

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

S.C. Supreme Court

Ralph King Anderson, III, Chief Administrative Law Judge

Opinion No. 5062 (S.C. Ct. App. Filed Dec. 12, 2012)

(Withdrawn, Substituted, and Refiled May 1, 2013)

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

Duke Energy Carolinas, LLC Petitioner,

v.

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

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

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

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Carolinas, LLC,

Petitioner,

vs.

South Carolina Department of Health and
Environmental Control,

Respondent,

and

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

Respondent-Intervenors.

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

**AMENDED NOTICE OF RULE 30(b)(6)
DEPOSITION OF AMERICAN RIVERS
AND
SOUTH CAROLINA COASTAL
CONSERVATION LEAGUE**

To: Christopher K. DeScherer
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100 Pine Street, Suite 1550
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rcollins@n-h-i.org

PLEASE TAKE NOTICE that Petitioner, Duke Energy Carolinas, LLC, through its counsel, pursuant to Rule 21 of the Rules of Procedure for the Administrative Law Court and Rule 30(b)(6) of the South Carolina Rules of Civil Procedure, will take the deposition upon oral

examination of American Rivers and South Carolina Coastal Conservation League commencing at 9:30am on April 29, 2010 at the offices of NEXSEN PRUET LLC, located at 1230 Main Street, Suite 700, Columbia, South Carolina 29201 or some other place as the parties agree on.

The deposition will take place before a notary public or other individual authorized to administer oaths, will be recorded by stenographic means and will continue from day to day until completed.

As required by Rule 30(b)(6) of the South Carolina Rules of Civil Procedure, American Rivers and South Carolina Coastal Conservation League shall designate and produce one or more officials, employees, agents or other person who are most knowledgeable to testify on their behalf regarding the matters set forth below:

1. A representative of each group who can testify as to his or her standing to be a party to this action.
2. The reasons that the decision of the Board of the Department of Health and Environmental Control (Board) is supported by the Administrative Record.
3. The reasons that the decision of the Board is neither arbitrary nor capricious in light of the facts contained in the Administrative Record.
4. The Water Quality Certification, with conditions added by the Staff (prior to the Board review) meets or does not meet the requirements of S.C. Regulation 61-101, 61-68 and 61-69.
5. The reasons why the Water Quality Certification, with conditions added by the Staff (prior to Board review) would not:
 - (a) Protect classified uses,
 - (b) Protect shortnose sturgeon; and
 - (c) Provide adequate downstream flow of the Catawba River to provide reasonable assurance that certification requirements and water quality standards in the Catawba River in South Carolina will be met.
6. The presence (or lack thereof) of shortnose sturgeon in the Wateree River, and shortnose sturgeon spawning activity in the Wateree River.

7. The historical and current impacts of Petitioner's hydroelectric developments on the presence of shortnose sturgeon population in the Wateree River.
8. The beneficial effect on shortnose sturgeon habitat of the higher continuous minimum flow requirement from Wateree Hydro (compared to current license requirement and practice) as proposed in the Comprehensive Relicensing Agreement.
9. Why beneficial habitat effects require mitigation under S.C. regulation 61-101.
10. Any situation in any part of the country in which American Rivers has supported the issuance or renewal of a FERC hydropower license.

This the 22nd day of April, 2010.

Nash E Long / by Bruce C. Long
w/ permission

Nash E. Long, III
(Admitted *pro hac vice*)
WINSTON & STRAWN LLP
214 North Tryon Street
Charlotte, North Carolina 28202
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(803) 771-8900

*Attorneys for Petitioner Duke Energy
Carolinas, LLC*

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing AMENDED NOTICE OF RULE 30(B)(6)
DEPOSITION OF AMERICAN RIVERS AND SOUTH CAROLINA COASTAL CONSERVATION LEAGUE
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

Robert D. Cook, Deputy Attorney General
T. Parkin Hunter, Assistant Attorney General
Elizabeth H. Smith, Assistant Attorney General
STATE OF SOUTH CAROLINA OFFICE OF
THE ATTORNEY GENERAL
Rembert Dennis Building
100 Assembly Street, Room 519
Columbia, SC 29201-3117

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

This the 22nd day of April, 2010.

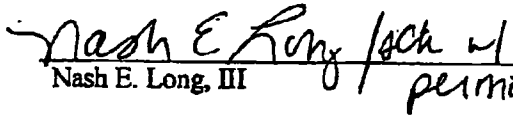

Nash E. Long, III *per permission*

EXHIBIT 2



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-Wateree Hydroelectric Project
Catawba and Wateree 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-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-Waterree Project
 - (4) A-4.0 MEP Article
 - (a) MEP for the Catwaba-Waterree 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-Waterree Project
 - iii) D: MEP for the Catwaba-Waterree Project
 - iv) E: 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.

EXCERPTS OF GERRIT JOBSIS DEPOSITION

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Duke Energy Carolinas, LLC,

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30(B)(6)

DEPOSITION OF RESPONDENT-INTERVENORS

Thursday, April 29, 2010

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1 Q. -- now that we're back on the record,
2 back on Exhibit 14 which is the transcript we've
3 referred to several times, I'd like to have you
4 look at page 60 of the transcript.

5 A. Okay.

6 Q. In the first full paragraph, it says,
7 "In the Comprehensive Licensing Agreement --" I
8 think that means relicensing agreement?

9 A. Uh-huh.

10 Q. But continuing on, it says, "Duke, and
11 the DNR, other parties, agreed to land protection,
12 and to use that to mitigate for low flows in the
13 Lake Wylie Reach, again, that thirty-two miles of
14 river in the Great Falls Reach which is two miles
15 around the town of Great Falls, and in the Wateree
16 Bypassed, which is below the Wateree Dam."

17 And my question to you, sir, is whether
18 you have a position that classified uses under
19 61-68 requires mitigation for low flows?

20 MR. DeSCHERER: Objection. Calls for
21 legal conclusion.

22 A. I don't have an opinion that classified
23 use is higher. I think that, you know, the
24 opinion -- our opinion is that -- that low flows
25 require, again, the avoidance, minimization and

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 A. They can be found in the relicensing
2 studies that were done by Duke, and they can be
3 found in the recommendations made by American
4 Rivers and the National Marine Fisheries Services
5 as far as the amount of -- how flows would affect
6 the amount of physical habitat in the river and how
7 those would be different from the maximum that
8 would occur under natural flow regime.

9 Q. And do you know what those numbers are
10 right now?

11 A. I do not.

12 Q. You do agree that the movement from
13 current conditions to CRA conditions would
14 represent an improvement in flow?

15 A. Yes.

16 Q. And an improvement in the habitat area
17 for fish in the waters?

18 A. Yes. It would represent an
19 improvement.

20 Q. Do you have a position on what the
21 optimum natural condition is for the
22 Catawba-Wateree River system?

23 A. Well, the optimum is the natural
24 condition.

25 Q. And why do you say that?

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ADMINISTRATIVE LAW COURT

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Thursday, April 29, 2010

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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

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

June 30, 2011



Stephen P. Hightower

S. C. Bar No. 72265

Staff Attorney

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and Environmental Control

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Attorney for Appellant SC DHEC

**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.

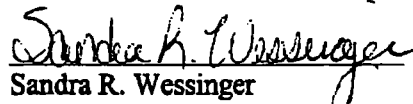
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I, Sandra R. Wessinger, Paralegal for the South Carolina Department of Health and Environmental Control, hereby certify that I have on this ^{25th} ~~21st~~ day of July, 2011, served a copy of the **Record on Appeal** upon all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid, addressed as follows:

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July 21, 2011
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

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

Duke Energy Carolinas, LLC,

Respondent,

RECEIVED

v.

AUG 12 2011

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

NEXSEN PRUET, LLC

Defendants,

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

Appellants.

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Administrative Law Court ("ALC") Erred in Refusing to Give Effect to Regulation 61-30.
2. Whether the ALC Erred in Finding that the South Carolina Department of Health and Environmental Control ("DHEC") Staff Decision Was Not Timely.
3. Whether the ALC Misconstrued Regulation 61-101, which in No Way Purports to Waive the State's Certification Authority.
4. Whether the ALC Erred in Ignoring that Duke is Estopped from Contesting the Timeliness of DHEC's Decision.
5. Whether the ALC Erred in Refusing to Recognize that Duke Has Waived Any Challenge to the DHEC Staff Decision and the State's Certification Authority.

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

Respondent Duke Energy Carolinas, LLC (“Duke”) operates the Catawba-Wateree Hydroelectric Project (the “Project”), which comprises 11 reservoirs and 13 hydroelectric stations, along with associated dams and other infrastructure, on the Catawba-Wateree River in North and South Carolina. Currently, Duke operates the Project pursuant to a 50-year license issued by 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, along with a Comprehensive Relicensing Agreement (“CRA”), for FERC to consider as the basis for a new license.

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 North and South Carolina.² R.p. 7-8. 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. R.p. 8. As a part of its application for a new federal license, Duke is required to obtain a water quality certification (“WQC”) under Section 401 of the Clean Water Act from both North and South Carolina, certifying that operation of the Project for the new license term will protect water quality and designated uses in the Catawba-Wateree River and will not

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 that incorporates the conditions of the expired license.

² The number of affected river miles stated here includes the Wateree River below the Wateree Hydroelectric Development.

degrade water quality or otherwise violate water quality standards. See 33 U.S.C. § 1341 (2010); S.C. Code Ann. Regs. 61-101 (2009).

Duke submitted an application for a WQC to DHEC on June 5, 2008. R.p. 94, ¶ 8. On May 15, 2009, DHEC issued a notice of its decision to issue a WQC. R.p. 27-28. On May 29, 2009, Respondents-Appellants American Rivers and South Carolina Coastal Conservation League (hereinafter, the "Conservation Groups") filed a Request for Final Review with the South Carolina Board of Health and Environmental Control ("Board") pursuant to S.C. Code Ann. § 44-1-60 (2009), challenging DHEC's proposed WQC on the grounds that it would permit Duke to operate the Project in violation of water quality standards. R.p. 5. After announcing its decision orally at the conclusion of the conference, the Board issued a written order reversing the 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. R.p. 1-4

Duke then filed a Notice of Request for Contested Case Hearing in the ALC on September 4, 2009, seeking issuance of the WQC in the form approved by DHEC staff. R.p. 55-58. The ALC thereafter entered orders allowing the Conservation Groups and the South Carolina Attorney General to intervene in the matter on November 9, 2009. R.p. 59-60, 61-62.

On January 21, 2010, Duke filed its Motion for Summary Judgment and Motion for Declaratory Judgment (hereinafter, "Duke Motions"), roughly one month after the commencement of discovery in this case. The ALC heard oral argument on the Duke Motions on May 6, 2010 and granted the Motions in a June 10, 2010 Order on Motion for

Summary Judgment (hereinafter, "C. Order").³ On June 21, 2010, Appellant-Respondent DHEC and the Conservation Groups filed a Joint Motion for Reconsideration. Out of an abundance of caution, because the ALC had not yet ruled on the Joint Motion for Reconsideration, DHEC filed a Notice of Appeal with this Court on July 8, 2010, and the Conservation Groups filed their own Notice of Appeal on July 9, 2010. The following day, on July 10, 2010, the ALC denied the Joint Motion for Reconsideration. DHEC filed a subsequent Notice of Appeal with this Court on July 15, 2010, and the Conservation Groups also filed another Notice of Appeal on July 16, 2010. On August 3, 2010, the Court notified the parties that the appeals would be consolidated.

II. STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP." Bovain v. Canal Ins., 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). As provided in Rule 56(c), summary judgment is proper 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 the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "[T]he evidence must be construed in the light most favorable to [the] respondent," Montgomery v. CSX Transp., Inc., 376 S.C. 37, 53, 656 S.E.2d 20, 28 (2008), and "all reasonable inferences" must be drawn in the respondent's favor, Ray v. Austin, Op. No. 26858 (S.C. Sup. Ct. filed August 16, 2010) (Shearouse

³ Duke premised its Motions in part on the argument that because DHEC counsel delayed his response to a set of Requests to Admit, certain facts and legal conclusions should be deemed admitted by DHEC. R.p. 74-75, n.2 The ALC, however, found that hospitalization of counsel's child constituted good cause to allow a belated response and therefore authorized DHEC's January 25, 2010 responses, mooted the parties' arguments on this issue. See R.p. 370-71, n.2.

Adv. Sh. No. 32 at 33 (quoting David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006)). As the movant, Duke “has the burden of clearly establishing” the lack of any triable issue of fact. Brandt v. Gooding, 368 S.C. 618, 626, 630 S.E.2d 259, 263 (2006).

STATEMENT OF FACTS

I. STATUTORY FRAMEWORK

A. CLEAN WATER ACT SECTION 401

“The Federal Water Pollution Control Act, commonly known as the Clean Water Act . . . is a comprehensive water quality statute” that “establishes distinct roles for the Federal and State Governments” to play in restoring and protecting the nation’s waters. PUD No. 1 of Jefferson County v. Wash. Dep’t of Ecology, 511 U.S. 700, 704 (1994) (citing 86 Stat. 816, as amended, 33 U.S.C. § 1251 et seq.). The federal government has primary responsibility for, among other things, establishing and enforcing limitations on certain individual discharges of pollutants through a permitting scheme, see 33 U.S.C. §§ 1311, 1314 (2010). States’ responsibilities include establishing and enforcing water quality standards for all intrastate waters. See 33 U.S.C. §§ 1311(b)(1)(C), 1313, 1319(a) (2010). The state standards supplement federal regulation and serve “to prevent water quality from falling below acceptable levels.” PUD No. 1 of Jefferson County, 511 U.S. at 704 (quoting EPA v. California Ex. Rel. State Water Resources Control Bd., 426 U.S. 200, 205 n.12 (1976)). Section 401 of the Clean Water Act (hereinafter “CWA” or “Act”) ensures the states’ ability to enforce these standards.

Section 401 “requires States to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into

intrastate navigable waters,” including FERC licenses for hydropower operations such as Duke’s. PUD No. 1 of Jefferson County, 511 U.S. at 707; 33 U.S.C. § 1341. If a state denies the applicant’s certification request, the federal license or permit cannot be granted. 33 U.S.C. § 1341(a)(1) (“No license or permit shall be granted if certification has been denied by the State.”). Similarly, the state may impose conditions through its certification, and those conditions automatically become part of the federal license or permit. Id. § 1341(d).

“[T]he purpose of Section 401 is to preserve the authority for the States to set standards that are more stringent than the level of protection afforded in a federal permit.” Nat’l Ass’n of Home Builders v. U.S. Army Corps of Eng’rs, 453 F. Supp. 2d 116, 134 (D.D.C. 2006). “State certifications under Section 401 are essential in the scheme to preserve state authority” and ensure that “[n]o polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s].” S.D. Warren Co. v. Maine Bd. of Env’tl. Protection, 547 U.S. 370, 386 (2006) (quoting 116 Cong. Rec. 8984 (1970)). Certification is particularly important in the context of hydroelectric projects, as the U.S. Supreme Court has held that state regulation outside of the Section 401 process is preempted by FERC’s licensing authority. Compare California v. FERC, 495 U.S. 490 (1990) (holding state’s authority to impose minimum streamflow requirements through state water permits preempted by FERC’s licensing authority) with PUD No. 1 of Jefferson County, 511 U.S. 700 at 721, 723 (holding that federal preemption does not bar states from enforcing minimum stream flows through Section 401).

While Section 401 protects state authority, it also protects the federal permit

applicant and federal agency by preventing states from unduly delaying the federal permitting process. 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,” Section 401 provides that “the certification requirements of this subsection shall be waived with respect to such Federal application.” 33 U.S.C. § 1341(a)(1). Through their regulations and guidelines, federal agencies and agency subdivisions have established various timeframes up to the one-year limit as the “reasonable period” for action.⁴ FERC’s regulations allot “the full one-year waiver period” as the reasonable period of time under the circumstances present here. U.S. Dep’t of Energy, FERC, Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act, 52 Fed. Reg. 5446 (Feb. 23, 1987); 18 C.F.R. § 4.34(b)(5)(iii) (2010).

