request to admit, especially in light
5 of the fact that I don't have any understanding
6 that his amended request to admit are in error
7 or would require you to prove that he has not
8 properly responded to a request to admit in a
9 way that you would have to present evidence to
10 prove it inaccurate. Do you follow me on that?

11 MR. POTTER: Yes, Your Honor, and we don't have that
12 characteristic of the situation.

13 THE COURT: If it was of that nature, I think I may
14 have a different position on all that, but at
15 least that's what I intend to do. I tell you
16 what. I'm going to follow that approach, and
17 I'm pretty sure I'm going to stick with it, but
18 I haven't gone and looked at the case law on
19 that, unless y'all have talked about the
20 prejudice angle, but I haven't looked at the
21 case law on when individuals are allowed to
22 amend their requests to admit.

23 MR. POTTER: Would you like to look at the case law,
24 Your Honor?

25 THE COURT: Yes, sir. Have you got it?

1 MR. POTTER: If I may approach.

2 THE COURT: Yeah.

3 MR. POTTER: I didn't bring an additional copy.

4 THE COURT: Tell them what -- what case is it so
5 we'll all know?

6 MR. POTTER: It's a West Law Rule 36, South Carolina
7 Rules of Civil Procedure and it's an annotated
8 rule.

9 THE COURT: Okay. There you go. I think we can all
10 know how to go to the annotated rules.

11 MR. POTTER: Section two and Section three are the
12 two sections that might be relevant to you.

13 THE COURT: Okay. (Reading.) You know, reading
14 this reminds me, I forgot about Toumey, Toumey
15 Regional Medical Center, because once an answer
16 to a request for admissions is amended under
17 Rule 36, both the initial answer and the
18 amended answer may be published to the jury.
19 So, I tell you what, I can allow them to submit
20 the amended request to admit, but both are
21 considered, so the other one is not withdrawn
22 and I consider the facts that are set forth
23 regarding that. But I did -- I want to go back
24 and read Bauman versus American Telegraph where
25 I finally conclude this determination of mine.

1 So with that said, I'm going to presume, for
2 the sake of this hearing, that I'm going to
3 allow the submission of the amended responses.
4 If I change my mind, I can always go back the
5 other way. But Bauman - reading this summary
6 of Bauman versus American Telegraph does
7 concern me a little bit, enough to at least
8 want to read the case.

9 All right. So with that said, let's move now
10 to the summary judgment motion.

11 MR. POTTER: Your Honor, can I have how about five
12 minutes with prepared remarks?

13 THE COURT: Okay. That's fine. That means "five
14 minutes for prepared remarks and please don't
15 interrupt me," which I'll do my best not to do.

16 MR. POTTER: If you feel compelled to do that to
17 clarify, I accept that, Your Honor.

18 THE COURT: You know I'll feel the itch. I'll just
19 trying to avoid scratching it. Go ahead.

20 MR. POTTER: May it please the Court. I am
21 representing Duke Energy, the Petitioner in
22 this action. We filed a motion for summary
23 judgment and declaratory judgment on January
24 21st, 2010, along with an affidavit of Mr. Mark
25 Oakley, a Duke employee who worked on the 401

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1 certification application.

2 The issue before the Court is straightforward:
3 Did DHEC's failure to issue or deny the
4 proposed water quality certification within 180
5 days of the application, as required by the
6 State's water quality certification Reg 61-101,
7 result in the State waiving its opportunity to
8 issue or deny the certification?

9 First, let me provide a time line of this case.
10 Duke Energy filed for 401 certification by the
11 State of South Carolina on June 5th, 2008. A
12 notice of Department decision was issued on
13 May 15th, 2009. A request for final review was
14 filed by the American Rivers and South Carolina
15 Coastal Conservation League on May 29th, 2009.
16 The Board of DHEC heard the parties on July
17 9th, 2009, and issued the final agency decision
18 denying the certification on August 6th, 2009.
19 And they overturned the staff's recommendation
20 to grant a certification. The request for a
21 contested case was then filed by Duke Energy
22 with the Administrative Law Court.

23 The purpose of Duke's request for a State 401
24 water quality certification is for the
25 relicensing of hydroelectric dams on the

1 Catawba-Wateree River Basin under a Federal
2 Energy Regulatory Commission licensing
3 procedure. This certification is not being
4 obtained for any dredge or fill activities. A
5 State can waive its 401 certification authority
6 under federal law if it takes longer than a
7 year to process the certification application.

8 It is our contention and the basis of our
9 motion for summary judgment that the 180-day
10 limitation under SC Regulation 61-101 applies
11 to this case. And I quote (A)(6) section of
12 61-101: Unless otherwise suspended or
13 specified in this regulation, the Department
14 shall issue a proposed decision on all
15 applications within 180 days of acceptance of
16 an application.

17 Section 401 of the Clean Water Act, which is
18 33 U.S.C 1341, provides in part: "If the
19 State" -- an ellipses -- "fails or refuses to
20 act on a request for certification" -- and this
21 is the important part -- "within a reasonable
22 period of time, which shall not exceed a year,
23 after receipt of such request, the
24 certification requirements of this subsection
25 shall be waived with respect to such Federal

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1 application."

2 It is our position that the General Assembly
3 adopted 180 days as the reasonable period of
4 time under South Carolina Regulation
5 61-101(A)(6).

6 Summary judgment is appropriate because there
7 are no material facts in dispute and the issue
8 before the Court can be decided by a plain
9 reading of SC Regulation 61-101 and the South
10 Carolina precedent of South Carolina DOT versus
11 SCDHEC. There is no dispute by DHEC that the
12 date the Department received Duke's
13 application, June 5th, 2008, would be the start
14 date for the one-year time period.

15 As for Mr. Oakley's affidavit, paragraph eight,
16 Mr. Wenerick's (ph) affidavit -- Mr. Wenerick's
17 a DHEC employee.

18 THE COURT: Okay.

19 MR. POTTER: At paragraph six, DHEC in its response
20 to -- their belated response to the request to
21 admit number four also admits that the
22 Department did not request additional
23 information within ten days of receipt of
24 Petitioner's application and the application is
25 therefore deemed complete for processing under

1 SC Regulation 101(C)(2).

2 THE COURT: I'm starting to feel the itch, but go
3 ahead.

4 MR. POTTER: This is also stated in Oakley's
5 affidavit at paragraph ten. While DHEC argues
6 that South Carolina Regulation 61-30, which is
7 the fee regulation, applies to this action,
8 Mr. Oakley's affidavit at paragraph 11 makes
9 clear that Duke Energy was never notified by
10 DHEC that processing of its 401 water quality
11 certification was suspended pursuant to SC
12 Regulation 61-101(C)(4).

13 Duke is not requesting its \$1,000 application
14 fee back under 61-30. Duke did not receive a
15 proposed decision from DHEC on its 401
16 certification application within 180 days of
17 its June 5th, 2008, application. And we
18 calculate the proper date to be December 2nd,
19 2008. And they didn't issue a notice of
20 proposed decision until May 15th, 2009.

21 The basis for this motion for summary judgment
22 is a case you're well aware of: SC DOT versus
23 SC DHEC issued April 29th, 2008. Without
24 belaboring your findings, you found in favor of
25 SC DOT in the waiver argument of 180 days under

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1 61-101(A)(6). You also found that SC Reg
2 61-30, the fee regulation, does not control the
3 waiver issue of 61-101(A)(6). That's at page
4 20 of your opinion. You held that under SC
5 Regulation 101(C)(4) that the Department must
6 notify an application (sic) that additional
7 information may be requested, specify a time
8 for submittal, and if that information is
9 then -- therefore not timely submitted and is
10 necessary for reaching the certification
11 decision, the certification will either be
12 denied without prejudice or processing will be
13 suspended.

14 Neither one of those occurred in this case.
15 And that's at Oakley affidavit paragraph 11.

16 Mr. Wenerick's affidavit, the DHEC employee,
17 does not say that a suspension under
18 61-101(C)(4) ever occurred. Mr. Wenerick's
19 affidavit clearly addresses only the fee
20 regulation, which is not germane to this
21 matter. And you've heard earlier today counsel
22 for DHEC saying 61-30 and 61-101 are the same
23 and we disagree with that position.

24 The DOT case was initially appealed to the
25 Court of Appeals, but that appeal was

1 abandoned. The Department has also not amended
2 61-101 to address the decision in the DOT case.
3 DHEC also contends that the processing of the
4 application stopped under 61-101 because of
5 language in e-mails and correspondence were
6 cited to the fee regulation. This --

7 THE COURT: Say that again. Back up and say that
8 again.

9 MR. POTTER: DHEC contends that the processing of
10 the application stopped under 61-101 because of
11 language in e-mails and correspondence --

12 THE COURT: Okay.

13 MR. POTTER: -- to Duke which cited to the fee
14 regulation. And that's in Mr. Wenerick's
15 affidavit in their response to our motion for
16 summary judgment.

17 This does not meet the requirements for
18 61-101(C)(4) and would clearly deprive Duke
19 Energy of its due process rights. And, again,
20 this issue was clearly addressed in your DOT
21 decision.

22 DHEC also contends that Duke was obligated to
23 raise waiver at the board hearing. The recent
24 Sierra Club versus SC DHEC opinion, March 10th,
25 2010, opinion number 4654 -- it's also known as

1 the Chem-Nuclear case -- we sent you a copy of
2 it without any argument just for you to have as
3 authority -- clearly addressed the preservation
4 issue before the Administrative Law Court on
5 pages four and five of the opinion.

6 The ALC is not limited to issues raised before
7 the board because you have de novo review.
8 Duke's prehearing statement dated October 21st,
9 2009, paragraphs 3-F and 4, clearly address the
10 180-day waiver argument. And as soon as
11 discovery happened, after 30 days we filed a
12 motion for summary judgment on this very issue.
13 And, therefore, we believe that contention on
14 their part is without merit.

15 Accordingly, the issue of the 180-day waiver is
16 proper for summary judgment since it's a legal
17 issue of undisputed facts. As rare as it is,
18 the issues here are the very same as the issues
19 in the SC DOT versus DHEC. We respectfully ask
20 the Court to grant this motion for summary
21 judgment. Thank you, Your Honor. I'll be
22 happy to take any questions or ...

23 THE COURT: Well, do y'all have prepared ...

24 MR. HIGHTOWER: Not prepared, Your Honor.

25 THE COURT: Okay.

1 MR. POTTER: If the itch should so incline you to
2 ask questions at this point.

3 THE COURT: Well, I'll start with -- I probably
4 would have hit you as you were going along, but
5 let's start with the fact that you said --
6 regarding they didn't ask for further
7 information within the ten days. What about
8 the fact that they're allowed to ask for
9 information within 30? Thirty or 60?

10 MR. POTTER: And they do. I mean, the regulation
11 says if after the date of application, the
12 (C)(2) section, if within ten days and in their
13 subsequent filing of requests for admit, they
14 do admit that they did not ask for anything and
15 so the clock starts on June the 5th of 2008.

16 THE COURT: Okay.

17 MR. POTTER: And I don't think there's any question
18 of the contention. Mr. Wenerick's affidavit
19 also says there's no special agreement -- and
20 he also in his affidavit --

21 THE COURT: Okay. Well, where I can be clear, the
22 fact that he didn't ask for additional
23 information within ten days just means the
24 clock starts.

25 MR. POTTER: We think it relates back to June 5th.

1 But even if you put ten more days, you're still
2 in December and the decision --

3 THE COURT: No, no. I would agree with you on that.
4 It's just the ten-day period is relevant as far
5 as starting the clock.

6 MR. POTTER: Yes, Your Honor.

7 THE COURT: But the 60-day period is the relevant
8 frame in which you ask for additional
9 information.

10 MR. POTTER: That's correct. That's in the
11 regulation.

12 THE COURT: And if you don't do it within that time
13 frame, you waive the request to ask for
14 additional information, correct?

15 MR. POTTER: Yeah, unless they -- they could, within
16 that 60 days, have a request, give us a
17 deadline. If we missed a deadline and then
18 they notified us under (C)(4) that they were
19 suspending our application, presumably they
20 could do that. But in a normal situation, the
21 60 days that's allowed for additional
22 questions -- for additional information is all
23 they are allowed.

24 THE COURT: All right. Right now, I think I'm going
25 to let you go.

1 MR. POTTER: Okay. Thank you, Your Honor.

2 THE COURT: And I'm going to hear from them.

3 So, Mr. Hightower?

4 MR. HIGHTOWER: Your Honor, the Department contends
5 that it did properly give notice to Duke that
6 it was suspending -- or, I should say, not
7 suspending, tolling review of its application.
8 But before we get to that, we should go back.
9 Duke has said that the application was
10 submitted to the Department on June 5th, 2008.
11 The Department agrees that it was submitted on
12 that day; however, the application was not
13 complete.

14 By the terms of 61-101, it says that an
15 application must include the names and
16 addresses of members of the public that must
17 get public notice. That was not done here. In
18 fact, there is a series of conversations
19 between Mr. Oakley and Mr. Chuck Hightower of
20 the Department, who is the supervisor for the
21 water quality section, in which they discuss
22 that very fact and eventually Duke actually
23 provided that information and the public was
24 given notice starting August 8th, 2008. So to
25 begin with, Duke is incorrect that they came in

1 on June 5th and had a complete application.

2 THE COURT: Well, they said they submitted an
3 application.

4 MR. HIGHTOWER: They submitted an application, but
5 they're saying that it was deemed complete and
6 therefore it must be correct. It's not
7 complete until it meets the minimum
8 requirements that the law says.

9 And Duke has never said that they actually had
10 this information. And the facts as in the
11 exhibits attached to Mr. Wenerick's affidavit
12 clearly show that there was this issue that we
13 didn't get that. In fact, I believe there's
14 also an affidavit from Mr. Hightower in which
15 it also has attached the e-mail correspondence
16 that he had with Mr. Oakley on that. So that
17 changes the time frame.

18 THE COURT: Under what period does it change it?

19 MR. HIGHTOWER: Well, Your Honor, since 61-101 --

20 THE COURT: Because you've got the ten days to set
21 forth that it's not complete. Once you don't
22 do it within the ten days, you still can ask
23 for additional information, but it doesn't mean
24 that the application is not submitted from my
25 reading of the statute. So tell me where I'm

1 wrong on that.

2 MR. HIGHTOWER: Where the Department believes you're
3 wrong is, Your Honor, the request for
4 additional information is information needed to
5 clarify --

6 THE COURT: Yeah.

7 MR. HIGHTOWER: -- information that is given to the
8 Department. It is the Department's position
9 that the applicant has the absolute duty to
10 make sure that the application they submit
11 meets the minimum requirements that are
12 specified in 61-101.

13 THE COURT: (C)(2).

14 MR. HIGHTOWER: Specifically -- let me see where it
15 is. Okay. In 61-101(C)(1), it talks about an
16 applicant for certification needed for a
17 federal license or permit must present a
18 complete application to the Department in a
19 manner specified by the Department. Further,
20 the last sentence of that paragraph says, "As
21 a minimum, the application must contain the
22 following information."

23 THE COURT: Wait a second. Let me get where you
24 are.

25 MR. HIGHTOWER: I am at C, capital C.

1 THE COURT: I'm in 101.

2 MR. HIGHTOWER: (C)(1).

3 THE COURT: I'm in there.

4 MR. HIGHTOWER: And the first sentence talks
5 about --

6 THE COURT: I've got that one.

7 MR. HIGHTOWER: -- complete application. The last
8 sentence of that paragraph starts: "As a
9 minimum, the application must contain the
10 following information," colon -- then it lists
11 five things -- actually six things, excuse
12 me -- and the sixth one, which is subsection F,
13 "the names and addresses of adjacent property
14 owners." The application did not include that.
15 The property owners that would be in question
16 here are the property owners around the various
17 reservoirs that are impacted by this
18 hydroelectric project. That information wasn't
19 provided. Duke felt that they could use some
20 other method of notifying the public and they
21 were told no, that was not sufficient.
22 Normally, most of the Department's 401 water
23 quality certifications are done for federal
24 permits that are issued by the United States
25 Army Corps of Engineers. We have a specific

1 agreement with them in which they send the
2 application for certification to us as a joint
3 application and that application becomes the
4 public notice and it goes out on public notice.
5 So, immediately, the date that the Department
6 gets the application is -- the application is
7 complete --

8 THE COURT: Okay.

9 MR. HIGHTOWER: -- because a federal agency has made
10 sure of it.

11 THE COURT: I see your --

12 MR. HIGHTOWER: That wasn't done here.

13 THE COURT: I see your point, because what you're
14 arguing is that the reading of 101(C) is that
15 you must submit a complete application and then
16 the language thereafter, "needing additional
17 information" sets forth that even if you submit
18 a complete application, you can ask for
19 additional information --

20 MR. HIGHTOWER: That's correct.

21 THE COURT: -- within that ten days.

22 MR. HIGHTOWER: That's correct, Your Honor.

23 THE COURT: All right. So what date was it that
24 they submitted all the information necessary
25 for the application to be complete?

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1 MR. HIGHTOWER: Your Honor --

2 THE COURT: You said September or was it August?

3 Okay, August.

4 MR. HIGHTOWER: August 8th was the date that the
5 application with the Department had all the
6 information and a public notice went out on
7 that date.

8 THE COURT: Well, so the record will be clear,
9 August 8 --

10 MR. HIGHTOWER: Excuse me, August 8th, 2008. I'm
11 sorry, Your Honor.

12 THE COURT: Well, that's all right. I just want the
13 record to be clear.

14 MR. HIGHTOWER: Yes, sir.

15 THE COURT: I think I knew the answer. Back to
16 August 8, 2008 --

17 MR. HIGHTOWER: Yes.

18 THE COURT: -- did the Department within ten days of
19 that date request additional information?

20 MR. HIGHTOWER: Yes, we asked for -- since
21 information concerning the Quality Assurance
22 Prevention Plan -- I believe that's what -- the
23 acronym is Q-U-A-P-P. We asked for that
24 information and, in fact, most of the time that
25 was tolled in this case was because the

1 Department did not get that information back
2 from Duke until January of 2009.

3 THE COURT: You asked for --

4 MR. HIGHTOWER: We specifically asked for that
5 information.

6 THE COURT: Give it to me, the phrase again.
7 Quality ...

8 MR. HIGHTOWER: I'm sorry, I want to make sure I
9 actually cite it correctly. Okay. It's the
10 Quality Assurance Program Plan; that was mailed
11 to Duke on August 9th, 2008. And I'm looking
12 specifically at paragraph --

13 THE COURT: Wait a second. Quality Assurance
14 Program Plan, is that what you said?

15 MR. HIGHTOWER: Program Plan, that's correct, Your
16 Honor.

17 THE COURT: And it was mailed on what date?

18 MR. HIGHTOWER: We mailed that letter to Duke on
19 August 19th, 2008.

20 THE COURT: August 19th is after -- I mean, I know
21 I'm from the Pee Dee, but that's more than ten
22 days.

23 MR. HIGHTOWER: Well, Your Honor, you would have to
24 start -- well, no, because usually the time
25 frame for something to begin, you take the next

1 day, which would be August 9th. August 9th,
2 2008, to August 19th, 2008, is ten days.

3 THE COURT: Okay. So within the ten days.

4 MR. HIGHTOWER: Yes, Your Honor. And that
5 information was sent to, I believe, Mr. Oakley.
6 And it wasn't until January -- just want to
7 make sure of the right -- I believe it
8 was -- yes, it was -- we received that plan
9 back from Duke on January 12th, 2009..

10 THE COURT: Okay. And at that point in time, the
11 Department would concede that the application
12 at least was complete?

13 MR. HIGHTOWER: Yes. Well, we would concede that
14 they had given us a completed application by
15 that time. They had given us information back
16 and --

17 THE COURT: I need to rephrase that.

18 MR. HIGHTOWER: -- and then we had some further
19 questions.

20 THE COURT: They are -- let me rephrase that --

21 MR. HIGHTOWER: I'm sorry.

22 THE COURT: -- because that was inerrantly asked.
23 They had already submitted a complete
24 application --

25 MR. HIGHTOWER: Yes.

1 THE COURT: -- but you requested additional
2 information --

3 MR. HIGHTOWER: We requested --

4 THE COURT: -- within ten days --

5 MR. HIGHTOWER: Yes.

6 THE COURT: -- and so pursuant to your reading of
7 61-101(C)(2) --

8 MR. HIGHTOWER: Yes.

9 THE COURT: -- they complied with the requirement to
10 submit the additional information that was
11 provided -- or which you were allowed to ask
12 for within ten days.

13 MR. HIGHTOWER: That's correct, Your Honor.

14 THE COURT: All right.

15 MR. HIGHTOWER: And then as counsel has noted, that
16 61-101 specifically says that besides that
17 ten-day window of time, the Department also has
18 six months -- excuse me, 60 days in which to
19 ask other information. And we believe that
20 once we got back that plan, there was also some
21 other information that we asked for and we
22 informed Duke in writing, either by formal
23 letters or by e-mails, all of which there are
24 copies of attached to the affidavit of
25 Mr. William Wenerick, who is the project

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1 manager who reviewed this application.

2 And then, as counsel did state, that on May
3 15th, 2009, the Department did issue a notice
4 of the Department decision, which was the
5 Department -- the decision the Department had
6 come up with and if nobody had appealed within
7 15 days, or, i.e., if nobody had appealed by
8 the end of business on May 30th, 2009, then
9 that would have been the final agency decision.
10 However, as noted by counsel, the South
11 Carolina Coastal Conservation League and
12 American Rivers filed a request for a final
13 review conference, as they are entitled to
14 pursuant to South Carolina Statute 44-160. And
15 then we had the review conference.

16 Counsel has said that it's incorrect that they
17 didn't waive raising this argument themselves
18 for this motion because they didn't raise it at
19 the review conference. He says, "Well, because
20 this Court has de novo review."

21 We agree this Court has de novo review, but
22 that's de novo review of the facts. We believe
23 that to argue that the Department -- or I
24 should say in this case the board's decision,
25 because it was the board's decision based on

1 the final review conference that is the
2 actual --

3 THE COURT: How about a summary on that, because I
4 just blatantly disagree with you on that.

5 MR. HIGHTOWER: Okay.

6 THE COURT: So just go ahead -- I mean, I want to
7 let you make your arguments. It's just I don't
8 see that at all.

9 MR. HIGHTOWER: Well, Your Honor, we particularly
10 believe that's true when Duke has taken it upon
11 themselves in their statement to specifically
12 state that the board somehow acted improperly
13 and the implication is they were aware that
14 there was some issue as to a time frame. And
15 it is the Department's position that the board
16 was never provided any information, that the
17 only party that had the knowledge of the timing
18 of the application and the review process, and
19 the belief, if you will, that there was
20 something wrong was Duke. The environmental
21 groups wouldn't have known any of that and the
22 Department clearly believes that it complied
23 with the time frame. So it would only be Duke.
24 And for Duke to now somehow bash the board
25 saying that they acted improperly when they

1 weren't given information --

2 **THE COURT:** I don't think Duke's -- Duke's not
3 bashing the board. They're just seeking to
4 raise an issue on appeal, which they are --

5 **MR. HIGHTOWER:** Well, that's true, Your Honor.

6 **THE COURT:** -- they can properly do so. And by the
7 way, it wasn't Duke that appealed the case, was
8 it?

9 **MR. HIGHTOWER:** No, no. In fact --

10 **THE COURT:** So what you're saying is, if another
11 party raises an appeal to the board and sets
12 forth their grounds for appeal, that you're
13 setting forth now the requirement that when one
14 party appeals to the board that the other
15 party's got to raise all their issues that they
16 present in the case in response to that appeal
17 rather than deal with just the issues that are
18 raised on appeal to the board.

19 **MR. HIGHTOWER:** Well, yes, Your Honor.

20 **THE COURT:** Okay. How about let's move on.

21 **MR. HIGHTOWER:** Okay. But we haven't yet addressed
22 61-30. 61-30, which was enacted pursuant to
23 Statute 48-230(B), states that the Department
24 shall not start to review any application --
25 and it specifically talks about water quality

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1 certifications -- until it gets its fee.
2 Specifically says the Department can't do
3 anything until we get that.

4 Under Duke's argument is, the Department should
5 ignore one regulation to comply with another
6 regulation. The Department says that that is
7 not something it can do. The Department is a
8 creature of statute. It is required to follow
9 the statutes and regulations of the State and
10 the applicable Federal statutes and
11 regulations.

12 The only way that the Department can reconcile
13 its duty under the fee regulation not to start
14 any review of any water quality certification
15 until it gets a fee and to comply with the time
16 frames that are within 61-101, is that they
17 must somehow coincide.

18 And in fact, the time frame that we're talking
19 about here, the 180 days, is in both
20 regulations. 61-101 says 180 days for review,
21 with no more than 365 days; and that is a
22 federally required time frame, as counsel for
23 Duke has noted. In 61-30, it gives 180 days
24 for the Department to conduct its review.

25 The Department believes that it has to

1 reconcile those two and put them together and
2 indeed they work well.

3 THE COURT: When you say "reconcile," you mean read
4 them --

5 MR. HIGHTOWER: Read them so that --

6 THE COURT: -- para materia?

7 MR. HIGHTOWER: Well, yes, to read them in such a
8 way that the Department can comply with the
9 procedural requirement in 61-101 that deals
10 with time frames for review. In fact, it even
11 has an even more restrictive time frame for
12 specified DOT projects, which aren't applicable
13 here. You have the 180-day for most projects
14 and then you have the fact that at no position
15 can the Department go beyond 365 days, because
16 the Federal Clean Water Act states that if
17 certification is not issued within 365 days,
18 that the State's right to issue the water
19 quality certification is deemed waived and
20 there would be no further review by the State.
21 It's interesting that the Legislature in 61-101
22 did not put in any type of penalty for the
23 Department not completing its review within 180
24 days. So it's the Department's belief that
25 what happens is, if it doesn't do that review

1 within that time, that gives the applicant the
2 ability, the standing and right to file a
3 Mandamus action to force the Department to
4 issue that; that would be an administerial duty
5 to issue a certification, whether it is to give
6 the actual certification or to deny the
7 certification. But what we don't agree is, is
8 that it would create a waiver.

9 The way Duke would have it looked at, the
10 Department would be in a position where if
11 applicants -- if it could not toll time when it
12 has requested information -- and we believe
13 that the letters here clearly gave Duke the
14 knowledge that we were tolling time.

15 The e-mails that are presented here and letters
16 show no qualification on the part of Duke
17 saying, "Well, are you just tolling the fee or
18 are you tolling anything else?" Doesn't say
19 that. Just says "tolling time." Indeed,
20 there's a time frame where Mr. Oakley in
21 response to a --

22 THE COURT: When you're saying that the letters from
23 DHEC don't say one way or the other, wouldn't
24 you think it would be incumbent upon DHEC to
25 specify what they're tolling rather than --

1 MR. HIGHTOWER: Well, Your Honor --

2 THE COURT: I tell you what, even before I get to
3 that one, the tolling time issue that you're
4 talking about --

5 MR. HIGHTOWER: Yes.

6 THE COURT: -- is, you're almost saying like DHEC's
7 a victim of the 180 days. DHEC created the 180
8 days through promulgating the reg. And then
9 secondary to that, DHEC has the ability to set
10 forth the time frame to respond to something
11 within whatever narrow time frame you want.
12 You could ask them to do it within five days
13 and if they don't -- and have set forth that if
14 you don't do it within five days, then at that
15 point in time, the time is tolled. But rather
16 than follow that procedure, which would be in
17 keeping with the regulation, what you're doing
18 is you're saying, "We're just going to send out
19 something that's just going to toll the time no
20 matter what," without even giving them an
21 opportunity to respond.

22 MR. HIGHTOWER: Well, we --

23 THE COURT: Tell me where I'm in error on any of
24 that.

25 MR. HIGHTOWER: Well, Your Honor, we believe that

1 by -- what we do is, instead of creating an
2 artificial time frame --

3 THE COURT: An artificial time frame?

4 MR. HIGHTOWER: Well, because the time frame -- if
5 I'm understanding what you're saying, Your
6 Honor, let's say with the Qualified Assurance
7 Program Plan, we could have stated we want that
8 in ten days.

9 THE COURT: Yeah.

10 MR. HIGHTOWER: And it took Duke four months almost
11 to get it to the Department.

12 THE COURT: Uh-huh (affirmatively responds).

13 MR. HIGHTOWER: We believe that we would be putting
14 unnecessary burdens on them. We tell them that
15 we're tolling the time on working on this while
16 they take the time that they feel they need.
17 Because otherwise what you do is you set up a
18 situation where applicants just try to get the
19 information in within a time frame that, as
20 you're stating, would be solely in the
21 discretion of the Department and not taking
22 into account what it takes for them to comply
23 with this information, and possibly making
24 errors in it just to get it in and then the
25 Department looks at it and says, "No, not

1 good," and just creates another artificial time
2 frame.

3 I guess the Department could do that, but I
4 believe that that would not be an effective way
5 of the Department administering this. And we
6 believe that since 61-30 does give a tolling,
7 and we do believe that they both have to run
8 together in order for the Department
9 to -- because based on what you're saying, the
10 fee reg, we would create -- give an artificial
11 time frame to Duke, let's say ten days, and in
12 that time --

13 THE COURT: I don't think I called it "artificial."
14 I called it a "specific time frame."

15 MR. HIGHTOWER: Okay, a specific time frame. A
16 specific time frame for them to give us the
17 information, but we're not able to do any
18 review at that time. They would be getting the
19 benefit of the ten days without the Department
20 being able to work on it and then tolling
21 thereafter. That really doesn't work well.
22 The Department believes that --

23 THE COURT: If it doesn't work well, why don't you
24 change your regulation?

25 MR. HIGHTOWER: Well, Your Honor, we believe that

1 when the Legislature, through the
2 administrative procedures process, enacted the
3 fee regs, they were aware that there were
4 programs out there in other regulations, such
5 as the water quality certification regulation,
6 that had time frames.

7 And it is the Department's belief that the
8 Legislature put very specific information on
9 how time frames are to be handled, how you
10 would toll, what information you have to ask,
11 the fact that it has to be in writing, all
12 these things, much more than is found in
13 61-101. 61-101 is very general. It says, "You
14 make a request," you know, and it doesn't give
15 as much detail. We believe that the later
16 regulation gives more detail. It's detail that
17 the Department has used for all of its
18 environmental permits so that there's a
19 uniformity instead of what probably was
20 occurring before, which would have been a
21 hodgepodge of time frames and how you would
22 handle them based on the information that the
23 Legislature had at that time.