B. SOUTH CAROLINA LAW

In South Carolina, state statutes and regulations promulgated by DHEC govern the agency’s decisions on Section 401 certification requests. DHEC’s regulations are approved by the General Assembly and have “the full force and effect of law.” S.C. Code Ann. § 1-23-160 (2009); S.C. Dep’t of Revenue v. Blue Moon of Newberry, Inc., 387 S.C. 467, 470, 693 S.E.2d 21, 22 (Ct. App. 2010). The resolution of this appeal involves application of two of DHEC’s regulations, S.C. Code Ann. Regs. 61-101 and 61-30 (2009).

⁴ See, e.g., U.S. Env’tl. Protection Agency, CWA Section 401 Water Quality Certification: A Water Quality Protection Tool for States & Tribes, at 12 (April 2010 Interim), available at http://www.epa.gov/owow/wetlands/pdf/CWA_401_Handbook_2010_Interim.pdf (last visited Oct. 25, 2010).

1. REGULATION 61-101

DHEC promulgated Regulation 61-101 to establish procedures and policies for reviewing Section 401 certification applications. S.C. Code Ann. Regs. 61-101(C)(1). Regulation 61-101 explains the waiver provision of Section 401 and provides timing requirements for DHEC decisions. Specifically, Regulation 61-101(A)(6) 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 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 of an application.

S.C. Code Regs. 61-101(A)(6). Although it requires that DHEC issue a proposed decision and do so within 180 days, the regulation does not specify what happens if a proposed decision is made beyond the 180-day period, nor does it dictate the manner in which the 180-day period is to be computed. Id.; see generally S.C. Code Ann. Regs. 61-101.

Regulation 61-101 establishes procedures for acceptance and review of certification applications. Regulation 61-101(C) mandates that an applicant “must present a complete application to [DHEC] in a manner specified by [DHEC].” S.C. Code Ann. Regs. 61-101(C)(1). Regulation 61-101(C)(1) details the minimum information necessary for a complete application. It further provides that if an application is deficient, “[DHEC] may require additional information to make the application

complete,” but must do so within ten days. S.C. Code Ann. Regs. 61-101(C)(1)-(2) (stating that “[i]f [DHEC] 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”). Independent of whether an application is complete, DHEC “may require the applicant to provide water quality monitoring data, water quality modeling results, or other environmental assessment related to factors in [Regulation 61-101.F.3] prior to accepting or processing the application.” Id. 61-101(C)(3). Additionally, after DHEC accepts and begins processing an application, it may still request additional information for another sixty-day period. S.C. Code Ann. Regs. 61-101(C)(2). Whenever DHEC requests additional information, it must “specify a time for submittal of such information.” S.C. Code Ann. Regs. 61-101(C)(4). “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 [DHEC].” Id. Thereafter, “[a]ny subsequent resubmittal will be considered a new application.” Id.

2. REGULATION 61-30

DHEC promulgated Regulation 61-30 to implement the Environmental Protection Fund Act, 1993 S.C. Acts 122, which imposes two principal obligations on the agency. The statute directs DHEC to “charge fees for the various services and functions it performs” under a number of statutes, including the Pollution Control Act, pursuant to which DHEC exercises the state’s Section 401 certification authority. S.C. Code Ann. § 48-2-50 (2009); id. § 48-2-30(B)(1) (2009). It further directs that DHEC “shall establish by regulation a schedule for timely action by [DHEC] on permit applications” under all

programs to which the fee requirements apply. S.C. Code Ann. § 48-2-70 (2009).

Pursuant to Section 48-2-70,

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.

S.C. Code Ann. § 48-2-70. The statute also provides a specific sanction for untimely action; it mandates that DHEC “shall refund the permit processing fee to the permit applicant” if it fails to make a decision within the timeframe established by regulation.

Id.

Accordingly, Regulation 61-30 has a two-pronged “Purpose and Scope.” S.C. Code Ann. Regs. 61-30(A). The regulation expressly states that it “prescribes fees applicable to applicants and holders of permits, licenses, certificates, certifications, and registrations (hereinafter, ‘permits’) and establishes schedules for timely action on permit applications.” Id. (emphases added). The “schedule” for timely action here consists of two principal components. For Section 401 WQCs, Regulation 61-30(H)(2)(a)(vii) establishes a deadline of 180 days, and Regulation 61-30(H)(1) details the manner in which the 180-day period is calculated.

Under Regulation 61-30, DHEC will not begin processing an application until it has received the required fee. S.C. Code Ann. Regs. 61-30(C)(1)(b). Moreover, its “schedule for timely review” of the application “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.” S.C. Code Ann. Regs. 61-30(B)(22) & (H)(1)(b).⁵

During review, the time “may be tolled or extended in accordance with the conditions stipulated in Section H(1) of this regulation.” S.C. Code Ann. Regs. 61-30(B)(22). As relevant here, Section H(1) states that “[t]he time schedule shall be tolled when [DHEC] makes a written request for additional information and shall resume when [DHEC] receives the requested information from the applicant.” S.C. Code Ann. Regs. 61-30(H)(1)(c). Regulation 61-30(H) also contains a number of additional directives concerning the manner in which time periods are to be computed, providing, for example, that “[a]ll times given in days are given in calendar days” and that “[t]he last day of the period is to be included, unless it is a Saturday, Sunday, or legal holiday, in which case the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday.” S.C. Code Ann. Regs. 61-101(H)(1)(a).

Regulation 61-30 explicitly incorporates the consequence for DHEC’s non-compliance with the time schedule established by the legislature in the statute, S.C. Code Ann. § 48-2-70. It provides that “[o]nce an applicant has been notified that the application has been deemed Administratively Complete, [DHEC] shall issue or deny the permit within the time period established in Section H,” and “if no permit decision has been rendered by the end of the relevant time period, the application fee shall be

⁵ The time the application is deemed “Administratively Complete” for purposes of starting Regulation 61-30’s “Time Schedule” is determined by reference to both Regulation 61-30 and to the applicable regulation governing the particular type of application at issue. See S.C. Code Ann. Regs. 61-30(B)(4) (defining “Administratively Complete” as “a determination by [DHEC] that all elements of an application, as specified in the applicable regulation and including but not limited to all required signatures and tender of the application fee, where required, have been received”).

refunded.” S.C. Code Ann. Regs. 61-30(C)(1)(d).

II. FACTUAL BACKGROUND

On June 5, 2008, Duke filed its application for a WQC with DHEC. R.p. 368; R.p. 94, ¶ 8. Subsequent to the filing of the application, DHEC’s project manager handling Duke’s 401 WQC application, William R. Wenerick, explained to Duke that, among other things, Regulations 61-30 and 61-101 require DHEC to complete its review of an application for a WQC within 180 days. See R.p. 126-27, ¶ 7. Mr. Wenerick also explained when the 180-day clock would begin to run in connection with Duke’s application for a WQC and how the time period could be tolled. Id. Both Mr. Wenerick and his supervisor, Charles Hightower, also informed Duke that required elements of Duke’s application were missing. R.p. 125-27, ¶¶ 5, 7; R.p. 181-82, ¶¶ 4-7. These missing items included an environmental protection fund application processing fee, an affidavit establishing that Duke had published a public notice in the newspaper, and “the names and addresses of adjacent property owners” as required by Regulation 61-30 and Regulation 61-101(C)(1)(f). R.p. 126-27, ¶ 7; R.p. 181-82, ¶¶ 4-7. Further, on June 27, 2008, Mr. Hightower informed Duke’s project manager, Mark Oakley, that a public notice could not be issued in connection with the WQC application until Duke provided the list of adjacent property owners and proof that Duke had published the required newspaper notice. R.p. 181, ¶¶ 4-5; see also S. C. Code Ann. Regs. 61-101(D)(4)(a) & (b). On July 29, 2008, Mr. Wenerick explained to Mr. Oakley that the “180 day clock will not start until we have received an affidavit of publication and the appropriate fee.” R.p. 127, ¶ 7; R.p. 134 (emphasis in original).

Duke withheld the information regarding adjacent property owners from DHEC for weeks. Mr. Oakley was “trying to fight this [requirement] off” “since it may bring out a lot of new issues that were never intended to be addressed in the relicensing process” R.p. 389; R.p. 391. Mr. Oakley continued to withhold information regarding adjacent property owners until July 29, 2008, even though the information “could be pulled and put into a mail merge format in a couple of hours.” R.p. 391. Duke finally turned over the information on adjacent property owners on July 29, 2008. R.p. 182, ¶ 8; R.p. 187. The Public Notice was then issued on August 8, 2008. R.p. 127, ¶ 8; R.p. 137.

Even after the public notice was issued, Duke delayed providing the remaining required items. Duke neglected to pay its application fee and provide proof of newspaper publication of the public notice until approximately August 25, 2008, after DHEC requested those items one last time on August 19, 2008. R.p. 128, ¶ 10; R.p. 141-42.

Subsequently, DHEC continued to request additional information from Duke for purposes of reviewing the company’s application. In addition to the items described above, Mr. Wenerick’s letter to Duke of August 19, 2008 also sought information on a document submitted with Duke’s application called the “Quality Assurance Program Plan” (“QAPP”). R.p. 127-28, ¶ 9; R.p. 141-42. Mr. Wenerick’s letter requested that Duke respond by October 19, 2008, and reminded Duke that DHEC had 180 days to complete action on the application for a 401 WQC or the assessed fee must be returned. Id. The letter further reminded Duke 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.” Id. Duke did not

comply with DHEC's deadline and did not fully respond to DHEC's request until months later on January 12, 2009. R.p. 130, ¶ 18; R.p. 162-63.

Commensurate with the scale of Duke's 11-reservoir and 13-hydroelectric-station project, DHEC sent a number of additional requests for information between October 8, 2008 and March 25, 2009. See R.p. 128-31, ¶¶ 11-24; R.p. 144-45, 153-54, 165-66, 171, 176-78. DHEC issued its Notice of Department Decision – Water Quality Certification (“NOPD”) for the Project on May 15, 2009. R.p. 27-28.

Between August 25, 2008 — the first date on which DHEC had received both the complete application and the application fee from Duke — until the date the NOPD was issued, (May 15, 2009) a total of 263 days elapsed. See R.p. 131-32, ¶ 25; R.p. 133-78. During these 263 days, DHEC tolled the clock multiple times while awaiting information requested from Duke. DHEC first tolled the time-clock for a period of 140 days (Aug. 25, 2008 to Jan. 12, 2009) for the time it took Duke to respond to the agency's first request for additional information sent on August 19, 2008. R.p. 131-32, ¶ 25. In addition, DHEC tolled the clock for an additional 29 days for the time it took Duke to respond to its subsequent requests for additional information. Id. In sum, according to DHEC, after subtracting the days during which the time was tolled as DHEC awaited Duke's responses to requests for additional information, DHEC's review took a total of 94 days. R.p. 131-32, ¶ 25.

ARGUMENT

The ALC both misconstrued the applicable law, under which DHEC's decision was indisputably timely and valid, and also ignored relevant facts showing that Duke has no right to argue otherwise. Most fundamentally, the ALC misread the applicable

regulations by failing to give effect to Regulation 61-30. Under the regulation, the time period for DHEC review was tolled by Duke's failure to provide necessary requested information, and undisputed facts show that DHEC staff issued its decision well within the regulatory deadline. Beyond erroneously finding any deadline was missed, the ALC also misinterpreted the nature of the regulatory deadline at issue by automatically assuming waiver of DHEC's authority to act when the provisions in question were intended to *preserve* the state's power under the CWA. Finally, in adopting this erroneous legal framework, the ALC overlooked correspondence and conduct by Duke during DHEC's review of its application that prevents Duke from contesting the timing of DHEC's decision at all. Duke essentially invited the delay it now says divested DHEC of the authority to act at all, even after Duke earlier claimed benefit from that very authority. Duke waived its timeliness argument and is estopped from making it.

I. THE ALC ERRED IN REFUSING TO GIVE EFFECT TO REGULATION 61-30.

A. BY ITS EXPRESS TERMS, REGULATION 61-30 GOVERNS THE TIMELINESS OF DHEC'S ACTION ON SECTION 401 WATER QUALITY CERTIFICATIONS.

The ALC acknowledged that "Regulation 61-30 applies to **any** permit issued by DHEC, including [Section 401 Water Quality] Certifications." R.p. 372 (emphasis in original). It refused, however, to apply Regulation 61-30 in determining the timeliness of DHEC's action on the Water Quality Certification at issue here. The ALC premised this refusal on its view that Regulation 61-30 "does not create a new overriding or superseding time frame for the reviewing of all environmental permits issued by [DHEC]." R.p. 373. According to the ALC, Regulation 61-30 does not establish deadlines for timely review of permit applications, but is instead "limited to determining

if and when to grant a refund.” R.p. 373. That claim contradicts the statute that gave rise to the regulation and the regulation itself. S.C. Code Section 48-2-70 authorizes DHEC to adopt a “schedule for timely action” that dictates the time “necessary and appropriate” for action on each type of permit, S.C. Code Ann. § 48-2-70, not merely the time after which it is appropriate to refund the application fee.

The ALC’s interpretation cannot be squared with the language of the regulation considered as a whole. If Regulation 61-30 were only intended to provide a method for determining when to refund an application fee, it would not contain requirements that dictate when DHEC is permitted to begin reviewing an application and deadlines for review to end. Yet, the regulation provides that DHEC “will not process an application until the application fee is received,” and that once an application is “Administratively Complete,” DHEC “shall issue or deny the permit within the time period established in Section H.” S.C. Code Ann. Regs. 61-30(C)(1)(d). By its plain language, the Regulation governs the time period within which DHEC “shall” process an application, id., and the ALC erred in resorting to a “forced” construction to limit its scope. See Brown v. S.C. Dep’t of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (cautioning that a “court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute”).

Aside from its inconsistency with the relevant text, the ALC’s view would render Regulation 61-30 a nullity in the circumstances the ALC believed to be present here. If Regulation 61-30 is “limited” to establishing a “refund” deadline, R.p. 373, while Regulation 61-101 sets forth a shorter timeframe after which DHEC loses the authority to

act, the Regulation 61-30 deadline becomes meaningless. If DHEC has already lost the authority to act, the remaining time allowed under Regulation 61-30 is irrelevant and cannot be used. Consequently, there would never be any need to apply Regulation 61-30(H)(2)(a)(vii)'s 180-day deadline, or to apply the carefully crafted "time schedule" in Regulation 61-30(H)(1) to determine whether DHEC had "timely" acted under Regulation 61-30. Attempting to apply Regulation 61-30's water-quality-certification deadline would therefore be a futile endeavor. But see Ellison v. Frigidaire Home Prods., 371 S.C. 159, 164, 638 S.E.2d 664, 666 (2006) (explaining that "[w]e presume the legislature . . . would not do a futile thing").

The ALC's failure to give full effect to Regulation 61-30 owes in part to its misinterpretation of Responsible Economic Development v. DHEC, 371 S.C. 547, 641 S.E.2d 425 (2007). The ALC took that decision to mean that DHEC "as a matter of law cannot invoke the provisions in a regulation promulgated under one Act in an action within the statutory authority of a different Act." R.p. 373. As our Supreme Court has explained, however, Responsible Economic Development did not purport to establish such a rule. Spectre, LLC v. DHEC, 386 S.C. 357, 688 S.E.2d 844 (2010). Spectre concerned application of the policies in the state's Coastal Management Program ("CMP"), which was developed pursuant to the South Carolina Coastal Zone Management Act ("CZMA"), S.C. Code Ann. § 48-39-10 et seq. (2009), to review of stormwater permits issued pursuant to the Stormwater Management and Sediment Reduction Act, S.C. Code Ann. § 48-14-10 et seq. (2009). The Court explained that the relevant inquiry is whether there exists "statutory authorization" to apply the CMP policies to the stormwater permits, not whether the policies and permits are products of

the same enabling legislation. Spectre, 386 S.C. at 371, 688 S.E.2d at 851. The Spectre court concluded that the “because [CZMA] § 48-39-80 provides explicit statutory authorization to apply the CMP to state permits,” DHEC has the authority to enforce the CMP’s policies in reviewing stormwater permit applications. Id. The Court expressly distinguished Responsible Economic Development because, in that case, the requisite statutory authorization was lacking. Id.

Here, as in Spectre, the legislature not only authorized, but mandated, that DHEC apply the regulation at issue to all state permits, including Section 401 Water Quality Certifications: the law was enacted “to facilitate the proper administration of each act listed in Section 48-2-30(B),” S.C. Code Ann. § 48-2-50(A), which, in turn, lists the “Pollution Control Act” — the very legislation that authorizes DHEC to administer the state’s Section 401 certification authority. See S.C. Code Ann. Regs. 61-101 (citing “Sections 48-1-30 and 48-1-50” of the Pollution Control Act, S.C. Code § 48-1-10 et seq., as the “statutory authority” for the regulation). Because the mandate to establish “schedules for timely action” encompasses every program for which Section 48-2-50(A) requires DHEC to charge fees, it necessarily encompasses programs under the Pollution Control Act, including the Section 401 Certification Program, as well. See S.C. Code Ann. § 48-2-70. Indeed, Regulation 61-30 explicitly states that it encompasses all permits, including Section 401 water-quality and similar certifications, that DHEC issues. S.C. Code Ann. Regs. 61-30(A). Because both Regulation 61-30 and its enabling legislation mandate its application to Section 401 water quality certifications, DHEC not only can, but must, apply Regulation 61-30 to its review of applications for Section 401 water quality certifications. The ALC was thus wrong to conclude that “there are no

provisions that specifically provide the regulations are overlapping.” R.p. 373. Because both regulations govern the time period within which DHEC “shall” act on Section 401 Water Quality Certifications, S.C. Code Ann. Regs. 61-30(C)(1)(d); id. 61-101(A)(6), they necessarily overlap. Spectre controls this case, not Responsible Economic Development.

B. REGULATIONS 61-30 AND 61-101 MUST BE READ *IN PARI MATERIA* TO PRODUCE A SINGLE, HARMONIOUS RESULT.

Where two provisions “deal[] with the same subject matter,” they “are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result.” Denman v. City of Columbia, 387 S.C. 131, 138, 691 S.E.2d 465, 467 (2010) (internal quotation marks omitted). As just discussed, Regulations 61-30 and 61-101 overlap to address the same subject matter. Both regulations govern DHEC’s review of applications for Section 401 Water Quality Certifications. And, both regulations specifically address the time period within which DHEC must conduct that review. Regulation 61-30 establishes a 180-day deadline for “timely action” and details the manner in which the 180-day period is computed, including the conditions under which the time allowed “may be tolled or extended.” S.C. Code Ann. Regs. 61-30(B)(22), (H)(1), & (H)(2)(a)(vii). Regulation 61-101 also sets forth a 180-day deadline, but does not dictate the manner in which that time period is calculated. See S.C. Code Ann. Regs. 61-101(A)(6). Regulations 61-30 and 61-101 and their respective 180-day deadlines can and thus must be read together to produce a single, harmonious result. Denman, 387 S.C. at 138, 691 S.E.2d at 467. Regulation 61-30, which was enacted after Regulation 61-101, can and should be read as clarifying the earlier provision by retaining the 180-day deadline while also detailing the manner in which the 180-day period must be calculated.

The ALC ignored this required construction by interpreting Regulation 61-101(C)(4) to “provide for a means by which the 180 days may be tolled.” R.p. 374. In fact, Regulation 61-101(C)(4) does not toll or suspend the time-period for reviewing the application; it allows DHEC to stop the actual processing of the application. See id. If the applicant subsequently provides the information necessary for DHEC to resume its review, the 180-day “clock” does not start ticking again where it left off. Rather, “[a]ny subsequent resubmittal will be considered a new application.” Id. A new application of course restarts the time period for processing. Because the resubmittal is considered a new application that restarts the time period for processing, it necessarily also restarts the time schedule under Regulation 61-30 at day one. In addition to misapprehending Regulation 61-101(C)(4), the ALC also misread the related but separate provision of Regulation 61-101(A)(6), which states that suspension of a permit application by the federal permitting agency automatically suspends DHEC’s processing of the application, and provides that “[u]nless otherwise suspended or specified in this regulation,” DHEC’s proposed decision must issue within 180 days. S.C. Code Ann. Regs. 61-101(A)(6) (emphasis added). By using the word “or” in the final sentence, Regulation 61-101(A)(6) indicates that processing may be suspended either in the ways “specified in [Regulation 61-101]” or “otherwise suspended.” S.C. Code Ann. Regs. 61-101(A)(6). One manner in which the time for processing is “otherwise suspended” is by operation of Regulation 61-30’s tolling provisions. Accordingly, Regulation 61-101 itself recognizes that requirements found in other regulations could operate to suspend its 180-day clock, which Regulation 61-30 manifestly does.

C. REGULATION 61-30, AS THE MORE SPECIFIC AND MORE RECENT ENACTMENT, WOULD CONTROL A CONFLICT WITH REGULATION 61-101.

Even if there were a conflict between the time limits included in Regulations 61-30 and 61-101, Regulation 61-30 must control. “[W]here two statutes are in conflict, the more recent and specific statute should prevail so as to repeal the earlier, general statute.” Denman, 387 S.C at 138, 691 S.E.2d at 468. As just noted, the regulations can and should be read in concert. However, if the provisions were perceived to conflict, Regulation 61-30 would control because it is both more recent and more specific than Regulation 61-101. Regulation 61-30 was enacted in 1995 and subsequently amended, see S.C. Code Ann. Regs. 61-30 (regulatory “history” and “notes”), while Regulation 61-101 was passed in 1990 and has not been altered since 1995, see S.C. Code Ann. Regs. 61-101 (regulatory “history” and “notes”).

Moreover, Regulation 61-30 is specifically geared towards time limits and consequences for non-compliance, while Regulation 61-101 is not. As discussed above, Regulation 61-30 implements an express directive to establish deadlines for action on all permit applications, including those for Section 401 WQCs. Regulation 61-101, in contrast, was enacted pursuant to DHEC’s authority under the Pollution Control Act, which authorizes DHEC to “abate, control and prevent pollution,” S.C. Code Ann. § 48-1-20, by “[t]aking all action necessary or appropriate to secure to this State the benefits of the Federal Water Pollution Control Act . . .”), id. § 48-1-50(17). Unlike the Environmental Protection Fund Act, which specifically addresses “the maximum length of time necessary and appropriate for a thorough and prompt review,” S.C. Code Ann. § 48-2-70, nothing in the Pollution Control Act purports to set deadlines or time limits for

action or allow DHEC to do so. Similarly, Regulation 61-30's "purpose" specifically targets "establish[ing] schedules for timely action on permit applications." S.C. Code Ann. Regs. 61-30(A). Regulation 61-101, in contrast, is more generally geared toward "establish[ing] procedures and policies for implementing State water quality certification requirements of Section 401." Id. 61-101(A). Regulation 61-30 therefore controls. Denman, 387 S.C at 138, 691 S.E.2d at 468.

II. DHEC'S DECISION WAS INDISPUTABLY TIMELY.

As the ALC recognized, Duke's application did not become complete, enabling DHEC to begin processing it, until Duke finally supplied information it had intentionally omitted from its June 5, 2008 submission. See R.p. 376 (stating that Duke's application was "deemed complete" when it was put on public notice on August 8, 2008). The ALC failed to recognize, however, that Duke delayed paying its application fee until on or about August 25, 2008. R.p. 128, ¶ 10. The ALC erroneously determined, as a matter of law, that "[a]s of August 8, 2008, the application fee had been paid by Duke." R.p. 376. There is no evidence to support that conclusion, and any dispute concerning this fact must be resolved in the Conservation Groups' (and DHEC's) favor. Consequently, DHEC did not have all that it required to begin processing Duke's application until August 25, 2008. See S.C. Code Ann. Regs. 61-30(C)(1)(b) (stating that DHEC "will not process an application until the application fee is received"); id. 61-30(C)(1)(d) (stating that "[o]nce an applicant has been notified that the application has been deemed Administratively Complete," the clock begins to run on DHEC's time for review); id. 61-30(B)(4) (defining "Administratively Complete" as a determination by DHEC that "all elements of an application," including, among other things, "tender of the application fee, where required, have been received"). As detailed above, from August 25, 2008 to May

15, 2009, 263 days elapsed, according to DHEC. During those 263 days, the time for review was tolled for a total of 169 days while DHEC awaited information it requested from Duke. Consequently, only 94 days of the 180-day limit elapsed between the time formal processing of the application began and issuance of DHEC's decision. The decision was thus well within the applicable time limit. See supra at pp. 12-14

III. THE ALC FUNDAMENTALLY MISCONSTRUED REGULATION

61-101.

A. NOTHING IN REGULATION 61-101 PURPORTS TO WAIVE SOUTH CAROLINA'S RIGHTS UNDER FEDERAL LAW.

A court's role in interpreting a statute or a regulation approved by the General Assembly is to ascertain and effectuate the Legislature's intent. Chem-Nuclear Sys., LLC v. S.C. Bd. of Health & Envtl. Control, 374 S.C. 201, 205, 648 S.E.2d 601, 603 (2007). Accordingly, "[a]ll rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute."

McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002). "The true guide to statutory construction," therefore "is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose." Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005); accord, e.g., Chem-Nuclear Sys., 374 S.C. at 205, 648 S.E.2d at 603.

As our Supreme Court explained in Johnston v. South Carolina Department of Labor, Licensing, & Regulation, when a statute does not speak to the consequences of an agency's failure to comply with a mandatory deadline, courts will not "assume the

Legislature intended [an agency] to lose its power to act for failing to comply with the statutory time limit.” 365 S.C. 293, 298, 617 S.E.2d 363 (2005) (holding that agency’s failure to comply with a statutory deadline did not prevent an administrative order from having effect). Subsequent decisions make clear that only positive, express statutory limits will deprive an agency acting in its adjudicatory capacity of jurisdiction or waive its authority to act. See, e.g., In re Matthews, 365 S.C. 293, 550 S.E.2d 311 (2005) (concluding that failure to comply with a mandatory 60-day time limit to bring a case to trial did not automatically divest a court of jurisdiction to conduct the trial after the deadline had passed); In Re: November 4, 2008 Bluffton Town Council Election, 385 S.C. 632, 686 S.E.2d 683 (2009) (reiterating that only express statutory limits on the class of cases an adjudicatory body can decide implicate subject matter jurisdiction); Connor Holdings, LLC v. Cousins, 373 S.C. 81, 644 S.E.2d 58 (2007) (Toal, C.J., concurring in the result) (“when a statutory limitation is not expressly characterized as jurisdictional, courts should treat the restriction as non-jurisdictional in character”).

In Johnston, the Board of the South Carolina Department of Labor, Licensing, and Regulation “was required to serve written notice of its decision on [Johnston] within thirty days of issuing a final order,” but failed to comply with this “mandatory time requirement.” 365 S.C. at 295, 297, 617 S.E.2d at 364-65. The South Carolina Supreme Court held that the time limit, though mandatory, “d[id] not affect the jurisdiction of the Board to determine the real estate disciplinary matter” at issue. Johnston, 365 S.C. at 297, 617 S.E.2d at 365. Johnston followed federal precedent set in Brock v. Pierce County, 476 U.S. 253, 260 (1986). That decision explained that 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.” Brock v. Pierce County, 476 U.S. 253, 260 (1986). 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). Accordingly, “if a statute does not specify a consequence for noncompliance with statutory timing provisions,” the federal courts, like the South Carolina Supreme Court, “will not in the ordinary course impose their own coercive sanction.” United States v. James Daniel Good Real Prop., 510 U.S. 43, 63 (1993); see also, 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).

Here, the ALC’s opinion acknowledges that “Regulation 61-101 does not expressly set forth consequences for DHEC’s failure to timely issue its certification within 180 days.” R.p. 379; see also SCDOT v. SCDHEC, 06-ALJ-07-0804-CC at 22 (April 29, 2008) (Anderson, J.) (stating that “Regulation 61-101 does not expressly set forth consequences for DHEC’s failure to timely issue its [notice of proposed decision]”). Rather than following precedent and considering the intended purpose of the regulation, however, the ALC did exactly what the Johnston court instructed it not to do by assuming that expiration of the regulation’s time limit divests DHEC of authority to act well before the deadline imposed by the CWA and FERC’s regulations.

Moreover, the ALC disregarded Regulation 61-101’s silence concerning the consequences of non-compliance with its time limit, which stands in stark contrast to

other DHEC regulations and state statutes, as well as the CWA itself. Those laws explicitly state the intended consequences of missing similar the deadlines. See, e.g., CWA Section 401, 33 U.S.C. § 1341(a)(1) (“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.”); 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, “[i]f 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 Ann. 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 Ann. 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”). Regulation 61-101 could easily have set forth waiver as the penalty for non-compliance with its time limit, but it did not.

Nor is there any force to the ALC’s claim that failure to void DHEC’s action will “render the 180 day requirement meaningless.” R.p. 380. The Supreme Court has

admonished courts *not* to “assume the Legislature intended [an agency] to lose its power to act for failing to comply with the statutory time limit,” Johnston, 365 S.C. at 298, 617 S.E.2d at 365, reflecting, “a great principle of public policy, applicable to all governments alike, which 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. at 260. Accordingly, “[t]here is no presumption or general rule that for every duty imposed upon the . . . Government . . . there must exist some corollary punitive sanction for departures or omissions, even if negligent.” Montalvo-Murillo, 495 U.S. at 717. Courts may not create “drastic” categorical sanctions where appropriate avenues for relief, such as mandamus or a claim under the Administrative Procedures Act (“APA”), S.C. Code Ann. § 1-23-310, et seq. (2009), for agency action unreasonably delayed, are available. Brock, 476 U.S. at 260 n.7. Those remedies assure that the 180-day requirement is *not* meaningless.

The ALC also reasoned that the Board in Johnston had an “independent reason” to comply with its deadline because it would not want to wait for its order to become effective, but that DHEC needed further coercion. R.p. 380 n.6. In fact, the opposite is true. As explained in Part I above, if DHEC misses its deadline, Regulation 61-30 requires DHEC to refund the application fee. See S.C. Code Ann. Regs. 61-30(C)(1)(d). And, DHEC will always face the federally imposed deadline of 365 days.

The ALC’s true basis for ignoring Johnston was its policy judgment that, while in Johnston it would not have been “in the public’s best interest” for the errant appraiser to escape official sanction, here loss of South Carolina’s “right to dictate 401 permit terms” on which a massive, multi-state hydropower operation will function for the next 50 years

will not disserve the citizens of our state. R.p. 380. But the purpose of Section 401 certification is to protect the state's authority to preserve its water quality, see supra at pp. 5-6, and DHEC's ability to enforce more stringent state standards and ensure needed water flow into South Carolina certainly impacts the public interest. Even the student note cited as the sole authority for the ALC's view contradicts the ALC's assessment of Section 401 certification. See Christopher J. Eggert, Note, *The Scope of State Authority Under Section 401 of the Clean Water Act after PUD No. 1 v. Wash. Dep't of Ecology*, 31 Willamette L. Rev. 851 (1995) (recognizing Section 401's import in preserving state authority to set more stringent requirements in the hydropower context). Here, as evidenced by DHEC's denial of Duke's certification application, DHEC and FERC do not agree about the necessity of higher, consistent minimum flows to protect the classified uses of South Carolina waters. DHEC determined that FERC's license conditions are insufficient to protect the state, and the ALC lacked authority to void the action of an agency charged with protecting the public health and welfare because the ALC thinks appraisers are more worthy of government oversight.

Regulation 61-101 implements the General Assembly's mandate that DHEC "secure" for South Carolina "the benefits" of Section 401 and any other available CWA protections. See S.C. Code Ann. § 48-1-50(17). A presumed uniform prospective abdication-through-waiver of that of authority is inconsistent with the statutory mandate. There is simply no basis to assume that DHEC intended to deprive itself, and the entire State of South Carolina, of the rights provided by federal law. Massive projects such as Duke's 11-reservoir and 13-hydroelectric-station operation require thorough evaluation, as this case proves. The ALC's conclusion that South Carolina silently waived its authority

to act after “(approximately six month[s]),” R.p. 379 – roughly half the time FERC has deemed reasonable and appropriate for a thorough review, see 18 C.F.R. § 4.34(b)(5)(iii) – is manifestly unreasonable and contrary to legislative intent. Rather than an attempt to cut in half the “reasonable time” allowed by the CWA and FERC’s regulations, Regulation 61-101’s shorter internal deadline is better understood as a means of protecting DHEC’s authority by ensuring that it does *not* lose the opportunity to safeguard the state’s interests.