24 Perhaps 61-101 could be amended to read that,
25 but we don't believe that it's necessary. We

1 believe that Duke is not prejudiced by this
2 process. In fact, they have a clear way of
3 understanding what we are going to do. We're
4 going to start at a specific time and that time
5 is, we get the fee. They're aware of that.
6 That anytime we ask for information in
7 writing --

8 THE COURT: When did they provide the fee? Don't
9 lose your train of thought.

10 MR. HIGHTOWER: I'm sorry. It's in August. I
11 believe -- I'm not sure the date they actually
12 sent it to us. That would be something that
13 Duke -- and I know that we processed it in
14 August of 2008. It was not -- it definitely
15 was not submitted to the Department in June of
16 2008.

17 THE COURT: Okay. Hold on one moment.

18 (Off the Record)

19 THE COURT: Go ahead, Mr. Hightower.

20 MR. HIGHTOWER: Well, for these reasons, we believe
21 that we have, in fact, complied with the
22 requirements of 61-101, with its time frame,
23 180-day time frame, and the requirements of
24 61-30, with its requirement for a fee and
25 complying with a similar 180-day time frame.

1 We also believe that in this case -- which is
2 factually distinguishable from the SC DOT case
3 that counsel has raised. In that case, as Your
4 Honor is aware, the Department did not send any
5 written documents. We were not able to produce
6 at trial any documents that showed in any way
7 we had asked for information and that we were
8 trying to -- and that we were tolling our
9 review pending getting that information. In
10 fact, it specifically says -- and it's page 17
11 of the --

12 THE COURT: I'm familiar with it.

13 MR. HIGHTOWER: -- decision, as I printed it from
14 the website. Here, DHEC did not establish that
15 there was any meaningful communication at the
16 time and information was not provided. More
17 importantly, DHEC never -- underscored --
18 notified DOT at any time -- also underscored --
19 that the processing of its application was
20 suspended.

21 We believe that we did give them that
22 information. Could we have maybe made it even
23 clearer? That's a possibility. But we believe
24 that we did make it clear and that Duke did not
25 indicate to us that it was not clear to them

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1 what was going on.

2 So we believe, especially in this summary
3 judgment motion where the standard of proof is,
4 is that all reasonable inferences from the
5 facts must be looked at in the light most
6 favorable for the non-moving party, which is
7 the Department here, that that information was
8 sufficient to put Duke on notice that we had
9 and we were tolling the time.

10 And then, also, as I showed earlier, Duke
11 didn't provide the application that was legally
12 required just under 61-101 at the time that
13 they said that they did; that they didn't
14 comply with the application requirements until
15 August of 2008, not June of 2008, and that the
16 Department did, in fact, under 61-101, meet a
17 time frame to ask for information that was not
18 given to us until January of 2009.

19 For all these reasons, we believe that the
20 Court should deny Duke's motion for summary
21 judgment and -- I believe it's also styled
22 motion for summary judgment and motion for
23 declaratory judgment.

24 THE COURT: All right. I'm going to ask you a
25 couple of questions before you sit down.

1 MR. HIGHTOWER: Oh, I'm sorry.

2 THE COURT: If I go with the August 8th -- I haven't
3 done the math, but if we go with the August
4 8th, 2008, and I don't agree with you on the
5 tolling in the e-mails, then the decision on
6 May 15th was not issued within 180 days; is
7 that right?

8 MR. HIGHTOWER: No, because --

9 THE COURT: But if I go with the January 12th, 2009
10 date when you received the Quality Assurance
11 Program Plan --

12 MR. HIGHTOWER: Yes.

13 THE COURT: -- then you are within the 180 days.
14 Even if I ignore --

15 MR. HIGHTOWER: That's correct, Your Honor.

16 THE COURT: -- that flat out, no matter what,
17 doesn't add up to 180 days.

18 MR. HIGHTOWER: That's correct, Your Honor.

19 THE COURT: All right. So what you're requesting is
20 that I first go with the January 12th, 2009
21 date.

22 MR. HIGHTOWER: Yes, Your Honor.

23 THE COURT: And, secondary, that if I do consider
24 the August 8th, 2008 date, that I consider that
25 it was tolled via your e-mails.

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1 MR. HIGHTOWER: That's correct, Your Honor.

2 THE COURT: All right. Or the language of your
3 e-mails. That pretty well sum it up?

4 MR. HIGHTOWER: Yes, Your Honor.

5 THE COURT: And also you're asking that I consider
6 Regulation 61-30. And what would 61-30 add to
7 this analysis that I just gave?

8 MR. HIGHTOWER: Well, what it would do is, it won't
9 clearly define when the start time would be.
10 It would be the time that we got the check.

11 THE COURT: Do you have the language --

12 MR. HIGHTOWER: But the Department has looked at it
13 from August 8th, just because we clearly have
14 that date as when the application was
15 100 percent complete and the public was
16 noticed, since the public notice requirement is
17 an absolute requirement in the water quality
18 certifications. There can be no certifications
19 without some type of public notice for an
20 individual application.

21 THE COURT: Okay.

22 MR. HIGHTOWER: We also believe that 61-30 also
23 clearly explains the tolling process, when
24 you're going to toll, when the tolling ends.
25 We just believe that that is a clearer way for

1 everybody to understand what the Department is
2 doing.

3 But we do agree with Your Honor, that even if
4 you did not find that 61-30 necessarily had
5 come into play here, we do believe that since
6 we did not get the Quality Assurance Program
7 Plan until January 12th, that was when we had
8 asked for information, that clearly was within
9 the time frame of 61-101. And that when we
10 issued the actual decision on May 15th, 2009,
11 that that was less than 180 days.

12 THE COURT: What does Regulation 61-30 do to clearly
13 explain the tolling process? Can you give me
14 the provision to go -- although I think
15 Mr. DeScherer had this in his brief. I don't
16 know if you did in yours. Maybe I'll just --

17 MR. HIGHTOWER: I'm not sure.

18 THE COURT: I'll tell you what, I'll ask him because
19 he's --

20 MR. HIGHTOWER: Okay.

21 THE COURT: He's the one that addressed it more
22 fully.

23 MR. HIGHTOWER: Okay. Thank you, Your Honor.

24 THE COURT: Mr. DeScherer?

25 MR. DESCHERER: Thank you, Your Honor.

1 THE COURT: You already know one question I'm going
2 to ask.

3 MR. DESCHERER: Your Honor, we strongly agree with
4 the Department's position on this motion. And
5 as far as 61-30 goes, we think Duke is in
6 error, that it does not also apply. We agree
7 with the Department that both provisions apply
8 to this situation --

9 THE COURT: Under what theory of law?

10 MR. DESCHERER: Well, I will -- we think they can be
11 read together and I will try -- I will attempt
12 to explain why.

13 As an initial matter, the Purpose and Scope of
14 61-30 states, and I'll quote: "This regulation
15 prescribes those fees applicable to applicants
16 and holders of permits, licenses, certificates,
17 certifications" -- as we have here -- "and
18 registrations and establishes schedules for
19 timely action on permit applications."

20 We do not read 61-30 as narrowly as only
21 applying to fees. We think it also regulates
22 the timing, the tolling and restarting of these
23 time lines. And if you turn to
24 61-30(H) -- let's see if I got this right --
25 (H) (1) (c).

1 THE COURT: Wait a second. I don't have that in
2 front of me. Is it in your brief?

3 MR. HIGHTOWER: Your Honor, it's in the Department's
4 brief.

5 MR. DESCHERER: We have the regulation right here.

6 MR. HIGHTOWER: But I do have the regulation here,
7 if you like.

8 THE COURT: Well, I was just going to pull it up --
9 I can pull your brief up.

10 MR. HIGHTOWER: Oh, okay. Well, my brief, it wasn't
11 saved in a Word format. I had them send it to
12 you in PDF.

13 THE COURT: I know, but I can open it up in Adobe.

14 MR. HIGHTOWER: Oh, okay.

15 (Off the Record)

16 THE COURT: Did you cite it as 61-30?

17 MR. HIGHTOWER: Let's see.

18 THE COURT: My computer says you don't have it in
19 there.

20 MR. HIGHTOWER: I'm sure I placed it in there.

21 (Off the Record)

22 THE COURT: Hold on. You tell me what page and
23 we'll get there.

24 MR. HIGHTOWER: I'm trying to find it.

25 THE COURT: I'm there at 61-30, at least where you

1 quoted it. Page ten?

2 MR. DESCHERER: In your brief.

3 THE COURT: Or you can just hand me up the regs,
4 either way.

5 MR. HIGHTOWER: Yes. Oh, yes. You can just hand
6 that up.

7 MR. DESCHERER: (Tendering.)

8 THE COURT: All right. Proceed, Mr. DeScherer.

9 MR. DESCHERER: Thank you, Your Honor. So, just to
10 be clear, 61-30(H)(1)(c) states: "The time
11 schedule shall be tolled when the Department
12 makes a written request for additional
13 information and shall resume when the
14 Department receives the requested information
15 from the applicant."

16 We view 61-30 and 61-101 as accomplishing two
17 different purposes. In our view, 61-30 is akin
18 to procedures, for example, in the civil rules
19 of -- the Rules of Civil Procedure that tell
20 litigants how to count ten days to determine
21 when their response is due. It will say things
22 like, you know, "Do not count weekends or
23 holidays," and it just provides how you count.
24 It's very mechanical; whereas 61-101, in our
25 view, actually provides remedies to DHEC if the

1 Department becomes frustrated with an
2 applicants' not turning over requested
3 information. Then under 61-101, the Department
4 can under certain circumstances suspend the
5 application or even deny the application.

6 So we view 61-30 as how do you count and how is
7 the time line tolled and how does it restart.
8 And 61-101 is slightly different. 61-101, in
9 our view, describes how the Department can
10 suspend an application, but also how they can
11 deny an application. So we think they do not
12 conflict. We think they can be read together.
13 And we think in this case, the Department
14 effectively tolled the application under 61-30
15 several different times.

16 THE COURT: All right.

17 MR. DESCHERER: So I believe I've answered the one
18 question I know is coming.

19 THE COURT: Yeah.

20 MR. DESCHERER: But I would also -- I would just
21 add, and I don't want to restate
22 Mr. Hightower's argument, but in terms of the
23 appropriate remedy here, we feel strongly that
24 61-101 does not -- you know, if the Court found
25 that it were violated and that DHEC did not

1 comply with it, we do not believe that it
2 provides for waiver in this situation. We
3 believe the General Assembly knows how to
4 specifically state in a regulation when waiver
5 would be called for. We think Duke is just
6 assuming that that is the remedy and I believe
7 Mr. Hightower said in his comments that it
8 would be more appropriate given the language in
9 61-101 for Duke to have to file, you know, a
10 Mandamus action, for example, to require the
11 Department to act. Because basically what
12 61-101 does is it provides a time line within
13 which the Department is to act and it does not
14 say what the consequences of the failure to act
15 are. And we think there are cases, both State
16 and Federal cases, that suggest, under this
17 situation, where the regulations are designed
18 to protect a public interest, it would be
19 inappropriate to find waiver in this
20 circumstance.

21 Just one other point. Mr. Hightower and
22 Mr. Potter have both talked about whether Duke
23 raised this issue at the final review
24 conference. I would also note that Duke did
25 not ask for this relief when it filed this

1 appeal. It simply asked for a reinstatement of
2 the staff decision. And I would argue that
3 it's not so much a jurisdictional argument as
4 an equitable argument, that they should not be
5 allowed to make that argument now as an
6 equitable argument as opposed to a
7 jurisdictional matter.

8 THE COURT: I don't know. I've got the authority to
9 invoke remedies in order to enforce my
10 jurisdiction, but it still is a proceeding at
11 law and I follow the proceeding at law until
12 there is not an adequate remedy at law. So I
13 think you're asking me to put the equitable
14 cart before the law remedy. So I think I'm
15 going to have to punch you on that one.

16 MR. DESCHERER: I understand, Your Honor. I
17 respectfully disagree, but thank you.

18 THE COURT: That's fine. Anything else?

19 MR. DESCHERER: That's all.

20 THE COURT: All right. Well, let me make some
21 notes. What's that case you rely on -- I can't
22 think of the name of it now -- for your theory
23 on the waiver, that you still proceed ...

24 MR. POTTER: The case I cited to you in my opening
25 arguments, Your Honor?

1 THE COURT: Oh, it's a recent --

2 MR. POTTER: The Chem-Nuclear case?

3 THE COURT: No, no, not that one. It was a case in
4 which the South Carolina Supreme Court held
5 that the jurisdiction of the agency was not
6 devoid -- or they didn't have a lack of subject
7 matter jurisdiction, even though they
8 procedurally failed to comply with their time
9 frames for issuing their decision.

10 MR. POTTER: Is that the Johnston case --

11 THE COURT: Johnston.

12 MR. POTTER: -- that you cited in your DOT case?

13 THE COURT: Yeah. Johnston, okay.

14 MR. POTTER: Do you want the citation? I can look
15 it up.

16 THE COURT: No, I just found it in my notes.

17 All right. I'll hear from you now.

18 MR. POTTER: Yes, Your Honor. You must have a
19 feeling of deja vu. If you recall your DOT
20 case, you've heard some of these same arguments
21 and rejected them.

22 THE COURT: Yep.

23 MR. POTTER: The Department has -- first of all, I'd
24 like to go to the argument of reading 61-101
25 and 61-30. 61-101 was promulgated in 1990

1 pursuant to the Pollution Control Act, 48-1-10
2 et seq., and that's the act that gives DHEC the
3 power to regulate air and water emissions.

4 DHEC's had 20 years to get it right. They had
5 another opportunity to get it right two years
6 ago when you issued your opinion on DOT, which,
7 again, an appeal was started but it was
8 abandoned.

9 61-30 is a fee reg; it's an entirely different
10 statute, environmental protection fee, goes
11 over many programs, not just the water quality
12 certification. It's not based on the Pollution
13 Control Act. It has different timings. I
14 refer you to 61-30(H) is how things stop. For
15 example, every time under 61-30 you ask for
16 something, the time stops. That's not how
17 61-101 reads. You try to read them in para
18 materium - or materia? I'm not sure I
19 pronounced that --

20 THE COURT: Para materia.

21 MR. POTTER: Materia. The more specific one would
22 control over the more general one.

23 THE COURT: Statutory construction law is so fun
24 because the more specific would control over
25 the general one, but the latter controls over

1 the former, so -- or the previous, so ...

2 MR. POTTER: But they're different statutes and I do
3 want to refer you to page seven of our reply --

4 THE COURT: Okay.

5 MR. POTTER: -- and that's a case called Responsible
6 Economic Development versus DHEC, 371 SC 547.
7 And the Department, as a matter of law, cannot
8 invoke provisions in a regulation promulgated
9 under one act in an action within the statutory
10 authority of another act. So I did want to
11 point that out to you.

12 THE COURT: Say that again one more time.

13 MR. POTTER: I'm sorry. The Department, as a matter
14 of law in South Carolina, cannot invoke
15 provisions in a regulation promulgated under
16 one act in an action within the statutory
17 authority of a different act. And that was a
18 case of the stormwater act versus the Pollution
19 Control Act -

20 THE COURT: Okay.

21 MR. POTTER: -- that was involved with that. And
22 the serious nature -- you heard this
23 discussion -

24 THE COURT: There's separate acts here? Because you
25 talk about Regulation 61-30, you said that --

1 MR. POTTER: It was promulgated under a general
2 statute that is not the Pollution Control Act,
3 which was what the 61-101 was promulgated
4 under.

5 THE COURT: I thought it was promulgated -- had an
6 "et seq." provision in it on the promulgation.
7 What act --

8 MR. POTTER: It affected different laws, but the
9 regulation -- it was promulgated pursuant to
10 South Carolina Code 48-2-50 and 48-39-145;
11 that's in (A) of the 61-30.

12 THE COURT: Wait a second. Let me write that down.
13 I know it's in your brief, but 48 dash ...

14 MR. POTTER: 48-2-50.

15 THE COURT: And?

16 MR. POTTER: 48-39-145.

17 THE COURT: And those -- okay. And those particular
18 provisions deal with?

19 MR. POTTER: Those are the statutory authority for
20 the promulgation of 61-30.

21 THE COURT: Oh. Those regulations -- those statutes
22 deal with what? I don't --

23 MR. POTTER: Well, one was the environmental
24 protection fee that gave general authority.
25 I'm not sure what the other one is off the top

1 of my head.

2 THE COURT: Well, what is 48-2-50? What is that
3 statute?

4 MR. HIGHTOWER: Your Honor, I have the statute, if
5 you would like it. It's part of the
6 Environmental Protection Funds Act and in
7 48-2-50(A) it says: In order to facilitate the
8 proper administration of each act listed in
9 section 42-30(B), the Department shall charge
10 fees for the various services and functions
11 that it performs under each of these acts,
12 including, but not limited to, application
13 fees, processing fees, permit maintenance fees,
14 certification fees, licensing fees,
15 registration fees.

16 THE COURT: Okay.

17 MR. HIGHTOWER: But if you look at 48-2-30, it
18 specifically says in subsection (B)(1) The
19 Pollution Control Act, which as Mr. Potter has
20 stated, is the act that gives the authority for
21 61-101.

22 THE COURT: Go ahead, Mr. Potter.

23 MR. POTTER: Well, the important thing here, our
24 only remedy -- we totally disagree with the
25 idea of saying 61-30 conforms into 61-101. And

1 it goes to the due process rights of Duke.
2 There are certain specific requirements that
3 Duke has to do as part of the application
4 process; there was deadlines.
5 The fee, the only remedy we have under the fee
6 regulation is to ask for our fee back if it's
7 not promptly permitted. Waiver is an
8 argument -- I noticed in the entire arguments
9 nobody cited your case, the DOT case, for any
10 proposition that they were making. And I cite
11 it all the time to your DOT case for the
12 proposition -- for example, Mr. DeScherer
13 asked --
14 **THE COURT:** Yeah, but that could be dangerous
15 because I've been known to reverse myself,
16 so ...
17 **MR. POTTER:** Well, hopefully not in this case. And
18 there's been no appellate overturning of your
19 decision.
20 **THE COURT:** Yeah.
21 **MR. POTTER:** But, you know, Mr. DeScherer was
22 talking about, you know, you can't read a
23 waiver requirement into 61-101. Well, you
24 clearly addressed that in the DOT case. I can
25 cite it to you, but you know your case.

1 THE COURT: Yeah.

2 MR. POTTER: If you want me to, I'll cite it, but if
3 not --

4 THE COURT: No, I know -- I'm familiar with that
5 part of it.

6 MR. POTTER: Okay.

7 THE COURT: I'm trying to more ascertain the --

8 MR. POTTER: And the 61-30, you weren't as clear in
9 some ways, but you made the statements that I
10 think addresses the argument. Moreover, the
11 Respondents reply upon some nebulous evidence
12 that the processing of the application was
13 suspended. And I suggest this trying to read
14 61-30 and 61-101 together is that such a
15 nebulous evidence.

16 If you compare 61-30(H), their tolling
17 provisions, they are totally unlike yours. For
18 example, under the tolling provision, they get
19 an extra 60 days if they have a public hearing.
20 Under your decision, you don't toll 60 days in
21 the DOT case for a public hearing. You clearly
22 address that in that decision, because that
23 argument was raised to you in that case. So I
24 don't think you can read the two together.

25 One, the fee provision is designed to -- we

1 take a fee from the applicant, we promise to
2 handle the application timely, and if we do
3 not, you get your fee back. Duke is not
4 requesting the \$1,000 fee back.

5 THE COURT: What is the purpose of (H) in that
6 regard, though? Is (H) fulfilling the
7 requirements of getting the fee back or does
8 (H) go further? Section (H) under 61-30.
9 Because I notice --

10 MR. POTTER: Look under (C). It says: If the
11 applicant fails to respond to such a request
12 within 180 days, the Department will consider
13 the application withdrawn and the application
14 fee will be forfeited.

15 THE COURT: Okay.

16 MR. POTTER: It has nothing to do -- and,
17 theoretically, if you looked at 61-30, you can
18 make an argument that it would extend over a
19 year's time and then it would violate Federal
20 law under a 401 certification and also violate
21 your interpretation that the one year is also
22 inside -- under State law under 61-101 in your
23 DOT decision.

24 THE COURT: Answer my question, so I can be clear,
25 what is the purpose of (H) if the regulation is

1 solely about fees?

2 MR. POTTER: I don't see anything in (H) other than
3 the fact that fees and time periods for return
4 of the fee. I may have missed some section in
5 the back, but a complete reading of the section
6 and there is nothing in there -- the time line
7 is simply of the fee. I don't know where --
8 I'm going to look back in the beginning, but --

9 THE COURT: Does it address the remedies for fees?
10 I'm not trying to trick you, Mr. Potter.

11 MR. POTTER: No, no, and --

12 THE COURT: I'm trying to get an answer from your
13 perspective. Sometimes it's just good to
14 answer the question.

15 MR. POTTER: And I'm not trying to evade. I'm just
16 trying to find any place in here other than
17 there's a schedule of fee and then there's a
18 provision of return of fee if it's not done.
19 But, again, I'm looking to see if it's in the
20 statute or if it's in the regulation itself
21 about -- (reading).

22 Their Purpose and Scope, this regulation
23 prescribes those fees applicable to applicants
24 and holders of permits, licenses, certificates
25 and registration permits and establishes

1 schedules for timely action.

2 THE COURT: Where are you reading from?

3 MR. POTTER: I'm sorry, section A of 61-30, Purpose
4 and Scope.

5 THE COURT: Okay.

6 MR. POTTER: And this regulation --

7 THE COURT: That's always a good place to start, I
8 can tell you that.

9 MR. POTTER: This regulation also establishes
10 procedures for the payment of fees, provides
11 for the assessment of penalties for nonpayment
12 and establishes an appeals process to contest
13 the calculation of applicability. But there's
14 nothing else in here other than the question of
15 whether you get your fee or ...

16 THE COURT: Okay.

17 MR. POTTER: At least my reading of it there isn't.
18 I may be mistaken, but that's your only remedy
19 is if they -- DHEC does not timely process your
20 application, you can request your fee back.

21 THE COURT: So the answer then would be, you can
22 read them para materia. It's just one deals
23 with the --

24 MR. POTTER: But the --

25 THE COURT: One deals with the fees and one deals

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1 with the processing of the case itself.

2 MR. POTTER: But the calculation of the 180 days
3 under 61-30 is entirely different than under
4 61-101(C)(4). For example, when you request --
5 when DHEC -- the day DHEC requests information,
6 the time stops. Under 101(C)(4), DHEC requests
7 information, gives a time line for it to be
8 responded to, and only if it's not responded
9 to, then DHEC has to give notice of a
10 suspension or denial.

11 THE COURT: Okay.

12 MR. POTTER: Quite different.

13 THE COURT: All right.

14 MR. POTTER: And I would point out -- and you
15 mentioned it, too. I disagree with the August
16 argument. Ten days --

17 THE COURT: We're going there.

18 MR. POTTER: Okay.

19 THE COURT: You just go ahead and finish up.

20 MR. POTTER: Well, if anything --

21 THE COURT: I'm going backwards in my notes.

22 MR. POTTER: Okay. The 180 days from August still
23 doesn't get you to May 15th, 2009. Even if you
24 were to adopt their argument, they clearly
25 would not have gone out on public notice

1 without a complete application; that would
2 violate the rights of the public to be able to
3 comment.

4 I've heard these comments about the QAPP, which
5 is a specialized document. It's not part of
6 the application. It's a separate document. It
7 was -- I don't want to go off the record, but
8 it was given to DHEC before the application was
9 ever filed.

10 THE COURT: Well, let's just stick with, then, what
11 is your reading of the law itself as far as
12 what you're -- rather the point you're making
13 now is, you've got they're taking the position
14 that the statute sets forth that in
15 61-101(C)(1) you must present a complete
16 application and that the references for
17 additional information are above and beyond the
18 requirement for a complete application, because
19 that was required from -

20 MR. POTTER: Uh-huh (affirmatively responds).

21 THE COURT: So do you disagree with that?

22 MR. POTTER: Well, let me step back for just a
23 moment. June 5th is the date the application
24 was submitted. And I'm going literally with
25 this regulation has been in effect. They had

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1 ten days to notify us that the application was
2 complete or not. And, again, we're going to
3 due process rights here. What does the
4 applicant know from the agency in charge of the
5 program? Ten days go by, we haven't gotten
6 anything. We deem our application complete.
7 In August, it goes out on public notice. It
8 has to have been complete by then to have gone
9 out for notice in any case.

10 THE COURT: When did it go out for public notice?
11 What day?

12 MR. POTTER: I think it was August 8th, but I'm not
13 sure. It would be --

14 THE COURT: Oh, the same date that they asked for
15 the --

16 MR. POTTER: Well, again, I don't want to go off the
17 record. We wanted -- your DOT case ignored --
18 obviously, the certification was being worked
19 on by DHEC without an application fee. The
20 payment was made at the same time the public
21 notice went out, August the 8th, 2009. If they
22 wanted it the first day, they would have had it
23 the first day. That's not material at all to
24 our argument.
25 Clearly DHEC had to do work on it to have it

1 ready to go out on public notice August 8th,
2 the same date that the fee was collected. And
3 in your DOT case, you also -- you acknowledge
4 the fact that DHEC was working on the
5 application. They raised the applicant fee as
6 the -- to try to toll and you rejected it in
7 the DOT case.

8 THE COURT: Yeah, I recognize that. I'm not -- at
9 this point in time, we've moved away from the
10 fee.

11 MR. POTTER: Okay.

12 THE COURT: So I'm only on 101.

13 MR. POTTER: Okay. And we go out on public note,
14 At no time, from June 5th until May 15th, did
15 we receive a letter from DHEC saying, "We are
16 suspending the processing of your application
17 under 101(C)(4) because you did not timely
18 submit something."

19 THE COURT: I recognize that. So even if we go with
20 the August 8, 2008 date and we don't consider
21 Regulation 61-30 applicable, then under your
22 reading, since their requirement was to give
23 you a specific time frame to do an act, five
24 days, ten days or whatever --

25 MR. POTTER: And they normally did.

1 THE COURT: Wait a second. Let me follow through.

2 MR. POTTER: I'm sorry, excuse me.

3 THE COURT: And let's say ten days. They should
4 have given you ten days to do whatever act.
5 And then if you did not do it within those ten
6 days, then the running of the 180 days could be
7 suspended.

8 MR. POTTER: Could be, but they would still have to
9 take an affirmative act and that would be a
10 communication to us.

11 THE COURT: That's why I said "could," so I'm
12 following that. So under that reading,
13 August -- it wouldn't matter if we went with
14 the first date of the -- the date that you
15 filed, which was ...

16 MR. POTTER: June the 5th, 2008.

17 THE COURT: You would think I'd wrote that down.

18 MR. POTTER: And the public hearing, I believe, was
19 August the 8th and -- subject to correction,
20 but I believe it's in our brief.

21 THE COURT: All right. So it wouldn't matter if we
22 used the June 5th, 2008, or the August 8th,
23 2008, because neither date -- under neither
24 reading would you get 180 days.

25 MR. POTTER: That's correct and that's favorable to

1 my client. But I do want for purposes of --

2 THE COURT: I understand.

3 MR. POTTER: No, for purposes of your type of
4 decision, I don't think you want to read out
5 the section (C)(2) that has --

6 THE COURT: So explain that to me.

7 MR. POTTER: I think --

8 THE COURT: One more time. Their argument is that
9 (C)(2) only applies if a complete application
10 is submitted and then even if -- I believe
11 that's what I heard -- and even if a complete
12 application is submitted, they still can
13 suspend it if they ask for additional
14 information within ten days after receiving
15 that complete application. Where is that
16 error?

17 MR. POTTER: Well, we read that as when receipt of
18 the application or joint public notice.
19 There's two events. We think -- we know that
20 they did not ask for anything within ten days
21 of the June 5th application; therefore, that
22 application is deemed complete by operation of
23 this regulation.

24 THE COURT: Let me back up, I'm sorry.

25 MR. POTTER: Excuse me.

1 THE COURT: I was reading the law and didn't hear
2 you real well.

3 MR. POTTER: Our position, there are two places in
4 (C)(2) that they can ask for additional
5 information at the date of application --

6 THE COURT: But I want to ignore 60 because 60, from
7 my reading, doesn't suspend the operation of
8 the time frame to begin running. So all I'm
9 trying to figure out is whether the first part
10 of the -- the first section of the first
11 sentence before you get to "however." When it
12 says: "If the Department does not request
13 additional information within the ten days," is
14 that additional information referring to
15 additional -- or information in addition to
16 that of the completed application or is it
17 referring to the information so as to clarify
18 the completion of the application?

19 MR. POTTER: I would assume it would be to clarify
20 the application. I mean, again, like I said,
21 DHEC did nothing, so again, we don't know as
22 the applicant there was anything incomplete at
23 that point in time. It is deemed complete by
24 the statute from the ten-day period.

25 THE COURT: Well, would you argue that the

1 application was not complete when submitted?

2 MR. POTTER: No, I do not. I mean, DHEC decided on
3 a much broader interpretation of public notice
4 in a FERC project than it did for another one.
5 Again, this is something going out of the
6 record. They wanted more names. We gave them
7 general names to start with the application.
8 They wanted an additional way of doing it. We
9 did it. It went out on public note in August.

10 THE COURT: Okay.

11 MR. POTTER: But we believe our application was
12 complete as of June 5th, 2009, under operation
13 of (C)(2) because we --

14 THE COURT: 2009?

15 MR. POTTER: I mean, June 5th, 2008, excuse me.
16 June 5th, 2008. Because we did not receive
17 anything within ten days to give the applicant
18 its due process notice that something was
19 incomplete.

20 They certainly didn't deny or make us withdraw
21 the certification. So, again, we don't have
22 notice of anything else to create arguments now
23 to try -- you heard the various deadlines and
24 dates and how to do. How would an applicant
25 know its rights under that type of logic?

1 You look at the regulation; it's clear. It's
2 a clear path on how it's to be handled.

3 Now, I agree with you that they can also ask
4 for information within ten days after the
5 application of the notice. I thought I heard
6 that it was more than ten days after that DHEC
7 asked for that information, not within ten
8 days.

9 THE COURT: Well, you don't count the first -- the
10 date that it was submitted, they said is --

11 MR. POTTER: Yeah, I haven't examined that issue
12 closely. But, again, even if you take August
13 8th, the 180 days you judicially notice is not
14 May 15th, 2009.

15 THE COURT: Yeah. Okay. Anything else?

16 MR. POTTER: One second, Your Honor.

17 That's all I have, Your Honor.

18 THE COURT: All right. Mr. DeScherer?

19 MR. DESCHERER: Yes.

20 THE COURT: I'm going to address the discovery issue
21 later. Or does it need to be addressed for
22 timing purposes and all that today?