B. THE ALC ERRED IN ASSUMING THAT REGULATION 61-101 SUPERSEDES FEDERAL LAW SETTING CWA SECTION 401’S TIME LIMIT.

Despite acknowledging the regulation’s silence on the consequences of non-compliance with its time limit, the ALC decided that it can “only” be interpreted one way. R.p. 379. According to the ALC, “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 U.S.C. § 1341 [(CWA Section 401)],” outside of which certification is waived. R.p. 379. But, the “reasonable period of time” after which Section 401 waives certification is set by federal, not state law. See, supra p. 7 & n.4. In the present context, it is set by a FERC regulation at “one year.” 18 C.F.R. § 4.34(b)(5)(iii). Regulation 61-101 cannot supersede federal law establishing the “reasonable period” of time for purposes of Section 401. The ALC assumed otherwise simply because Regulation 61-101 references the state’s obligation to act within the time allotted by federal law. As just discussed, however, the mention of the federal deadline only undermines the ALC’s implausible assumption that DHEC, by

setting an internal deadline in its regulations, meant to deprive South Carolina of the full benefit of the longer time period that 18 C.F.R. § 4.34(b)(5)(iii) affords the state to act.

C. THE ALC FAILED TO GIVE DHEC'S INTERPRETATION THE REQUIRED DEFERENCE.

Compounding the errors described above, the ALC failed to afford DHEC's construction of its own regulation the deference to which it is entitled. "The 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." Glover v. Suitt Constr. Co., 318 S.C. 465, 469, 458 S.E.2d 535, 537 (1995); Brown, 348 S.C. at 515, 560 S.E.2d at 415 (stating that "the Court typically defers to the [DHEC] Board's construction of its own regulation"); cf. Auer v. Robbins, 519 U.S. 452, 461 (1997) (stating that an agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation" (internal quotation marks omitted)). Additionally, "[t]he 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." City of Columbia v. Bd. of Health and Envtl. Control, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987). DHEC interprets Regulation 61-101, which, again, is silent concerning the consequences of non-compliance with the time limit, not to deprive the agency of authority to protect the public health and welfare for failure to meet the 180-day deadline. As just discussed, the ALC offered no compelling, or even valid, reason to disagree with DHEC's interpretation. Because DHEC's interpretation is consistent with its mandate under the Pollution Control Act, long-standing precedent, and the liberal construction afforded the agency's authority to protect the public health and welfare, the ALC was obligated to defer to that interpretation.

IV. THE ALC ERRED IN IGNORING FACTS SHOWING DUKE IS ESTOPPED FROM ARGUING DHEC'S DECISION WAS NOT TIMELY.

Whether a party is estopped from claiming a time limit 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 (2007). The factual question at the heart of the inquiry is whether respondents invited or induced "the very delay they now assert as a defense." 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., 327 S.C. 55, 488 S.E.2d 327, 330 (1997). Here, Duke controlled the clock ticking on its application at all times. It was aware that its recalcitrance in providing information necessary to DHEC's review would lengthen the processing time for its application, since DHEC needed and considered itself entitled to the full time period provided by Regulations 61-30 and 61-101. Yet, Duke dragged its feet knowing that each day it delayed further extended the "clock" on which both DHEC and Duke were counting the days until the 180-day deadline expired. At the same time, it communicated to DHEC its desire that DHEC continue working towards a staff decision and sought DHEC's indulgence for its incomplete application and untimely responses to information requests. Because Duke induced the very delay it now complains of, it must be estopped from even arguing that DHEC's initial decision on its application was untimely.

Estoppel applies "where one party has been induced by the conduct of another party to do or forbear doing something, which he would not or would have done but for

such conduct of the other party.” Bull v. Rowe, 13 S.C. 355 (1880) (citing Bigelow on Estoppel at 480). “The doctrine of equitable estoppel is frequently applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced or of which he has accepted any benefits.” Yawkey v. Lowndes, 150 S.C. 493, 148 S.E. 554 (1929) (internal quotation marks omitted); see also Black’s Law Dictionary 551 (6th ed. 1990) (describing estoppel as a “doctrine which holds that an inconsistent position, attitude or course of conduct may not be adopted to loss or injury of another” and which may also “be based on acceptance of benefits”). Estoppel may arise from affirmative misstatement, from conduct, or from silence. See Southern Ry. Co. v. Day, 140 S.C. 388, 396-400, 138 S.E. 870, 873-74 (1926). “Silence, where it is so intended, or where it has that effect, to mislead a party, to his disadvantage, and to the other party’s advantage, is an equitable estoppel.” Southern Ry. Co. v. Day, 140 S.C. at 399, 138 S.E. at 873-74 (emphasis in original) (further explaining that “[h]e who is silent when conscience requires him to speak shall be debarred from speaking when conscience requires him to be silent” (internal quotation marks omitted)). And, “passive acquiescence estops equally with active interference.” Id. (internal quotation marks omitted); see also Seabrook Island Property Owners Ass’n. v. Pelzer, 292 S.C. 343, 348, 356 S.E.2d 411, 414 (Ct. App. 1987) (holding that “[i]f a party stands by and sees another dealing with his property in a manner inconsistent with his rights and makes no objection while the other changes his position, his silence is acquiescence and it estops him from later seeking relief”); Yawkey, supra (explaining that “estoppel by acquiescence” is applied where a

party that is aware of his rights or has “means of knowledge” sees another party acting upon a mistaken notion of his own rights but acquiesces to the other’s conduct).

In the administrative context, courts have recognized that “[a] litigant is not entitled to remain mute and await the outcome of an agency’s decision and, if it is unfavorable, attack it on the ground of asserted procedural defects not called to the agency’s attention when, if in fact they were defects, they would have been correctible [sic] at the administrative level.” First-Citizens Bank and Trust Co. v. Camp, 409 F.2d 1086, 1088-89 (4th Cir. 1969) (collecting cases). “Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but erred against objection made at the time appropriate under its practice.” Wilson v. Hodel, 758 F.2d 1369, 1372 (10th Cir. 1985) (quoting United States v. L.C. Tucker Truck Lines, 344 U.S. 33, 37 (1952)).

Here, Duke was repeatedly informed of DHEC’s time schedule and the manner in which the time period was being calculated. DHEC notified Duke when it began the review of Duke’s application that started the 180-day “clock” and also sent written notice of each instance in which the time period was tolled. See generally R.p. 124-78. In addition to this formal correspondence, Duke and DHEC communicated informally via e-mail regarding the schedule. Id. This correspondence shows that Duke not only failed to object to DHEC’s taking longer than 180 calendar days to process its application, Duke communicated its acquiescence to DHEC’s time schedule to the agency. Duke admits that its “[i]n house counsel was kept advised throughout the process.” R.p. 395, lines 1-2. But Duke did not direct its questions about how to compute the 180-day time period and

“reconcile” the manner in which Regulations 61-101 and 61-30 “fit[] together,” R.p. 147, to the attorney it kept informed and involved at all times. Instead, Duke directed those inquiries to DHEC. See id. And although Duke missed mandatory deadlines for submitting additional information on multiple occasions, in one instance in which it did respond promptly, Duke indicated that it was counting and tolling days in the same manner as DHEC by recognizing that its response time determined whether or not the “clock” was “running.” See R.p. 168. Even so, Duke says it did not concern itself with time elapsed or overlap between Regulations 61-30 and 61-101 because it was at times “more focused on delivering information” that it knew DHEC needed. R.p. 393, lines 17-18.

Based on this correspondence and Duke’s conduct throughout the review process, DHEC reasonably understood Duke to acquiesce to DHEC’s time schedule and, more specifically, to toll the time limit while DHEC waited for Duke to submit the information necessary for a complete application and proper review. Throughout the process, Duke’s conduct and correspondence made clear to DHEC that Duke had no objection to the review extending beyond 180 calendar days. Given that understanding, DHEC staff, which had the right under 61-101(C)(4) to deny Duke’s application as early as October 20, 2008 (56 calendar days from the August 25, 2008 commencement of the 180-day period), instead repeatedly indulged Duke’s incomplete and untimely submissions and continued its review. Specifically, when DHEC requested additional information on a document entitled the “draft Quality Assurance Program Plan” (“QAPP”) submitted with Duke’s application, DHEC set an October 19, 2008, response deadline that Duke failed to meet. R.p. 127-28, 130, ¶¶ 9-10, 18. Accordingly, DHEC could have denied Duke’s

application on Oct. 20, 2008 (56 calendar days from the August 25, 2008 start of the 180-day period). See S.C. Code Ann. Regs. 61-101(C)(4) (allowing denial of an application without prejudice where an applicant fails to timely submit requested information).

DHEC also could have done so when Duke failed to respond to DHEC's August 8, 2008 information request by the November 8, 2008 response deadline, which fell 75 calendar days after August 25, 2008. But DHEC indulged Duke's tardiness and progressed as best it could without the necessary information. See R.p. 128-31, ¶¶ 11-24; R.p. 160 (correspondence from Duke thanking DHEC for giving Duke extra time to submit requested information). The ALC utterly ignored these facts, which show that Duke must be estopped from contesting the timing of DHEC's decision.

While it could not disregard these undisputed facts at any stage, the ALC's failure to engage them at the summary judgment stage was particularly inappropriate. In deciding a summary-judgment motion, all facts must be construed in the light most favorable to the non-moving party, and all reasonable inferences must be drawn in its favor. Ray v. Austin, Op. No. 26858 (S.C. Sup. Ct. filed August 16, 2010) (Shearouse Adv. Sh. No. 32 at 33 (internal quotation marks omitted)). It is certainly reasonable to infer that because DHEC relied to its detriment on Duke's acquiescence to the agency's time computation, DHEC took the action Duke now complains about — continuing to process Duke's application — rather than simply denying certification pursuant to Regulation 61-101(C)(4). Having received the benefit of continued review and ultimately of a favorable staff decision, Duke cannot now reverse its regulatory interpretation. See, e.g., Pelzer, 292 S.C. at 348, 356 S.E.2d at 414 (plaintiff who paid

assessed charges despite constructive knowledge that they exceeded applicable limits was estopped from claiming a refund after receiving the benefit of the expenditures).

Estoppel is particularly warranted here because the record shows that Duke misled DHEC staff by stating that Duke would provide information sooner than it in fact did, and suggesting it was making good faith efforts to fully comply with requirements it was actually seeking to “fight” behind the scene. R.p. 389. Although Regulation 61-101 plainly states that applications for Section 401 WQCs must include, among other things, “the names and addresses of adjacent property owners,” S.C. Code Ann. Regs. 61-101(C)(1)(f), Duke did not turn over this information as part of its permit application. Duke’s project manager, Mark Oakley, stated in an e-mail to other Duke representatives that he was “trying to fight this [requirement] off.” R.p. 389. On June 27, Mr. Oakley spoke with Charles Hightower of DHEC by phone and told Mr. Hightower that “he would provide [a list of adjacent property owners] the same day [on] June 27, 2008.” R.p. 181, ¶¶ 4-5. Despite telling Mr. Hightower that he would provide the necessary information on June 27, Mr. Oakley sent an e-mail to his colleagues again on June 30, 2008, saying that: “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 if SCDHEC tries to deal with them all.” R.p. 390-91. In fact, the record reveals that Mr. Oakley continued to withhold information regarding adjacent property owners until July 29, 2008 in spite of the fact that a colleague explained to Mr. Oakley on June 28, 2008 that the information DHEC was seeking “could be pulled and put into a mail merge format in a couple of hours.” R.p. 391. Similarly, nearly two months after the October 19, 2008 response deadline specified in

DHEC's August 19, 2008 information request, Duke notified DHEC on December 12, 2008 that it was "targeting to submit a revised QAPP by December 19." R.p. 129-30, ¶ 17; R.p. 160. But DHEC did not receive Duke's responsive information regarding the QAPP until January 12, 2009 – a total of 115 days after DHEC had made its request. R.p. 130, ¶ 18. Duke's strategic withholding of necessary information and manipulation of agency staff further demonstrates that Duke is estopped from contesting the timeliness of the DHEC staff decision.

V. DUKE HAS WAIVED ANY CHALLENGE TO THE DHEC STAFF'S CERTIFICATION DECISION AND THE STATE'S CERTIFICATION AUTHORITY.

The ALC further erred in failing to recognize that Duke has waived any timeliness objection by asking both the DHEC Board and the ALC to uphold the DHEC staff's decision and issue Duke a Section 401 water quality certification. Waiver is a "voluntary relinquishment of a right with knowledge of all the facts," S.C. Tax Comm'n v. Metropolitan Life Ins. Co., 266 S.C. 34, 40, 221 S.E.2d 522, 524 (1975), and "may be implied from circumstances indicating an intent to waive," Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981). "Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver." Id. Here, Duke not only declined to contest the DHEC staff decision before the DHEC Board, it defended that decision to the Board during the Final Review process. See R.p. 189-95 (asking the DHEC Board to deny the Conservation Groups' request for Final Review, leaving the DHEC staff decision in place). Thereafter, Duke filed a notice in the ALC stating that Duke "requests a contested case review of the SCDHEC decision and requests the WCO be issued in the form that the SCDHEC staff drafted." R.p. 56

(emphasis added). Duke's requests that the DHEC Board uphold the DHEC staff's decision and that the ALC issue it a water quality certification identical to that drafted by the DHEC staff are incompatible with its subsequent claim that the staff decision was "improperly issued" such that there was "no Department decision for the Board to review." R.p. 71, 88. By asking the DHEC Board to issue a substantive decision validating the issuance of the certification, Duke manifested its intent to waive any challenge to DHEC staff's grant of a Section 401 certification as "improper" or ineffective. See Bonnette, 277 S.C. at 18-19, 282 S.E.2d at 598-99 (holding right to a preliminary hearing waived where appellant proceeded through plea negotiations while remaining silent regarding his desire for a preliminary hearing); accord, e.g., RWE NUKEM Corp., 373 S.C. at 197-98, 644 S.E.2d at 734 (finding genuine question of material fact as to whether defendant waived the right to assert a statute of limitations defense due to conduct that could be construed as inconsistent with that defense).

Having waived its right to challenge the staff decision it supported before the DHEC Board, Duke cannot collaterally attack the decision in the ALC. Duke contends that the DHEC Board's decision was "the result of unlawful procedure because the Board reviewed and reversed an improperly issued staff decision on certification." R.p. 71, 87. But the Board faithfully followed the procedures spelled out in Act 387, 2006 S.C. Acts 387, codified at S.C. Code Ann. § 44-1-60 (2009). Duke has never disputed that the Conservation Groups timely filed their request for final review with the DHEC Board pursuant to S.C. Code Ann. § 44-1-60(E), or that the DHEC Board followed the statutory procedures for granting the final-review request, conducting the final-review conference, and issuing its decision, see S.C. Code Ann. § 44-1-60(F). There is nothing untoward

about the Board's following statutory procedures to "review and reverse" a staff decision that Duke (now) claims was "improperly issued," R.p. 71, 87 – that is the reason those procedures exist.

The DHEC Board plainly has authority to review DHEC staff decisions pursuant to S.C. Code Section 44-1-60. And Duke does not seriously dispute the Board's jurisdiction. It is simply seeking to gloss over its waiver of any challenge to DHEC staff's issuance of the Section 401 certification and its accompanying failure to exhaust administrative remedies. Because Duke did not exhaust its administrative remedies by challenging the staff decision before the DHEC Board, it cannot attack the staff decision as "improperly issued," R.p. 87, in the ALC. See MRI at Belfair, LLC v. DHEC, 06-ALJ-07-0714-CC, 2006 SC ENV LEXIS 99, at *14 (Oct. 18, 2006) (Anderson, J.) (holding that "Board review is a mandatory prerequisite to any review by this Court"). While courts have recognized that the failure to exhaust administrative remedies may be excused in appropriate circumstances, the ALC did not hold Duke excepted from the general rule, but rather assumed the rule did not apply. See R.p. 370-71, n.2. The ALC erroneously assumed that the nature of the contested case proceeding as a "*de novo* hearing" meant that Duke could raise "every . . . legal issue relevant to the decision of DHEC, whether or not the . . . issue was raised at the Board level." R.p. 370-71, n.2. The relevant authority readily contradicts the ALC's suggestion that the doctrine of waiver does not apply in a *de novo* hearing. See, e.g., Bonnette, 277 S.C. at 18 (applying waiver doctrine to criminal trial); RWE NUKEM Corp., 373 S.C. at 197-98, 644 S.E.2d at 734 (addressing waiver of statute of limitations defense to lawsuit initiated in circuit court); S.C. Code Ann. § 1-23-380 (APA requirement that a party seeking judicial review

have “exhausted all administrative remedies available within the agency” (emphasis added)); Lazicki-Thomas v. S.C. Budget & Control Bd., 378 S.C. 72, 73, 661 S.E.2d 374, 375 (2008) (stating that, “[f]ollowing exhaustion of her administrative remedies and a final determination by respondent, appellant filed a request for a contested case hearing with the ALC”).

CONCLUSION

For the foregoing reasons, we respectfully request that the ALC’s Orders of June 10, 2010 and July 9, 2010 be reversed.

Respectfully submitted,



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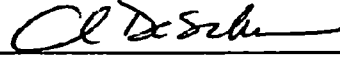
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August 11th, 2011

CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

I certify that the foregoing Final Brief of Appellant complies with Rule 211(b),

SCACR.

A handwritten signature in black ink, appearing to read "C. DeScherer", is written over a horizontal line.

Christopher K. DeScherer

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

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

Duke Energy Carolinas, LLC,

Respondent,

v.

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

Defendants,

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

Appellants.

CERTIFICATE OF SERVICE

I certify that I have served the Final Brief of Appellants American Rivers and South Carolina Coastal Conservation League on all parties by depositing a copy of it in the United States Mail on this 11th day of August, 2011, addressed to their attorneys of record, as indicated below:

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

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

Duke Energy Carolinas, LLC,

Respondent,

vs.

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

Defendants,

Of Whom South Carolina Department of
Health and Environmental Control, American
Rivers, and The South Carolina Coastal
Conservation League are,

Appellants.

FINAL BRIEF OF APPELLANT
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STATEMENT OF ISSUES ON APPEAL

- I. DID THE ADMINISTRATIVE LAW COURT ("ALC") ERR IN DETERMINING THAT THE DEPARTMENT REVIEW OF DUKE'S WATER QUALITY CERTIFICATION APPLICATION WAS NOT TIMELY?
 - A. Did the ALC err in failing to find that Regulation 61-30 is the only statutorily mandated method for determining the timeliness and completeness of Department review of water quality certification applications?
 - B. Did the ALC err in finding that Regulation 61-30 is barred by Responsible Economic Development, et al.?
 - C. Did the ALC err in finding that the time schedule in Regulation 61-30 is limited to determining if and when to grant a refund?
 - D. Did the ALC err in failing to find Regulation 61-30 supersedes Regulation 61-101 to the extent provisions conflict?
 - E. Did the ALC err in failing to find that the Department's review of Duke's water quality certification application substantially complied with Regulations 61-101 and Regulation 61-30?
- II. DID THE ALC ERR WHEN IT HELD THAT THE DEPARTMENT WAIVED ITS RIGHT TO ISSUE A WATER QUALITY CERTIFICATION TO DUKE?
 - A. Did the ALC err in finding that an agency cannot lose its authority to act as a consequence of failing to comply with a mandatory statutorily imposed time period if the statute does not specify the consequence?
 - B. Did the ALC err in not following Johnston?

STATEMENT OF THE CASE

This case began when the Appellants/Respondents-Intervenors American Rivers and South Carolina Coastal Conservation League (collectively referred to as the "Conservation Groups") appealed the Notice of Department Decision – Water Quality Certification, Public Notice No. DHEC 08-C-001("WQC") issued by the South Carolina Department of Health and Environmental Control ("Department") to Respondent/Petitioner Duke Energy Carolina, LLC ("Duke") on May 15, 2009, in accordance with the appellate procedures contained in S.C. Code Ann. § 44-1-60 (Supp. 2010) for appealing Department decisions.¹ The South Carolina Board of Health and Environmental ("Board") granted the Conservation Groups' request for a final review conference, which was held on July 9, 2009. The Board heard testimony from the Conservation Groups, the South Carolina Attorney General, and the South Carolina Department of Natural Resources and the Department.² On August 6, 2009, the Board issued a Final Agency Decision ("FAD") in which they overturned the Department's issuance of Duke's WQC on the basis of the arguments presented by the Conservation Groups during the final review conference. (FAD, R. p. 2-3).

Duke appealed the Final Agency Decision by filing a request for a contested case proceeding in the Administrative Law Court ("ALC") on September 5, 2009. By an order dated November 9, 2009, the ALC admitted the Conservation Groups and the South

¹ The statute governing appeals of Department Decisions, S.C. Code Ann. § 44-1-60, was recently amended effective July 1, 2010. Since this case was pending before the ALC on June 1, 2010, the statute's amendments are not applicable to this case.

² Although the Board allowed representatives of the South Carolina Department of Natural Resources and the Attorney General Office to provide information to the Board, they were not made parties to the proceeding.

Carolina Attorney General as Respondent-Intervenors.³ On January 21, 2010, Duke filed two motions in the ALC – one for summary judgment and the other for declaratory judgment.⁴ Duke based its argument for summary judgment on two grounds, that, (1) pursuant to 25A S.C. Code Ann. Regs. 61-101(A)(6), the Department was required to issue a proposed decision on Duke's application for certification within 180 days of receiving the application, which was filed on June 5, 2008; and (2) by operation of law, the State South Carolina waived its right to issue certification when the Department failed to either issue or deny the certification on or before December 2, 2008. (Petitioner's Motion for Summary Judgment dated January 21, 2010, "MSJ", R. p. 76).

The Department filed a response to this motion on February 12, 2010 in which it argued that Duke's motions should be denied. A hearing on Duke's motions was held before the ALC on May 6, 2010. On June 10, 2010, the ALC issued its Order on Motion for Summary Judgment ("Opinion") granting Duke's Motion for Summary Judgment and not ruling upon Duke's Motion for Declaratory Judgment.

The Department and the Conservation Groups filed a Joint Motion for Reconsideration of the ALC's Opinion on June 21, 2010, which was denied by the ALC on July 9, 2010.⁵ Both the Department and the Conservation Groups filed timely appeals

³ The ALC limited the participation of the South Carolina Attorney General to issues impacting the State's law suit against the State of North Carolina seeking a ruling from the United States Supreme Court on the proper apportionment of water from the Catawba River.

⁴ The ALC did not address Duke's Motion for Declaratory Judgment in its Opinion. Therefore this matter is not before the Court on this appeal.

⁵ The Department filed its Notice of Appeal from the ALC's Opinion on July 8, 2010, the day before the ALC filed its order denying the Joint Motion for Reconsideration. The Department subsequently filed a second Notice of Appeal that included the ALC's denial of the Joint Motion for Reconsideration, which was consolidated with the Department's initial Notice of Appeal by the Clerk of the Court.

from the ALC's Opinion to grant summary judgment to Duke and its denial of their Joint Motion for Reconsideration, which the Court has consolidated under this caption.

STATEMENT OF LAW

A. Statutory and Regulatory Framework Governing Department review

An applicant for a federal permit which might result in any discharge into navigable waters of the United States is required under the federal Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 – 1387 (2010) to obtain a water quality certification from the state in which the discharge is or will be located. Pursuant to section 401 of the CWA (hereinafter referred to as "CWA § 401"), States "shall establish procedures for public notice in the case of all application for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications." 33 U.S.C. § 1341(a)(1). Further, CWA § 401 provides that:

[i]f 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

33 U.S.C. § 1341 (a)(1).

CWA § 401 grants States the authority to review projects for which applicants are seeking federal permits and to condition the permits for such projects so that the water quality standards of the State, both under the CWA and under State law, are met. Such review must be conducted within a reasonable period of time not to exceed one year from the date the State received the request.

Regulation 61-101

Regulation 61-101 was enacted pursuant to the authority granted the Department in the Pollution Control Act ("PCA"), S.C. Code Ann. §§ 48-1-10 et seq. (Rev. 2008 & Supp. 2010). Specifically, Section 48-1-30 authorizes generally that the Department may promulgate regulations guiding the procedures permits under the PCA. Section 48-1-50(17) of the PCA authorizes the Department to take all necessary or appropriate actions to secure to the State the benefits of the Federal Water Pollution Control Act or the Federal Air Quality Act and other Federal and State acts concerning air and water pollution control.

Pursuant to the authority granted the Department under PCA, S.C. Code Ann. §§ 48-1-30 and 48-1-50(17), the Department promulgated the Water Quality Certification regulations, 25A S.C. Code Ann. Regs. 61-101 (Supp. 2010) ("Regulation 61-101"), which became effective February 23, 1990. Under Regulation 61-101, any applicant for a Federal license or permit, including those issued by the Federal Energy Regulatory Commission ("FERC"), to conduct any activity which during construction or operation may result in any discharge in navigable waters, must obtain a water quality certification from the Department."⁶ 25A S.C. Code Ann. Regs. 61-101(A)(2).

Further, Regulation 61-101 provides a time frame for the review of applications. Specifically, the regulation provides that

[t]he 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 of the applicant or the

⁶ The term "Department" refers to the Department of Health and Environmental Control. 25A S.C. Code Ann. Regs. 61-101 (B)(4).

Department or of its own volition, suspension of processing of application (sic) 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 (sic) an application.

25A S.C. Code Ann. Regs. 61-101(A)(6).

Regulation 61-101 includes no penalty or waiver if the Department is unable to meet its requirement of a decision being rendered within 180 days. Review can begin only when an applicant has presented the Department with a complete application in the manner specified by the Regulation. 25A S.C. Code Ann. Regs. 61-101 (C)(1). An application, *inter alia*, must contain the names and address of adjacent property owners.

25A S.C. Code Ann. Regs. 61-101(C)(1)(f).

Regulation 61-101(C)(2) also provides that:

[i]f 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.

Regulation 61-101 (C)(4) provides that:

[w]hen the Department requests additional information it will specify a time for submittal of such information. If the information is not timely submitted and is necessary for reaching a certification decision, certification will be denied without prejudice or processing will be suspended upon notification to the applicant by the Department. Any subsequent resubmittal will be considered a new application.

Environmental Protection Fund Act and Regulation 61-30

Department review of water quality certification applications is also governed by the Environmental Protection Fund Act, S.C. Code Ann. §§ 48-2-10 to 48-2-90 (Rev.

2008 & Supp. 2010) ("Fund Act") and its promulgated regulation. The Fund Act, was enacted in 1993 for the purpose of creating a fund whose "monies must be used for improved performance in permitting, certification, licensing, monitoring, investigating, enforcing, and administering the [D]epartment's functions." S.C. Code Ann. § 48-2-40. The funds are solely for the use of administering environmental programs and may not be used to "supplant or reduce in any way the general fund appropriation to the [D]epartment from the state or federal program." S.C. Code Ann. § 48-2-80.

The statutes subject to the provisions of the Fund Act include, the PCA, Clean Air Act, Safe Drinking Water Act, Hazardous Waste Management Act, Atomic Energy Act, and the Oil and Gas Act. The Fund Act applies to the processing of all environmental permits, licenses, certificates, and registrations authorized by those statutes. S.C. Code Ann. § 48-2-30 (B). Water quality certifications are expressly referred to and identified as being covered by the Fund Act. S.C. Code Ann. § 48-2-50(H)(1)(b).

To ensure implementation of the legislative purpose of improving the Department's performance in reviewing permit, certification, and license applications, the Fund Act contains a provision entitled "[p]rocessing of permit application; maximum time for review" that mandates that the Department promulgate regulations governing the timeliness, thoroughness, and completeness of the Department's processing of the applications subject to the Fund Act. S.C. Code Ann. § 48-2-70 pronto:

[u]nder each program for which a permit processing fee is established pursuant to this article, the promulgating authority also shall establish by regulation a schedule for timely action by the Department of Health and Environmental Control on permit applications under that program. 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 fee for a thorough and prompt review of each categories 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 the regulation, the department shall refund the permit processing fee to the permit applicant.

In accordance with the statutory mandate, the Department promulgated the Environment Protection Fee Regulation, 24A S.C. Code Ann. Regs. 61-30 (Supp. 2009) ("Regulation 61-30"). Regulation 61-30, which became effective June 23, 1995, in pertinent part, provides 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." 24A S.C. Code Ann. Regs. 61-30 (C)(1)(b) (emphasis added).

The regulation also 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.

24A S.C. Code Ann. Regs. 61-30 (H)(1)(c) (emphasis added).

B. Standard of Review

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP." Bovain v. Canal Insurance, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009) Rule 56(c) provides that summary judgment is proper 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 the moving party is entitled to judgment as a matter of law." Rule 56 (c), SCRCP. Thus, in reviewing a grant of

summary judgment, the nonmoving party is entitled to have all factual allegations and inferences to be drawn from those facts viewed in the light most favorable to it upon appeal. Sapp v. Ford Motor Company, 386 S.C. 143, 146, 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) (stating “[i]n 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”). Here, in response to the bare boned affidavit supporting Duke’s Motion for Summary Judgment, the Department presented two detailed affidavits explaining the Department’s review of Duke’s application. Since, Duke did not file any further affidavits, the Court must construe the facts stated by the Department and render all reasonable inferences therefrom in favor of the Department.

STATEMENT OF FACTS

The Department’s Review of Duke’s Water Quality Certification Application.

On June 5, 2008, Duke filed an application with the Department for a water quality certification for a FERC license authorizing Duke’s continued operation of the Catawba-Wateree Hydroelectric Project in South Carolina. (Affidavit of William R. Wenerick, (“Wenerick Aff.”), R. p. 125, ¶ 5; Affidavit of E. Mark Oakley (“Oakley Aff.”), R. p. 94, ¶¶ 8 and 9). The Department’s review did not commence on June 5, 2008, as claimed by Duke because, Duke failed to comply with the application requirements contained in Regulations 61-101 and Regulation 61-30.

The application was submitted to the Department without the names and addresses of the adjacent property owners as required by 25A S.C. Code Ann. Regs. 61-101(C)(1)(f). (Wenerick Aff. R. pp. 2-3, ¶ 6; Affidavit of Charles Hightower

“Hightower Aff.” R. p. 181, ¶¶ 4 and 5; cf. Oakley Aff. R. p. 94, ¶¶ 8 and 9. Additionally, the application was submitted to the Department without the regulatory prescribed application fee required by 24A S.C. Code Ann. Regs. 61-30(G)(1)(b)(i). (Wenerick Aff. R. p. 125, ¶ 5); cf. Oakley Aff. R. p. 94, ¶¶ 8 and 9.

On June 27, 2008, Duke provided the Department with several lists that contained the names of interested citizens and stakeholders who had contacted Duke and had requested notification of matters regarding Duke’s FERC application. (Hightower Aff. R. p. 181, ¶ 6). These lists, however, did not comply with the minimal requirements for a water quality certification application because the “lists did not contain the names and address of all property owners adjacent to the project.” Id. On July 29, 2008, approximately seven (7) weeks after it had submitted its application, Duke provided the Department with a list of the names and addresses of all adjacent property owners on July 29, 2008. (Hightower Aff., R. p. 182, ¶ 8; Hightower Aff., Exhibit 2, R. pp. 180-182). By submitting the names and addresses of all adjacent property owners to the Department, Duke’s application met the minimal requirements for water quality certification applications in Regulation 61-101. However, the application still was not ready for processing because Duke had not submitted the fee for major activity water quality certification applications under 24A S.C. Code Ann. Regs. 61-30(G)(1)(b)(i).

On July 29, 2008, in response to Duke’s providing missing names and addresses of adjacent property owners, the Department notified Duke by email that it was placing the Duke application on public notice and that it was requiring that Duke provide additional information before Department review would commence. Specifically, the Department notified Duke that review would not commence until after the Department

received an affidavit of publication and had received Duke's application fee. (Wenerick Aff. R. pp. 126-127, ¶ 7; see 25A S.C. Code Ann. Regs. 61-101(C)(1). In accordance with the notification, on August 8, 2008, the Department placed the Duke application on public notice as Public Notice No. DHEC 08-C-001. (Wenerick Aff. R. p. 127, ¶ 8; Wenerick Aff. Exhibit 2).

While waiting for Duke to respond to its request for the affidavit of publication and application fee, the Department sent a detailed request for additional information ("RAI") by letter dated August 19, 2008 to Duke regarding the draft Quality Assurance Program Plan ("QAPP") that Duke had submitted with the application. (Wenerick Aff., R. pp. 127-128, ¶ 9). The Department's RAI requested that Duke submit the information to the Department by October 19, 2008 and notified Duke that pursuant to Regulation 61-30 the Department had 180 day to issue a decision on the application. Id. The Department's RAI also stated Duke's application would not be complete for processing until the application fee and affidavit of public requested in a separate letter dated August 15, 2008, was received. Id.