23 MR. DESCHERER: We have asked for additional
24 discovery, not to extend the deadline but for
25 an additional deposition, and it may depend on

1 how you rule on the pending motion in terms of
2 whether you need to decide the additional
3 discovery motion.

4 **THE COURT:** Okay. Well, I'll try to issue this
5 decision promptly. I've got to go back and
6 look at all your arguments. I've got a lot of
7 scribble to go try to figure out first before
8 to get to where I'm going. Is there anything
9 new that Mr. Potter raised in his arguments
10 that y'all wish to respond to, just because I
11 want to make sure I cover all my bases. And
12 you'll get the last shot.

13 Mr. Potter, do you need your Rule 36 back?

14 **MR. POTTER:** No, Your Honor, you can keep that.

15 **THE COURT:** All right.

16 **MR. HIGHTOWER:** Your Honor, the only thing was --
17 just in the case of Responsible Economic
18 Development versus DHEC, which was a case that
19 dealt with whether or not the stormwater
20 regulations, 72-350, I think it was, whether
21 you can take the anti-degradation requirements
22 out of 61-68 and you run them together and the
23 Supreme Court said no because the enabling
24 statute for the stormwater regulations is the
25 Stormwater Management Act and that was the

1 only -- the regulations only cited to that act
2 and not to the Pollution Control Act, which was
3 the act in which 61-68 where the
4 anti-degradation requirements were promulgated
5 there, too.

6 THE COURT: That's fine.

7 MR. HIGHTOWER: And I think that that is different.

8 THE COURT: In all deference to Mr. Potter this
9 time, I don't know if I buy that part of his
10 argument. The scope part I'm going have to
11 consider, because when I say "scope," when
12 regulation 61-30 sets forth that "scope," right
13 at the outset I've got to analyze this case in
14 that regard.

15 MR. HIGHTOWER: Oh, and the only other thing, just
16 to clarify, when Mr. Potter had cited in your
17 opinion about the "nebulous evidence," that was
18 referring to the fact that the Department had
19 a witness, the reviewer, who stated that he had
20 made phone calls to DOT, but we had no written
21 evidence to show, like we do here, that there
22 were e-mails that mentioned "tolling" and
23 everything else. So that was --

24 THE COURT: I'll invent a new word: hence the
25 "nebulosity."

1 MR. HIGHTOWER: Thank you, Your Honor.

2 THE COURT: Okay. New. Go ahead.

3 MR. DESCHERER: I don't know, Your Honor, if you --
4 Mr. Potter talked a lot about 61-30. We feel
5 strongly, our position is that it does apply.
6 I don't know if the Court wishes to hear
7 additional response.

8 THE COURT: Strongly that what?

9 MR. DESCHERER: We feel like 61-30 does apply.

10 THE COURT: Yeah, I think you made that point
11 earlier.

12 MR. DESCHERER: Okay.

13 THE COURT: As a matter of fact, you started on that
14 point.

15 MR. DESCHERER: Yes.

16 THE COURT: And now you're attempting to finish on
17 that point.

18 MR. DESCHERER: Thank you.

19 THE COURT: All right. Do you wish to respond to
20 anything he said?

21 MR. POTTER: Nothing, Your Honor.

22 THE COURT: Okay. All right. Well, I'll think
23 about everything y'all have argued and I'll let
24 you know. Or either I'll get you back on the
25 phone and ask you some more questions, if need

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1 be. Thank you very much.

2 MR. POTTER: Thank you, Your Honor.

3 MR. HIGHTOWER: Thank you, Your Honor.

4 (The proceedings concluded at 11:44 a.m.)

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CERTIFICATE

This is to certify that the within hearing consisting of Eighty (80) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on July 29, 2010.

Cassandra E. Vance

Cassandra E. Vance
Court Reporter

Notary Public for South Carolina
My Commission Expires: February 26, 2018

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**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from the Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Docket No. 09-ALJ-07-0377-CC

South Carolina Department of Health
and Environmental Control,

Appellant,

vs.

Duke Energy Carolinas, LLC,

Respondent.

American Rivers and South Carolina
Coastal Conservation League as

Intervenors.

RECORD ON APPEAL

Stephen P. Hightower
S. C. Bar No. 72265
Staff Attorney
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201
TEL: (803) 898-3349
FAX: (803) 898-3367
EMAIL: hightosp@dhec.sc.gov
Attorney for Appellant SC DHEC

James W. Potter, Esquire
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Post Office Drawer 2426
Columbia, South Carolina 29202
TEL: (803)
FAX: (803)
EMAIL:
Attorney for Respondent Duke Energy, LLC

Christopher K. DeScherer
Southern Environmental Law Center
Post Office Box 609
Charleston, South Carolina 29402
TEL: (843) 720-5270
FAX: (843) 720-5240
EMAIL: cdescherer@selcsc.org
Attorney for Respondent/Intervenors South
Carolina Coastal Conservation League and
American Rivers

Julia F. Youngman (*pro hac vice*)
Southern Environmental Law Center
200 West Franklin Street, Suite 3030
Chapel Hill, North Carolina 27516
TEL: (919) 967-1450
FAX: (919) 929-9421
EMAIL: jyoungman@selcnc.org
Attorney for Respondent/Intervenors South
Carolina Coastal Conservation League and
American Rivers

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Carolinas, LLC,

Petitioner,

v.

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

Respondents.

Docket No. 09-ALJ-07-0377-CC

**ORDER ON MOTION
FOR SUMMARY JUDGMENT**

This matter is before the Administrative Law Court pursuant to the Motion of the Petitioner, Duke Energy Carolinas, LLC (Petitioner or Duke) for Summary Judgment and its Motion for Declaratory Judgment, filed with this Court on January 21, 2010. Briefs on the Motions with supporting affidavits were submitted by all parties, and a hearing was held on May 6, 2010. After careful consideration of the memoranda and the arguments made at the hearing, Duke's Motion for Summary Judgment and Motion for Declaratory Judgment are hereby granted.

BACKGROUND

Duke operates the Catawba-Wateree Hydroelectric Project (Project) pursuant to a 50-year license issued by the Federal Power Commission (now the Federal Energy Regulatory Commission (FERC)) in 1958.¹ On August 29, 2006, Duke submitted an application for a new 50-year license to FERC in order to continue operating the Project. As a part of its application

FILED

June 10, 2010

SC ADMIN. LAW COURT

¹ In the event a new license does not issue prior to the expiration of the existing license, FERC issues an annual license from year to year which incorporates the conditions of the expired license.

for a new federal license, Duke is required to obtain a Water Quality Certification (WQC) under Section 401 of the Clean Water Act from each state in which the Project operates.

On April 7, 2008, FERC issued a "Ready for Environmental Analysis" (REA) notice on Duke's application, which started the clock running for Duke to provide FERC with a WQC from the State of South Carolina or evidence that it had applied for a WQC. Duke submitted its application for a WQC to the Respondent South Carolina Department of Health and Environmental Control (DHEC) on June 5, 2008. On May 15, 2009, DHEC issued a "Notice of Department Decision – Water Quality Certification" in which it proposed to issue the WQC for the Project with conditions. On May 29, 2009, the Respondents South Carolina Coastal Conservation League and American Rivers filed a Request for Final Review of the decision with the DHEC Board pursuant to S.C. Code Ann. § 44-1-60 (Supp. 2009). The Board held a Final Review Conference on July 9, 2009, and on August 6, 2009, it issued a Final Agency Decision which reversed the DHEC staff decision and denied the WQC, finding that the WQC failed to provide reasonable assurance that water quality standards would be met.

On September 4, 2009, Duke filed a request for a contested case hearing before this Court, seeking issuance of the WQC as issued by DHEC staff. The Court entered orders allowing the Respondents South Carolina Coastal Conservation League and American Rivers (Conservation Groups) and the South Carolina Attorney General to intervene in this matter on November 9, 2009. Duke filed the instant Motions on January 21, 2010.

STANDARD OF REVIEW

Rule 68 of the Administrative Law Court Rules provides that "[t]he South Carolina Rules of Civil Procedure . . . may, in the discretion of the presiding administrative law judge, be applied in proceedings before the Court to resolve questions not addressed by these rules." Rule 56(c) of the South Carolina Rules of Civil Procedure provides that summary judgment is properly granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. In order to prevail on its Motion for Summary Judgment, Duke thus has the burden of establishing the lack of any triable issue of fact. *See, e.g., Brandt v. Gooding*, 368 S.C. 618, 626, 630 S.E.2d 259, 263 (S.C. 2006); *Singleton v. Sherer*, 377 S.C. 185, 197, 659 S.E. 2d 196, 202 (Ct. App. 2008).

Furthermore, summary judgment should be granted “when plain, palpable and undisputed facts exist on which reasonable minds cannot differ.” Bayle v. S.C. Dep’t of Transp., 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001). In determining whether summary judgment is proper, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. Byers v. Westinghouse Elec. Corp., 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004).

DISCUSSION

General Law

Section 401 of the federal Clean Water Act (CWA), 33 U.S.C. § 1341 (CWA Section 401) requires an applicant for a Federal license for any activity which may result in any discharge into a navigable water to provide the federal licensing authority a certification from the state in which the discharge originates confirming the discharge will comply with applicable provisions of the CWA. This type of certification is known as a Water Quality Certification (WQC). States are required to establish procedures for public notice of all applications for WQC and procedures for public hearings to the extent the state deems hearings appropriate. CWA Section 401(a)(1) provides:

If the State . . . fails or refuses to act on a request for 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. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State. . . .

Thus, if a state fails to act upon a request for certification within a “reasonable period of time” the state certification requirements of Section 401 are waived.

25A S.C. Code Ann. Regs. 61-101 (Supp. 2009), which is the Water Quality Certification regulation, was first promulgated under the authority of the Pollution Control Act in 1990 to establish the procedures for the State of South Carolina to issue, deny or waive certification required under Section 401. S.C. Reg., Vol. 14, Issue 3, p. 143 (February 23, 1990). More specifically, Regulation 61-101 sets forth the procedures and policies for implementing the State

water quality certification requirements of the Clean Water Act. Regulation 61-101(A)(6) states as follows:

The Department is required by Federal law to issue, deny, or waive certification for Federal licenses or permits within one (1) year of acceptance of a completed application unless processing of the application is suspended. If 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. Unless otherwise suspended or specified in this regulation, the Department shall issue a proposed decision on all applications within 180 days of acceptance or an application.

(Emphasis added). Therefore, South Carolina law requires DHEC to issue a proposed decision on an application for a WQC within 180 days of acceptance of an application, unless that time period is "otherwise suspended or specified in [Regulation 61-101]."

Duke contends that DHEC waived its right to issue or deny a WQC for the Project because it did not issue a proposed decision within 180 days of the filing of the application as required by Regs. 61-101. Duke submitted its WQC application to DHEC on June 5, 2008. It argues that DHEC was required to render its proposed decision on or before December 2, 2008 or its right to issue or deny a WQC for the Project was waived by operation of state law. Therefore, when DHEC issued its "Notice of Department Decision – Water Quality Certification" on May 15, 2009, it lacked authority to do so because the waiver had already occurred. Likewise, Duke argues that the Board lacked authority to make its Final Agency Decision denying the WQC application on August 6, 2009, since there was no valid staff decision for it to review.

DHEC and the Conservation Groups, on the other hand, contend that Duke's motion for summary judgment should be denied because there are genuine issues of material fact which require development through discovery and which should be resolved on the merits, including documentary evidence which establishes the fact that DHEC sent Duke a number of requests for additional information to support its application. DHEC and the Conservation Groups argue that these requests for additional information had the effect of tolling the 180 day time frame for issuance of a proposed decision pursuant to 24A S.C. Code Ann. Regs. 61-30 (Supp. 2009).²

² DHEC and the Conservation Groups also argue that to the extent Duke's motion relies upon its Requests to Admit served upon DHEC, such reliance is inappropriate. First, they contend DHEC either responded to the

DHEC and the Conservation Groups thus contend that both Regulations 61-101 and 61-30 apply to WQC applications, but that Regulation 61-30 provides a specific method of determining when processing of a WQC application is suspended. To the contrary, Duke argues that Regulation 61-30 must be read separately from Regulation 61-101 and has no effect on whether processing of an application is being suspended under the latter regulation.

Regulation 61-30

Regulation 61-30 (Fee Regulation) is entitled "Environmental Protection Fees" and was promulgated to implement the South Carolina Environmental Protection Fund Act, S.C. Code Ann. §§ 48-2-10 thru 48-2-90 (2008) (Fees Act). The Fees Act requires the Department to charge fees for the various services and functions it performs under the seven (7) statutes

requests in a timely manner or, in the alternative, DHEC should be allowed to withdraw its admissions. Second, they argue that the requests, even if deemed admitted by DHEC, are not binding on the Conservation Groups. At the outset of the hearing, the Court addressed the issue of whether DHEC belated response to Duke's Request to Admit be allowed. DHEC's response was one week late. During that timeframe the daughter of DHEC's counsel was hospitalized. I find that these facts reflect good cause to allow the belated response. Furthermore, Duke has established no prejudice as a result of that one week delay. In fact, in its Reply Memorandum in support of the motions, Duke asserts that DHEC's responses to the Requests to Admit, which were submitted on January 25, 2010 and which are incorporated in DHEC's Memorandum in opposition to the motions, do not create any disputed issues of fact even if this Court does not deem the Requests to Admit to be admitted by rule.

Furthermore, DHEC and the Conservation Groups contend Duke's "motions improperly seek relief not requested in Duke's pleadings in the case." However, no pleadings have been ordered by the Court in this matter pursuant to ALC Rule 18. Therefore, there are no binding pleading upon which to make this motion. Rather, Duke filed a Notice of Request for Contested Case Hearing and thereafter the Court ordered that the parties submit Prehearing Statements. The Court's Order for Prehearing Statements required the parties to state, to the best of their ability, the "action requested of the Court" Duke's Prehearing Statement requests the Court to issue a 401 Certification as developed by the Department staff or "[a]lternatively, the Court could find that the Department failed to comply with regulatory and statutory requirements to act within 180 days and within one-year" Therefore, the issue of waiver is properly before the Court.

Finally, DHEC and the Conservation Groups argue that Duke cannot raise the issue of waiver at the contested case level because the issue was not raised before the DHEC Board at the Final Review Conference. However, this proceeding is a "contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act." S.C. Code Ann. § 44-1-60(F)(2) (Supp. 2009). In a contested case proceeding, the ALC is not restricted to a review of the decision below, but instead the proceeding before the ALC is "in the nature of a *de novo* hearing." Reliance Ins. Co. v. Smith, 327 S.C. 528, 534, 489 S.E.2d 674, 677 (Ct. App. 1997); see also Marlboro Park Hosp. v. S.C. Dep't of Health and Envtl. Control, 358 S.C. 573, 595 S.E.2d 851 (Ct. App. 2004). A trial *de novo* is one in which "the whole case is tried as if no trial whatsoever had been had in the first instance." Blizzard v. Miller, 306 S.C. 373, 375, 412 S.E.2d 406, 407 (1991). Although Act 387 of 2006 changed the nature of the DHEC Board's review from an appellate review following the contested case hearing before the ALC to an administrative review preceding the contested case hearing, the Act did not change the nature or scope of the ALC's review. The ALC clearly holds a "contested case hearing" under Section 44-1-60(F), and a "contested case hearing" is the due process evidentiary hearing required by the South Carolina Constitution. See 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 such instances the right to judicial review."). Accordingly, in a contested case hearing the ALC may consider every fact and legal issue relevant to the decision of DHEC, whether or not the fact or issue was raised at the Board level.

including the Pollution Control Act. S.C. Code Ann. § 48-2-30(B) (2008).³ The Fees Act further requires the promulgation of regulations establishing “a schedule for timely action by the Department of Health and Environmental Control on permit applications under [programs for which a permit processing fee is established].” S.C. Code Ann. § 48-2-70 (2008). Furthermore, Section 48-2-70 specifically provides that:

These schedules shall contain criteria for determining in a timely manner when an application is complete and the maximum length of time necessary and appropriate for a thorough and prompt review of each category of permit applications and shall take into account the nature and complexity of permit application review required by the act under which the permit is sought. 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.

(emphasis added). In accordance with the above statutory directive, Regulation 61-30(A) provides:

Pursuant to South Carolina Code Sections 48-2-50(1993) and 48-39-145, the Department of Health and Environmental Control shall charge fees for environmental programs it administers pursuant to federal and state law and regulations. This regulation prescribes those fees applicable to applicants and holders of permits, licenses, certificates, certifications, and registrations (hereinafter, “permits”) and establishes schedules for timely action on permit applications. . . .

24A S.C. Code Ann. Regs. 61-30(A) (Supp. 2009) (emphasis added). A “permit” is described in the regulation as “any permit, license, certificate, registration, plan approval, variance, or other approval issued by or required by the Department or any of its divisions, pursuant to any statute or regulation.” Regs. 61-30(B)(13) (emphasis added). Accordingly, Regulation 61-30 applies to any permit issued by DHEC, including WQC Certifications.

With respect to time schedules, Regulation 61-30(H)(2)(vii) establishes a 180 day time frame for DHEC to make a determination on a WQC certification. The time schedule is computed beginning on the day notice is mailed to the applicant that the application is deemed “administratively complete,” however, “[i]f notice that the application is Administratively Complete or notice that the application is not Administratively Complete, together with notice of the specific items deemed to be lacking, is not mailed to an applicant within ten (10) working

³ Those fees are deposited in a special account within the Treasurer’s Office. S.C. Code Ann. § 48-2-30 (A) (2008).

days of receipt of an application, the time period will begin.” Regs. 61-30(H)(1)(b). More importantly, “the 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.” Regs. 61-30(H)(1)(c).

Nevertheless, the Department, as a matter of law cannot invoke provisions in a regulation promulgated under one Act in an action within the statutory authority of a different Act.

As a creature of statutes, regulatory bodies like DHEC have only the authority granted them by the legislature. Any action taken by DHEC outside of its statutory and regulatory authority is null and void.

Responsible Economic Dev. v. S.C. Dep’t of Health and Env’tl. Control, 371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007) (citation omitted). Based upon that reasoning, our Supreme Court held in Responsible Economic Development that since there was no statutory authorization to apply the Pollution Control Act and the Stormwater Act and their corresponding regulations to each other, “the regulations of the Pollution Control Act do not apply to the Stormwater Act or its regulations.” Id.

Here, there are no provisions that specifically provide the regulations are overlapping. Rather, each regulation administers the provisions of the law authorizing the regulation. The Fee Act requires the Department to establish a schedule for timely action so as to have a time frame by which to determine if an applicant is entitled to a refund of the application fee. S.C. Code Ann. § 48-2-70 (2008). Following that authority, Regulation 61-30.B(22) defines “Time Schedules” as follows:

“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.

24A S.C Code Regs. 61-30(B)(22) (Supp. 2009) (emphasis added). Accordingly, the Time Schedules in Section H of Regulation 61-30 are limited to determining if and when to grant a refund. It does not create a new overriding or superseding timeframe for the reviewing of all environmental permits issued by the Department.

DHEC nonetheless argued that it needs the ability to toll the 180 day timeframe pursuant to Rule 61-30 to insure it obtains the information it needs to decide these cases. However, the General Assembly has nonetheless generally established a timeframe for making these determinations to be 180 days. In complying with that timeframe the Regulation permits DHEC to set an appropriate time for submittal of information. However, by establishing that these matters must generally be decided within 180 days, the General Assembly has made the determination that 180 days is usually a sufficient period of time to reach a determination in these matters. Nevertheless, regulation 61-101 does provide for a means by which the 180 days may be tolled though it is not via the procedure that DHEC wishes to utilize. If the information is not submitted within that time period DHEC may upon notice suspend processing the certification if the information is necessary for reaching a certification decision. See 25A S.C. Code Ann. Regs. 61-101(C)(4) (Supp. 2009). DHEC thus obviously has a means to obtain the information necessary for it to make an informed decision without the need to engineer a construction of its regulations to accomplish that goal. Therefore, review of whether the Department timely reviewed the permit in this case is properly made pursuant to Regulation 61-101.

Review under Regulation 61-101

Duke filed its application for a WQC with DHEC on May 5, 2008. Thereafter, DHEC and Duke exchanged correspondence on several occasions. First, on June 27, 2008, e-mail exchanged between Duke's representative and DHEC's representative refers to Duke's attempt to identify adjacent property owners. On July 29, 2008, another e-mail from Duke to DHEC discusses the publication of public notices in South Carolina newspapers and includes an attachment listing mailing addresses of some of the adjacent property owners. Also on July 29, 2008, DHEC sent an e-mail to Duke that specified that an application fee of \$1,000.00 and affidavit of publication would be required before DHEC would process Duke's WQC application. The e-mail stated, in part:

The Department has 180 days to complete action on an application for 401 Water Quality Certification or the assessed fee must be returned. The 180 days includes only those days in which the application is actively being reviewed by the Department; the clock stops when information is requested and the SC Department of Health and Environmental Control is waiting on a response.

Accordingly, the 180 day clock will not start until we have received an affidavit of publication and the appropriate fee.

See Ex. 1 to Affidavit of William "Rusty" Wenerick in Support of DHEC's Response to Petitioner's Motions (Wenerick Affidavit) (emphasis in original).

Public Notice No. DHEC-08-C-001 was issued by DHEC on August 8, 2008. This notice informed the public that DHEC would accept comments on the Project received on or before October 7, 2008. The notice also included identical language concerning the running of the 180 day time frame to that quoted above. The Department subsequently sent a formal request for additional information to Duke on August 19, 2008, regarding the draft Quality Assurance Protection Plan (QAPP) that had been attached to Duke's application. This request also stated that "[o]nce the fee and affidavit of publication is received (requested 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." See Ex. 6 to Wenerick Affidavit. Subsequent formal requests for additional information sent by DHEC to Duke on October 8, 2008, and October 21, 2008, included language stating that "the clock stops when information is requested and the Department is waiting on a response." See Exs. 7-8 to Wenerick Affidavit. Duke provided responses to the October 8 request on November 10, 2008, and March 9, 2009. It responded to the October 21 request on November 21, 2008, and December 12, 2008, and continued to exchange information with DHEC on this request into February of 2009. See Ex. 8 to Wenerick Affidavit. With regard to the August 19, 2008 request for a draft QAPP, Duke submitted a revised QAPP on January 9, 2009, and DHEC notified Duke that the August 19 request was satisfied as of January 12, 2009. See Ex. 6 to Wenerick Affidavit. DHEC issued its proposed WQC decision on May 15, 2009.

Duke contends that none of these items of correspondence had the effect of tolling the 180 day time frame set forth in Regulation 61-101; it argues that the notices about the "180 day clock" pertains only to whether a fee refund would be required pursuant to Regulation 61-30. Regulation 61-101(A)(6) provides that unless an application is "otherwise suspended," by the Federal permitting agency, the applicant or the Department "on its own volition," DHEC must issue a proposed WQC decision within 180 days of acceptance of an application. The

Regulation further provides that: "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." Regs. 61-101(C)(2). Finally, the Regulation states that "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." Regs. 61-101(C)(4).

The WQC Regulation thus authorizes the Department to suspend the 180-day time period for issuing a decision only if one (1) of two (2) events occurs -- either, (1) FERC suspends processing of the federal license application during the 180 days, or (2) the applicant fails to timely submit requested additional information necessary for reaching a certification decision to the Department and the Department notifies the applicant of the suspension. It is undisputed that neither Duke nor the Department requested FERC to suspend processing of Duke's license application, and FERC did not suspend processing of the license application on its own volition. Furthermore, the Department did not notify Duke that it was suspending the processing of its application because they failed to timely submit requested additional information necessary for reaching a certification decision.

While the Department, in the course of requesting additional information from Duke, included language advising Duke of the provisions of the Fee Regulation, that language clearly did not meet the legal requirement for suspension pursuant to R.61-101, i.e. notification of suspension after the applicant fails to submit information requested pursuant to the WQC Reg in a timely manner. In other words, the boilerplate language in the requests for additional information cannot possibly comply with the WQC Regulation's suspension requirement because the Department issued them to inform Duke of the date the responses were due. They were not issued after the due date, a prerequisite to the notice of suspension.

As of August 8, 2008, the application fee had been paid by Duke and DHEC put the application on public notice. Once the application was put on public notice, it was deemed complete. Therefore, the time within which the Department could request additional information

from Duke expired on August 18, 2008. On August 19, 2008 DHEC sent a request for additional information regarding the Quality Assurance Program Plan. The August 19 request was not timely and therefore did not create a suspension of time within which the Department was required to issue a decision.

Implication of Not Acting within 180 Days

DHEC and the Conservation Groups argue that Regulation 61-101 does not set forth any consequence for DHEC's failure to comply with the 180-day time frame and that the Court should therefore not assume that the legislature intended for DHEC to waive its power to dictate 401 permit terms once the 180-day time period elapses. In support of that contention, they cite Johnston v. S.C. Dep't of Labor, Licensing, and Regulation, 365 S.C. 293, 617 S.E.2d 363 (2005). In Johnston, a licensed real estate appraiser was charged by the Real Estate Appraisers Board (Board) with violating certain regulations applicable to those in his profession. After an administrative hearing on the matter, the Board found that the appraiser had committed the alleged violations and therefore issued a written order imposing a fine and suspending his license. Pursuant to S.C. Code Ann. § 40-60-150(C)(3) (Supp. 2004),⁴ the Board was required to serve written notice of its decision on the appraiser within thirty days of issuing its final order. However, notice of the Board's decision was not properly served on the appraiser within the requisite thirty-day time period. Thereafter, the appraiser appealed the Board's decision to the ALC. The ALC reversed the Board's order, finding that the Board's failure to serve notice of its decision within the statutorily-mandated time period divested the Board of jurisdiction to decide the matter. However, on further appeal, the Supreme Court held that the failure by the Board to comply with Section 40-60-150(C)(3) did not affect the Board's jurisdiction. Instead, the Supreme Court held that the Board's decision was valid, but ineffective, until it was served upon the appraiser. The Supreme Court explained:

There is no indication the Legislature intended for the time limit to prevent the Board from having the ability to discipline an errant appraiser if the Board fails to serve notice of the written decision within the prescribed time period. Instead, the Legislature intended to speed the resolution of appraiser disciplinary cases for the benefit of all parties involved. . . . We note that, although the thirty-day time limit is mandatory, the Legislature has not provided how that mandate is to be

⁴ S.C. Code Ann. § 40-60-150(C)(3) (Supp. 2004) stated in pertinent part: "The board shall render a decision and shall serve notice, in writing within thirty days, of the board's decision to the applicant or appraiser charged."

enforced. There is no language regarding the consequences if the Board misses the deadline for serving written notice of its decision on the appraiser. Accordingly, we will not assume the Legislature intended the Board to lose its power to act for failing to comply with the statutory time limit.

Johnston, 365 S.C. at 297-98, 617 S.E.2d at 365 (internal citations omitted). The Supreme Court then determined that the appraiser was not prejudiced by the Board's failure to complete service within thirty days of the Board's issuance of its decision, and it therefore remanded the case to the ALC for a ruling on the merits of the appraiser's other claims. Id. at 298, 617 S.E.2d at 365.

The present case is distinguishable from Johnston. In analyzing the implications of the 180 day timeframe for water quality certification under Regulation 61-101(A)(6) it is important to review the progression of the regulation's language in light of the Federal CWA. The first sentence of Regulation 61-101(A)(6) recognizes that the Department is required by Federal law to either:

- Issue the certification;
- Deny the certification; or
- Waive the certification

"within one (1) year of acceptance of a completed application unless processing of the application is suspended." More specifically, that Federal law provides that if the Department "fails or refuses to act on a request for 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." 33 U.S.C.A. § 1341(a)(1) (emphasis added). Clearly, Section 1341(a)(1) of the Federal law provides that if the State of South Carolina fails to properly act on a WQC within one year, the authority of the Department to review the certification request shall be waived. Therefore, at the outset, this is a matter that is undoubtedly subject to waiver or loss of jurisdiction by failure to act. Consequently, the issue in this case is not whether a certification (or under the analysis in Johnston, the jurisdiction) can be waived, but rather when it is waived.

The second sentence of Regulation 61-101(A)(6) provides for how the running of the timeframe may be suspended – by the Federal permitting agency, the applicant or the Department "on its own volition." This sentence is important because it notifies all participants in this process of the procedure under which the timeframe for issuing a decision on the permit

may be suspended. Importantly, Duke Energy correctly asserts that it is entitled to rely upon that established procedure.

Finally and most importantly, the last sentence of Regulation 61-101(A)(6) answers the question of when review of a certification is waived in South Carolina. It implements a 180 day timeframe to issue a proposed decision if the application is not suspended. While Regulation 61-101 does not expressly set forth consequences for DHEC's failure to timely issue its certification within 180 days, Regulation 61-101 clearly reflects the General Assembly's determination that these decisions must be made within 180 days unless the timeframe is otherwise suspended. Moreover, reviewing Regulation 61-101 in light of the CWA provisions clearly reflects that it addresses the waiver provision of the CWA. Therefore, the only reasonable interpretation of Regulation 61-101(A)(6) is that the 180 day (or approximately six month) time period implements the "reasonable period of time" for consideration of a certification under 33 USCA § 1341. In providing that timeframe, Regulation 61-101(A)(6) further requires the Department to issue its proposed decision within 180 days of acceptance of an application.⁵ Regulation 61-101(A)(6) thus establishes a mandatory timeframe in which a decision must be issued in South Carolina before it is waived.

Furthermore, if a waiver is not imposed by operation of Regulation 61-101, there is no consequence to the Department for not issuing a proposed decision in compliance with the time period established by the Legislature. Hence, by promulgating and adopting Regulation 61-101(A)(6) the State of South Carolina established in state law that the "reasonable time" within which the Department must issue or deny certification is 180 days, and if the Department fails or refuses to act on a request for certification within the 180 day time period, the state certification requirement with respect to the Federal permit application is waived. In this case, DHEC failed to follow its own procedures, since there is no indication that it ever requested additional information from Duke in accordance with Regulation 61-101 or that it suspended the processing

⁵ "The term 'shall' in a statute means that the action is mandatory." Wigfall v. Tideland Utils., Inc., 354 S.C.100, 111, 580 S.E.2d 100, 105 (2003); see also Goodman v. City of Columbia, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995) (A regulation authorized by the legislature has the force of law.) This timeframe is therefore mandatory.

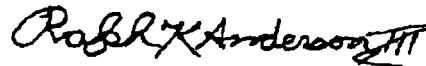
of the permit pending the receipt of additional information. To allow DHEC to now to proceed with its review would render the 180 day requirement meaningless.⁶

Finally, in Johnston, had the Supreme Court agreed with the appraiser's argument, it would have meant that the appraiser would have gone undisciplined for his actions. Clearly, allowing licensed real estate appraisers to go unpunished for their professional misdeeds is not in the public's best interest. Here, however, a state's waiver of its right to dictate 401 permit terms does not affect the federal government's authority to place conditions on the permit in accordance with federal law. See Christopher J. Eggert, The Scope of State Authority Under Section 401 of the Clean Water Act after PUD No. 1 v. Washington Department of Ecology. Accordingly, a waiver of the WQC in this instance does not mean that all review is evaded.

ORDER

For all the foregoing reasons, Duke's Motion for Summary Judgment is hereby GRANTED.

AND IT IS SO ORDERED.



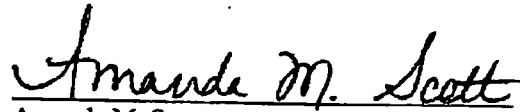
Ralph King Anderson, III
Chief Administrative Law Judge

June 10, 2010
Columbia, South Carolina

⁶ It is also notable that in Johnston, because the Board's decisions do not become effective until they are served on the appraiser, the Board has an independent reason to promptly serve the appraiser. Here, however, proposed projects cannot go forward until a certification is issued. DHEC generally has no independent reason to timely issue its certification other than the possibility of losing its power to deny or dictate the conditions of a certification.

CERTIFICATE OF SERVICE

I, Amanda M. Scott, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Amanda M. Scott
Judicial Law Clerk

June 10, 2010
Columbia, South Carolina

APX 000390

2. In their memorandum opposing Duke's Motions, filed Feb. 12, 2010, the Conservation Groups argued, among other things, that Duke's Motions should be denied pursuant to Rule 56(f) because they would require the premature resolution of disputed factual issues. (Conservation Groups' Mem. Opp'n Duke's Mot. Summ. J. 6-9.)

3. In a joint supplemental memorandum filed April 27, 2010, the Conservation Groups and DHEC further described ongoing discovery that concerned issues raised in Duke's Motions, including numerous depositions and the review of voluminous document productions, of which Duke's alone totaled over 130,000 pages. (Joint Supp. Mem. Opp'n Pet'r's Mot. Summ. J. & Mot. Decl. J. 6.)

4. The Court heard oral argument on Duke's Motions on May 6, 2010. At that time, discovery still had not concluded. The parties were in the midst of conducting numerous depositions, Respondents were continuing to review Duke's document productions, and the Conservation Groups' Motion for Additional Discovery – seeking additional interrogatories, requests for admission, and depositions (portions of which Duke had consented to and all of which DHEC had consented to) – was pending simultaneously before the Court. Shortly thereafter, on May 12, 2010, the Conservation Groups filed a motion to compel the production of certain documents by Duke, when attempts to secure the documents from Duke without a motion failed. When discovery concluded on May 17, 2010, 13 witnesses (including some from each of the parties) had been deposed, one deposition had been terminated unilaterally before its conclusion by Duke's counsel (Deposition of Mark Oakley 75:15-77:3, May 14, 2010),¹ and the

¹ Duke terminated the personal deposition of Mark Oakley during the course of questioning by DHEC's counsel on May 14, 2010, after less than three hours (which included a dinner break). The parties had agreed in advance that Oakley's deposition would follow the 30(b)(6) depositions of Duke's client representatives. As DHEC counsel was exploring Oakley's understanding of notices he received from DHEC tolling the decision on the application, counsel for Duke abruptly terminated the deposition and threatened sanctions against DHEC's lawyer "individually" if DHEC pursued anymore "issues" for deposition:

Conservation Groups' Motion for Additional Discovery and their Motion to Compel documents from Duke were pending before the Court. After the conclusion of discovery, on June 1, 2010, Duke also filed a Motion to Compel seeking production of documents that DHEC asserted were privileged.

5. The Court granted Duke's Motion for Summary Judgment and Motion for Declaratory Judgment on June 10, 2010.

6. In light of the following additional evidence developed during the course of discovery, which includes documents discovered and deposition testimony elicited after the hearing on Duke's Motions, DHEC and the Conservation Groups respectfully request that the court reconsider its ruling granting Duke's Motions. The following additional evidence supports DHEC's and the Conservation Groups' arguments that the evidence, viewed in the light most favorable to the non-movants, shows that DHEC complied with the processing requirements of Regulations 61-101 and 61-30. At a minimum, this additional evidence shows that a genuine question of material fact exists as to whether DHEC complied with the processing requirements of 61-101 and 61-30, rendering summary judgment inappropriate (Conservation Groups' Mem. Opp'n Duke's Mot. Summ. J. 12-18; DHEC Mem. Opp'n Pet'r's Mot. Summ. J. 2-5, 12-15.):

Q. Well, but this is going to your statement in your affidavit that you weren't notified --

MR. LONG: All right. We're done. We're done. I'm terminating the deposition. You're harassing this witness.

MR. HIGHTOWER: No. I am trying to make sure --

MR. LONG: Hold on. It is 8:30. This goes well beyond what is reasonable for this witness, it goes well beyond the redirect and I'm terminating it. We're done. Enjoy your drive back.

MR. POTTER: I am speaking as a South Carolina attorney, if you have anymore issues I will file a protective order on Monday seeking sanctions against you individually.

(Oakley Dep. 75:15-76:7.)

This occurred after the Court's hearing on Duke's Motions and three days before the conclusion of discovery.

Deposition of Mark Oakley (and referenced exhibits): 9:4-11:6, 13:8-16:16, 18:2-19:16, 21:24-23:23, 25:7-31:7, 33:22-39:15, 41:6-43:16, 44:3-45:6, 46:21-49:25, 56:15-59:21, 60:10-64:1, 68:23-70:16, 73:17-77:3.

30(b)(6) Deposition of Duke Energy Carolinas, LLC (Mark Oakley): 151:8-154:17.

Deposition of William R. Wenerick: 36:2-37:2, 41:24-43:11, 50:14-25.

Documents produced by Duke: DE_CWHP0010715, DE_CWHP0010738, DE_CWHP0010758, DE_CWHP0010806-10808, DE_CWHP0011050-11052, DE_CWHP0012248, DE_CWHP0012153-12154, DE_CWHP0012940-12943, DE_CWHP0013149, DE_CWHP0017255-17257, DE_CWHP0017485-17488, DE_CWHP0022050-22052, DE_CWHP0031661-31675, DE_CWHP0031841-31842, DE_CWHP0032871-32873.

Copies of these depositions, deposition exhibits, and documents produced by Duke are being submitted herewith.²

7. This additional evidence also underscores the Conservation Groups' argument that Duke's Motions, filed at the outset of discovery, not only improperly turned on the resolution of disputed issues of material fact, but required the Court to prematurely resolve those disputed questions based upon an incomplete presentation of material evidence. (Conservation Groups' Mem. Opp'n Duke's Mot. Summ. J. 6-9.) The Conservation Groups respectfully request that the Court amend its Order and deny summary judgment on this basis.

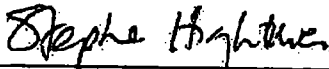
8. Finally, the additional evidence cited herein lends further support for the equitable arguments raised by DHEC and the Conservation Groups in their supplemental memorandum. (Joint Supp. Mem. Opp'n Pet'r's Mot. Summ. J. & Mot. Decl. J. 5-6.) The Conservation Groups and DHEC respectfully request that the Court amend its Order and deny summary judgment on the grounds that a question of fact exists as to: whether Duke is estopped from claiming waiver because it invited or induced the very delay it asserts should result in waiver; whether Duke

² DHEC and the Conservation Groups have identified herein particularly relevant portions of each deposition listed for the convenience of the Court, but each deposition may contain additional relevant testimony and, therefore, a copy of each deposition transcript in its entirety is being provided for completeness of the record.

waived any timeliness objection by failing to raise it during agency processing of the water quality certification application and by defending the water quality certification it later sought to have waived; and whether the timeframe for processing the application should be equitably tolled.

For the reasons stated herein, the Conservation Groups and DHEC respectfully request that the Court reconsider and amend its ruling on Duke Energy's Motion for Summary Judgment and Motion for Declaratory Judgment, entered June 10, 2010, and deny the same.

This the 21st day of June, 2010.

 (by ed w. l. as per permission)

Stephen P. Hightower
Office of General Counsel
S.C. Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201
Tel.: (803) 898-3349
Fax: (803) 898-3367
HIGHTOSP@dhec.sc.gov

*Counsel for Respondent S.C. Department of Health and
Environmental Control*



Christopher K. DeScherer
SOUTHERN ENVIRONMENTAL LAW CENTER
43 Broad Street, Suite 300
Charleston, SC 29401
Tel: (843) 720-5270
Fax: (843) 720-5240
cdescherer@selcsc.org

Julia F. Youngman, admitted *pro hac vice*
SOUTHERN ENVIRONMENTAL LAW CENTER
200 West Franklin Street, Suite 330
Chapel Hill, NC 27516
Tel: (919) 967-1450
Fax: (919) 929-9421
jyoungman@selcnc.org

Richard Roos-Collins, (*pro hac vice*)
Natural Heritage Institute
100 Pine Street, Suite 1550
San Francisco, CA 94111
Telephone: (415) 693-3000 ext. 103
Facsimile: (866) 407-8073
rrcollins@n-h-i.org

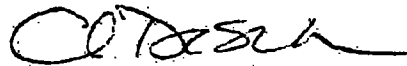
*Counsel for Respondent-Intervenors American Rivers and
South Carolina Coastal Conservation League*

CERTIFICATE OF SERVICE

I hereby certify that I am counsel for Respondent-Intervenors South Carolina Coastal Conservation League and American Rivers in the above-captioned matter, and that on the 21st day of May, 2010, I served a copy of the foregoing Joint Motion for Reconsideration on the following persons via U.S. Mail, first-class postage prepaid:

James W. Potter, Esq.
Nexsen Pruet, LLC
1230 Main Street, Suite 700
P.O. Drawer 2426
Columbia, SC 29202

Nash E. Long, III, Esq.
Winston & Strawn LLP
214 N. Tryon Street
Charlotte, NC 28202



Christopher K. DeScherer
SOUTHERN ENVIRONMENTAL LAW CENTER
43 Broad Street, Suite 300
Charleston, SC 29401

That is also tied to the database that John has, so there is no need to go through Walter. We have the same shared capability using the latest county parcel data. Ours is tied also to the permit database.

Joe S Hall, Director, Lake Services
Duke Energy Lake Services - EC12Q
PO Box 1006
Charlotte, NC 28201-1006
Phone 704-382-8576
Fax 704-382-8614

From: Oakley, Mark
Sent: Friday, June 27, 2008 12:43 PM
To: Hall, Joe
Cc: 'John P. Eddins'; Reagan, Kelvin K
Subject: RE: I need some C-W info in case SCDHEC wants us to mail out 401 notices.

I'm not sure I need this yet, I just want to be prepared.

Ed also told me that Walter Dixon may have a way to get addresses via county GIS records, so I'm going to ask him also.

From: Hall, Joe
Sent: Friday, June 27, 2008 12:04 PM
To: Oakley, Mark
Cc: John P. Eddins; Reagan, Kelvin K
Subject: RE: I need some C-W info in case SCDHEC wants us to mail out 401 notices.

Mark,

We do have a comprehensive database but there are limitations based primarily on how accurately the data was entered and the age of the data esp. current owners and addresses. I have already asked to have a continually updated method to track the number of piers, etc by lake on all projects. This is still in progress. The best way to pull together the contact information will be to work with John Eddins to pull in the data from the pier permit database. John will be out all week with his newborn (scheduled for 7/2). He will typically respond to emails at his Theorem address (and I copied him on this note) and will likely do the analysis when we request. How soon do you need this?
Thanks.

Joe S Hall, Director, Lake Services
Duke Energy Lake Services - EC12Q
PO Box 1006
Charlotte, NC 28201-1006
Phone 704-382-8576
Fax 704-382-8614

From: Oakley, Mark
Sent: Friday, June 27, 2008 11:05 AM
To: Hall, Joe; Reagan, Kelvin K
Subject: I need some C-W info in case SCDHEC wants us to mail out 401 notices.

I assume we maintain a data base of all C-W permit holders (piers, docks, marinas, everyone who has a non-project use permit).

How many permit holders are there on the C-W reservoirs in SC?

Do we have reliable mailing addresses for them all? Are addresses in a format that we could create mailing labels?

Do we have reliable e-mail addresses for them all?

I'm trying to fight this off.

DE_CWHP0032873

From: Oakley, Mark
Sent: Friday, July 18, 2008 04:35 PM
To: John P. Eddins; Hall, Joe
CC: Styer, Tami C; Carriker, Joseph W
Subject: RE: I need some C-W info in case SCDHEC wants us to mail out 401 notices.

I have spoken to SCDHEC this morning and they have decided that they need to send letters to all property owners adjacent to the reservoir or main stem river shoreline in the Catawba-Wateree basin. I agreed that we would proceed to pull together a mail list of these property owners and send it to SCDHEC.

John, I believe you have advised that you have all the data you need. I'd like to discuss with you at your earliest convenience. I will be out of the office Monday and probably Tuesday, so you can call me at 704-382-5778 (office) or at 704-564-5490 (cell).

Thanks.

From: John P. Eddins [mailto:JEddins@theoremgeo.com]
Sent: Monday, July 14, 2008 7:05 PM
To: Oakley, Mark; Hall, Joe
Cc: Styer, Tami C; Carriker, Joseph W
Subject: RE: I need some C-W info in case SCDHEC wants us to mail out 401 notices.

Mark,

Just wanted to give you a status update.

I went today and picked up Kershaw and Fairfield county data so I have all of the info needed (I was wrong on the Kershaw data costs, total data cost was 2350.00 for Kershaw instead of the 2000.00 I initially reported (additional 350 for cama/ownership data)).

I have to get a couple of maps done for Jen tonight but will start on these mailing address tomorrow.

Data Costs: Kershaw \$2,350.00
 Fairfield: \$1,000.00

If there are any questions, comment or concerns, don't hesitate to contact me. Cell phone will be best.

Thanks,
John

John P. Eddins
Theorem Geo Associates
www.TheoremGeo.com
jeddings@TheoremGeo.com
704.231.3606

From: Oakley, Mark [mailto:emoakley@duke-energy.com]
Sent: Monday, June 30, 2008 8:30 AM
To: John P. Eddins; Hall, Joe
Cc: Styer, Tami C
Subject: RE: I need some C-W info in case SCDHEC wants us to mail out 401 notices.

Thanks, John, this is good info.

What I would need is a list of the names and mailing addresses of all property owners adjoining the SC reservoirs, the river below Wylie Hydro and the river below Wateree hydro (I may need to limit the distance below Wateree Hydro).

All I really need to know from you now is your confirmation of how long this would take (including purchasing Kershaw County data). I am not going to ask any more of you while you are out for the

DE_CWHP0032871

birth. Take care of you and your family first.

I'm hoping I can talk SCDHEC out of doing such an extensive mailing, since it may bring out a lot of new issues that were never intended to be addressed in the relicensing process and could significantly mire the water quality certification process if SCDHEC tries to deal with them all.

From: John P. Eddins [mailto:JEddins@theoremgeo.com]
Sent: Saturday, June 28, 2008 3:40 PM
To: Oakley, Mark; Hall, Joe
Cc: Styer, Tami C
Subject: RE: I need some C-W info in case SCDHEC wants us to mail out 401 notices.

Mark,

To answer your question below, the answer is yes. Currently all adjacent property owners to the lake can be pulled along with their address (Kershaw county is an exception, I do not have data for them but that data is available, it just needs to be purchased). The leg work for what you are asking has been done so that info could be pulled and put into a mail merge format in a couple of hours.

If however, you wanted to limit the data/contacts pulled to specific records in the private permits database, I could supply you with a list but I only have roughly 13500 of 35000 records matched with a confidence of 60% or greater (anything with a lower match probability was not considered a match).

Conversely, if you wanted contact info for all parcels that have a structure as of 2005/2006 photography, I could pull this contact info quickly with a very high degree of confidence in the data (made points where there was a structure on the newest available photography and have associated point to pull related parcel data).

If you think you may need this info this coming week, please let me know Monday and I can get it done on Monday or Tuesday.

My wife threatened my life if I so much as look at a computer from 7/2-7/5. I waited for it, but she never smiled, so I think she was serious. Since life is one of those things I enjoy, I am going to be unplugged and offline for a few days.

Thanks,
John

John P. Eddins
Theorem Geo Associates
www.TheoremGeo.com
jeddings@TheoremGeo.com
704.231.3606

From: Oakley, Mark [mailto:emoakley@duke-energy.com]
Sent: Friday, June 27, 2008 1:45 PM
To: Hall, Joe; John P. Eddins
Cc: Styer, Tami C
Subject: RE: I need some C-W info in case SCDHEC wants us to mail out 401 notices.

Good info. I didn't know that.

What I need to know is can we gather adjacent property owner names and addresses via county GIS property records (for the counties that have GIS-based records), how feasible this is, how complete we think the GIS systems are and how long it would take to pull together adjacent landowner names and addresses.

I can't in good conscience ask John to start this before he returns from being out for the baby, but would like him to start this when he gets back in the office.

Thanks! Good stuff.

From: Hall, Joe
Sent: Friday, June 27, 2008 12:55 PM
To: Oakley, Mark
Subject: RE: I need some C-W info in case SCDHEC wants us to mail out 401 notices.

DE_CWHP0032872

Mark Oakley

May 14, 2010

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1 Q. You understood how the review process
2 was going to go on?

3 A. I understood that I had to deliver
4 information by October 19th.

5 Q. Okay. I'm going to show you an
6 e-mail that I'm going to have marked as Respondent's
7 Exhibit 8.

8 (THEREUPON, Respondent's Exhibit 8
9 was marked for identification).

10 (Recess in Proceedings).

11 BY MR. HIGHTOWER:

12 Q. Okay. You talked about there being a
13 third clock. What were the three clocks that you
14 were talking about?

15 A. This actually does a pretty good job
16 of setting them up.

17 Certainly the e-mail begins with a
18 discussion of the fee clock.

19 Q. Uh-huh.

20 A. It adds to that a question to Mr.
21 Wenerick regarding -- basically asking help
22 reconciling that requirement with 61-101.C.2 and
23 then advises Mr. Wenerick that I was aware of a FERC
24 requirement of a one-year clock and asking that this
25 be added to the other two questions that we had

Mark Oakley

May 14, 2010

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1 asked and that we can reconcile how the clocks work
2 in this case.

3 Q. Did you get a response?

4 A. I did not.

5 Q. Did you follow up?

6 A. I followed up some months later.

7 This is in October of 2008. I
8 believe it was in February 2009 that I advised Rusty
9 that I had learned additional information about the
10 federal clock, specifically that there are no
11 tolling provisions and it's a pretty strict 365-day
12 requirement.

13 Q. Okay. Anything else?

14 That's one clock. Did you discuss
15 the other two clocks?

16 A. No.

17 I was, frankly, more focused on
18 delivering information.

19 Q. Did you seek an opinion from the
20 department, a formal opinion from the department,
21 from the General Counsel's office?

22 A. Mr. Wenerick advised that he had
23 sought clarification from the counsel's office.

24 Q. Okay. Did you discuss this matter at
25 all with counsel for Duke, either in-house counsel

Mark Oakley

May 14, 2010

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1 Okay. And by that type of training
2 usually people tend to be very detailed oriented,
3 wouldn't you agree?

4 A. In general terms.

5 Q. Just speaking in generalities right
6 now.

7 When I asked you before about the
8 procedures of, you know, do you go to in-house
9 counsel or outside counsel, is that written down
10 anywhere?

11 A. No.

12 Q. Duke has no formal procedure for
13 obtaining legal advice?

14 MR. LONG: Object to the form, lacks
15 foundation.

16 You can answer.

17 THE WITNESS: I'm sure that our
18 in-house attorneys do, but they're our first
19 stop, they make the decision on outside counsel
20 and who and when and for what topics.

21 BY MR. HIGHTOWER:

22 Q. So when did you seek some information
23 from in-house counsel with regard to this matter?

24 MR. LONG: Objection, it's vague.

25 You can answer.

Reported By: April Reid, RPR, CRR, CLR www.huseby.com

HUSEBY, INC. - 1230 W. Morehead Street, #408, Charlotte, North Carolina 28208 (800) 333-2082

Mark Oakley

May 14, 2010

Page 34

1 THE WITNESS: In-house counsel was
2 kept advised throughout the process. At what
3 point I asked questions or which questions I
4 simply don't recall.

5 BY MR. HIGHTOWER:

6 Q. When you asked questions of Mr.
7 Wenerick were those your questions or were they
8 questions that you asked after speaking to in-house
9 counsel?

10 MR. LONG: Objection as vague, but
11 you can answer.

12 THE WITNESS: I would say there were
13 questions of both types.

14 BY MR. HIGHTOWER:

15 Q. Did you inform Mr. Wenerick that
16 in-house counsel had asked for a legal opinion?

17 A. No.

18 Q. Is Mr. Wenerick an attorney?

19 A. I don't know his training. He was
20 serving as the DHEC project manager for this 401
21 application.

22 Q. Okay. Okay. Would you agree that
23 serving as the project manager for it he probably
24 was not the attorney?

25 A. I think that's a reasonable

NEXSEN|PRUET

James W. Potter
Member
Admitted in SC, AL

July 1, 2010

VIA Hand-Delivery

The Honorable Ralph K. Anderson, III
Chief Administrative Law Judge
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: *Duke Energy Carolinas, LLC v. South Carolina Department of
Health and Environmental Control – Docket No: 09-ALJ-07-0377-
CC*

Dear Judge Anderson:

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

Please find enclosed Petitioner's Response to Respondent's and Respondent-Intervenor's Motion for Reconsideration. As to their Declaratory Motion, Petitioner agrees that all other Motions are mooted by the granting of the Summary Judgment Motion.

Petitioner's pretrial Motions were required, under the Amended Scheduling Order, to be filed by June 7, 2010. The other parties would normally have until June 22, 2010 to respond to these Motions. The case management on the timing of responding to the filed Motions is left to the decision of the Court.

1230 Main Street
Suite 700 (28201)
PO Drawer 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803.253.8213
F 803.253.8277
E JPotter@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

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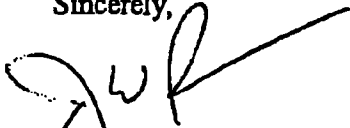
JUL 01 2010

SC ADMIN. LAW COURT

The Honorable Ralph K. Anderson, III
July 1, 2010
Page 2

Please let me know if you have any questions regarding this filing.

Sincerely,



James W. Potter
JWP/fwt

cc: Stephen Hightower, Esq.
Christopher DeScherer, Esq.
Julie Youngman, Esq.

STATE OF SOUTH CAROLINA
BEFORE THE ADMINISTRATIVE LAW COURT

Duke Energy Carolinas, LLC

Petitioner,

v.

South Carolina Department of
Health and Environmental Control,

Respondent,

American Rivers, and the South
Carolina Coastal Conservation League

Respondent-Intervenors.

Docket No. 09-ALJ-07-0377-CC

**PETITIONER'S RESPONSE TO
MOTION FOR RECONSIDERATION**

Respondent and Respondent-Intervenors filed a Motion for Reconsideration on June 21, 2010. Petitioner responds to this Motion as follows:

I. The Motion for Reconsideration is not sufficient to meet the requirements of Rule 7(b) and 59(a) and 59(e) of the South Carolina Rules of Civil Procedure.

The Motion filed under ALC Rule 29(D), primarily recites that discovery was not complete when the Motion for Summary Judgment was decided. This is incorrect since under the Amended Scheduling Order, May 17th was the deadline to complete discovery and the Court's Order was issued on June 10, 2010. Respondent and Respondent-Intervenor did not file any supplemental materials prior to the Court's decision.

Discovery began on December 15, 2009 and lasted until May 17, 2010. The Court's Order relies both on documents wholly in the custody and control of Respondent since May 15, 2009 and on the absence of any documents of SCDHEC purporting to properly suspend the time

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period under 61-101. Accordingly the argument regarding discovery not being complete is frivolous, and there was more than ample time for any purported "evidence" to have been shared with the Court prior to the motions hearing on May 6, 2010 and prior to its making a decision.

The Motion also refers the Court to documents and deposition testimony but does not state with particularity the grounds for the Motion and the presumed errors in the Court's decision. Instead, the moving parties file a stack of documents and ask the Court to read them to find error.

This Motion clearly violates the provisions of ALC Rule 29D, SCRCP Rule 59 and SCRCP Rule 7(b) ([a] Motion shall state with particularity the grounds therefore). The Motion for Reconsideration does not challenge the Court's analysis of Johnston (page 11 of the Order) or the distinction in the timelines of S.C. Regulation 61-101 and 61-30 (pages 5 to 11 of the Order).

Accordingly, Petitioner asks the Court to deny the Motion for Reconsideration for not meeting the requirements for such a Motion. Compare Camp v. Camp, 378 S.C. 237, 662 S.E. 2d 458 (Ct. App. 2009) rev'd, 386 S.C. 571, 689 S.E. 2d 634 (S.C. 2010) (distinguished by the fact that in this case there are sophisticated parties, with complex issues, and Petitioner would be prejudiced if this Motion is deemed to meet the requirements of the South Carolina Rules of Civil Procedure).

II. The Motion for Consideration Does Not Raise New Issues

All Documents referenced in the Motion for Reconsideration could have been submitted to the Court prior to its decision. Nothing new has been proffered after the date of the decision. No case law is offered to show any purported errors of law.

The Court's Order is based on agreed upon dates on the handling of Petitioner's 401

application. These dates were provided by affidavit and at the hearing. The date of application, the date of public notice and the date of Notice of Department's Decision are uncontroverted. The complete absence of any documents from SCDHEC suspending the time limits under S.C. Regulation 61-101(c)(4) is also uncontroverted (Court's Order at pages 8 and 9). The movants' argument on estoppel against Petitioner has already been raised and argued at the hearing. The Court's Order addresses these arguments at pages 4 and 5, footnote 2. As stated earlier, there is no challenge of the Court's Johnston analysis or the differences in timelines between S.C. Regulation 61-101 and 61-30.

Respondent and Respondent-Intervenors attempt to make something sinister about the ending of Mr. Oakley's individual deposition. They leave out relevant facts from their Motion¹.

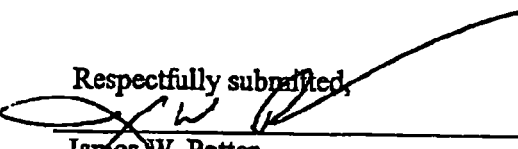
Accordingly, Respondent's and Respondent-Intervenors' Motion for Reconsideration should be denied.

¹ Petitioner's Rule 30(b)(6) deposition was taken on Friday, May 14, 2010. Mr. Oakley acted as the primary witness and spent approximately six hours being deposed on topics related to the Rule 30(b)(6) Notice. The individual deposition of Mr. Oakley began in the late afternoon of the same day and lasted about three hours. The primary questioner in the individual deposition was Mr. Hightower and many of the questions were repetitive of the Rule 30(b)(6) deposition. Nonetheless, each party completed their direct questioning of Mr. Oakley. On redirect by Mr. Hightower, however, the questioning was so repetitive and oppressive that the deposition was halted. Counsel was prepared to file a Motion for Protective Order pursuant to SCRCR Rule 30(j)(3), but in a face-to-face conversation on Monday May 17, 2010 with Mr. Hightower, he indicated that he did not intend to question Mr. Oakley any further (see Attorney affidavit of James W. Potter attached as Exhibit 1). Counsel did not file the Motion for Protective Order based on Mr. Hightower's representation and the matter resolved itself without the need of Court intervention.

CONCLUSION

For the foregoing reasons, Petitioner asks that the Motion for Reconsideration be denied and/or found to not be a sufficient Motion under SCRCP Rule 7(b).

Respectfully submitted,



James W. Potter
W. Thomas Lavender, Jr.
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
P.O. Drawer 2426
Columbia, South Carolina 29202
(803) 771-8900

Nash E. Long, III
(Admitted *pro hac vice*)
WINSTON & STRAWN LLP
214 North Tryon Street, 22nd Floor
Charlotte, North Carolina 28202
(704) 350-7700
(704) 350-7800 (fax)

*Attorneys for Petitioner Duke Energy
Carolinas, LLC*

July 1, 2010
Columbia, South Carolina

CERTIFICATE OF SERVICE

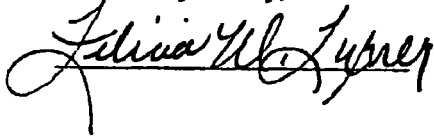
I hereby certify that I have served the foregoing *Petitioner's Response To Motion For Reconsideration* upon each of the parties in this lawsuit by U.S. mail, first class, postage prepaid, in envelope(s) addressed as follows:

Stephen P. Hightower
Office of the General Counsel
SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL
2600 Bull Street
Columbia, SC 29201

Christopher K. DeScherer
SOUTHERN ENVIRONMENTAL LAW CENTER
43 Broad Street
Suite 300
Charleston, SC 29401

Julia F. Youngman
SOUTHERN ENVIRONMENTAL LAW CENTER
200 West Franklin Street, Suite 330
Chapel Hill, NC 27516

This 1st day of July, 2010



FILED

JUL 01 2010

SC ADMIN. LAW COURT

EXHIBIT 1

STATE OF SOUTH CAROLINA
BEFORE THE ADMINISTRATIVE LAW COURT

Duke Energy Carolinas, LLC	)	
	)	
Petitioner,	)	Docket No. 09-ALJ-07-0377-CC
	)	
v.	)	
	)	AFFIDAVIT OF JAMES W. POTTER
South Carolina Department of Health and Environmental Control,	)	
	)	
Respondent,	)	
	)	
American Rivers, and the South Carolina Coastal Conservation League	)	
	)	
Respondent-Intervenors.	)	
	)	

PERSONALLY APPEARED BEFORE James W. Potter, who, after being duly sworn,
deposes and says that:

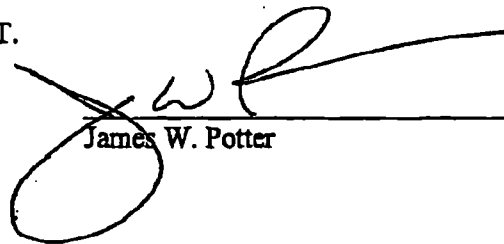
1. I am an attorney in the firm Nexsen Pruet, LLC, 1230 Main Street, Suite 700, Columbia, South Carolina 29201. I am an attorney of record for Petitioner in the above-captioned case, and I submit this affidavit in conjunction with Petitioner's Response to Motion for Reconsideration.