The Department received the affidavit and the application fee on August 25, 2008, which would have commenced the Department's review under Regulation 61-101 and Regulation 61-30. However, because the Department had not received the information requested in the RAI, the Department's review did not start. The Department's review remained tolled until January 12, 2009, when Duke provided all the information requested in the first RAI letter. (Wenerick Aff. R. p. 130, ¶ 18).

During the tolling of the Department's processing of the application pursuant to the first RAI letter to Duke, the Department sent two more RAI letters to Duke regarding

information that the Department need to process the application. The second RAI letter was sent to Duke on October 8, 2008, requesting the Duke submit the requested information by November 8, 2008. (Wenerick Aff. R. p. 128, ¶ 11). On November 10, 2008, the Department received the information requested in the second RAI letter. (Wenerick Aff. R. p. 129, ¶ 15).

The third RAI letter was send to Duke on October 21, 2008, requesting the information be sent to the Department by November 21, 2008. (Wenerick Aff. R. p. 129, ¶ 13). The Department received a partial response on the due date for the information, November 21, 2008. (Wenerick Aff., R. p. 129, ¶ 16). The remainder of the information was received on December 12, 2008. (Wenerick Aff. R. pp. 129-130, ¶ 17).

As noted above, Duke submitted its response to the first RAI letter on January 12, 2009. (Wenerick Aff. R. p. 130, ¶ 18). Pursuant to Regulation 61-30, the receipt of this response started the 180-day clock on the Department's review of the Duke application. On May 15, 2009, the Department issued its Notice of Department Decision – Water Quality Certification for Public Notice No. DHEC 08-C-001 on May 15, 2009, pursuant to its review under Regulations 61-101 and 61-30. From the date the Department received the application fee from Duke on August 25, 2008, to May 15, 2009, the date that the Department issued the water quality certification, a total of 234 days elapsed. (Wenerick Aff., R. pp. 131-132, ¶ 25). Of that 263-day time period, the time between August 25, 2008 and January 12, 2009, the Department review was tolled under Regulation 61-30. Id. Of the time period between January 12, 2009 and May 15, 2009, there were 94 days in which to complete information was available for review. Id.

ARGUMENTS

I. THE ALC ERRED IN DETERMINING THAT THE DEPARTMENT REVIEW OF DUKE'S WATER QUALITY CERTIFICATION APPLICATION WAS NOT TIMELY

- A. Regulation 61-30 is the only statutorily mandated method for determining the timeliness and completeness of Department review of water quality certification applications.**

As noted in the Statutory and Regulatory section, the Water Certification regulation was promulgated pursuant to the broad authority contained in the PCA. Specifically, the Legislature authorized the Department to take all steps appropriate and necessary to obtain the benefits of federal air and water pollution statutes. S.C. Code Ann. § 48-1-50(17) mandates that the Department may [t]ake all action necessary or appropriate to secure to the State the benefits of the Federal Water Pollution Control Act or the Federal Air Quality Act and any and all other Federal and State acts concerning air and water pollution control.” However, neither that specific authority nor the more general authority in S.C. Code Ann. § 48-1-30 providing for promulgation of regulations, mandate a particular method for determining whether the Department has reviewed a water quality certification application thoroughly and timely.

The only statutory mandate regarding the method for determining whether the Department has reviewed a water quality certification application thoroughly, completely, and timely is found in the Fund Act. That statute provides, in pertinent part, that the Department shall promulgate by regulation a schedule for determining whether the Department has reviewed a water quality certification application thoroughly and timely. S.C. Code Ann. § 48-2-70. Pursuant to this mandate, the Department promulgated Regulation 61-30 which, in pertinent part, provides that when the Department requests in writing additional information from an applicant all time from the

date of the request until the date that the information is received is excluded from the time period for Department review. 24A S.C. Code Ann. Regs. 61-30(H)(1)(c) (“[t]he 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”). Therefore, the only legislatively mandated method for measuring the timeliness and thoroughness of Department reviews of water quality certification applications is found in Regulation 61-30.

B. The applicability of the time schedule in Regulation 61-30 is not barred by Responsible Economic Development, et al.

Notwithstanding, the fact that only the time schedule in Regulation 61-30 is statutorily mandated, the ALC and Duke claim that the time schedule in Regulation 61-30 cannot be applied to the Department review of water quality certifications under Regulation 61-101 because of the precedent in Responsible Economic Development, et al. v. South Carolina Department of Health and Environmental Control and Wal-Mart Stores East, LP, 371 S.C. 547, 641 S.E.2d 425 (2007). (Opinion, R. p. 373; Petitioner’s Reply to Respondent’s and Respondent-Intervenors’ Responses to Petitioner’s Motion for Summary Judgment and Motion for Declaratory Judgment (“Duke’s Reply”, R. pp. 252-253). In that case, the Supreme Court was asked to determine whether the requirements of Regulations 61-68 and 61-69 could be applied to a stormwater permit issued pursuant to Regulations 72-305 and 72-307. Regulation 61-68 was promulgated pursuant to the Pollution Control Act, while Regulations 72-305 and 72-307 were not promulgated pursuant to the statutory authority contained in the Stormwater Management and Sediment Reduction Act.

In rejecting the Appellants' claims and affirming the Department's issuance of the stormwater permit, the Supreme Court held that the case-by-case modifications provision contained in Regulation 72-305(B)(4) could not be invoked because of an alleged violation of Regulations 61-68 and 61-69, since Regulations 72-305 and 72-307 were not enacted pursuant to and did not reference Regulations 61-68 and 61-69. Responsible Economic Development, et al., 371 S.C. at 553, 641 S.E.2d at 428.

Here, the facts could not be more distinguishable from those in Responsible Economic Development, et al. The Fund Act expressly states that its provisions apply to water quality certifications which are promulgated pursuant to the PCA. Specifically, in §48-2-30, the Fund Act expressly states that its provisions apply to environmental permits, licenses, certificates, and regulations issued pursuant to the Pollution Control Act. S.C. Code Ann. § 48-2-30 (B)(1). Further, in S.C. Code Ann. § 48-2-50, the Fund Act identifies water quality certification applications by name, a practice mirrored in Regulation 61-30, which was promulgated in response to the Fund Act mandates. S.C. Code Ann. § 48-2-50(H)(1)(b); 24A S.C. Code Ann. Regs. 61-30(G)(1)(b).⁷ Thus, contrary to the assertions of the ALC and Duke that the Department cannot invoke the time schedule provision in Regulation 61-30 to a permit authorized by the PCA, Regulation 61-30 and its time schedule unequivocally apply to the Department's review of water quality certification applications as contemplated by the Fund Act. See Responsible Economic Development, et al., 371 S.C. at 553, 641 S.E.2d at 428.

⁷ Both the Fund Act and Regulation 61-30 identify water quality certification applications by name as a covered activity, but the Fund Act sets forth the maximum fee that can be charged for Department review of the applications while Regulation 61-30 sets forth the actual fee currently authorized.

C. The time schedule in Regulation 61-30 is not limited to determining if and when to grant a refund.

The ALC's assertion that Regulation 61-30 only applies to refund of an application fee is erroneous. The ALC arrives at this conclusion by relying upon the definition of the term "Time Schedules" in Regulation 61-30(B)(22) as the definitive expression of the legislative intent supporting the promulgation of the time schedule provision. However, both the ALC's use of the regulatory definition and the conclusion that the definition limits the applicability of Regulation 61-30 are misplaced.

The Supreme Court has consistently held that "[a]lthough regulations authorized by the Legislature generally have the force of law, a regulation may not alter or add to the terms of a statute." Sanford v. South Carolina State Ethics Commission, et al., 385 S.C. 483, 498, 685 S.E.2d 600, 608 (2009) (emphasis added), citing Gaffney Ledger v. South Carolina Ethics Commission, 360 S.C. 107, 600 S.E.2d 540 (2004); Goodman v. City of Columbia, 318 S.C. 488, 458 S.E.2d 531 (1995); Banks v. Batesburg Howling Company, 202 S.C. 273, 24 S.E.2d 496 (1943); see also Society of Professional Journalists v. Sexton, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984) ("Although a regulation had the force of law, it must fall when it alters or adds to a statute"). Thus, it is the language in the Fund Act, which authorized Regulation 61-30, and not the language in the regulation that is controlling.

In determining the intent of a statute, this Court has stated that the primary rule of statutory construction is that "legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control, 380 S.C. 349, 365, 669

S.E.2d 899, 907 (Ct. App. 2009) (citations omitted). Here, the language used by the Legislature in the Fund Act clearly does not limit the scope of the time schedule to solely determining whether or not the applicant should receive a refund. The purpose and scope of the time schedule is discussed in detail in two sections of the Fund Act. In the section entitled "Processing of permit applications; maximum time for review," the statute provides that:

[u]nder each program for which a permit processing fee is established pursuant to this article, the promulgating authority also shall establish by regulation a schedule for timely action by the Department of Health and Environmental Control on permit applications under that program. 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 fee for a thorough and prompt review of each category 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 the regulation, the department shall refund the permit processing fee to the permit applicant.

S.C. Code Ann. § 48-2-70 (emphasis added). And in the section entitled "Purpose and uses of fund," the statute provides that

{t}he fund is available to the [D]epartment to help defray the costs of administering the regulatory programs under each act enumerated in Section 48-2-30(B). The monies must be used for improved performance in permitting, certification, licensing, monitoring, investigating, enforcing, and administering the [D]epartment's function under these acts . . .

S.C. Code Ann. § 48-2-40 (emphasis added).

Taken together, the language on these statutory provisions establish that the primary intent of the Legislature in enacting the Fund Act was to improve upon the methods of Department review then in existence, and that the means to accomplish that

goal was to mandate time schedules that would, at a minimum: (1) establish when an application is complete for processing; (2) establish the maximum time period necessary and appropriate for thorough and prompt review of applications; and (3) take into account the nature and complexity of the various reviews covered by the requirement.

Regulation 61-30 incorporates these mandates by establishing a time schedule that (1) determines when an application is complete for processing, 24A S.C. Code Ann. Regs. 61-30(H)(1)(b); (2) determines the maximum time appropriate for a thorough and prompt review of water quality certification applications as 180 days, 24A S.C. Code Ann. Regs. 61-30(H)(2)(a)(vii); and (3) improves upon the method of Department review by excluding time attributed to obtaining information from the time period for reviewing the application, 24A S.C. Code Ann. Regs. 61-30(H)(1)(c).

Notwithstanding, the ACL contends that the time schedule in Regulation 61-30 is limited to providing a means for determining if and when an application is entitled to a refund of its application fee. Although the Fund Act provides in section 48-2-70, that "[i]f the [D]epartment fails to grant or deny the permit within the time frame established by regulation, the [D]epartment shall refund the permit processing fee to the permit applicant," that provision must be read in context with the rest of section 48-2-70 and with section 48-2-40 which sets forth the legislative purpose of and uses of the fund. When the portion of section 48-2-70 is read in context with the rest of that section and with section 48-2-40, it is clear that the ALC has misconstrued the purpose of the time schedule. Limiting the time schedule to determining the status of fee refunds does not comport with the legislative purpose of the Fund Act, which is to improve the Department performance in processing applications and other functions. S.C. Code Ann.

§ 48-2-40. Thus, the ALC's contention that Regulation 61-30 is limited to determining the status of fee refunds should be rejected by this Court as meritless.

D. Regulation 61-30 supersedes Regulation 61-101 to the extent the provisions conflict.

In deciding that Duke was entitled to summary judgment the ALC contends applying only Regulation 61-101 to determine timeliness of review is proper. In taking this position, the ALC sets up Regulations 61-101 and 61-30 as two entirely different and conflicting methods of computing the running of the 180-day time period for reviewing water quality certifications. This produces absurd results that clearly the Legislature would not have intended.

Treating the time frames in Regulations 61-101 and 61-30 as two entirely different methodologies sets up a conflict that is unwieldy for the Department and applicants and generally reduces the length of time that the Department is reviewing an application with all requested information available. Under the ALC's methodology, the Department loses a significant time period from the 180-day time period for review that is established in Regulation 61-30.

To the extent Regulation 61-101 and Regulation 61-30 conflict, it is Regulation 61-30 that supersedes Regulation 61-101. When courts have in the past determined that irreconcilable conflicts existed, they have uniformly held that the conflict should be resolved in favor of the more recent law as the best expression of the Legislature's intent. See Southeastern Freight Lines v. City of Hartsville, 313 S.C. 466, 469, 443 S.E.2d 395, 397 (1994) ("[w]hen two statutes are incapable of reasonable reconciliation, the latest statute passed repeals any earlier statute to the extent of repugnancy between the two statutes"). For example, in Yarnes v. Stroh Brewery Company, 295 S.C. 243, 368 S.E.2d

64 (1988) the Supreme Court reviewed the interaction of two statutes impacting the rights and obligations of beer distributors and wholesalers. Section 61-9-1040(1), which was enacted in 1974, allowed a beer wholesaler to sell the business for the highest possible market value while guaranteeing their distributor the right to either purchase the business from the wholesaler at identical terms as the potential purchaser or to continue furnishing beer to the new purchaser. Yarnes, 295 S.C. at 246, 368 S.E.2d at 66. Six years later, in 1980, the legislature enacted S.C. Code Ann. § 61-9-315(b), which prohibited beer producers from holding any interest in any beer business of any person holding a wholesale permit. Yarnes, 295 S.C. at 246, 368 S.E.2d at 66. The Supreme Court found that these statutes conflicted in such a way that there was not possible construction of the two statutes that would allow both statutes to be given effect, and concluded that the 1980 statute repealed that portion of the prior statute that was incapable of being harmonized. Id. at 246, 368 S.E.2d at 66 (holding “[b]y implication, § 61-9-315(b) repealed § 61-9-1040(1) to the extent of the conflict”).

Similarly, in Southeastern Freight Lines v. City of Hartsville, 313 S.C. 466, 443 S.E.2d 395 (1994), the Supreme Court reviewed the interaction between provisions of the Uniform Contribution Among Tortfeasors Act, S.C. Code Ann. §§ 15-38-10 to 15-38-70, and a provision of the South Carolina Tort Claims Act, §§ 15-78-10 to 15-78-190. Southeastern Freight Lines, 313 S.C. at 467-68, 443 S.E.2d at 396. Sections 15-78-100(c) and 15-78-120(a)(1) of the Tort Claims Act were enacted in 1986 and, respectively, provide that “the trier of fact in any tort action against a government entity to ‘return a special verdict specifying the proportion of monetary liability of each defendant against whom liability of each defendant against whom liability is determined’

and that the total monetary liability of all governmental entities is limited to only one occurrence. Southeastern Freight Lines, 313 S.C. at 469, 443 S.E.2d at 397. Sections 15-38-20(B) and 15-38-30 of the Uniform Contribution Among Tortfeasors Act were enacted in 1988 and, respectively, provided that “a right of contribution for joint tortfeasors who have paid their pro rata share of common liability” and that “relative degrees of fault are not to be considered in determining the pro rata liability of tortfeasors.” Southeastern Freight Lines, 313 S.C. at 469, 443 S.E.2d at 397. Reviewing the language of the relevant provisions, the Supreme Court concluded that since the apportioned liability and apportioned liability provisions of the Tort Claims Act could not be reconciled with the unlimited, pro rata liability provisions contained in the Uniform Contribution Among Tortfeasors Act, the later Act had repealed the provisions of the Tort Claims Act. Id. at 469, 443 S.E.2d at 397 (holding “[c]learly, the apportioned liability required by section 15-78-100(c) and the limitation on damages provided by section 15-78-120(a)(1) are inconsistent with the unlimited, pro rata liability required by section 15-38-20. Because this inconsistency cannot reasonably be reconciled, we conclude that the trial judge was correct in ruling that the Uniform Contribution Among Tortfeasors Act repealed sections 15-78-100(c) and 15-78-120(a)(1) of the Tort Claim Act”).