2. The individual deposition of Mr. Oakley was halted on May 14, 2010 during the redirect by Mr. Hightower due to its repetitive and oppressive nature. I stated on the record my intention to file a Motion for Protective Order.

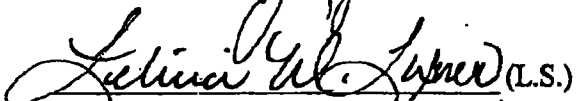
3. On Monday, May 17, 2010 in a face-to-face conversation with Mr. Hightower I asked him if he was intending to reconvene the deposition or file a Motion to Compel. Mr. Hightower indicated that he did not intend to question Mr. Oakley any further.

4. Based on this representation I did not file a Motion for Protective Order under SCRCR Rule 26(c).

FURTHER AFFIANT SAYETH NOT.


James W. Potter

SWORN and subscribed to before me
this 1st day of July, 2010.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 12/17/2018

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Carolinas, LLC,

Petitioner,

v.

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

Respondents.

Docket No. 09-ALJ-07-0377-CC

**ORDER ON MOTION
FOR RECONSIDERATION**

Respondents contend that this Court failed to consider facts uncovered during discovery that occurred after the summary judgment hearing in this case. Indeed, "summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). Here, however though a motions hearing was held before discovery was completed, the Amended Scheduling Order required that discovery be complete by May 17, 2010. The Court specifically withheld issuing its order until June 10, 2010, well after discovery was completed.¹ There was therefore more than ample time for Respondents to have shared with the Court any additional discovered evidence prior to the Court's decision. However, the Respondents did not provide any supplemental information to the ALC after discovery was completed.²

¹ Additionally, though there is a motion pending to expand discovery, Respondents have made no assertions that the request relates to this issue. Furthermore, as explained below if such discovery was needed in this proceeding Respondents were required to specifically explain that need to the ALC. Baughman; see also, George v. Empire Fire and Marine Ins. Co., 344 S.C. 582, 545 S.E.2d 500 (2001) ("Once the moving party carries its initial burden, the 'opposing party must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.' " quoting in part Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348 (1986)). Accordingly, the evidence does not establish that further discovery is likely to create any genuine issue of material fact.

² Notably, as to DHEC the staff and any documents creating an issue of genuine fact were in the custody and control of the Department.

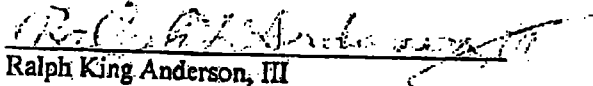
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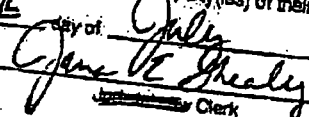
ADMINISTRATIVE LAW COURT

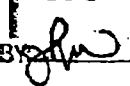
Moreover, Respondents' Motion also refers the Court to documents and deposition testimony but does not state with particularity any new facts uncovered by discovery that would impact the court's decision. Rather, the moving parties filed a group of documents with conclusory assertions and presumably request the Court to review them to determine if the prior decision was erroneous. Obviously, South Carolina does not follow the "plain error rule." Jean Hoefer Toal et al., Appellate Practice in South Carolina 55 (2d ed. 2002). To the contrary, an adverse party to summary judgment "must set forth specific facts showing there is a genuine issue for trial." Strickland v. Madden, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct. App. 1994). Moreover, an objection to a court's decision must be "sufficiently specific to inform the trial court of the point being urged by the objector." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). In this instance, the issue is whether there is new evidence that has come to light that establishes a genuine issue of material fact. Respondents' motion fails to properly produce any such evidence. Therefore,

IT IS HEREBY ORDERED that Respondents' Motion for Reconsideration is **DENIED**.
AND IT IS SO ORDERED.


Ralph King Anderson, III
Chief Administrative Law Judge

July 9, 2010
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).
This 9th day of July
By:  Clerk

RECEIVED
JUL 12 2010
BY 

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Carolinas, LLC,

Petitioner,

vs.

South Carolina Department of Health and
Environmental Control,

Respondent.

Docket No. 09-ALJ-07-0377-CC

**MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO INTERVENE
OF SOUTH CAROLINA COASTAL
CONSERVATION LEAGUE AND
AMERICAN RIVERS**

**MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE OF
SOUTH CAROLINA COASTAL CONSERVATION LEAGUE AND AMERICAN
RIVERS**

On September 4, 2009, Duke Energy Carolinas, LLC ("Duke"), filed a Notice of Request for Contested Case Hearing to challenge the South Carolina Department of Health and Environmental Control's ("DHEC") decision to deny Duke's application for a water quality certification in connection with Duke's operation of the Catawba-Wateree Hydroelectric Project. DHEC denied Duke's request for a water quality certification after the South Carolina Coastal Conservation League ("League") and American Rivers ("AR") (collectively the "Petitioners") asked the South Carolina Board of Health and Environmental Control ("DHEC Board" or "Board") to review DHEC's original decision to grant Duke's application for the certification. See Notice of Department Decision – Water Quality Certification. Petitioners submit this Memorandum of Law in Support of their Motion for Leave to Intervene in the subsequent appeal by Duke pursuant to Rule 20 of the Rules of Procedure for the Administrative Law Court.

In support of their motion to intervene, Petitioners assert that the League, AR, and their respective members have interests in the Catawba Wateree River; that the League and AR could

be aggrieved or adversely affected by the final order in this proceeding; that the interests of the Petitioner organizations are not adequately represented by the existing parties; that the League and AR are so situated that the disposition of this proceeding may as a practical matter impair or impede their ability to protect their interests; and that the participation of the Petitioner organizations as parties in this matter will not unduly prolong these proceedings or prejudice the rights of the parties.

BACKGROUND

The Catawba-Wataree Hydroelectric Project ("Project") consists of 11 reservoirs and 13 hydroelectric stations on the Catawba and Wataree Rivers in North and South Carolina. See Federal Energy Regulatory Commission, Draft Environmental Impact Statement at 1 (FERC Project No. 2232) (Mar. 6, 2009). Six of the reservoirs are in North Carolina. See id. at 15. Five of the reservoirs are in South Carolina: Wylie, Fishing Creek, Great Falls, Cedar Creek and Wataree. See id. In total, the Project affects more than 300 miles of river, a drainage area of more than 4,750 square miles, and nearly 1,800 miles of reservoir and island shoreline in both states.¹ In South Carolina, unimpounded river sections affected by the Project include 32 miles below the Wylie Dam, two miles at Great Falls, and 76 miles below the Wataree Dam, including parts of Congaree National Park. See id. at 2, 18-20.

On August 29, 2006, Duke filed an application for a new federal license for the Project with the Federal Energy Regulatory Commission ("FERC"). See id. at 1. Pursuant to the federal Clean Water Act ("CWA"), an applicant for such a federal license that "may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such

¹ See id. at 1, 15, and 224-253. The number of affected river miles stated here includes the Wataree River below the Wataree Hydroelectric Development.

discharge will comply with the applicable provisions of [the Clean Water Act].” 33 U.S.C. § 1341(a)(1) (Section 401 of the CWA). Before issuing such a water quality certification under Section 401 of the CWA, the state of South Carolina must ensure the activity’s compliance with all applicable state and federal water quality standards. If operation of the proposed activity would violate water quality standards and cannot reasonably be expected to meet water quality standards through remedial actions, the state must deny certification. See 33 U.S.C. § 1341(a)(1) & (3).

On June 5, 2008, Duke applied for such a Section 401 water quality certification. On August 8, 2008, DHEC noticed and solicited public comment on Duke’s application for a Section 401 water quality certification for the Project. On May 15, 2009, DHEC issued a Notice of Department Decision – Water Quality Certification (the “Certification”), authorizing the continued operation of the Project. On May 29, the League and AR filed their Petition for Hearing with the Board, challenging DHEC’s decision to issue the Certification, and the Board conducted a final review conference on July 9, 2009. On August 6, 2009, the Board issued a written order, which stated as follows:

Having reviewed the administrative record and heard from the parties in this matter, the Board has determined that the Notice of Department Decision – Water Quality Certification should be denied based on the arguments set forth by Requestors during the final review conference. The Board finds that the Water Quality Certification as issued does not provide sufficient flow to protect classified uses, the endangered shortnose sturgeon and adequate downstream flow of the Catawba River into South Carolina in order to provide reasonable assurance that certification requirements and water quality standards in the Catawba River in South Carolina will be met. Accordingly, the Department staff decision of May 15, 2009 is reversed and the certification is denied.

Final Agency Decision, Docket No. 09-RFR-43 at 2 (Aug. 6, 2009). Finally, on September 4, 2009, Duke filed a Notice of Request for Contested Case Hearing with this Administrative Law Court (“ALC”).

ARGUMENT

I. THE LEAGUE AND AMERICAN RIVERS ARE ENTITLED TO INTERVENE AS PARTIES.

The South Carolina Supreme Court has liberally construed the rules governing intervention and emphasized the “minimal” nature of the applicant’s burden of establishing the need to protect its interests. Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 394 S.E.2d 712 (1990) (addressing Rule 24 of the South Carolina Rules of Civil Procedure (“SCRCP”), which involves similar requirements to those rules governing intervention in the ALC). Pursuant to Administrative Law Court Rule (“SCRALC”) 20(B), any person may intervene in any pending contested case hearing upon a showing that:

(1) the movant will be aggrieved or adversely affected by the final order; (2) the interests of the movant are not being adequately represented by existing parties, or that it is otherwise entitled to intervene; (3) that intervention will not unduly prolong the proceedings or otherwise prejudice the rights of existing parties.

Further, SCRALC 20(C) requires timely filing of a motion to intervene:

The motion for leave to intervene shall be filed as early in the proceedings as possible to avoid adverse impact on the existing parties or the disposition of the proceedings. Unless otherwise ordered by the administrative law judge, the motion to intervene shall be filed at least twenty (20) days before the hearing.

As discussed below, Petitioners meet all of these requirements and are therefore entitled to intervene in this action as a party.

A. The Motion for Intervention is Timely.

Petitioners’ motion to intervene is timely. Petitioners have filed this motion early in these proceedings (less than one month after DHEC’s appearance) and long before any hearing is even scheduled; as such, Petitioners have avoided causing any adverse impact on the existing parties or the disposition of these proceedings. See SCRALC 20(C). Moreover, Petitioners

effectively initiated the proceedings by filing their original challenge to DHEC's initial notice of Certification, and have been a party to the proceedings at every stage, thus far.

B. Petitioners Would Be Aggrieved and Adversely Affected by the Final Order Sought by Duke.

SCRALC 20(B)(1) requires persons seeking intervention to show that they would be "aggrieved or adversely affected by the final order." In its Notice of Request for Contested Case Hearing, Duke "requests the WQC [Section 401 water quality certification] be issued in the form that the SCDHEC staff drafted." Duke's Notice Req. Contested Case Hr'g at 1. As discussed below, Petitioners would be aggrieved and adversely affected by a decision to issue Duke's requested Certification.²

The Coastal Conservation League is a non-profit conservation organization with offices in Charleston, Georgetown, Beaufort, and Columbia, South Carolina. The League's mission is to protect South Carolina's threatened resources – its natural landscapes, abundant wildlife, clean water, and traditional communities. To accomplish this mission, the League has worked on river-related issues affecting South Carolina for years. The League has approximately 5,000 members who live in South Carolina. Some of these members use and enjoy the Catawba Wateree River for primary and secondary recreation, aesthetic enjoyment, and public water supply.

American Rivers is a non-profit conservation organization with offices in Washington, D.C., Columbia, South Carolina, and throughout the nation. AR is dedicated to the protection and restoration of the nation's rivers. With over 65,000 supporters across the country, including those that live in the vicinity of the Project, AR is the nation's leading river conservation

² See also Petitioners' Position on Intervention, attached hereto as Exhibit A, describing legal deficiencies in the Certification sought by Duke, which would adversely affect Petitioners' interests.

organization. Like the League's members, members of AR use and enjoy the Catawba Wateree River for primary and secondary recreation, aesthetic enjoyment, and public water supply.

Both the League and AR have been actively engaged in activities related to the Project since 2001. Petitioners have been active participants in the Enhanced Traditional Licensing Process conducted by Duke in connection with its relicensing application before FERC since its inception. The extensive involvement of the Petitioners has included participating in the Foothills, Piedmont, and Lower Catawba Advisory Committees, South Carolina State Relicensing Team, Aquatic Resources Committee, Instream Flow ad hoc Committee, and numerous other meetings related to the relicensing of this Project. Petitioners have also provided oral and written comments on relicensing documents and study plans with a goal of helping to develop a license and Section 401 water quality certification that meet legal requirements and are in the public interest. After DHEC issued the initial Certification, the League and AR filed a request for a final review conference before the DHEC Board (attached hereto as Exhibit B), which ultimately resulted in the denial of Duke's application for a water quality certification and the filing of the present appeal by Duke.

In light of its interests and involvement in this matter to date, DHEC has identified American Rivers as a person who has "exercised their legal right to object to the issuance of the permit or license." See Agency Information Sheet & Notice Appearance at 2-3 (Sept. 21, 2009).³ Federal courts construing the counterpart rule governing intervention under the Federal Rules of Civil Procedure expressly have recognized that an environmental group has the right to intervene in a suit challenging the actions or measures which had been at issue in earlier proceedings in which the environmental group was involved. See In re: Sierra Club, 945 F.2d.

³ Presumably, DHEC inadvertently omitted the League from this category as the League has participated in this matter in the same capacity as AR.

776, 779 (4th Cir. 1991) (noting environmental group had interest to intervene in lawsuit by trade industry group challenging enforcement of regulation where environmental group was party to administrative permitting proceedings involving the regulation); see also Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1397, 1398 (9th Cir. 1995) ("A public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported"); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983) (stating same). In this instance, the League and AR not only participated in the FERC proceeding for the federal relicensing and the state proceeding on the water quality certification, but initiated the request for review which led to DHEC's denial of the water quality certification.

In addition, a decision by this ALC to issue the Section 401 water quality certification in the form proposed by DHEC's staff would aggrieve and adversely affect the League and AR in a number of ways. As explained in greater detail in the League's and AR's Position in Intervention, which is attached hereto as Exhibit A, such a decision would violate the CWA, the South Carolina Pollution Control Act, and the regulations promulgated thereunder because it would erroneously allow out-of-kind mitigation in the form of land conservation and money payments to mitigate for impacts to instream flow, it would not provide adequate flows to prevent adverse impacts to waters that contain or will contain the federally listed endangered shortnose sturgeon, and it would not assure the Project's compliance with applicable water quality standards in addition to other flaws. These legal deficiencies would impair the interests of the Petitioner organizations in protecting and restoring rivers and streams in South Carolina, like the Catawba Wateree River. In addition to impairing the interests of the Petitioner organizations, a decision by this ALC in Duke's favor would also injure the interests of the League's and AR's members who use and enjoy the waters at issue and have an interest in the

protection of the Catawba Wateree River and its ecological integrity. For these reasons, Petitioners would be aggrieved and adversely affected by a decision granting Duke the relief it requests: the issuance of Duke's requested Certification.

C. Petitioners' Interests in this Matter Are Not Adequately Represented by Existing Parties, and Petitioners Are Entitled to Intervene.

Rule 20(B)(2) of the SCRALC provides that any person may intervene in any pending contested case upon a showing that "the interests of the movant are not being adequately represented by existing parties, or that it is otherwise entitled to intervene." Interpreting a similar requirement under Rule 24(a)(2) of the South Carolina Rules of Civil Procedure, the South Carolina Supreme Court rejected "rigid applications" of this inquiry in favor of a pragmatic examination of the consequences of a decision to permit or deny intervention. Berkeley Elec. Coop., 302 S.C. at 189; see also Trbovich v. United Mine Workers, 404 U.S. 528, 538 n. 10 and acc. text (1972) (citation omitted) (U.S. Supreme Court explaining that the "inadequate representation" requirement of Fed R. Civ. P. Rule 24(a) "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal").

In Berkeley Electric Cooperative, the South Carolina Supreme Court articulated a three-factor test applicable to all applications for intervention under Rule 24(a)(2), SCRCF. Adopting the "Sagebrush test" (established in Sagebrush Rebellion, 713 F.2d 525 (9th Cir. 1983)) for determining adequacy of representation, the Court explained it would consider: "(1) whether the existing parties will undoubtedly make all of the intervenor's arguments; (2) whether the existing parties are capable and willing to make such arguments; and (3) whether the intervenor offers different knowledge, experience, or perspective on the proceedings that would otherwise be absent." Berkeley Elec. Coop., 302 S.C. at 191.

Application of the Sagebrush test in this case shows that the League and AR are entitled to intervention. First, it is not clear that DHEC “will undoubtedly make all of the intervenor’s arguments” nor that DHEC is “willing to make such arguments.” Id. Although the DHEC Board explained in its ruling that it was denying the water quality certification “based on arguments set forth by the [League and AR] during the final review conference” (Final Agency Decision at 2), it is also true that DHEC staff initially intended to issue the Certification in the very form that Duke has now asked this Court to issue. In fact, it was only after the Petitioners sought a final review conference in this matter that the DHEC Board took its action in denying the water quality certification. If the League and AR had not so acted, the initial Certification likely would still stand. Where organizations seeking intervention have taken action to instigate the reversal of an agency’s position, courts have found that the government agency does not serve to adequately represent the interest of these organizations. See, e.g., County of Fresno v. Andrus, 622 F.2d 436, 439 (9th Cir. 1980) (saying “there is further reason to doubt that the Department [of the Interior] will fully protect [the applicant’s] interest...in light of the fact that the Department began its rulemaking only reluctantly after [the applicant] brought a law suit against it”); Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. Dep’t of the Interior, 100 F.3d 837, 845 (10th Cir. 1996) (stating the government’s “ability to adequately represent Dr. Silver despite its obligation to represent the public interest is made all the more suspect by its reluctance in protecting the Owl, doing so only after Dr. Silver threatened, and eventually brought, a law suit to force compliance with the Act”) (citations omitted). Although certainly Petitioners expect DHEC to vigorously defend the DHEC Board’s decision, there is obviously no guarantee that DHEC will or is willing to do so given the position that its own staff has taken in prior proceedings related to this matter.

Second, the League and AR also qualify for intervention because they “offer[] different knowledge, experience, or perspective on the proceedings that would otherwise be absent.” Berkeley Elec. Coop., 302 S.C. at 191. The South Carolina Supreme Court has noted “that a governmental entity’s representation of a private party’s interests does not constitute adequate representation.” Id. (citing Nat’l Farm Lines v. Interstate Commerce Commission, 564 F.2d 381 (10th Cir. 1977)). Other courts have also pointed out the divergent interests between governmental agencies and non-profit organizations dedicated to protecting the environment and public health. In In re: Sierra Club, 945 F.2d 776, the Fourth Circuit Court of Appeals allowed a conservation organization to intervene in an industry trade group’s challenge to a state regulation governing hazardous waste landfills. The Fourth Circuit explained that “although Sierra Club and South Carolina DHEC may share some objectives, South Carolina DHEC is not an adequate representative” because of its duty to “represent all of the citizens of the state, including” the hazardous waste industry. Id. at 780; see also People for the Ethical Treatment of Animals, et al. v. Babbitt, 151 F.R.D. 6, 8 (D. D.C. 1993) (saying the government’s mandate to design and enforce an entire regulatory system precludes it from adequately representing one party’s interest in it).

Finally, even if the Petitioners’ interests were adequately represented by DHEC at the outset of this matter, prior decisions of this Court counsel in favor of intervention now because DHEC’s and the Petitioners’ interests may diverge during the course of these proceedings. In S.C. Coastal Conservation League v. S.C. Dep’t of Envtl. Control, 97-ALJ-07-0763-CC, 1998 SC ENV LEXIS 49 (April 14, 1998) (Bates, J.), the League decided not to intervene in a contested case in which DHEC had denied a permit because the League believed that DHEC was adequately representing its interests by defending the agency’s permit denial. As the case

progressed, DHEC and the permit applicant entered into settlement negotiations pursuant to which a modified permit was issued. According to the ALC, “[b]y not seeking party status in the agency proceedings, as they properly could have done, Petitioners removed themselves from an active role in the administrative decision making process . . . [and] lack standing under the APA to challenge the resulting order.” *Id.* at *8. The ALC suggested that the League should have intervened at the outset of the original contested case because although the agency “may have initially shared [the League’s] *position* on the permitting decision, [the agency’s] *interest* in the overall subject matter of the case was not necessarily the same” *Id.* at *5 (emphasis in original). Accordingly, intervention is necessary here because the Petitioners and DHEC do not share the same interests, and even if their respective positions were currently aligned, which is denied, they would not necessarily remain so. An order denying Petitioners’ motion to intervene as parties may as a practical matter impede the Petitioners’ ability to protect their interests.

In sum, the League and AR have unique interests in this litigation that are not identical to DHEC’s and have satisfied the minimal burden of showing that the current parties do not adequately represent those interests.

D. Intervention will Not Unduly Prolong these Proceedings or Prejudice the Rights of the Parties.

Finally, intervention by the League and AR will not unduly delay or prejudice the adjudication of the rights of the original parties. Petitioners have sought intervention in a timely manner within one month of DHEC’s appearance in this contested case and prior to any significant developments in this action. The League and AR understand that a hearing date has not yet been scheduled, nor has any discovery been commenced. In addition, the proposed intervenors will not seek to prolong the adjudication of any issue.

Prior to filing this motion and supporting memorandum, counsel for Petitioners consulted with counsel for Duke and DHEC. Counsel for Duke has not expressed a final position on Petitioners' motion, and counsel for DHEC has stated that DHEC will not take a position on this motion.

CONCLUSION

For all of the foregoing reasons, the South Carolina Coastal Conservation League and American Rivers respectfully request that they be granted the right to intervene in this proceeding.

Respectfully submitted, this 16th day of October, 2009.



Christopher K. DeScherer
S.C. Bar No.: 77753
Southern Environmental Law Center
38 Broad Street, Suite 200
P.O. Box 609
Charleston, SC 29402
(843) 720-5270

*Attorney for Petitioners South Carolina Coastal
Conservation League and American Rivers*

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NEXSEN|PRUET

James W. Potter
Member
Admitted in SC, AL

October 22, 2009

Honorable John D. McLeod
SC Administrative Law Court
Edgar A. Brown Building, Suite 224
1205 Pendleton Street
Columbia, SC 29201

Re: Duke Energy Carolinas, LLC vs. South Carolina Department of
Health and Environmental Control, Docket No. 09-ALJ-07-0377-CC

Dear Judge McLeod:

Duke Energy Carolinas, LLC takes no position on whether the Court should grant intervention to American Rivers and South Carolina Coastal Conservation League. If the Court should grant intervention, the Court should condition intervention upon compliance with the October 19, 2009 Scheduling Order (as provided by Rule 20 D) and submission of a prehearing statement by the Intervenors.

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

Respectfully submitted,



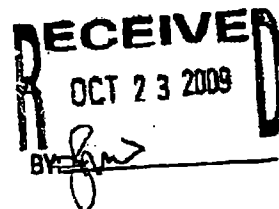
James W. Potter

JWP/fwt

cc: Stephen Hightower, Esquire
C. DeScherer, Esquire

1230 Main Street
Suite 700 (29201)
PO Drawer 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803.253.8213
F 803.253.8277
E JPotter@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law



James W. Potter
Member
Admitted in SC, AL

October 30, 2009

VIA HAND-DELIVERY

The Honorable Ralph K. Anderson, III
Chief Administrative Law Judge
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: Duke Energy Carolinas, LLC v. SC Department of Health and
Environmental Control. Docket No. 09-ALJ-07-0377-CC

Dear Judge Anderson:

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

On behalf of Duke Energy Carolinas, LLC I am writing to respond to Mr. DeScherer's letter of October 30, 2009 regarding his client's request for Intervention and desire to change the existing Scheduling Order in this case.

The request for a contested case was filed on September 4, 2009. On October 19, 2009 the Court entered a Consent Scheduling Order which was filed on October 16, 2009. On October 16, 2009 Southern Environmental Law Center, on behalf of American Rivers and South Carolina Coastal Conservation League, filed a request to Intervene in this case. We responded to the Intervention request by letter dated October 22, 2009 (copy attached) stating that Duke Energy Carolinas, LLC took no position on the Intervention as long as the Court required compliance with the October 19, 2009 Scheduling Order as provided by Rule 20D and submission of a prehearing statement.

Since the proposed Intervenor now object to the Scheduling Order and time is of the essence in completing mediation before extensive discovery is conducted unnecessarily, we must object to their Intervention request since SCDHEC can adequately represent the interests purportedly raised by the Intervenor and because the proposed Intervenor cannot meet the requirements of Rule 20D.

1230 Main Street
Suite 700 (29201)
PO Drawer 2428
Columbia, SC 29202
www.nexsenpruet.com

T 803.253.8213
F 803.253.8277
E JPotter@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

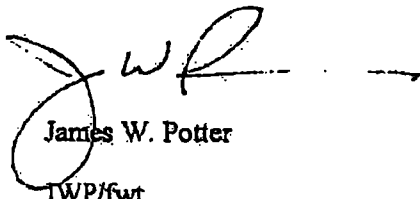
The Honorable Ralph K. Anderson, III
October 30, 2009
Page 2

While the proposed intervenors claim in their memorandum in support of intervention that they "filed this motion early in these proceedings...long before any hearing is even scheduled, the reality is that they waited over a month after Duke Energy Carolinas initiated this case to intervene and in fact moved on the same day that the Petitioner and Respondent filed a Consent Scheduling Order with this Court. Now proposed Intervenor seek to alter the schedule that has already been approved by this Court, in spite of their claims that their intervention is timely and will not cause any adverse impact.

Duke Energy Carolinas applied for a 401 water quality certification as part of its relicensing of the FERC-license Catawba-Wataree Hydroelectric Project. Duke Energy Carolinas applied for a new FERC license in August, 2006, and the original license expired in August, 2008, more than a year ago. Duke Energy Carolinas currently operates under an "annual" license authorization from FERC and is opposed to any additional delays, which would result from allowing proposed Intervenor to intervene, unless they are required to comply with the schedule already entered in this case.

Accordingly, we ask that the Court allow intervention subject to the existing schedule and require proposed Intervenor to file a prehearing statement, or, in the alternative, either to deny the Intervenor request or defer any decision pending the outcome of mediation between the parties which has already been scheduled for November 5, 2009.

Sincerely,



James W. Potter

JWP/fwt

cc: Stephen Hightower, Esquire
Christopher DeScherer

NPCOL1:1831776,1-LT-(JWP) 700263-00291

SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 843-720-5270
Facsimile 843-720-5240
SouthernEnvironment.org

P.O. Box 609
Charleston, SC 29402-0609

Street Address:
38 Broad Street, Suite 200
Charleston, SC 29401-3042

Charlottesville, VA
Chapel Hill, NC
Atlanta, GA

December 2, 2009

VIA U.S. MAIL

Jana E. Shealy
Clerk
Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

RE: Duke Energy Carolinas, LLC v. S.C. Dep't of Health and Envtl. Control, et al.
Docket No. 09-ALJ-07-0377-CC

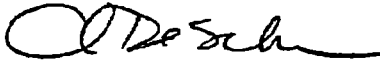
Dear Ms. Shealy:

Enclosed for filing in the above-referenced matter, please find the original and two copies of South Carolina Coastal Conservation League and American Rivers' Pre-Hearing Statement.

I have also enclosed an additional copy of the Pre-Hearing Statement. Please date-stamp this copy and return it to me in the enclosed self-addressed, stamped envelope.

Thank you for your assistance. Please do not hesitate to contact me if you have any questions regarding this filing.

Sincerely,



Christopher K. DeScherer

Enclosure

cc: James W. Potter, Esq.
Stephen P. Hightower, Esq.
Childs Cantey, Esq.
Nash Long, Esq.

100% recycled paper

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Carolinas, LLC,	)	Docket No. 09-ALJ-07-0377-CC
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
South Carolina Department of Health and Environmental Control, South Carolina Attorney General, American Rivers and South Carolina Coastal Conservation League,	)	RESPONDENT-INTERVENORS'
	)	PRE-HEARING STATEMENT
Respondents.	)	
	)	

Respondent-Intervenors South Carolina Coastal Conservation League and American Rivers ("Intervenors") hereby submit this Pre-Hearing Statement in accordance with the Order for Pre-Hearing Statements of September 24, 2009, and Order Granting Intervention of November 9, 2009.

1. The nature of this proceeding:

Petitioner Duke Energy Carolinas, LLC ("Petitioner" or "Duke"), is appealing the decision of the South Carolina Department of Health and Environmental Control ("DHEC") to deny a water quality certification sought by Duke for the federal licensing of its Catawba-Wateree Hydroelectric Project ("Project"). As a part of its application for a new federal license, Duke Energy is required to obtain a water quality certification under Section 401 of the Clean Water Act, certifying that operation of the Project for the next license term will comply with federal and state water quality standards. *See* 33 U.S.C. § 1341(a)(1); S.C. Code Ann. Regs. 61-101. Duke applied for the certification on June 5, 2008, and on May 15, 2009, DHEC issued a Notice of Department Decision –

Water Quality Certification (the "401 Certification"). On May 29, 2009, Intervenor filed a Request for Final Review with the South Carolina Board of Health and Environmental Control ("Board"), pursuant to S.C. Ann. Code § 44-1-60, challenging the 401 Certification on the grounds that it would permit Duke to operate the Project in violation of water quality standards. All parties to this appeal participated in a final review conference before the Board on July 9, 2009. After announcing its decision orally at the conclusion of the conference, the Board issued a written order reversing DHEC staff and denying the 401 Certification on August 6, 2009, finding that the 401 Certification would fail to provide reasonable assurance that water quality standards would be met.

2. The statutory provision(s) conferring subject matter jurisdiction to the Administrative Law Court (Court) and other applicable statutes and regulations:

- S.C. Code Ann. § 1-23-310 *et seq.* (Administrative Procedures);
- S.C. Code Ann. § 1-23-600 (South Carolina Administrative Law Court);
- S.C. Code Ann. § 44-1-60 (Appeals from DHEC decision);
- 33 U.S.C. § 1341 (Section 401 of the Federal Water Pollution Control Act);
- S.C. Code Ann. § 48-1-10 *et seq.* (South Carolina Pollution Control Act); and
- S.C. Code Ann. Regs. 61-101 (water quality certification); 61-68 (water classifications and standards); 61-69 (classified waters); and 61-72 (procedures for contested cases).