The facts in this case are similar to those in Yarnes and in Southeastern Freight Lines. The requirements of Regulation 61-101 and Regulation 61-30 both establish 108-day reviews for water quality certification, but the methods of determining the Department’s timely review under Regulations 61-101 and 61-30 conflict. Regulation 61-101 was initially promulgated in 1990 and amended in 1995. Regulation 61-30 was

initially promulgated in 1995, and the applicable provision of Regulation 61-30, specifically Regulation 61-30(H), Time Schedules., was amended repeatedly between 1995 and 2004. The last amended regulation should be given effect as the most recent expression of legislative intent. Indeed, when reviewing laws that have overlapping applicability, a court must assume that the Legislature was aware of the prior law at the time the later law was enacted. Spectre, LLC v. South Carolina Department of Health and Environmental Control, et al., 389 S.C. 357, 368, 688 S.E.2d 844, 908 (2010) (stating “[t]here is a basic presumption the legislature has knowledge of preceding legislation when enacting subsequent statutes on related matters). Consequently, by implication the time schedule in Regulation 61-30 implicitly repealed the time measuring method in Regulation 61-101. Moreover, Regulation 61-30 was promulgated and amended pursuant to a statute which specifically required promulgation of a regulation dealing with permit and certification time frames. Accordingly, the ALC erred in granting summary judgment to Duke on the ground that the Department failed to make a timely decision under Regulation 61-101, while totally dismissing the timeliness provisions of Regulation 61-30.

E. The Department’s review of Duke’s water quality certification application substantially complied with Regulations 61-101 and Regulation 61-30.

The Department’s review of Duke’s water quality certification application substantially complied with the applicable regulatory requirements of Regulation 61-101 and Regulation 61-30. As stated in the Statutory/Regulatory Framework Section, under Regulation 61-101, the applicant must provide an application that meets enumerated requirements set forth in 25A S.C. Code Ann. Regs. 61-101(C)(1). In addition, the

application must meet any additional requirements that the Department may impose to make a complete application. 25A S.C. Code Ann. Regs. 61-101(C)(1), (2), and (3). Under Regulation 61-30, the application must be accompanied by the applicable filing fee and any other information that the Department notifies the applicant is necessary to make the application complete for processing. 24A S.C. Code Ann. Regs. 61-30(H)(1)(a) and (b). Thereafter, the Department processes the application under the timeliness provision of Regulation 61-30. 24A S.C. Code Ann. 61-30(H)(1)(c) and (d). The timeliness provisions of Regulation 61-30 do not differ significantly from Regulation 61-101.

Here, Duke filed an incomplete application with the Department for a water quality certification. (Wenerick Aff. R. p. 125, ¶ 5). The application was incomplete because it failed to provide a list of all the names and addresses of adjacent landowners and it was not accompanied by a filing fee. 24A S.C. Code Ann. Regs. 61-30(C)(1)(b) and 61-30(G)(b)(i); 25A S.C. Code Ann. Regs. 61-101(C)(1)(f). On July 29, 2008, Duke corrected part of the application by providing the Department with a list of the names and addresses of all adjacent property owners on July 29, 2008. (Hightower Aff. R. p. 182, ¶ 8). However, Duke did not remit the application fee as required by Regulation 61-30 until August 25, 2008.

After receiving the names and addresses from Duke on July 29, 2008, the Department notified Duke in writing that day that it was placing the Duke application on public notice, but processing of the application would not commence until Duke submitted its application fee and submitted an affidavit of publication. (Wenerick Aff. R. p. 126, ¶ 7; See 24A S.C. Code Ann. Regs. 61-30(C)(b); 25A S.C. Code Ann. Regs.

61-101(C)(1)). Duke's application was placed on public notice as Public Notice No. DHEC 08-C-001 on August 8, 2008. (Wenerick Aff. R. p. 127, ¶ 8). Slightly more than two weeks later on August 17, 2008, the Department sent a detailed request for additional information ("RAI") regarding the draft Quality Assurance Program Plan ("QAPP") that Duke had submitted with its application. (Wenerick Aff., R. pp. 127-128, ¶ 9). Finally, on August 25, 2009 the Department was in receipt of Duke's application fee and the affidavit of publication that the Department had requested. The Department's receipt of these documents would have commenced the 180-day time period for Department review; however, because the Department had not received the information requested in the RAI, the Department's review was tolled, which substantially complies with Regulation 61-101 and Regulation 61-30 time schedules. (Wenerick Aff. R. p. 128, ¶ 10; see 24A S.C. Code Ann. Regs. 61-30(H)(1)(c)). The Department's review remained tolled until January 12, 2009, when Duke provided all the information requested in the first RAI letter. (Wenerick Aff. R. p. 130, ¶ 18).

During the tolling of the Department's processing of the application pursuant to the first RAI letter to Duke, a second RAI letter was sent to Duke on October 8, 2008. In this RAI letter, the Department requested that Duke provide written responses to 12 comment letters received by the Department in response to Public Notice No. DHEC 08-001.⁸ (Wenerick Aff. R. p. 128, ¶ 11). The public comment period ended on October 7, 2008 and the Department needed Duke's responses to the comments to assist in its processing of the application. The Department received Duke's responses to the second

⁸ Public Notice No. DHEC 08-001 informed the public that they had sixty (60) days from August 8, 2008 until October in which to submit comments regarding the Duke application. (Wenerick Aff. R. p. 127, ¶8; Wenerick Aff. Exhibit 2, R. pp. 136-139).

RAI letter on November 10, 2008. This lifted the tolling of the Department review with regard to the information requested in the second RAI. See 24A S.C. Code Ann. 61-30(H)(1)(c). However, since the Department had not received the information requested in the first RAI, the 180 day clock remained stopped. (Wenerick Aff. R. p. 129, ¶ 15; see 24A S.C. Code Ann. Regs. 61-30(H)(1)(c)).

The Department's possession of Duke's water quality certification application lasted a total of 263 calendar days from the date that the Department was in receipt of the application fee and affidavit of publication on August 25, 2008, until the day that the Department issued its decision on May 15, 2009.⁹ (Wenerick Aff. R. pp. 131-132, ¶ 25). The actual time that Duke's application was complete and subject to review under the regulations was 94 days. Id. Since the Department had 180 days in which to issue a decision on Duke's application, the Department's review was timely.

Both the ALC and Duke, nevertheless, challenge the Department's review on the ground that it did not conform to the regulatory requirements in Regulation 61-101. This argument fails to address the fact that as discussed previously, the requirements of Regulation 61-30 are an integral part of the review process. Moreover, even if Regulation 61-101 were to be applied alone, the Department's actions substantially complied with the Regulation. The Department correctly used the applicable provisions of Regulation 61-101 to determine that the Duke filed a defective application and to request additional information necessary to make Duke's application complete for processing. In addition, the Department sent written requests for additional information with dates certain for information necessary for making a decision on the application. Duke did not provide this information in a timely manner and, in response to RAI and

⁹ The affidavit inadvertently cited the incorrect figure of 242 days.

Duke, provided the information more than two months after the date it was required to be submitted.

Duke was not harmed, and was treated less harshly by tolling of the time period. Otherwise, when the language contained in Regulation 61-101(c)(4), Duke may have been required to submit a new application or could have had the application denied on that basis.

II. THE ALC ERRED WHEN IT HELD THAT THE DEPARTMENT WAIVED ITS RIGHT TO ISSUE A WATER QUALITY CERTIFICATION TO DUKE.

The ALC incorrectly held that the water quality certification issued to Duke was invalid as the Department had waived its right to condition Duke's FERC license. According to the ALC, the Department lost the right to condition Duke's FERC permit based on its failure to review Duke's certification application within the 180 day time period as calculated under Regulation 61-101. As stated in the preceding section, the ALC's determination that the Department's review of Duke's certification application was untimely is incorrect. Nevertheless, even if this Court were to agree with the ALC's determination on the timeliness of the Department's review, the ALC's determination that the Department waived its right to issue the certification is not supported by the law or the facts.

Regulation 61-101(A)(6) provides as follows:

[t]he 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 of the applicant or the Department or of its own volition, suspension of processing of application (sic) 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 (sic) an application.

25A S.C. Code Ann. Regs. 61-101(A)(6). The provision is broken into three parts, each contained in its own sentence. In the first sentence, the provision acknowledges that under the CWA, the Department has a maximum of one year from the date that it receives a complete application in which to conduct its review of the application to issue, deny, or waive the certification of a federal permit, unless the processing has been suspended by the federal agency. In the second sentence, the provision explains how an application processing may be suspended by the federal agency. Lastly, in the third sentence, the provision states that the Department shall issue a proposed decision within 180 days of accepting the application unless “otherwise suspended or specified in this regulation.” Nowhere in the provision does it state that the Department’s failure to render a decision within 180 days “shall constitute a waiver” of the Department of the Department’s authority to issue a certification, a point of law that the ALC concedes. (Opinion, p. 13). Nevertheless, in direct contrast to Supreme Court precedent, the ALC created a waiver by implication.

- A. The Supreme Court has determined that an agency cannot lose its authority to act as a consequence of failing to comply with a mandatory statutorily imposed time period if the statute does not specify the consequence.**

The question of whether an agency loses its authority to act for failing to comply with a statutory time limit was answered by the Supreme Court in the seminal case, Johnston v. South Carolina Department of Labor, Licensing, and Regulation, 365 S.C. 293, 617 S.E.2d 363 (2005). In Johnston, the Supreme Court was asked to determine

whether mandatory language in a statute requiring an agency to perform a task within a specified time frame created a jurisdictional bar if the task was not performed within the statutory time frame. Under the South Carolina Real Estate Appraisers, Registration, Licensing and Certification Act ("Act"), the Real Estate Appraisers Board conducts administrative hearings regarding violations of the Act. The respondent, Mr. Johnston, was charged with violating the Act and its regulations and, after an administrative hearing before the Real Estate Appraisers Board, was found to have committed the alleged violations. The Real Estate Appraisers Board determined that as a consequence of the violations, Mr. Johnston would be fined \$1,000.00 and his license would be suspended for a year. Pursuant to the Act, the Board was required to notify Mr. Johnston of its decision within 30 days of the date of the hearing. Specifically, the statute stated "[t]he 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." S.C. Code §40-60-150(C)(3) (Supp. 2004).

In its analysis of the statute, the Supreme Court found that the statutory language of the Act did not indicate that the Legislature intended for the Board to lose its authority to act. Rather, the Supreme Court found that the language indicated a desire by the Legislature speed the resolution of disciplinary proceedings for the benefit of all parties. Johnston, 365 S.C. at 297-98, 617 S.E.2d at 365 (citations omitted). Accordingly, the Supreme Court held that when the statute omitted a consequence "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 298, 617 S.E.2d at 365, citing Brock v. Pierce County, 476 U.S. 253, 106 S.Ct. 1834, 90L.Ed.2d 248 (1986) ("courts should not

assume Congress intended agency to lose its power to act; agency does not lose jurisdiction for failing to comply with statutory time limit unless statute expressly sets time limit and specifies a consequence”).

Here, as in Johnston, the issue to be decided is whether courts can strip a governmental agency of the power to act, e.g., issue a water quality certification, after the statutory or regulatory time period has expired. Although Regulation 61-101(A)(6) expressly provides that the Department can waive a certification, it specifically states that such a waiver occurs only if the Department does not render a decision within one year of acceptance a completed application. While the regulation also states that the Department must issue a proposed decision on water quality certification applications within 180 days of acceptance of a complete application, it does not state that a consequence of that failure is a waiver. Regulation 61-101(A)(6) does not mandate that the remedy for inaction within the federally mandated time period applies to failure to meet the state regulatory mandated time period. Since there is no express language in the regulation to show that the Legislature intended that the Department lose its authority to issue certifications after the expiration of the 180-day time period, it cannot be assumed that the Legislature intended that such a remedy should exist.

B. Johnston cannot be distinguished from the water quality certification regulation in this case.

In rendering judgment in favor of Duke, the ALC distinguished Johnston not on the law, but by claiming that the public policy interests are less important in this case than in Johnston. The ALC finds that the public is harmed more by barring further governmental action in Johnston than it would by holding the Department waived its authority to issue the water quality certification with conditions. (Order, R. p. 380). The

ALC found the waiver unimportant because it did not prevent the federal government from placing conditions in accordance with federal law. Id. Clearly, both the harms are significant. The Department's May 15, 2009, certification decision was based on the Department's application of the state law, including, but not limited to the water quality standards contained in 24A S.C. Code Ann. Regs. 61-68 (Supp. 2010). These standards were promulgated under the Clean Water Act and the Pollution Control Act and represent the minimum standards set for water quality and specific standards set by the State that provide greater protections than those mandated by the CWA. Federal courts in their review of the CWA have expressly recognized the uniqueness of state specific laws and their applicability to federal permits.

The United States Supreme Court stated in PUD No. 1 of Jefferson County, et al. v. Washington Department of Ecology, 511 U.S. 700, 713-714, 114 S.Ct. 1900, 1910 (1994) that the CWA provides that states may condition federal permits with "any limitations necessary for compliance with state water quality standards or any other appropriate requirements of State law." The United States Supreme Court found that 33 U.S.C. §1341(d) expands the authority of states to impose effluent or other limitations under the CWA and appropriate state law as conditions on CWA § 401 certification of a project. Id.

The United States Court of Appeals for the District of Columbia Circuit stated in City of Tacoma, Washington v. Federal Energy Regulatory Commission, 460 F.3d 53, 68 (D.C. Cir. 2006) that "[t]he 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 under federal standards." Id. at 68 (citation omitted). The loss

of the state's right to condition Duke's FERC permit pursuant to the appropriate state law requirements affects significant environmental interests of South Carolina's citizens. The waiver granted by the ALC is not supported in law and is draconian. It does a great disservice to the environmental interest of the State of South Carolina and its citizens.

CONCLUSION

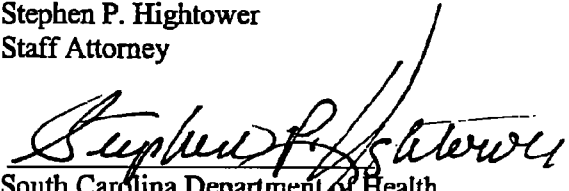
For the reasons stated, this Court should reverse the order of the Administrative Law Court granting Respondent/Petitioner Duke Energy Carolinas, LLC's Motion for Summary Judgment and remand the case to the Administrative Law Court for a hearing on the merits.

Respectively submitted,

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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

Duke Energy Carolinas, LLC,

Respondent,

vs.

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

Defendants,

Of Whom South Carolina Department of
Health and Environmental Control, American
Rivers, and The South Carolina Coastal
Conservation League are,

Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b),
SCACR.

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Attorney General, American Rivers, and The
South Carolina Coastal Conservation League, Defendants,

Of Whom South Carolina Department of
Health and Environmental Control, American
Rivers, and The South Carolina Coastal
Conservation League are, Appellants.

CERTIFICATE OF SERVICE

I, Sandra R. Wessinger, Paralegal for the South Carolina Department of Health and Environmental Control, hereby certify that I have on this **22nd day of August, 2011**, served a copy of *South Carolina Department of Health and Environmental Control's Final Brief of Appellant* upon all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid, addressed as follows:

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge

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Control, South Carolina Attorney General, American Rivers, and
The South Carolina Coastal Conservation League. Defendants,

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

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE ADMINISTRATIVE LAW COURT ("ALC") CORRECTLY INTERPRET REGULATION 61-101 AND REGULATION 61-30 TO GIVE EFFECT TO BOTH REGULATIONS?
- II. DID THE ALC CORRECTLY CONCLUDE THAT THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL'S ("DHEC") FAILURE TO ISSUE OR DENY THE WATER QUALITY CERTIFICATION WITHIN THE REGULATORY 180-DAY TIME FRAME CONSTITUTES WAIVER?
- III. IS DUKE ENERGY CAROLINAS, LLC ("DUKE") ESTOPPED FROM RAISING THE TIMELINESS OF DHEC'S ACTION ON ITS CERTIFICATION APPLICATION?
- IV. DID DUKE WAIVE ITS RIGHT TO CHALLENGE THE FINAL AGENCY DECISION IN A CONTESTED CASE?
- V. AS AN ADDITIONAL SUSTAINING GROUND, IS DHEC COLLATERALLY ESTOPPED FROM RELITIGATING THE EFFECT OF FAILURE TO ACT WITHIN THE 180-DAY TIME PERIOD IN REGULATION 61-101?
- VI. AS AN ADDITIONAL SUSTAINING GROUND, DO THE ENVIRONMENTAL GROUPS LACK STANDING TO CHALLENGE THE WAIVER OF CERTIFICATION FOR THE PROJECT?