3. The issues to be presented for determination, including any claims or defenses expected to be raised:

- That the Board's decision to deny the 401 Certification is supported by the administrative record;
- That the Board's decision to deny the 401 Certification is not arbitrary or capricious in view of the evidence in the administrative record;

- That the Board's reversal of the staff decision and denial of the 401 Certification was an appropriate exercise of authority to issue a final agency decision and grant any relief warranted in accordance with S.C. Code Ann. § 44-1-60 and regulations governing Board review;
- That the Attorney General's appearance, submission of testimony, provision of information, and response to Board questioning at the final review conference on July 9, 2009, regarding the interest of the State of South Carolina in the 401 Certification was proper, was within the scope of matters raised in the administrative record and Intervenor's request for final review, and did not improperly influence the Board;
- That the 401 Certification, and the conditions contained therein, failed to satisfy the requirements of water quality standards (S.C. Code Ann. Regs. 61-101, 61-68, and 61-69) and, therefore, DHEC's denial was in accordance with law; and
- That DHEC complied with time limits prescribed by state and federal law in processing and acting on the water quality certification, and therefore, did not waive its authority to issue or deny the Certification.

4. A brief summary of the facts to be presented at the hearing:

The following brief summary highlights facts in the record and forecasts evidence that will be presented at the hearing. Intervenor's will show that the Board properly reversed the DHEC staff's decision and denied the 401 Certification because it failed to provide reasonable assurance that water quality standards would be met. Intervenor's will submit evidence demonstrating that DHEC staff's 401 Certification:

- would have authorized minimum flows for up to the next 50 years (as Duke requested in its FERC application) that are inadequate to assure that waters impacted by the Project are suitable for fishing and the survival and propagation of a balanced indigenous aquatic community of fauna and flora;
- lacked enforceable conditions for maintenance of spawning flows for the federally listed shortnose sturgeon and other diadromous and resident fish;
- lacked adequate conditions to provide floodplain inundation in areas downstream of the Wateree Dam, including the Congaree National Park; and
- approved an out-of-kind mitigation scheme that improperly allowed the state to trade land and money for water.

The Project consists of 11 reservoirs and 13 hydroelectric stations on the Catawba and Wateree Rivers in North and South Carolina and affects 32 miles of unimpounded river below the Wylie Dam, two miles at Great Falls, and 76 miles below the Wateree Dam, including parts of Congaree National Park. Duke acknowledges in its Supplemental Information Packet ("SIP") submitted with its application for water quality certification that flows in the Wylie Regulated River Reach, the Great Falls Long Bypassed Reach, and the Wateree Spillway Channel had been identified as "not fully meeting resource agency resource objectives," and therefore, "mitigation [was] provided" to offset those impacts. *See* Application, SIP at 121. However, the mitigation provided, in the form of land conservation and money payments, will not mitigate Project impacts caused by inadequate minimum instream flows. The evidence will show that there is no scientific basis for trading minimum instream flows for either land protection or monetary payments. The impact of drastically reduced flow cannot be replaced with land protection because land does not provide the same, or even comparable, ecological benefits necessary to mitigate effectively for flow-related impacts. Moreover, the lack of a geographic nexus between the areas affected by the Project and the lands the Catawba-Wateree Revised Relicensing Agreement ("CRA") proposes to protect as mitigation does not comply with federal and state mitigation requirements. *See* 401 Certification (incorporating as condition of certification Habitat Flow Agreement, which includes South Carolina Mitigation Package, from CRA).

In addition, the minimum instream flows approved by DHEC staff for the Wateree Regulated Reach are below the minimum instream flows identified by the National Marine Fisheries Service ("NMFS") to provide adequate spawning habitat for

shortnose sturgeon recovery, as well as other target diadromous species. *See, e.g.*, NMFS, Comments on DEIS, 4-5, eLibrary no. 20090506-5070 (May 6, 2009); NMFS, Preliminary Recommendations, Terms, Conditions and Reservation of Authority to Prescribe Fishways, eLibrary no. 20080606-5077 (June 5, 2008), 6-7; Letter from NMFS to FERC (Aug. 31, 2009) (finding Project may adversely affect shortnose sturgeon and requiring formal consultation under ESA). NMFS is the federal agency responsible for administering the Endangered Species Act with respect to marine fishes. The 401 Certification authorizes minimum flows that, according to relicensing studies prepared by Duke, provide only a fraction of the potential habitat for shortnose sturgeon. NMFS recommended higher minimum continuous flows for shortnose sturgeon and other diadromous fish habitat below the Wateree development. Intervenor support NMFS's flow recommendations for the Wateree Regulated Reach. The evidence will also demonstrate that the instream flow regimes authorized for the Great Falls/Long Channel Reach and the Wylie Reach are deficient and lack needed seasonal variation to support diadromous fish spawning. Significantly, the Wylie Reach is designated as a State Scenic River. The minimum flows authorized for the Wylie Reach represented only about 25 percent of the average annual flow, and as acknowledged by the DHEC staff assessment, did not meet the South Carolina Department of Natural Resources' ("DNR") habitat target for striped bass (spawning flow) and shortnose sturgeon.

The minimum instream flows below Wateree will also result in inadequate inundation of the Wateree Floodplain and the Congaree National Park. The Congaree National Park is South Carolina's only National Park, and it is the largest remaining old-growth floodplain forest in North America. The Congaree National Park floodplain

provides, among other things, important habitat for spawning and rearing by blueback herring, a species that has been identified for priority protection by DNR.

As a result of these shortcomings, the 401 Certification issued by DHEC staff failed to provide reasonable assurance that water quality standards would be met and, therefore, violated federal and state water quality laws. Accordingly, the DHEC Board properly reversed DHEC staff and denied the 401 Certification.

5. The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citations:

Intervenors request that the Court:

- a. Affirm the decision by DHEC to deny the 401 Certification (Final Agency Decision, Board Docket No. 09-RFR-43 at 2, Aug. 6, 2009) because it failed to provide reasonable assurance that water quality standards would be met, as required by S.C. Code Ann. Regs. 61-101 (A)(4)-(5). The 401 Certification, as issued by DHEC staff, for example:
 - Authorized minimum instream flows in the Wylie Regulated River Reach, the Great Falls Long Bypassed Reach, and the Wateree Regulated and Bypassed Reaches that are inadequate to assure Project waters are suitable for the classified uses and existing uses, including fishing and the survival and propagation of a balanced indigenous aquatic community of fauna and flora, as required by S.C. Code Ann. Regs. 61-68 and 61-101(A)(4)-(5), (F)(5)(b).
 - Authorized minimum flows that would adversely impact special or unique habitats, including a State Scenic River, in violation of S.C. Code Ann. Regs. 61-101(F)(5)(d).
 - Failed to assure maintenance of spawning flows for shortnose sturgeon and other diadromous and resident fish and would have adversely impacted waters containing federally listed shortnose sturgeon in violation of S.C. Code Ann. Regs. 61-68 and 61-101(F)(5)(c).
 - Improperly authorized out-of-kind mitigation in the form of land conservation and money payments, in lieu of requiring higher flows, to

serve as mitigation for flow-related impacts. The "Flow Mitigation Package," which requires a combination of conservation measures and a payment of \$1 million to DNR, will do nothing to mitigate impacts to the affected aquatic resources from deficient flows and is inadequate to meet the requirements of S.C. Code Ann. Regs. 61-68 and 61-101. Further, the DHEC Staff Assessment did not demonstrate that there are no feasible alternatives to out-of-kind mitigation that would reduce adverse consequences on water quality, classified uses, and endangered species as required by R. 61-101(F)(5)(b)-(c).

- Lacked enforceable conditions for adequate flows in the Wateree River to mimic natural flow conditions and to provide floodplain inundation in Congaree National Park and, therefore, improperly permitted adverse impacts to special or unique habitats in contravention of S.C. Code Ann. Regs. 61-101(F)(5)(d).

- b. Affirm that DHEC complied with time limits under state and federal law in acting on the water quality certification application submitted by Duke and, therefore, did not waive its authority to issue or deny certification. See 33 U.S.C. § 1341(a)(1) (requiring state to "act on" request for water quality certification request within one year of receipt); S.C. Code Ann. Regs. 61-101 (requiring DHEC to issue decision within 180 days of acceptance of application); S.C. Code Ann. § 44-1-60 (2008) (relating to Board review of DHEC decisions).

6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion:

Intervenors do not foresee raising motions at the hearing at this time, but Intervenors specifically reserve the right to raise such motions, including evidentiary motions, as circumstances might require.

7. A list of proposed witnesses and exhibits:

- a. Witnesses: Intervenors have not yet determined which witnesses they might call at a hearing in this matter, but potential witnesses include the following:

- Gerrit Jöbsis – American Rivers
- Prescott Brownell – NMFS
- Bill Post – DNR
- Dick Christie – DNR
- Barry Beasley – DNR
- Wade Cantrell – DHEC
- Vivianne Vejdani – DNR (formerly with DHEC)
- Rusty Wenerick – DHEC
- Heather Preston – DHEC
- Chuck Hightower – DHEC
- Tami Styer – Duke Energy Carolinas, LLC
- Jeffrey Lineburger – Duke Energy Carolinas, LLC
- Mark Oakley – Duke Energy Carolinas, LLC
- Expert witnesses, who will be identified in accordance with the Consent Scheduling Order in this matter
- All witnesses named or called by any other party to this action.

Intervenors reserve the right to supplement this list of witnesses.

- b. Exhibits: Intervenors have not yet determined which exhibits they will use at a hearing in this matter, but potential exhibits may include the following:

- Administrative record prepared for the Board;
- Any pleadings or written discovery generated in this matter;
- Transcript of the Board hearing on July 9, 2009, and shortnose sturgeon studies referred to therein;
- Catawba-Wateree Revised Comprehensive Relicensing Agreement (filed Dec. 26, 2008);
- U.S. Army Corps of Engineers et al., Stream Mitigation Guidelines (April 2003);

- Santee River Basin Accord for Diadromous Fish Protection, Restoration, and Enhancement;
- Duke's Application for New License, including appendices and exhibits (FERC Project No. 2232-552);
- Comments submitted by American Rivers and/or the South Carolina Coastal Conservation League regarding Duke's new license application (FERC Project No. 2232-552);
- Letter from NMFS to FERC (August 31, 2009) (requiring formal consultation on shortnose sturgeon);
- Comments submitted by NMFS regarding Duke's new license application (FERC Project No. 2232-552)
- NMFS Preliminary Recommendations, Terms, Conditions and Reservation of Authority to Prescribe Fishways (June 5, 2008);
- Letter from Mark Robinson, FERC, to Alton Boozer, DHEC (Nov. 1, 2004)
- All exhibits listed or introduced by any other party to this action.

Intervenors reserve the right to supplement this list of exhibits.

8. A statement regarding the necessity for discovery, if any:

Intervenors anticipate that discovery will be necessary pursuant to Rules 26-37 of the South Carolina Rules of Civil Procedure and Rule 21 of the South Carolina Rules of Procedure for the Administrative Law Court ("SCRALC"), including interrogatories, requests for production of documents, requests for admissions and depositions. In addition, Intervenors may seek relief from the limitations on interrogatories, requests for admissions, and the number of depositions set forth in SCRALC 21.

9. Whether the party deems it necessary by the undersigned Judge to conduct a Pre-Hearing Scheduling Conference or issue an order regarding motions, discovery, etc.:

Petitioner and Respondent agreed to and the Court entered a Consent Scheduling Order on October 19, 2009, and Intervenors are subject to that Order pursuant to the Court's subsequent Order Granting Intervention, entered November 9, 2009.

10. The estimated time required for the hearing: Three days.

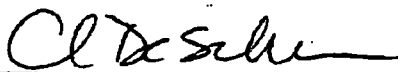
11. A range of proposed hearing dates for which all of the parties or available for a hearing on the merits in this case:

The Consent Scheduling Order sets a hearing date of May 17, 2010, and Intervenors are available the week of May 17, 2010, for the hearing.

12. An email address that the Court can use for e-mail correspondence:

Counsel for Intervenors can be contacted by email at cdescherer@selcsc.org and jyoungman@selcnc.org.

This 2nd day of December, 2009.



Christopher K. DeScherer
SOUTHERN ENVIRONMENTAL LAW CENTER
P.O. Box 609
Charleston, SC 29402
Tel: (843) 720-5270
Fax: (843) 720-5240
cdescherer@selcsc.org

Julia F. Youngman
admitted *pro hac vice*
200 West Franklin Street, Suite 330
Chapel Hill, NC 27516
Tel: (919) 967-1450
Fax: (919) 929-9421
jyoungman@selcnc.org

CERTIFICATE OF SERVICE

I hereby certify that I am counsel for Respondent-Intervenors South Carolina Coastal Conservation League and American Rivers in the above-captioned matter, and that on the 2nd day of December, 2009, I served a copy of the foregoing Pre-Hearing Statement on the following persons via U.S. Mail, first-class postage prepaid:

James W. Potter, Esq.
Nexsen Pruet, LLC
1230 Main Street, Suite 700
P.O. Drawer 2426
Columbia, SC 29202

Nash E. Long, III, Esq.
Winston & Strawn LLP
214 N. Tryon Street
Charlotte, NC 28202

Stephen P. Hightower, Esq.
Office of General Counsel
S.C. Department of Health and
Environmental Control
2600 Bull Street
Columbia, SC 29201

Henry McMaster, S.C. Attorney General
Childs Cantey, Esq.
P.O. Box 11549
Columbia, SC 29211



Christopher K. DeScherer
SOUTHERN ENVIRONMENTAL LAW CENTER
P.O. Box 609
Charleston, SC 29402

1 Is American Rivers planning on doing
2 any studies on dissolved oxygen that it has not yet
3 done for purposes of this litigation?

4 A. At this time we have no plans to do
5 that.

6 Q. I want to talk now about a different
7 topic, and that's the topic of standing.

8 A. Uh-huh.

9 Q. And do you also understand you're
10 designated to speak on that topic under the
11 notice --

12 A. Yes.

13 Q. -- on behalf of American Rivers?

14 I'd like for you to state for the
15 record -- just give us an example of a member of
16 American Rivers, the organization, that has been
17 adversely impacted by the 401 certification for the
18 Catawba-Wateree Hydroelectric Project.

19 A. Well, what I am prepared to say is that
20 we have about 320 members in South Carolina, and I
21 have contacted -- a number of those live in the
22 Columbia vicinity -- the Columbia, Camden vicinity,
23 also some up in the Rock Hill vicinity. I have
24 talked to some of those, and they have indicated
25 that they do use and value the common water rivers

1 and that their interests are affected by the
2 operations of these dams.

3 Q. All right. Are -- any of those people
4 that you contacted, do they live on the rivers
5 themselves?

6 A. No. Not -- well, no, they don't.

7 Q. Okay. And can you specifically
8 identify for me -- and you can just pick an
9 example. Just identify for me one member by name
10 that has been adversely impacted by the proposed
11 CRA licensing water quality certification and
12 describe for me concretely the nature of the
13 impact.

14 A. Well, I don't know that I'm allowed to
15 give out membership information. I've been told by
16 our organization that that is confidential
17 information, the individual names of members.

18 Q. Can you just give me an example that
19 you can call them for purposes of the discussion
20 today John Doe or Jane Smith --

21 A. Uh-huh.

22 Q. -- and we can have a discussion later
23 on if we need to about identification of this
24 person, but I'm trying to get at the specific harm
25 that any of your members have as a result of the

1 proposed relicensing consistent with the CRA.

2 A. Well, the harm is the -- is the -- the
3 values that they hold for the Catawba-Wateree
4 Rivers for the species of fish and other wildlife
5 and habitat and for the values they place in a
6 healthy aquatic ecosystem; that is, for their
7 boating, recreation, fishing recreation, nature
8 viewing benefits.

9 Q. So they -- they appreciate these
10 resources, in other words?

11 A. They appreciate these resources and
12 they -- they recognize that improvement is needed
13 to the -- to the system for meeting the public
14 benefits that the river should provide.

15 Q. And is there any example of a specific
16 benefit that these members were denied as a result
17 of the relicensing under the CRA terms and
18 conditions?

19 A. I have not discussed that with members.

20 Q. Are the members aware that the -- of
21 the operational changes that we have discussed
22 today with respect to the Comprehensive Relicensing
23 Agreement?

24 A. The member -- I can't tell you exactly
25 what they understand, but I know our discussions

1 were related around the differences between the CRA
2 flows and the flows in our recommendations and the
3 mitigation for lack of flows with land protection
4 and monetary compensation.

5 Q. Did any person that is a member of
6 American Rivers have a discussion with you about
7 the impact on them for moving from current
8 conditions to CRA conditions?

9 A. I don't recall.

10 Q. Are you aware of any such impact for
11 any individual American Rivers member?

12 A. The impact to move from current
13 conditions to CRA conditions?

14 Q. On them. Yes.

15 A. On them? Well, I think there would
16 be -- again, as it comes to recreational boating,
17 fishing, as I said before, and the aquatic life,
18 there would be an enhancement under the CRA.

19 Q. Are you aware of any specific harm in
20 terms of negative impact on any individual American
21 Rivers member from moving from the current regime
22 to the CRA regime for operation of these projects?

23 A. I'm not aware of a harm.

24 MR. LONG: No further questions.

25 MR. POTTER: Off the record.

1 (Off-the-record conference.)

2 (A recess transpired.)

3 (Mr. Holman present.)

4 EXAMINATION

5 BY MR. DeSCHERER:

6 Q. Mr. Jobsis, I'd like to ask you just a
7 few questions.

8 Previously do you recall Mr. Long
9 asking you questions about whether the proposed
10 flows as part of the CRA will be an enhancement
11 over the current license?

12 A. I do recall that, yes.

13 Q. Is it your understanding that -- or do
14 you know whether Duke on a voluntary basis at the
15 current time at times exceeds the flow levels in
16 its current license?

17 A. I do know that Duke has for probably 15
18 years or longer voluntarily released flows that are
19 similar to the level they are -- we -- they have
20 put forth in the CRA.

21 Q. So as a practical matter, is it -- is
22 it always the case that there will be an
23 enhancement in your view between the flows in the
24 CRA versus what Duke currently releases?

25 A. In the license requirements -- the CRA

1 is an enhancement over the license requirements,
2 but the CRA is not necessarily an enhancement over
3 what Duke has been doing in practice.

4 Q. Okay. Thank you.

5 I am going to hand you a letter and ask
6 you if you recognize it, and I'm going to mark that
7 as Respondent-Intervener's 1.

8 (RESPONDENT-INTERVENOR EXH. 1, August
9 31, 2009, Letter to Ms. Kimberly D. Bose From David
10 M. Bernhart, marked for identification.)

11 BY MR. DeSCHERER:

12 Q. Do you recognize this letter?

13 A. I do recognize this letter. It's a
14 letter from the National Marine Fisheries Service
15 to the secretary of the Federal Energy Regulatory
16 Commission dated August 31st, 2009.

17 Q. And does this relate to the ongoing
18 FERC relicensing process for the Catawba?

19 A. Yes, it does. It's related to
20 Endangered Species Act consultation --

21 Q. Will you --

22 A. -- for the Catawba-Wateree
23 Hydroelectric Project.

24 Q. Will you read out loud the first eight
25 lines of the letter.

1 able to identify any additional contentions that
2 Mr. Jobsis has not already discussed or made at the
3 board hearing?

4 A. No, he covered them.

5 Q. All right. Let me ask you about the
6 question of standing which is going to be a little
7 bit different from my examination of Mr. Jobsis.
8 Okay?

9 A. Okay.

10 Q. I want to focus on members of your
11 organization, sir, and any specific individuals
12 that have been adversely impacted by the movement
13 to CRA conditions for the Catawba-Wateree
14 Hydroelectric Project.

15 A. The CRA has not been implemented yet.

16 Q. Will any of them be harmed by that?

17 A. I don't have any actual knowledge of
18 harm that has not been caused by something that
19 hasn't been done.

20 MR. LONG: I just want to read that
21 again.

22 BY MR. LONG:

23 Q. Where are your members in South
24 Carolina located?

25 A. We have five -- approximately 5,000

1 members. Most of them are in the eight coastal
2 counties. We have a substantial number -- I'm not
3 sure of the exact number -- here in Columbia. Once
4 you get off the coast, they're often concentrated
5 around municipalities.

6 Q. Are -- do you have any members in
7 counties that these rivers run through, the Wateree
8 and the Catawba?

9 A. Yes.

10 Q. Okay. What counties?

11 A. I don't have a county-by-county
12 breakdown. I have identified a couple of folks who
13 regularly use and enjoy the river, but I just know
14 that we do have members and I can look into numbers
15 and counties and that sort of thing if necessary.

16 Q. And you mentioned that you have in mind
17 a couple of folks that regularly use and enjoy the
18 rivers. What can you tell me about that?

19 A. Two members. Long-time members who
20 regularly boat, photograph, fish up and down the
21 Catawba-Wateree basin.

22 Q. And are you prepared to divulge their
23 names under the protective order?

24 A. Having not been briefed by counsel on
25 the protective order, I can't say for certain, but

1 I'd say that sounds reasonable.

2 MR. LONG: All right. Do you want to
3 handle that offline?

4 MR. DeSCHERER: Sure. We're just going
5 to step --

6 MR. LONG: Yeah, if you want to talk
7 about whether he can do that.

8 (A recess transpired.)

9 BY MR. LONG:

10 Q. Back on.

11 A. I did touch base with a couple members
12 and make sure that these things -- these statements
13 were accurate, but if it's going to be an issue on
14 the May 6th hearing or if they're going to be
15 suddenly part of the case, I would feel more
16 comfortable if I let them know that they were about
17 to have their names formally used in a court case.
18 I can do that, but as a matter of courtesy to them,
19 I'd want to let them know.

20 Q. And then you can give those through
21 your counsel --

22 A. Absolutely.

23 Q. -- to me?

24 A. I think -- I think it's going to be
25 fine.

1 Q. Now, just following up on the
2 circumstances for those two members, do you -- can
3 you tell me in which county they live?

4 A. The ones I'm thinking of -- one of them
5 lives in Richland County and one of them has a
6 residence in Beaufort County and Richland County.

7 Q. And how was the staff and water quality
8 certification that was issued by the DHEC staff in
9 this case -- how would that certification have
10 harmed either of those individuals?

11 A. It seems speculative to me -- the
12 certification was denied. So it seems speculative
13 to me to imagine ways that they may be harmed by
14 something that was never approved.

15 Q. Well, what is the concern that they
16 would have about the implementation that they
17 wanted to prevent?

18 A. The reduced flows, the lower levels of
19 flows that negatively impact the balanced
20 indigenous aquatic community of the Wateree River.
21 The precedential value of trading land for water
22 in -- in other regulatory proceedings in South
23 Carolina. Their general belief that we need to
24 take steps to bring back species that are on the
25 brink. And we do what we can to help them recover

1 as supported by science and data. Those are the
2 ones off the top of my head.

3 Q. Did you discuss each one of those with
4 these two individuals?

5 A. I can't say that I touched on every --
6 more or less. More or less. I can't say that I
7 said those exact words to them, but, yeah.

8 Q. Were they aware that the CRA flows were
9 increasing over the current license flows?

10 A. Yes.

11 Q. In what sense were they worried about
12 reduced flows then?

13 A. They're worried about the trading land
14 for water that natural resource agencies say is
15 necessary to meet habitat needs.

16 Q. And did they understand that the CRA
17 flows would increase habitat for endangered species
18 such as the shortnose sturgeon?

19 A. They understood that the CRA flows were
20 higher than what is in the license now, and beyond
21 that, I can't speak to what they exactly knew.

22 Q. Did -- did they have any knowledge or
23 understanding of any change in habitat expected
24 under the CRA regime?

25 A. I can't speak to the specifics -- that

1 specific level of knowledge for each of the two of
2 them.

3 Q. And you referred to something as the
4 precedential value of trading land for water. What
5 was their concern for that?

6 A. That if you trade land for water in one
7 place, anytime there was an issue where stream flow
8 quantity was the issue, that water would again be
9 traded for land, that other applicants could make
10 the same argument ultimately to the detriment of
11 the river or the resource.

12 Q. And did you discuss with either of them
13 the -- the flow regime that the CRA provides for in
14 comparison to the flow regime that South Carolina
15 Coastal Conservation League was seeking in this
16 case?

17 A. Not in any sort of scientific detail.

18 Q. In any detail at all?

19 A. Just broadly in terms of, you know, the
20 proposal was not enough water -- for the reasons we
21 stated it's not enough water.

22 Q. Were there any species of concerns that
23 those individuals identified to you?

24 A. All species, but certainly the listed
25 species, the shortnose sturgeon.

1 Q. And what did they have to say about
2 shortnose sturgeon?

3 A. Again, they have a -- an interest, a
4 desire to see species recover.

5 Q. Are there any other members that you're
6 aware of that you've talked to for purposes of this
7 deposition today that would be harmed by the water
8 quality certification that Duke sought and that the
9 DHEC staff issued?

10 A. Those are the two I spoke with in
11 preparation for today's deposition.

12 Q. Okay.

13 MR. LONG: Go off the record for a
14 second.

15 (Off-the-record conference.)

16 MR. LONG: That's it. Thank you.

17 THE WITNESS: Great. Thank you.

18 (The deposition was concluded at

19 3:44 p.m.)
20
21
22
23
24
25

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Carolinas, LLC,

Petitioner,

vs.

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

Respondents.

Docket No. 09-ALJ-07-0377-CC

**RESPONDENT-INTERVENORS'
LIST OF PROPOSED
WITNESSES & EXHIBITS**

Respondent-Intervenors American Rivers and the South Carolina Coastal Conservation League ("Conservation Groups") hereby submit this list of proposed witnesses they may call and proposed exhibits they may seek to introduce as evidence at the hearing of this matter. Each exhibit identification refers to the entirety of the document, including any appendices and exhibits, without regard to whether the appendices and exhibits were included in referenced deposition exhibits. In addition, where deposition copies are of poor quality or do not retain color from the original document, the Conservation Groups may introduce new copies of the same documents. By identifying proposed exhibits and witnesses, Conservation Groups do not waive any objections they may have to relevance, materiality, or admissibility of such exhibits or witness testimony. The Conservation Groups may revise the sequence and provide a re-numbered list of their trial exhibits prior to trial. The Conservation Groups also reserve the right to supplement their list of potential exhibits with documents identified from ongoing review of documents produced recently on CDs by the S.C. Department of Health and Environmental Control ("DHEC") and/or the documents produced electronically by Duke Energy Carolinas,

LLC ("Duke Energy"), which Respondent-Intervenors are continuing to review, and further reserve their right to supplement their list with additional documents received in response to prior-pending public records requests, in response to designations by the other parties, in response to new information provided by any of the parties during the course of the hearing, or with leave of the court for any other reason.

LIST OF PROPOSED WITNESSES

Respondent-Intervenors may call any or all of the following witnesses:

1. Gerrit Jöbsis
2. Patrick Moore
3. Bob Guild (Conservation Groups' interests)
4. John Cooper (Conservation Groups' interests)
5. Stuart Greeter (Conservation Groups' interests)
6. Mark Cantrell
7. Shawn Young, Ph.D.
8. Bruce Allen Pruitt, Ph.D.
9. Kimberly M. Meitzen
10. Representatives of the Department of Health and Environmental Control: Rusty Wenerick, Heather Preston, Chuck Hightower, and Wade Cantrell.
11. Representatives of the Department of Natural Resources: Dick Christie, Bill Post, Doug Cooke, Mark Collins, and Barry Beasley.
12. Representatives and consultants of Duke Energy: Mark Oakley, Jeffrey Linberger, Dave Coughlan, Hugh Barwick, Ty Ziegler, and John Knight.
13. Any witness identified or offered by any other party.
14. Witnesses offered for the purposes of authenticating documents to which authenticity has not been stipulated.

LIST OF PROPOSED EXHIBITS

Respondent-Intervenors may seek to introduce any or all, or portions of, the following exhibits:

1. Section 401 Water Quality Certification Application to the South Carolina Department of Health and Environmental Control, Catawba-Wateree Hydroelectric Project (FERC No. 2232) (including Supplemental Information Packet and appendices) (June 2008)
2. Catawba-Wateree Revised Comprehensive Relicensing Agreement ("CRA") (Dec. 22, 2008) (including explanatory statement and appendices, as well as cover letter submitted to FERC Dec. 28, 2010).
3. Notice of Department Decision - Water Quality Certification, Public Notice # DHEC 08-C-001 (May 15, 2009) (including Staff Assessment)
4. American Rivers and South Carolina Coastal Conservation League's Request for Final Review of the South Carolina Department of Health and Environmental Control's Notice of Department Decision - Water Quality Certification (May 29, 2009).
5. Duke Energy's Response to Request for Final Review (June 9, 2009)
6. American Rivers and South Carolina Coastal Conservation League's reply to Duke Energy's Response to Request for Final Review (June 12, 2009)
7. South Carolina Board of Health and Environmental Control, Final Agency Decision (09-RFR-43) (Aug. 6, 2009)
8. Transcript of the Board hearing (July 9, 2009)
9. Santee River Basin Accord for Diadromous Fish Protection, Restoration, and Enhancement (Dep. Ex. P-18) (ARCCL 000283-000304)
10. Duke's Application for New License, including appendices and exhibits (FERC Project No. 2232)
11. Comments submitted by Conservation Groups regarding Duke's new license application (FERC Project No. 2232), including:
 - a. Conservation Groups' Comments on First Stage Consultation Document (FERC Project No. 2232) (May 31, 2003) (ARCCL 000052-90)
 - b. Conservation Groups' Comments on the Notice of Application and Settlement Agreement Tendered for Filing With the Commission, Soliciting Comments on the Settlement, Additional Study Requests, Establishing Procedural Schedule for Relicensing and a Deadline for Submission of Final Amendments (FERC Project No. 2232) (Oct. 30, 2006) (ARCCL 000094-113)

- c. Conservation Groups' Comments, Motion to Intervene, Protests, (January 5, 2007) (ARCCL 0000114-122)
 - d. Conservation Groups' Comments and Recommendations Regarding Notice of License Ready for Environmental Analysis, Catawba Wateree Hydroelectric Project (FERC Project No. 2232) (June 6, 2008) (ARCCL 0000123-144)
 - e. Comments on the Draft Environmental Impact Statement for the Catawba Wateree Hydroelectric Project (FERC Project No. 2232) (May 11, 2009) (ARCCL 0000175-191)
12. Conservation Groups' Comments on Duke Energy's Section 401 Water Quality Certification Application to the South Carolina Department of Health and Environmental Control, Catawba-Wateree Hydroelectric Project (FERC Project No. 2232) (Oct. 7, 2008) (ARCCL 000145-174).
 13. Department of Interior's Comments on Final License Application ("FLA") and CRA (Oct. 27, 2006) (eLibrary no. 20061027-5039)
 14. Department of Interior's Comments and Recommendations, Notice of Application Ready for Environmental Analysis, Catawba-Wateree Hydroelectric Project (FERC Project No. 2232) (June 4, 2008) (eLibrary no. 20080604-5002).
 15. Department of Interior's Preliminary Section 18 Prescriptions for Fishways (June 4, 2008) (eLibrary no. 20080605-5006)
 16. National Marine Fisheries Service's ("NMFS") Comments on FLA (Oct. 26, 2006) (eLibrary no. 20061026-5053)
 17. NMFS' Preliminary Recommendations, Terms, Conditions and Reservation of Authority to Prescribe Fishways (June 5, 2008) (eLibrary no. 20080610-0243, 20080606-5077) (Dep. Ex. P-15) (ARCCL 000259-282)
 18. NMFS' Comments on Draft Environmental Impact Statement (May 6, 2009) (eLibrary no. 20090506-5070 (ARCCL 000250-255)
 19. Letter from David M. Bernhart, NMFS, to Kimberly D. Bose, FERC (Aug. 31, 2009) (eLibrary no. 20090910-0237) (Dep. Ex. R-I 1) (ARCCL 000256-258)
 20. Final Recovery Plan for Shortnose Sturgeon (1998) (ARCCL 000898-001026) (Dep. Ex. P-27).
 21. NOAA Technical Memorandum NMFS-OPR-18, A Protocol for Use of Shortnose and Atlantic Sturgeons (May 2000) (ARCCL 000805-825) (Dep. Ex. R-I 15)
 22. Wateree Floodplain Inundation Study Report (July 2006) (DE_CWHP0008452 -- 8497) (Dep. Ex. P-30), as well as related underlying data in possession of DTA.

23. Fish Community Survey and Assessment (June 25, 2004) (available at <http://www.duke-energy.com/pdfs/aquatics01.pdf>).
24. Fish Community Survey and Assessment in the Catawba And Wateree Rivers – 2004 (Updated in 2005) (June 24, 2005) (Dep. Ex. R-I 33) (available at http://www.duke-energy.com/pdfs/Aquatics_01_Report.pdf)
25. Diadromous Fish Studies (June 25, 2004) (available at <http://www.duke-energy.com/pdfs/aquatics3.pdf>)
26. Diadromous Fish Sampling in the Wateree River – 2004 & 2005 (available at http://www.duke-energy.com/pdfs/Aquatics_03.1_Report.pdf)
27. Santee-Cooper Basin Diadromous Fish Passage Restoration Plan (2001) (Dep. Ex. P-18)
28. Instream Flow Assessment (Dec. 5, 2003) (available at <http://www.duke-energy.com/pdfs/aquatics4.pdf>)
29. Instream Flow Study Report (Dec. 2005) (available at http://www.duke-energy.com/pdfs/Complete_IFIM_Report.pdf)
30. Mussel Survey (June 25, 2004) (available at <http://www.duke-energy.com/pdfs/aquatics6.pdf>)
31. Mussel Surveys for Catawba-Wateree Relicensing (June 6, 2005) (available at http://www.duke-energy.com/pdfs/Aquatics_06_Report.pdf)
32. Aquatics Resource Committee Report (6/29/05) (available at http://www.duke-energy.com/pdfs/Final_Aquatic_Resource_Committee_Report.pdf) (ARCCL 000022-000040) (Depo Ex. R-I 45)
33. Detailed Water Quality Study Plan (including appendices) (Aug. 11, 2004) (available at http://www.duke-energy.com/pdfs/Detailed_WQ_SPTText2.pdf)
34. Water Quality Resource Committee Report (July 9, 2005) (available at http://www.duke-energy.com/pdfs/WQ_RC_Report_ver_5.pdf)
35. Draft CRA Excerpt (DE_CWHP0039879-39880)
36. Handwritten notes of Steven Leach (April 7, 2010) (DE CWHP SDL000001-000005) (Dep. Ex. R-I 13)
37. Document entitled "Water Quality Team" (April 24, 2003) (DE_CWHP0040050-DE_CWHP0040053)
38. Email from Mark Oakley to Ed Luttrell (Oct. 31, 2006) (DE_CWHP0106537-106538)
39. Email from Dick Christie to Barry Beasley (Aug. 9, 2002)

40. Email from Dick Christie to Mark Oakley (Feb. 6, 2003) (DE_CWHP0040054-40067)
41. Water Quantity, CW Ops and Modeling Tools (April 24, 2003) (DE_CWHP0040050)
42. Email from Mark Oakley to Scott Fletcher (Oct. 8, 2003) (DE_CWHP0104189)
43. Email from Jeffrey Lineberger to Greg Kozak (March 1, 2004) (DE_CWHP0013850)
44. Letter from Timothy N. Hall, U.S. Fish and Wildlife Service, to Mark Oakley (March 19, 2004) (Dep. Ex. R-I 37) (ARCCL 000646-649) (elibrary No. 20041130-0267)
45. Letter from Edwin Eudaly, U.S. Fish and Wildlife Service, to Mark Oakley (March 19, 2004) (elibrary No. 20041130-0267)
46. Email from Steven Johnson to David Coughlan (April 20, 2004) (Dep. Ex. R-I 34) (DE_CWHP0026226- DE_CWHP0026228)
47. Letter from Timothy N. Hall, U.S. Fish and Wildlife Service, to Mark Oakley (June 7, 2004) (Dep. Ex. R-I 38) (ARCCL 000650-657) (elibrary No. 20041130-0267)
48. Email from Mark Oakley to Ty Ziegler (June 23, 2004) (DE_CWHP0039423)
49. Email from Gene E. Vaughn to Mark Cantrell (July 26, 2004) (DE_CWHP0037664)
50. Email from Lineberger to Lineberger (Aug. 11, 2004) (DE_CWHP0014013) (Dep. Ex. R-I 6)
51. Email from Dempsey (Hugh) Barwick to Phillip Moore (Aug. 18, 2004) (DE_CWHP0096819) (Dep. Ex. R-I 35)
52. Email from Prescott Brownell to Arnold Stephen (Aug. 30, 2004) (DE_CWHP0022714)
53. Letter from Timothy N. Hall, U.S. Fish and Wildlife Service, to Mark Oakley (Sept. 14, 2004) (elibrary No. 20041130-0267)
54. Letter from Timothy N. Hall, U.S. Fish and Wildlife Service, to Mark Oakley (Nov. 19, 2004) (Dep. Ex. R-I 16) (ARCCL 000650-657)
55. Letter from Timothy N. Hall, U.S. Fish and Wildlife Service, to Mark Oakley (Nov. 22, 2004) (elibrary No. 20041130-0267)
56. Email from Mark Oakley to Steven Johnson (Jan. 5, 2005) (DE_CWHP0020009)
57. Email from Steven Johnson to Doug Cooke (Jan. 18, 2005) (DE_CWHP0020445)
58. Email from Mark Collins to David Coughlan (Jan. 18, 2005) (DE_CWHP0020303)
59. Email from Mark Oakley to Steven Johnson (Feb. 10, 2005) (DE_CWHP0020839)

60. Letter from Mark Oakley to Roy Crabtree (NOAA Fisheries) (Feb. 11, 2005) (DE_CWHP0020840- DE_CWHP0020841)
61. Email from Mark Oakley to Steven Johnson (Feb. 11, 2005) (DE_CWHP0020440- DE_CWHP0020441)
62. Letter from Timothy N. Hall, U.S. Fish and Wildlife Service, to Mark Oakley (Feb. 15, 2005) (Dep. Ex. R-I 37) (elibrary No. 20050307-0042)
63. Email from Barry Beasley to Dick Christie, Ed Duncan (Mar. 25, 2005)
64. Email from Mark Oakley to Tim Gause (Mar. 29, 2005) (DE_CWHP0039972)
65. Email Mark Oakley to Ed Luttrell (April 15, 2005) (DE_CWHP0101067) (Dep. Ex. R-I 7, 31)
66. Email from David Coughlan to Hugh Barwick (April 21, 2005) (DE_CWHP0096465)
67. Email from Mark Oakley to Edward Bruce (Sept. 29, 2005) (DE_CWHP0011664) (Dep. Ex. R-I 29)
68. Email from Mark Oakley to Edward Bruce (Oct. 3, 2005) (DE_CWHP0035315) (Dep. Ex. R-I 5)
69. Letter from Mark Oakley to Rheta Geddings (Oct. 28, 2005) (Dep. Ex. R-I 27)
70. Email from Dick Christie to Ed Duncan and Barry Beasley (Dep. Ex. R-I 30)
71. Email from Jeffrey Lineberger to Edward Bruce (Feb. 7, 2006) (DE_CWHP0030096- DE_CWHP0030097) (Dep. Ex. R-I 8)
72. Memorandum from Department of Interior, U.S. Fish and Wildlife Service, to CWRC Stakeholders (Feb. 16, 2006) (ARCCL 000708-710) (Dep. Ex. R-I 17)
73. Email from Steve Jester to Jeffrey Lineberger (Apr. 1, 2006) (DE_CWHP0051389)
74. Email from Steven Johnson to Jeffrey Lineberger (Aug. 18, 2006) and attachment, Meeting with Department of Interior and Duke, DLA Resolution Meeting (May 9, 2006) (DE_CWHP0039933-39941)
75. Email from Mark Oakley to Carol Goolsby (May 22, 2006) (DE_CWHP0038845- 38846) (Dep. Ex. R-I 9)
76. Email from Mark Oakley to Duke Staff (May 22, 2006) (DE_CWHP0038664) (Dep. Ex. R-I 28)
77. Email from Steve Jester to Mark Oakley (May 23, 2006) (DE_CWHP0038664-65)
78. Email from Jeff Lineberger to Mark Oakley (July 20, 2006) (DE_CWHP0039002-39025)

79. Email from Steven Johnson to Jeff Lineberger (Aug. 18, 2006) (Dep. Ex. R-1 11)
80. Email from Steven Johnson to Jeff Lineberger (Aug. 18, 2006) (DE_CWHP0039933)
81. Email from Jeff Lineberger to Hugh Barwick (Oct. 25, 2006) (DE_CWHP0023652-DE_CWHP0023653)
82. Email from Jennifer Huff to Jeffrey Lineberger (Oct. 27 2006) (DE_CWHP0097262)
83. Email from Dick Christie (DNR) to Gina Kirkland (DHEC) (Nov. 3, 2006)
84. Email from Tami Styer to John Whittaker (Nov. 9, 2006) (DE_CWHP0042609)
85. Email from Mark Oakley to Tamara Styer (Nov. 13, 2006) (DE_CWHP0041823-DE_CWHP0041899)
86. Email from Ed Bruce to Mark Oakley (Nov. 13, 2006) (DE_CWHP0041900-DE_CWHP0041976)
87. Email from Steve Jester to Jennings B. Kinney et al. (Jan. 17, 2008) (DE_CWHP0050635-50637)
88. Email from William E. Twilley to Mark E. Hollis (Feb. 18, 2008) (DE_CWHP0113062)
89. Email from Mark Oakley, Catawba-Wateree 401 Water Quality Certification Processes Begin in North Carolina and South Carolina (June 19, 2008)
90. Email from Jeffrey Lineberger to Hugh Barwick (July 15, 2009) (DE_CWHP0016635-16636)
91. Email from Mark Oakley, Update re: Catawba-Wateree 401 Water Quality Certification Processes in North Carolina and South Carolina (Aug. 12, 2008) (DE_CWHP0022050-DE_CWHP0022051)
92. Email from Scott Fletcher to Mark Oakley (Aug. 25, 2008) (DE_CWHP0031841)
93. Email from Mark Oakley, Duke Energy Receives Annual License Extension (Sept. 23, 2008)
94. Letter from Rusty Wenerick, DHEC, to Mark Oakley, Duke Energy (Oct. 8, 2008) (DE_CWHP0032486)
95. Emails between Mark Oakley and Rusty Wenerick (Oct. 8, 2008) (DE_CWHP0012852) (Oct. 8, 2008) (DE_CWHP0012870), (Oct. 21, 2008) (DE_CWHP0010846)
96. (Email from Dick Christie to Mark Oakley (Oct. 14, 2008) (DE_CWHP0042603) (Dep. Ex. R-1 24)
97. Email from Mark Oakley to Mark Oakley (Oct. 30, 2008) (DE_CWHP0012935)

98. Email from Bob Perry to Dick Christie (Nov. 3, 2008) (DE_CWHP0042874)
99. Email from Mark Oakley to Bob Perry (Nov. 4, 2008) (DE_CWHP0032366-32368)
100. Email from Tami C. Styer to Mark Oakley (May 29, 2009) (DE_CWHP0081376)
101. Email from Mark Oakley to Bob Perry (June 22, 2009) (DE_CWHP0102174)
102. Email from R. Ellison to Mark Oakley (June 22, 2009) (DE_CWHP0012248)
103. Email from Dick Christie to Bob Perry (June 29, 2009) (DE_CWHP0103418)
104. Email from Steve Jester to Tami Styer (June 29, 2009) (DE_CWHP0102450)
105. Email from Mark Oakley to D. Christie (July 9, 2009) (DE_CWHP_102161); email from Ty Ziegler to Mark Oakley (July 8, 2009) (DE_CWHP0098096-98097)
106. Email from Hugh Barwick to David J. Coughlan (Nov. 16, 2009) (DE_CWHP0098240) (Dep. Ex. R-I 36)
107. Letter from Bob Perry to Noah Silverman (Dec. 14, 2009) (DE_CWHP0043542) (Dep. Ex. P-16)
108. Email from Mark Oakley to Jeff Lineberger (Jan. 6, 2010) (DE_CWHP0081311)
109. U.S. Army Corps of Engineers et al., Stream Mitigation Guidelines (April 2003) (ARCCL 000222-000249)
110. Stream Mitigation for FERC-related 401 Certifications Internal DWQ Guidance, version 1.2 (Jan. 9, 2006) (ARCCL 000006-000013); Stream Mitigation for FERC-related 401 Certifications Internal DWQ Guidance, version 1.4 (January 9, 2007) (ARCCL 000014-000021); Memo from John Dorney to Coleen Sullins (Aug. 17, 2007) and attached Stream Mitigation for FERC-related 401 Certifications, Internal DWQ Guidance, NC Division of Water Quality, Version 1.5 (Aug. 24, 2007) (ARCCL 000041-000049)
111. Letter from James D. Giattina, Director, Water Protection Division of the US EPA Region 4, to Coleen Sullins, Chief, NC DWQ (Jan. 8, 2010) (Dep. Ex. R-I 4) (ARCCL 000001-000003)
112. Letter from James D. Giattina, Director, Water Protection Division of US EPA Region 4, to Gerrit Jöbbsis, American Rivers, (Jan. 8, 2010) (ARCCL 000004-000005)
113. Letter from Mark Robinson, FERC, to Alton Boozer, DHEC (Nov. 1, 2004) (ARCCL000050-000051)
114. Aquatics 01 Study Plan – Draft (Oct. 6, 2003)

115. Memo from Steven Leach to Dick Christie, Catawba-Wataree Hydro Project FERC No. 2232 Diadromous Fish Sampling in the Wataree River – 2004 Results for the Aquatics 03 Study Plan (Task 6), (Jan. 10, 2005)
116. Final Environmental Impact Statement prepared by FERC (selected excerpts to be identified) (Dep. Ex. P-28)
117. Documents related to hydropower upgrades and Department of Energy funding (2009-2010)
118. Estimation of Economic Parameters of U.S. Hydropower Resources (June 2003)
119. U.S. Department of Interior, The Instream Flow Incremental Methodology, A Primer for IFIM (March 1995)
120. U.S. Department of Interior, Stream Habitat Analysis Using the Instream Flow Incremental Methodology (1998)
121. Expert Report and curriculum vitae of Shawn Young, Ph.D. (Dep. Exs. P-24, P-25), and materials referenced in the report.
122. Expert Report and curriculum vitae of Kimberly Meitzen (Dep. Exs. P-36, P-39) and materials referenced in the report.
123. Curriculum vitae of Gerrit Jobsis (Dep. Ex. P-19)
124. Curriculum vitae of Bruce Pruitt (Dep. Ex. P-29)
125. Exhibits 1 – 9 to Respondent-Intervenors' Memorandum in Opposition to Petitioner Duke Energy's Motion for Summary Judgment and Motion for Declaratory Judgment.
126. The Administrative Record
127. Any written discovery or pleadings served by any party, and any attachments thereto
128. Any deposition exhibit of any party
129. Any affidavit of any party or witness
130. Any exhibit identified or offered by any other party
131. Demonstrative exhibits

This the 1st day of June, 2010.

Christopher K. DeScherer
Christopher K. DeScherer
SOUTHERN ENVIRONMENTAL LAW CENTER
43 Broad Street, Suite 300
Charleston, SC 29401
Tel: (843) 720-5270
Fax: (843) 720-5240
cdescherer@selcsc.org

Julia F. Youngman, admitted *pro hac vice*
SOUTHERN ENVIRONMENTAL LAW CENTER
200 West Franklin Street, Suite 330
Chapel Hill, NC 27516
Tel: (919) 967-1450
Fax: (919) 929-9421
jyoungman@selcnc.org

Richard Roos-Collins, (*pro hac vice*)
Natural Heritage Institute
100 Pine Street, Suite 1550
San Francisco, CA 94111
Telephone: (415) 693-3000 ext. 103
Facsimile: (866) 407-8073
rrocollins@n-h-i.org

*Counsel for Respondent-Intervenors American Rivers and
South Carolina Coastal Conservation League*

CERTIFICATE OF SERVICE

I hereby certify that I am counsel for Respondent-Intervenors South Carolina Coastal Conservation League and American Rivers in the above-captioned matter, and that on the 18 day of June, 2010, a copy of the foregoing document was served on the following persons via Federal Express, with courtesy copies by e-mail:

James W. Potter, Esq.
Nexsen Pruet, LLC
1230 Main Street, Suite 700
P.O. Drawer 2426
Columbia, SC 29202
jpotter@nexsenpruet.com

Nash E. Long, III, Esq.
Winston & Strawn LLP
214 N. Tryon Street
Charlotte, NC 28202
NLong@winston.com

Stephen P. Hightower, Esq.
Office of General Counsel
S.C. Department of Health and
Environmental Control
2600 Bull Street
Columbia, SC 29201
HIGHTOSP@dhec.sc.gov


Christopher K. DeScherer
SOUTHERN ENVIRONMENTAL LAW CENTER
43 Broad Street, Suite 300
Charleston, SC 29401

BOARD:
Paul C. Aughtery, III
Chairman
Edwin H. Cooper, III
Vice Chairman
Steven G. Kimer
Secretary



C. Ead. Hunter, Commissioner

Promoting and protecting the health of the public and the environment.

BOARD:
Henry C. Scott
M. David Mitchell, MD
Glenn A. McCall
Coleman F. Buckhouse, MD

July 8, 2010

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SC Court of Appeals

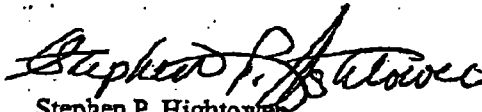
Honorable Jeanette Barber, Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Duke Energy Carolinas, LLC v. South Carolina Department of Health and
Environmental Control*
Docket No. 08-ALJ-07-0381-CC
OGC No. 20887.1

Dear Ms. Gee:

Enclosed please find an original and one (1) copy of the Department's Notice of Appeal,
copy of the order appealed from, and certificate of service in the above referenced matter

Very truly yours,


Stephen P. Hightower
Staff Attorney

Enclosures

cc: James W. Potter, Esquire
Nash E. Long, III, Esquire
Christopher DeScherer, Esquire

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Office of General Counsel

Columbia Office • 2600 Bull Street • Columbia, SC 29201 • Phone: (803) 898-3350 • Fax: (803) 898-3367 • www.scdhec.gov

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge
Docket No. 09-ALJ-07-0377-CC

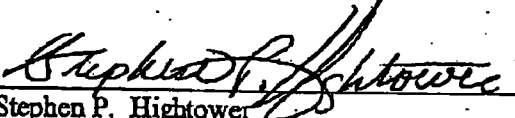
South Carolina Department of Health and Environmental
Control..... Appellant,

vs.

Duke Energy Carolina, LLC, ... Respondent.

NOTICE OF APPEAL

The South Carolina Department of Health and Environmental Control appeals the Order on Motion for Summary Judgment issued by the Administrative Law Court on June 10, 2010 granting Summary Judgment to Respondent.


Stephen P. Hightower
S. C. Bar No. 72265
Staff Attorney
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201
Tel: 803.898.3349
Fax: 803.898.3367
hightosp@dhec.sc.gov
Attorney for South Carolina Department of
Health and Environmental Control

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Carolinas, LLC,

Petitioner,

v.

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

Respondents.

Docket No. 09-ALJ-07-0377-CC

**ORDER ON MOTION
FOR SUMMARY JUDGMENT**

This matter is before the Administrative Law Court pursuant to the Motion of the Petitioner, Duke Energy Carolinas, LLC (Petitioner or Duke) for Summary Judgment and its Motion for Declaratory Judgment, filed with this Court on January 21, 2010. Briefs on the Motions with supporting affidavits were submitted by all parties, and a hearing was held on May 6, 2010. After careful consideration of the memoranda and the arguments made at the hearing, Duke's Motion for Summary Judgment and Motion for Declaratory Judgment are hereby granted.

BACKGROUND

Duke operates the Catawba-Wateree Hydroelectric Project (Project) pursuant to a 50-year license issued by the Federal Power Commission (now the Federal Energy Regulatory Commission (FERC)) in 1958.¹ On August 29, 2006, Duke submitted an application for a new 50-year license to FERC in order to continue operating the Project. As a part of its application

FILED

June 10, 2010

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¹ In the event a new license does not issue prior to the expiration of the existing license, FERC issues an annual license from year to year which incorporates the conditions of the expired license.

for a new federal license, Duke is required to obtain a Water Quality Certification (WQC) under Section 401 of the Clean Water Act from each state in which the Project operates.

On April 7, 2008, FERC issued a "Ready for Environmental Analysis" (REA) notice on Duke's application, which started the clock running for Duke to provide FERC with a WQC from the State of South Carolina or evidence that it had applied for a WQC. Duke submitted its application for a WQC to the Respondent South Carolina Department of Health and Environmental Control (DHEC) on June 5, 2008. On May 15, 2009, DHEC issued a "Notice of Department Decision - Water Quality Certification" in which it proposed to issue the WQC for the Project with conditions. On May 29, 2009, the Respondents South Carolina Coastal Conservation League and American Rivers filed a Request for Final Review of the decision with the DHEC Board pursuant to S.C. Code Ann. § 44-1-60 (Supp. 2009). The Board held a Final Review Conference on July 9, 2009, and on August 6, 2009, it issued a Final Agency Decision which reversed the DHEC staff decision and denied the WQC, finding that the WQC failed to provide reasonable assurance that water quality standards would be met.

On September 4, 2009, Duke filed a request for a contested case hearing before this Court, seeking issuance of the WQC as issued by DHEC staff. The Court entered orders allowing the Respondents South Carolina Coastal Conservation League and American Rivers (Conservation Groups) and the South Carolina Attorney General to intervene in this matter on November 9, 2009. Duke filed the instant Motions on January 21, 2010.

STANDARD OF REVIEW

Rule 68 of the Administrative Law Court Rules provides that "[t]he South Carolina Rules of Civil Procedure . . . may, in the discretion of the presiding administrative law judge, be applied in proceedings before the Court to resolve questions not addressed by these rules." Rule 56(c) of the South Carolina Rules of Civil Procedure provides that summary judgment is properly granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." Rule 56(c), SCRCR. In order to prevail on its Motion for Summary Judgment, Duke thus has the burden of establishing the lack of any triable issue of fact. See, e.g., Brandt v. Gooding, 368 S.C. 618, 626, 630 S.E.2d 259, 263 (S.C. 2006); Singleton v. Sherer, 377 S.C. 185, 197, 659 S.E. 2d 196, 202 (Ct. App. 2008).

Furthermore, summary judgment should be granted "when plain, palpable and undisputed facts exist on which reasonable minds cannot differ." Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001). In determining whether summary judgment is proper, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. Byers v. Westinghouse Elec. Corp., 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004).

DISCUSSION

General Law

Section 401 of the federal Clean Water Act (CWA), 33 U.S.C. §1341 (CWA Section 401) requires an applicant for a Federal license for any activity which may result in any discharge into a navigable water to provide the federal licensing authority a certification from the state in which the discharge originates confirming the discharge will comply with applicable provisions of the CWA. This type of certification is known as a Water Quality Certification (WQC). States are required to establish procedures for public notice of all applications for WQC and procedures for public hearings to the extent the state deems hearings appropriate. CWA Section 401(a)(1) provides:

If the State . . . fails or refuses to act on a request for 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. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State. . . .

Thus, if a state fails to act upon a request for certification within a "reasonable period of time" the state certification requirements of Section 401 are waived.

25A S.C. Code Ann. Regs. 61-101 (Supp. 2009), which is the Water Quality Certification regulation, was first promulgated under the authority of the Pollution Control Act in 1990 to establish the procedures for the State of South Carolina to issue, deny or waive certification required under Section 401. S.C. Reg., Vol. 14, Issue 3, p. 143 (February 23, 1990). More specifically, Regulation 61-101 sets forth the procedures and policies for implementing the State

water quality certification requirements of the Clean Water Act. Regulation 61-101(A)(6) states as follows:

The Department is required by Federal law to issue, deny, or waive certification for Federal licenses or permits within one (1) year of acceptance of a completed application unless processing of the application is suspended. If 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. Unless otherwise suspended or specified in this regulation, the Department shall issue a proposed decision on all applications within 180 days of acceptance or an application.

(Emphasis added). Therefore, South Carolina law requires DHEC to issue a proposed decision on an application for a WQC within 180 days of acceptance of an application, unless that time period is "otherwise suspended or specified in [Regulation 61-101]."

Duke contends that DHEC waived its right to issue or deny a WQC for the Project because it did not issue a proposed decision within 180 days of the filing of the application as required by Regs. 61-101. Duke submitted its WQC application to DHEC on June 5, 2008. It argues that DHEC was required to render its proposed decision on or before December 2, 2008 or its right to issue or deny a WQC for the Project was waived by operation of state law. Therefore, when DHEC issued its "Notice of Department Decision - Water Quality Certification" on May 15, 2009, it lacked authority to do so because the waiver had already occurred. Likewise, Duke argues that the Board lacked authority to make its Final Agency Decision denying the WQC application on August 6, 2009, since there was no valid staff decision for it to review.

DHEC and the Conservation Groups, on the other hand, contend that Duke's motion for summary judgment should be denied because there are genuine issues of material fact which require development through discovery and which should be resolved on the merits, including documentary evidence which establishes the fact that DHEC sent Duke a number of requests for additional information to support its application. DHEC and the Conservation Groups argue that these requests for additional information had the effect of tolling the 180 day time frame for issuance of a proposed decision pursuant to 24A S.C. Code Ann. Regs. 61-30 (Supp. 2009).²

² DHEC and the Conservation Groups also argue that to the extent Duke's motion relies upon its Requests to Admit served upon DHEC, such reliance is inappropriate. First, they contend DHEC either responded to the

DHEC and the Conservation Groups thus contend that both Regulations 61-101 and 61-30 apply to WQC applications, but that Regulation 61-30 provides a specific method of determining when processing of a WQC application is suspended. To the contrary, Duke argues that Regulation 61-30 must be read separately from Regulation 61-101 and has no effect on whether processing of an application is being suspended under the latter regulation.

Regulation 61-30

Regulation 61-30 (Fee Regulation) is entitled "Environmental Protection Fees" and was promulgated to implement the South Carolina Environmental Protection Fund Act, S.C. Code Ann. §§ 48-2-10 thru 48-2-90 (2008) (Fees Act). The Fees Act requires the Department to charge fees for the various services and functions it performs under the seven (7) statutes

requests in a timely manner or, in the alternative, DHEC should be allowed to withdraw its admissions. Second, they argue that the requests, even if deemed admitted by DHEC, are not binding on the Conservation Groups. At the outset of the hearing, the Court addressed the issue of whether DHEC belated response to Duke's Request to Admit be allowed. DHEC's response was one week late. During that timeframe the daughter of DHEC's counsel was hospitalized. I find that these facts reflect good cause to allow the belated response. Furthermore, Duke has established no prejudice as a result of that one week delay. In fact, in its Reply Memorandum in support of the motions, Duke asserts that DHEC's responses to the Requests to Admit, which were submitted on January 25, 2010 and which are incorporated in DHEC's Memorandum in opposition to the motions, do not create any disputed issues of fact even if this Court does not deem the Requests to Admit to be admitted by rule.

Furthermore, DHEC and the Conservation Groups contend Duke's "motions improperly seek relief not requested in Duke's pleadings in the case." However, no pleadings have been ordered by the Court in this matter pursuant to ALC Rule 18. Therefore, there are no binding pleading upon which to make this motion. Rather, Duke filed a Notice of Request for Contested Case Hearing and thereafter the Court ordered that the parties submit Prehearing Statements. The Court's Order for Prehearing Statements required the parties to state, to the best of their ability, the "action requested of the Court" Duke's Prehearing Statement requests the Court to issue a 401 Certification as developed by the Department staff or "[a]lternatively, the Court could find that the Department failed to comply with regulatory and statutory requirements to act within 180 days and within one-year" Therefore, the issue of waiver is properly before the Court.

Finally, DHEC and the Conservation Groups argue that Duke cannot raise the issue of waiver at the contested case level because the issue was not raised before the DHEC Board at the Final Review Conference. However, this proceeding is a "contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act" S.C. Code Ann. § 44-1-60(F)(2) (Supp. 2009). In a contested case proceeding, the ALC is not restricted to a review of the decision below, but instead the proceeding before the ALC is "in the nature of a *de novo* hearing." *Reliance Ins. Co. v. Smith*, 327 S.C. 528, 534, 489 S.E.2d 674, 677 (Ct. App. 1997); see also *Marlboro Park Hosp. v. S.C. Dep't of Health and Envtl. Control*, 358 S.C. 573, 595 S.E.2d 851 (Ct. App. 2004). A trial *de novo* is one in which "the whole case is tried as if no trial whatsoever had been had in the first instance." *Blizzard v. Miller*, 306 S.C. 373, 375, 412 S.E.2d 406, 407 (1991). Although Act 387 of 2006 changed the nature of the DHEC Board's review from an appellate review following the contested case hearing before the ALC to an administrative review preceding the contested case hearing, the Act did not change the nature or scope of the ALC's review. The ALC clearly holds a "contested case hearing" under Section 44-1-60(F), and a "contested case hearing" is the due process evidentiary hearing required by the South Carolina Constitution. See 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 such instances the right to judicial review."). Accordingly, in a contested case hearing the ALC may consider every fact and legal issue relevant to the decision of DHEC, whether or not the fact or issue was raised at the Board level.

including the Pollution Control Act. S.C. Code Ann. § 48-2-30(B) (2008).³ The Fees Act further requires the promulgation of regulations establishing "a schedule for timely action by the Department of Health and Environmental Control on permit applications under [programs for which a permit processing fee is established]." S.C. Code Ann. § 48-2-70 (2008). Furthermore, Section 48-2-70 specifically provides that:

These schedules shall contain criteria for determining in a timely manner when an application is complete and the maximum length of time necessary and appropriate for a thorough and prompt review of each category of permit applications and shall take into account the nature and complexity of permit application review required by the act under which the permit is sought. 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.

(emphasis added). In accordance with the above statutory directive, Regulation 61-30(A) provides:

Pursuant to South Carolina Code Sections 48-2-50(1993) and 48-39-145, the Department of Health and Environmental Control shall charge fees for environmental programs it administers pursuant to federal and state law and regulations. This regulation prescribes those fees applicable to applicants and holders of permits, licenses, certificates, certifications, and registrations (hereinafter, "permits") and establishes schedules for timely action on permit applications....

24A S.C. Code Ann. Regs. 61-30(A) (Supp. 2009) (emphasis added). A "permit" is described in the regulation as "any permit, license, certificate, registration, plan approval, variance, or other approval issued by or required by the Department or any of its divisions, pursuant to any statute or regulation." Regs. 61-30(B)(13) (emphasis added). Accordingly, Regulation 61-30 applies to any permit issued by DHEC, including WQC Certifications.

With respect to time schedules, Regulation 61-30(H)(2)(vii) establishes a 180 day time frame for DHEC to make a determination on a WQC certification. The time schedule is computed beginning on the day notice is mailed to the applicant that the application is deemed "administratively complete," however, "[i]f notice that the application is Administratively Complete or notice that the application is not Administratively Complete, together with notice of the specific items deemed to be lacking, is not mailed to an applicant within ten (10) working

³ Those fees are deposited in a special account within the Treasurer's Office. S.C. Code Ann. § 48-2-30 (A) (2008).

days of receipt of an application, the time period will begin." Regs. 61-30(H)(1)(b). More importantly, "the 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." Regs. 61-30(H)(1)(c).

Nevertheless, the Department, as a matter of law cannot invoke provisions in a regulation promulgated under one Act in an action within the statutory authority of a different Act.

As a creature of statutes, regulatory bodies like DHEC have only the authority granted them by the legislature. Any action taken by DHEC outside of its statutory and regulatory authority is null and void.

Responsible Economic Dev. v. S.C. Dep't of Health and Envtl. Control, 371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007) (citation omitted). Based upon that reasoning, our Supreme Court held in Responsible Economic Development that since there was no statutory authorization to apply the Pollution Control Act and the Stormwater Act and their corresponding regulations to each other, "the regulations of the Pollution Control Act do not apply to the Stormwater Act or its regulations." Id.

Here, there are no provisions that specifically provide the regulations are overlapping. Rather, each regulation administers the provisions of the law authorizing the regulation. The Fee Act requires the Department to establish a schedule for timely action so as to have a time frame by which to determine if an applicant is entitled to a refund of the application fee. S.C. Code Ann. § 48-2-70 (2008). Following that authority, Regulation 61-30.B(22) defines "Time Schedules" as follows:

"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.

24A S.C. Code Regs. 61-30(B)(22) (Supp. 2009) (emphasis added). Accordingly, the Time Schedules in Section H of Regulation 61-30 are limited to determining if and when to grant a refund. It does not create a new overriding or superseding timeframe for the reviewing of all environmental permits issued by the Department.

DHEC nonetheless argued that it needs the ability to toll the 180 day timeframe pursuant to Rule 61-30 to insure it obtains the information it needs to decide these cases. However, the General Assembly has nonetheless generally established a timeframe for making these determinations to be 180 days. In complying with that timeframe the Regulation permits DHEC to set an appropriate time for submittal of information. However, by establishing that these matters must generally be decided within 180 days, the General Assembly has made the determination that 180 days is usually a sufficient period of time to reach a determination in these matters. Nevertheless, regulation 61-101 does provide for a means by which the 180 days may be tolled though it is not via the procedure that DHEC wishes to utilize. If the information is not submitted within that time period DHEC may upon notice suspend processing the certification if the information is necessary for reaching a certification decision. See 25A S.C. Code Ann. Regs. 61-101(C)(4) (Supp. 2009). DHEC thus obviously has a means to obtain the information necessary for it to make an informed decision without the need to engineer a construction of its regulations to accomplish that goal. Therefore, review of whether the Department timely reviewed the permit in this case is properly made pursuant to Regulation 61-101.

Review under Regulation 61-101

Duke filed its application for a WQC with DHEC on May 5, 2008. Thereafter, DHEC and Duke exchanged correspondence on several occasions. First, on June 27, 2008, e-mail exchanged between Duke's representative and DHEC's representative refers to Duke's attempt to identify adjacent property owners. On July 29, 2008, another e-mail from Duke to DHEC discusses the publication of public notices in South Carolina newspapers and includes an attachment listing mailing addresses of some of the adjacent property owners. Also on July 29, 2008, DHEC sent an e-mail to Duke that specified that an application fee of \$1,000.00 and affidavit of publication would be required before DHEC would process Duke's WQC application. The e-mail stated, in part:

The Department has 180 days to complete action on an application for 401 Water Quality Certification or the assessed fee must be returned. The 180 days includes only those days in which the application is actively being reviewed by the Department; the clock stops when information is requested and the SC Department of Health and Environmental Control is waiting on a response.

Accordingly, the 180 day clock will not start until we have received an affidavit of publication and the appropriate fee.

See Ex. 1 to Affidavit of William "Rusty" Wenerick in Support of DHEC's Response to Petitioner's Motions (Wenerick Affidavit) (emphasis in original).

Public Notice No. DHEC-08-C-001 was issued by DHEC on August 8, 2008. This notice informed the public that DHEC would accept comments on the Project received on or before October 7, 2008. The notice also included identical language concerning the running of the 180 day time frame to that quoted above. The Department subsequently sent a formal request for additional information to Duke on August 19, 2008, regarding the draft Quality Assurance Protection Plan (QAPP) that had been attached to Duke's application. This request also stated that "[o]nce the fee and affidavit of publication is received (requested 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." See Ex. 6 to Wenerick Affidavit. Subsequent formal requests for additional information sent by DHEC to Duke on October 8, 2008, and October 21, 2008, included language stating that "the clock stops when information is requested and the Department is waiting on a response." See Exs. 7-8 to Wenerick Affidavit. Duke provided responses to the October 8 request on November 10, 2008, and March 9, 2009. It responded to the October 21 request on November 21, 2008, and December 12, 2008, and continued to exchange information with DHEC on this request into February of 2009. See Ex. 8 to Wenerick Affidavit. With regard to the August 19, 2008 request for a draft QAPP, Duke submitted a revised QAPP on January 9, 2009, and DHEC notified Duke that the August 19 request was satisfied as of January 12, 2009. See Ex. 6 to Wenerick Affidavit. DHEC issued its proposed WQC decision on May 15, 2009.

Duke contends that none of these items of correspondence had the effect of tolling the 180 day time frame set forth in Regulation 61-101; it argues that the notices about the "180 day clock" pertains only to whether a fee refund would be required pursuant to Regulation 61-30. Regulation 61-101(A)(6) provides that unless an application is "otherwise suspended," by the Federal permitting agency, the applicant or the Department "on its own volition," DHEC must issue a proposed WQC decision within 180 days of acceptance of an application. The

Regulation further provides that: "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." Regs. 61-101(C)(2). Finally, the Regulation states that "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." Regs. 61-101(C)(4).

The WQC Regulation thus authorizes the Department to suspend the 180-day time period for issuing a decision only if one (1) of two (2) events occurs — either, (1) FERC suspends processing of the federal license application during the 180 days, or (2) the applicant fails to timely submit requested additional information necessary for reaching a certification decision to the Department and the Department notifies the applicant of the suspension. It is undisputed that neither Duke nor the Department requested FERC to suspend processing of Duke's license application, and FERC did not suspend processing of the license application on its own volition. Furthermore, the Department did not notify Duke that it was suspending the processing of its application because they failed to timely submit requested additional information necessary for reaching a certification decision.

While the Department, in the course of requesting additional information from Duke, included language advising Duke of the provisions of the Fee Regulation, that language clearly did not meet the legal requirement for suspension pursuant to R.61-101, i.e. notification of suspension after the applicant fails to submit information requested pursuant to the WQC Reg in a timely manner. In other words, the boilerplate language in the requests for additional information cannot possibly comply with the WQC Regulation's suspension requirement because the Department issued them to inform Duke of the date the responses were due. They were not issued after the due date, a prerequisite to the notice of suspension.

As of August 8, 2008, the application fee had been paid by Duke and DHEC put the application on public notice. Once the application was put on public notice, it was deemed complete. Therefore, the time within which the Department could request additional information

from Duke expired on August 18, 2008. On August 19, 2008 DHEC sent a request for additional information regarding the Quality Assurance Program Plan. The August 19 request was not timely and therefore did not create a suspension of time within which the Department was required to issue a decision.

Implication of Not Acting within 180 Days

DHEC and the Conservation Groups argue that Regulation 61-101 does not set forth any consequence for DHEC's failure to comply with the 180-day time frame and that the Court should therefore not assume that the legislature intended for DHEC to waive its power to dictate 401 permit terms once the 180-day time period elapses. In support of that contention, they cite Johnston v. S.C. Dep't of Labor, Licensing, and Regulation, 365 S.C. 293, 617 S.E.2d 363 (2005). In Johnston, a licensed real estate appraiser was charged by the Real Estate Appraisers Board (Board) with violating certain regulations applicable to those in his profession. After an administrative hearing on the matter, the Board found that the appraiser had committed the alleged violations and therefore issued a written order imposing a fine and suspending his license. Pursuant to S.C. Code Ann. § 40-60-150(C)(3) (Supp. 2004),⁴ the Board was required to serve written notice of its decision on the appraiser within thirty days of issuing its final order. However, notice of the Board's decision was not properly served on the appraiser within the requisite thirty-day time period. Thereafter, the appraiser appealed the Board's decision to the ALC. The ALC reversed the Board's order, finding that the Board's failure to serve notice of its decision within the statutorily-mandated time period divested the Board of jurisdiction to decide the matter. However, on further appeal, the Supreme Court held that the failure by the Board to comply with Section 40-60-150(C)(3) did not affect the Board's jurisdiction. Instead, the Supreme Court held that the Board's decision was valid, but ineffective, until it was served upon the appraiser. The Supreme Court explained:

There is no indication the Legislature intended for the time limit to prevent the Board from having the ability to discipline an errant appraiser if the Board fails to serve notice of the written decision within the prescribed time period. Instead, the Legislature intended to speed the resolution of appraiser disciplinary cases for the benefit of all parties involved. . . . We note that, although the thirty-day time limit is mandatory, the Legislature has not provided how that mandate is to be

⁴ S.C. Code Ann. § 40-60-150(C)(3) (Supp. 2004) stated in pertinent part: "The board shall render a decision and shall serve notice, in writing within thirty days, of the board's decision to the applicant or appraiser charged."

enforced. There is no language regarding the consequences if the Board misses the deadline for serving written notice of its decision on the appraiser. Accordingly, we will not assume the Legislature intended the Board to lose its power to act for failing to comply with the statutory time limit.

Johnston, 365 S.C. at 297-98, 617 S.E.2d at 365 (internal citations omitted). The Supreme Court then determined that the appraiser was not prejudiced by the Board's failure to complete service within thirty days of the Board's issuance of its decision, and it therefore remanded the case to the ALC for a ruling on the merits of the appraiser's other claims. Id. at 298, 617 S.E.2d at 365.

The present case is distinguishable from Johnston. In analyzing the implications of the 180 day timeframe for water quality certification under Regulation 61-101(A)(6) it is important to review the progression of the regulation's language in light of the Federal CWA. The first sentence of Regulation 61-101(A)(6) recognizes that the Department is required by Federal law to either:

- Issue the certification;
- Deny the certification; or
- Waive the certification

"within one (1) year of acceptance of a completed application unless processing of the application is suspended." More specifically, that Federal law provides that if the Department "fails or refuses to act on a request for 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." 33 U.S.C.A. § 1341(a)(1) (emphasis added). Clearly, Section 1341(a)(1) of the Federal law provides that if the State of South Carolina fails to properly act on a WQC within one year, the authority of the Department to review the certification request shall be waived. Therefore, at the outset, this is a matter that is undoubtedly subject to waiver or loss of jurisdiction by failure to act. Consequently, the issue in this case is not whether a certification (or under the analysis in Johnston, the jurisdiction) can be waived, but rather when it is waived.

The second sentence of Regulation 61-101(A)(6) provides for how the running of the timeframe may be suspended — by the Federal permitting agency, the applicant or the Department "on its own volition." This sentence is important because it notifies all participants in this process of the procedure under which the timeframe for issuing a decision on the permit

may be suspended. Importantly, Duke Energy correctly asserts that it is entitled to rely upon that established procedure.

Finally and most importantly, the last sentence of Regulation 61-101(A)(6) answers the question of when review of a certification is waived in South Carolina. It implements a 180 day timeframe to issue a proposed decision if the application is not suspended. While Regulation 61-101 does not expressly set forth consequences for DHEC's failure to timely issue its certification within 180 days, Regulation 61-101 clearly reflects the General Assembly's determination that these decisions must be made within 180 days unless the timeframe is otherwise suspended. Moreover, reviewing Regulation 61-101 in light of the CWA provisions clearly reflects that it addresses the waiver provision of the CWA. Therefore, the only reasonable interpretation of Regulation 61-101(A)(6) is that the 180 day (or approximately six month) time period implements the "reasonable period of time" for consideration of a certification under 33 USCA § 1341. In providing that timeframe, Regulation 61-101(A)(6) further requires the Department to issue its proposed decision within 180 days of acceptance of an application.⁵ Regulation 61-101(A)(6) thus establishes a mandatory timeframe in which a decision must be issued in South Carolina before it is waived.

Furthermore, if a waiver is not imposed by operation of Regulation 61-101, there is no consequence to the Department for not issuing a proposed decision in compliance with the time period established by the Legislature. Hence, by promulgating and adopting Regulation 61-101(A)(6) the State of South Carolina established in state law that the "reasonable time" within which the Department must issue or deny certification is 180 days, and if the Department fails or refuses to act on a request for certification within the 180 day time period, the state certification requirement with respect to the Federal permit application is waived. In this case, DHEC failed to follow its own procedures, since there is no indication that it ever requested additional information from Duke in accordance with Regulation 61-101 or that it suspended the processing

⁵ "The term 'shall' in a statute means that the action is mandatory." *Wigfall v. Tideland Utils. Inc.*, 354 S.C.100, 111, 580 S.E.2d 100, 105 (2003); see also *Goodman v. City of Columbia*, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995) (A regulation authorized by the legislature has the force of law.). This timeframe is therefore mandatory.

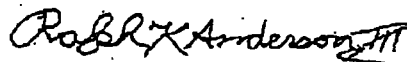
of the permit pending the receipt of additional information. To allow DHEC to now to proceed with its review would render the 180 day requirement meaningless.⁶

Finally, in Johnston, had the Supreme Court agreed with the appraiser's argument, it would have meant that the appraiser would have gone undisciplined for his actions. Clearly, allowing licensed real estate appraisers to go unpunished for their professional misdeeds is not in the public's best interest. Here, however, a state's waiver of its right to dictate 401 permit terms does not affect the federal government's authority to place conditions on the permit in accordance with federal law. See Christopher J. Eggert, The Scope of State Authority Under Section 401 of the Clean Water Act after PUD No. 1 v. Washington Department of Ecology. Accordingly, a waiver of the WQC in this instance does not mean that all review is evaded.

ORDER

For all the foregoing reasons, Duke's Motion for Summary Judgment is hereby GRANTED:

AND IT IS SO ORDERED.



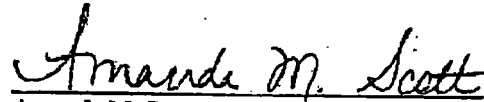
Ralph King Anderson, III
Chief Administrative Law Judge

June 10, 2010
Columbia, South Carolina

⁶ It is also notable that in Johnston, because the Board's decisions do not become effective until they are served on the appraiser, the Board has an independent reason to promptly serve the appraiser. Here, however, proposed projects cannot go forward until a certification is issued. DHEC generally has no independent reason to timely issue its certification other than the possibility of losing its power to deny or dictate the conditions of a certification.

CERTIFICATE OF SERVICE

I, Amanda M. Scott, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Amanda M. Scott
Judicial Law Clerk

June 10, 2010
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge
Docket No. 09-ALJ-07-0377-CC

South Carolina Department of Health and Environmental
Control.....Appellant,

vs.

Duke Energy Carolina, LLC, ...Respondent.

CERTIFICATE OF SERVICE

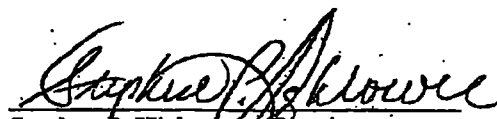
I certify that I have served a copy of the Department's Notice of Appeal on counsel of record by depositing a copy of it in the United States Mail, postage prepaid, addressed as follows:

James W. Potter, Esquire
W. Thomas Lavender, Jr., Esquire
Nexsen Pruet, LLC
Post Office Drawer 2426
Columbia, SC 29202
Attorneys for Respondent
Duke Energy Carolina, LLC

Christopher K. DeScherer, Esquire
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401
Attorney for Respondents-Interveners
American Rivers and South Carolina
Coastal Conservation League

Nash E. Long, III, Esquire
(Admitted pro hac vice)
Winston & Strawn LLP
214 North Tryon Street
Charlotte, NC 28202
Attorney for Respondent
Duke Energy Carolinas, LLC

Julia F. Youngman, Esquire
Southern Environmental Law Center
200 West Franklin Street, Suite 330
Chapel Hill, NC 27516
Attorney for Respondents-Interveners
American Rivers and South Carolina
Coastal Conservation League



Stephen P. Hightower, Esquire
South Carolina Department of Health and
Environmental Control
2600 Bull Street
Columbia, S.C. 29201
Tel: (803) 898-3349

July 8, 2010

BOARD:

Paul C. Aughry, III
Chairman

Edwin H. Cooper, III
Vice Chairman

Steven G. Kiser
Secretary



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

BOARD:

Henry C. Scott

M. David Mitchell, MD

Glenn A. McCall

Coleman F. Buckhouse, MD

July 15, 2010

Honorable Jeanette Barber, Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Duke Energy Carolinas, LLC v. South Carolina Department of Health and
Environmental Control*
Docket No. 08-ALJ-07-0381-CC
OGC No. 20887.1

Dear Ms. Gee:

Enclosed please find an original and one (1) copy of the Department's Notice of Appeal, copy of the Order on Motion for Reconsideration issued by the Administrative Law Court on July 9, 2010, and certificate of service in the above referenced matter. The Department respectfully requests that this Notice of Appeal be consolidated with the Notice of Appeal filed by the Department on July 8, 2010, with regard to the same case.

If you have any questions regarding this manner, I can be reached directly at (803) 898-3358.

Very truly yours,

Stephen P. Hightower
Staff Attorney

Enclosures

cc: James W. Potter, Esquire
Nash E. Long, III, Esquire
Christopher DeScherer, Esquire

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Office of General Counsel

Columbia Office • 2600 Bull Street • Columbia, SC 29201 • Phone: (803) 898-3350 • Fax: (803) 898-3367 • www.scdhec.gov

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge
Docket No. 09-ALJ-07-0377-CC

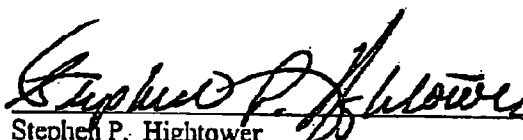
South Carolina Department of Health and Environmental
Control..... Appellant,

vs.

Duke Energy Carolina, LLC, ... Respondent.

NOTICE OF APPEAL

The South Carolina Department of Health and Environmental Control appeals the Order on Motion for Reconsideration issued by the Administrative Law Court on July 9, 2010, denying the Joint Motion for Reconsideration of Respondent South Carolina Department of Health and Environmental Control and Respondent-Intervenor American Rivers and South Carolina Coastal Conservation League.



Stephen P. Hightower
S. C. Bar No. 72265
Staff Attorney
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201
Tel: 803.898.3349
Fax: 803.898.3367
hightosp@dhec.sc.gov
Attorney for South Carolina Department of
Health and Environmental Control

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Duke Energy Carolinas, LLC,

Petitioner,

v.

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

Respondents.

Docket No. 09-ALJ-07-0377-CC

ORDER ON MOTION
FOR RECONSIDERATION

Respondents contend that this Court failed to consider facts uncovered during discovery that occurred after the summary judgment hearing in this case. Indeed, "summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). Here, however though a motions hearing was held before discovery was completed, the Amended Scheduling Order required that discovery be complete by May 17, 2010. The Court specifically withheld issuing its order until June 10, 2010, well after discovery was completed.¹ There was therefore more than ample time for Respondents to have shared with the Court any additional discovered evidence prior to the Court's decision. However, the Respondents did not provide any supplemental information to the ALC after discovery was completed.²

¹ Additionally, though there is a motion pending to expand discovery, Respondents have made no assertions that the request relates to this issue. Furthermore, as explained below if such discovery was needed in this proceeding Respondents were required to specifically explain that need to the ALC. Baughman; see also, George v. Empire Fire and Marine Ins. Co., 344 S.C. 582, 545 S.E.2d 500 (2001) ("Once the moving party carries its initial burden, the opposing party must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial." "quoting in part Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348 (1986)). Accordingly, the evidence does not establish that further discovery is likely to create any genuine issue of material fact.

² Notably, as to DHEC the staff and any documents creating an issue of genuine fact were in the custody and control of the Department.

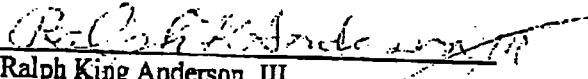
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ADMIN LAW COURT

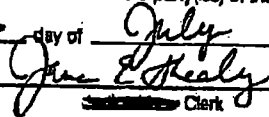
Moreover, Respondents' Motion also refers the Court to documents and deposition testimony but does not state with particularity any new facts uncovered by discovery that would impact the court's decision. Rather, the moving parties filed a group of documents with conclusory assertions and presumably request the Court to review them to determine if the prior decision was erroneous. Obviously, South Carolina does not follow the "plain error rule." Jean Hoefer Toal et al., Appellate Practice in South Carolina 55 (2d ed. 2002). To the contrary, an adverse party to summary judgment "must set forth specific facts showing there is a genuine issue for trial." Strickland v. Madden, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct. App. 1994). Moreover, an objection to a court's decision must be "sufficiently specific to inform the trial court of the point being urged by the objector." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). In this instance, the issue is whether there is new evidence that has come to light that establishes a genuine issue of material fact. Respondents' motion fails to properly produce any such evidence. Therefore,

IT IS HEREBY ORDERED that Respondents' Motion for Reconsideration is **DENIED**.
AND IT IS SO ORDERED.


Ralph King Anderson, III
Chief Administrative Law Judge

July 9, 2010
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 9th day of July
By:  Clerk

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Raphl King Anderson, III, Chief Administrative Law Judge
Docket No. 09-ALJ-07-0377-CC

South Carolind Department of Health and Environmental
Control..... Appellant,

vs.

Duke Energy Carolina, LLC, ... Respondent.

CERTIFICATE OF SERVICE

I certify that I have served a copy of the Department's Notice of Appeal on counsel of record by depositing a copy of it in the United States Mail, postage prepaid, addressed as follows:

James W. Potter, Esquire
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Nexsen Pruet, LLC
Post Office Drawer 2426
Columbia, SC 29202
Attorneys for Respondent
Duke Energy Carolina, LLC

Christopher K. DeScherer, Esquire
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401
Attorney for Respondents-Interveners
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(Admitted pro hac vice)
Winston & Strawn LLP
214 North Tryon Street
Charolette, NC 28202
Attorney for Respondent
Duke Energy Carolinas, LLC

Julia F. Youngman, Esquire
Southern Enceironmental Law Center
200 West Franklin Street, Suite 330
Chapel Hill, NC 27516
Attorney for Respondents-Interveners
American Rivers and South Carolina
Coastal Concervation League



Stephen P. Hightower, Esquire
South Carolina Department of Health and
Environmental Control
2600 Bull Street
Columbia, S.C. 29201
Tel: (803) 898-3349

July 15, 2010

STATE OF SOUTH CAROLINA
BEFORE THE ADMINISTRATIVE LAW COURT

Duke Energy Carolinas, LLC

Petitioner,

v.

South Carolina Department of
Health and Environmental Control,

Respondent,

American Rivers, and the South
Carolina Coastal Conservation League

Respondent-Intervenors.

Docket No. 09-ALJ-07-0377-CC

**MOTION FOR SUMMARY
JUDGMENT AGAINST
RESPONDENT-INTERVENORS FOR
LACK OF STANDING**

Respondent-Intervenors American Rivers and South Carolina Coastal Conservation League ("SCCCL") were allowed to intervene in this case on November 9, 2009. During discovery, SCRCP Rule 30(b)(6) depositions were taken of these organizations on April 29, 2010. A subject of these depositions (Matter 1) was for "a representative of each group who can testify as to his or her standing to be a party to this action." (Exhibit 1).

Mr. Jobsis' testified on behalf of American Rivers. Mr. Jobsis indicated that no member of American Rivers lived on either the Catawba or Wateree Rivers (page 120 of the 30(b)(6) deposition, lines 3-6) and refused to identify by name any members allegedly affected by this matter (page 120 of the deposition, lines 7-17). When asked of a specific benefit that members of the American Rivers were denied as a result of relicensing under the Comprehensive Relicensing Agreement (CRA) (which is an

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integral part of the 401 application) Mr. Jobsis, as representative for American Rivers, said he had not discussed this with his members (page 126 of the deposition, lines 15-19). American Rivers concedes that recreational boating, fishing and aquatic life would be enhanced under the provisions of the CRA that are incorporated in the proposed 401 certification (CRA conditions) over existing conditions (page 127 of the deposition, lines 10-18, page 65, lines 12-19). American Rivers could not articulate any harm to its members from moving from the current license conditions to the CRA conditions (page 127 of the deposition, lines 19-23). The 401 Staff proposed Notice of Department Decision at issue in this case, which was subsequently denied by the DHEC Board, incorporates these CRA conditions. (Exhibit 2)

Mr. Patrick Moore testified as the Rule 30(b)(6) witness for SCCCL. Mr. Moore is an attorney and familiar with the concept of standing. However, Mr. Moore also did not specifically identify any members harmed by the 401 certification process (page 144 of the deposition, lines 22-25 and page 145, line 1). When asked how his members were harmed, Mr. Moore indicated that it would be speculative to articulate harm when the certification was denied (page 146 of the deposition, lines 7-14). Mr. Moore would not testify specifically as to any harm to his members or what had been conveyed by them to him on this matter (page 146 of the deposition, lines 15-25, page 147, lines 1-25, page 148, lines 1-25, and page 149, lines 1-11).

Although requested by Petitioner's counsel, no Respondent-Intervenors identified their organizations' members prior to the end of discovery.

Concept of Standing

Quoting from Town of Arcadia Lakes, et al. v. SCDHEC, et al. Docket No. 09-ALC-07-0069-CC (January 21, 2010) at page 16:

A fundamental prerequisite to institute an action is the requirement that the Petitioners have standing. Blanding v. Coleman, 285 S.C. 472, 330 S.E. 2d 298 (1985). In Sea Pines Association for Protection of Wildlife, Inc. v. South Carolina Department of Natural Resources, the South Carolina Supreme Court adopted the following 3-prong test for establishing standing as set forth by the U.S. Supreme Court in Lujan v. Defenders of Wildlife.

First the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not "conjectured" or "hypothetical".

Second there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly trace[able] to the challenged action of the defendant, and not Th[e] result [of] the independent action of some third party before the court.

Third, it must be "likely" as opposed to merely "speculation," that the injury will be "redressed by a favorable decision." Id. at 345 S.C. 594, 601, 550 S.E. 2d 287, 291 (2001).

The burden is on the Respondent – Intervenor to demonstrate standing. Id. at 601, 550 S.E 2d at 291.

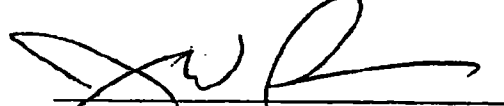
Respondent – Intervenor, in their Pre-hearing Statement, seek to have the Administrative Law Court uphold the Board's decision to deny the 401 water quality certification proposed by the SCDHEC Staff. This result would leave the existing FERC license in force, an effect which the Respondent-Intervenor's 30(b)(6) deponents both

agree is less beneficial to their members than the CRA conditions under the SCDHEC Staff proposed decision. In other words, the Respondent-Intervenors have not only suffered no injury in fact, but also support a result (the status quo) that is less beneficial to their members than the result they oppose and that Petitioner seeks (a 401 certification as proposed by DHEC staff).

In Town of Arcadia Lakes, Judge McLeod found that the Cary Lake Petitioners failed to produce any evidence of direct harm caused by the issuance of the permit. Judge McLeod also found that assuming an applicant would not follow permit conditions as being merely speculative and not an "injury in fact". Id. at 20.

In this case American Rivers and SCCCL have both failed to identify any members that have suffered an injury in fact during the discovery period of the Amended Scheduling Order. Their remedy (denying the 401 and leaving the existing 1958 FERC license in effect) would result in conditions that are worse for their members than the CRA conditions in the 401 proposed by the SCDHEC Staff decision. It appears that American Rivers and SCCCL do not have standing and should be dismissed from this action.

Respectfully submitted,



James W. Potter

W. Thomas Lavender, Jr.

NEXSEN PRUET, LLC

1230 Main Street, Suite 700 (29201)

Post Office Drawer 2426

Columbia, South Carolina 29202

Attorney for Petitioner

Duke Energy Carolinas, LLC

Nash E. Long, III

(Admitted pro hac vice)

Winston & Strawn LLP

214 North Tryon Street

Charlotte, North Carolina 28202

(704) 350-7700

(704) 350-7800 (fax)

Attorney's for Petitioner

Duke Energy Carolinas, LLC

June ____, 2010
Columbia, South Carolina

EXHIBIT 1