STATEMENT OF THE CASE

Respondent Duke Energy Carolinas, LLC ("Duke") operates the Catawba-Wateree Hydroelectric Project (the "Project") pursuant to a 50-year license issued by the Federal Energy Regulatory Commission ("FERC") in 1958. (*See* Affidavit of E. Mark Oakley, "Oakley Aff." ¶ 4-5, R. p. 94). On August 29, 2006, Duke submitted an Application for New License to FERC in order to continue operating the Project. (Oakley Aff. ¶5, R. p. 94). Duke submitted an application for a Water Quality Certification ("WQC") to DHEC on June 5, 2008. (Oakley Aff., ¶ 8, R. p. 94). On May

15, 2009, the DHEC staff issued a notice of its proposed decision to issue a WQC. (Oakley Aff., ¶ 13, R. p. 95). On May 29, 2009, Appellants American Rivers and South Carolina Coastal Conservation League (hereinafter, the “Appellants” or “Environmental Groups”) filed a Request for Final Review with the South Carolina Board of Health and Environmental Control (“Board”). (See Request for Final Review dated May 29, 2009, R. pp. 5-54). On August 6, 2009, the Board issued the final agency decision, a written order reversing the DHEC staff and denying the WQC. (See Final Agency Decision dated Aug. 6, 2009, R. pp. 1-4).

Duke filed a Notice of Request for Contested Case Hearing in the ALC on September 4, 2009. (See Notice of Request for Contested Case Hearing dated September 4, 2009, R. pp. 55-58). The ALC thereafter entered orders allowing the Environmental Groups and the South Carolina Attorney General to intervene in the matter on November 9, 2009. (See Order dated November 9, 2009, R. pp. 59-60). On January 21, 2010, Duke filed its Motion for Summary Judgment and Motion for Declaratory Judgment. (See Motion for Summary Judgment and Motion for Declaratory Judgment dated January 21, 2010, R. pp. 63-69). The ALC heard oral argument on Duke’s motions on May 6, 2010 and granted the motions in a June 10, 2010 Order on Motion for Summary Judgment. (See Order on Motion for Summary Judgment dated June 10, 2010, R. pp. 367-81). On June 21, 2010, DHEC and the Environmental Groups filed a Joint Motion for Reconsideration. (See Joint Motion for Reconsideration dated June 21, 2010, R. pp. 382-95). DHEC filed a Notice of Appeal with this Court on July 8, 2010, and the Environmental Groups filed their own Notice of Appeal on July 9, 2010. On July 9, 2010, the ALC denied the Joint Motion for

Reconsideration. (See Order on Motion for Reconsideration dated July 9, 2010, R. pp. 406-07). DHEC filed a subsequent Notice of Appeal with this Court on July 15, 2010, and the Environmental Groups also filed another Notice of Appeal on July 16, 2010. (DHEC and Environmental Groups hereinafter referred to collectively as "Appellants"). On August 3, 2010, the Court notified the parties that the appeals would be consolidated. On January 31, 2011, Duke filed a Motion to Dismiss which was denied on April 20, 2011.

STATEMENT OF THE FACTS

On August 29, 2006, Duke submitted an Application for New License to FERC to continue operation of the Project. (Oakley Aff., ¶ 5, R. p. 94). 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 and that it had been waived. (Oakley Aff., ¶ 7, R. p. 94). Duke submitted its application for a WQC to DHEC on June 5, 2008. (Oakley Aff., ¶ 8, R. p. 94). Duke was never notified by SCDHEC that processing of the 401 WQC Request was suspended pursuant to South Carolina Regulations R.61-101.C4 or otherwise. (Oakley Aff., ¶ 11, R. p. 95). On August 8, 2008, DHEC placed the Duke WQC application on public notice as Public Notice No. DHEC 08-C-001. (Affidavit of Williams R. Wenerick, "Wenerick Aff.," ¶ 8 and Exh. 2, R. pp. 127 and 137-39; Transcript of Motion Hearing dated May 6, 2010, hereinafter "Hrg. Tr.," p. 32, ll. 2-14,

R. p. 317).¹ DHEC did not issue any decision related to Duke's WQC application until May 15, 2009, when DHEC issued its proposed decision, a document titled "Notice of Department Decision – Water Quality Certification." (Oakley Aff., ¶ 13, R. p. 95).

ARGUMENTS

I. THE ALC CORRECTLY INTERPRETTED REGULATION 61-101 AND REGULATION 61-30 TO GIVE EFFECT TO BOTH REGULATIONS.

Contrary to Appellants' contentions, the ALC interpreted Regulation 61-101 and Regulation 61-30 in a manner which gives effect to both regulations. Regulation 61-30 by its own terms limits the application of the time-period defined therein to determinations, under its enabling statute, of the expiration of such period for the sole purpose of determining when to refund fees for a variety of permits. In contrast, Regulation 61-101 governs DHEC's substantive review solely of a WQC application and mandates that such review be completed within 180 days unless the review is suspended. Appellants incorrectly presume that any difference between the two regulations creates a conflict requiring reconciliation through the rules of statutory construction. However, such rules do not apply unless there is in fact a conflict. "It is well settled that statutes in

¹ At the hearing on the Motion for Summary Judgment, counsel for DHEC conceded that DHEC had a complete application on August 8, 2008, when Duke's application was placed on public notice.

THE COURT: You said September or was it August? Okay, August.

MR. HIGHTOWER: August 8th was the date that the application with the Department had all the information and a public notice went out on that date.

THE COURT: Well, so the record will be clear, August 8--.

MR. HIGHTOWER: Excuse me, August 8th, 2008. I'm sorry, Your Honor.

THE COURT: Well, that's all right. I just want the record to be clear.

MR. HIGHTOWER: Yes, sir.

(Hrg. Tr., p. 32, ll. 2-14, R. p. 317).

apparent conflict should, if possible, be construed so as to allow both to stand and to give effect to each.” *National Advertising Co., Inc. v. Mount Pleasant Bd. of Adjustment*, 312 S.C. 397, 400, 440 S.E.2d 875, 877 (1994) (citation omitted). As discussed more fully below, the ALC interprets Regulation 61-101 and Regulation 61-30 in a manner which harmonizes these two regulations and gives full effect to both. Accordingly, the ALC’s interpretation should be affirmed.

A. There is no conflict between Regulation 61-101 and Regulation 61-30.

Appellants argue that Regulation 61-101 and Regulation 61-30 necessarily conflict because the method for calculating the 180-day time period for a decision on a WQC application is described in differing terms in each regulation. As the ALC correctly held, any perceived dissimilarity between these regulations does not create a direct conflict because each regulation determines the applicable method for calculating the 180-day time period for distinctly separate and unrelated purposes. “Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative.” *Hodges v. Rainey*, 341 S.C. 79, 88, 533 S.E.2d 578, 583 (2000) (citation omitted). “It is presumed that the Legislature is familiar with prior legislation, and that if it intends to repeal existing laws it would . . . expressly do so; hence, if by any fair or liberal construction two acts may be made to harmonize, no court is justified in deciding that the later repealed the first.” *Id.* at 88-89, 533 S.E.2d at 583 (citation omitted). The South Carolina appellate courts have applied the rules of statutory construction to the interpretation of agency regulations. *See, e.g., Avant v. Willowglen Academy*, 367 S.C. 315, 319-320, 626 S.E.2d 797, 799 (2006) (applying the principle that more specific rules prevail over general ones to reconcile inconsistency between workers’ compensation regulation and plan adopted pursuant to a more specific statute); *Converse*

Power Corp. v. South Carolina Dep't of Health and Env'tl. Control, 350 S.C. 39, 48-49, 564 S.E.2d 341, 346-47 (Ct. App. 2002) (applying general rules of statutory construction, including determination of legislative intent, to interpretation of a DHEC regulation). The ALC applied a "fair and liberal construction" to Regulation 61-101 and to Regulation 61-30 to give full effect to both regulations.

B. Regulation 61-30 was promulgated to carry out the purposes of the Environmental Protection Fund Act.

Regulation 61-30 is promulgated pursuant to the Environmental Protection Fund Act, S.C. CODE ANN. §§ 48-2-10 *et seq.* ("Fund Act"). The purpose of the Fund Act is to establish a fund separate from the State's general fund to be used to defray DHEC's costs in administering certain regulatory programs, including permitting programs under the Pollution Control Act. S.C. CODE ANN. §§ 48-2-30 and -40 (2008 and Supp. 2010). The Fund Act requires DHEC to promulgate regulations setting the fees authorized under the Act. S.C. CODE ANN. § 48-2-50 (2008). The Fund Act also establishes a maximum fee allowed for specific permitting programs administered by DHEC. *Id.* Section 48-2-70 of the Fund Act requires DHEC to "establish by regulation a schedule for timely action" on permit applications. S.C. CODE ANN. § 48-2-70 (2008). Section 48-2-70 further expressly provides that failure to grant or deny the application with that time frame mandates a refund of the fee to the applicant. *Id.*

Regulation 61-30 was promulgated by DHEC to carry out the purposes of the Fund Act—to establish a separate fund to defray the costs of administering certain DHEC regulatory programs and to designate the fees which may be deposited into that fund. Appellants argue that the ALC's interpretation of the limited application of the time periods in Regulation 61-30 renders such provisions meaningless. (*See*

Environmental Groups' Brief, p. 17). To the contrary, as required by the Fund Act, Regulation 61-30 establishes the time periods in which DHEC will process applications for the permits which are subject to the fees authorized under the Fund Act. Regulation 61-30 expressly provides for the limited application of the time schedules defined therein:

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

24A S.C. CODE ANN. REGS. § 61-30(B)(22) (Supp. 2010) (emphasis added). There is no doubt that the "time schedules" set forth in Regulation 61-30 are solely "for purposes of this regulation" and established in accordance with Section 48-2-70 of the Fund Act which provides for refund of fees upon DHEC's failure to process application within the time period established by regulation. There is no basis for an argument that the time period established in Regulation 61-30 has any application other than to determine when a refund is due an applicant as provided for in Section 48-2-70 of the Act.

Notably, the Fund Act requires DHEC to establish a process whereby the applicant may appeal the calculation of the fee:

A person required to pay the fees set forth in this article who disagrees with the calculation or applicability of the fee may petition the department for a hearing by submitting a petition setting forth the fee which is challenged, the grounds on which relief is sought, and the total amount of the fee due. The petition and the fee must be received by the department no later than thirty days after the due date. The hearing must be conducted in accordance with contested case provisions set forth in the Administrative Procedures Act and department regulations. If it is finally determined that the amount in dispute was improperly assessed,

the department shall return the amount determined to be improperly assessed with interest not to exceed the statutory rate.

S.C. CODE ANN. § 48-2-60 (2008). Accordingly, the Fund Act provides for appeal of the calculation or application of a fee authorized by the Act. This narrow appeal provision is further evidence of the limited legislative purpose of the Fund Act. The purpose of the Fund Act is to authorize the assessment of fees for certain DHEC programs to be directed to a special fund, and the Fund Act provides a mechanism to challenge the calculation of such fees by DHEC. Indeed, while the Fund Act and Regulation 61-30 address the assessment of such fees in connection with permit applications, neither the Fund Act nor Regulation 61-30 confers on the applicant the right to appeal DHEC's substantive decision of a permit application. In this case, the right to appeal a DHEC decision on a WQC application is conferred by S.C. CODE ANN. § 44-1-60. S.C. CODE ANN. § 44-1-60 (Supp. 2010). *South Carolina Coastal Conservation League v. South Carolina Dep't of Health and Envtl. Control*, 390 S.C. 418, 430, 702 S.E.2d 246, 253 (2010). The regulation governing DHEC's decision on a WQC is Regulation 61-101, which was promulgated pursuant to the Pollution Control Act to satisfy Section 401 of the Clean Water Act.

C. **The ALC correctly concluded that DHEC failed to act on Duke's WQC application within the 180-day time limit for processing of WQC applications under Regulation 61-101.**

The South Carolina Supreme Court has acknowledged that Regulation 61-101 governs the water quality certification process. See *South Carolina Coastal Conservation League v. South Carolina Dep't of Health and Envtl. Control*, 390 S.C. 418, 430, 702 S.E.2d 246, 253 (2010) ("[Regulation 61-101] establishes procedures and policies for implementing water quality certification requirements of Section 401 of the

Clean Water Act and requires DHEC to send notice to specific parties.”). Regulation 61-101 expressly provides that DHEC must act on a WQC application within 180 days: “Unless otherwise suspended or specified in this regulation, the Department shall issue a proposed decision on all applications within 180 days of acceptance or (sic) an application.” 25A S.C. CODE ANN. REGS. § 61-101(A)(6) (Supp. 2010). Appellants agree that the substantive review of a WQC application is governed by Regulation 61-101. (See Environmental Groups’ Brief, p. 8; DHEC Brief, pp. 33-34). However, Appellants argue that Regulation 61-30 governs the calculation of the 180-day time period in Regulation 61-101 because Regulation 61-101 “does not dictate the manner in which that time period is calculated.” (Environmental Groups’ Brief, p. 20). To the contrary, Regulation 61-101 directly addresses the circumstances under which the processing of a WQC application is suspended. Specifically, Regulation 61-101 provides that DHEC may suspend its processing of the WQC application if the federal licensing agency suspends processing of the application for the license: “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.” 25A S.C. CODE ANN. REGS. § 61-101(A)(6) (Supp. 2010). As such, if the federal licensing application is suspended by the federal agency, DHEC’s processing of the WQC application is also automatically suspended “unless specified otherwise in writing by [DHEC].” *Id.* Regulation 61-101 also authorizes DHEC to suspend processing of the WQC application under certain circumstances and with proper notice to the applicant. Regulation 61-101 provides in relevant part:

2. If the Department does not request additional information within ten (10) days of receipt of the application or joint public notice, the application will be deemed complete for processing; however, additional information may still be requested of the applicant within sixty (60) days of receipt of the application.
3. The Department may require the applicant to provide water quality monitoring data, water quality modelling results, or other environmental assessment related to factors in Article F.3 prior to accepting or processing the application and assessing the impacts of the proposed activity.
4. When the Department requests additional information it will specify a time for submittal of such information. **If the information is not timely submitted and is necessary for reaching a certification decision, certification will be denied without prejudice or processing will be suspended upon notification to the applicant by the Department.** Any subsequent resubmittal will be considered a new application.

25A S.C. CODE ANN. REGS. § 61-101(C)(2)-(4) (Supp. 2010) (emphasis added).

Regulation 61-101 clearly mandates the specific circumstances under which the processing of a WQC application can be and is suspended by DHEC. Contrary to the Appellants' assertions, the mere request for information does not suspend processing of the application. It is only suspended when:

- First) DHEC specifies a time for submittal of additional information;
- Second) Information requested is not timely submitted to DHEC;
- Third) DHEC determines that such information is necessary to reach a decision on the application; **and**
- Fourth) DHEC gives the applicant notice that the certification is denied without prejudice or that processing is being suspended.

Id. As the ALC correctly concluded, Regulation 61-101 “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.” (Order on Motion for Summary Judgment dated June 10, 2010, hereinafter “Order,” p. 10, R. p. 376) (emphasis in original).

The ALC correctly concluded that suspension of Duke’s WQC application under Regulation 61-101 was the only means to stop the running of the 180-day time period for the processing of the application. (Order, p. 9, R. p. 375). While there were several requests for additional information from Duke during this time period, the ALC found that these were ineffective to “suspend” the processing of the application. Specifically, the ALC correctly found that since DHEC did not provide Duke with notice of a suspension of its processing of the WQC application, DHEC’s references to “stopping the 180-day clock” in such communications only had the effect of tolling the 180-day time schedule under Regulation 61-30 for purposes of determining when a refund of the application fee was due to Duke. *Id.* Moreover, in its brief, DHEC concedes that following its initial request for additional information on August 19, 2008, DHEC staff made additional requests for information on October 8, 2008, and November 8, 2008, even though Duke had not yet provided the information requested on August 19, 2008. (DHEC Brief, pp. 17-18). Accordingly, it is clear that DHEC had not suspended the processing of the application as allowed under Regulation 61-101, but continued to review and process the application. Accordingly, it was clear that DHEC never suspended its processing of Duke’s application.

Viewing the facts in the light most favorable to the Appellants, Duke unquestionably had submitted a complete WQC application no later than August 8, 2008, evidenced by the fact that DHEC on that date issued a public notice formally

initiating the WQC process and the 180-day clock. (Wenerick Aff., ¶ 8 and Exh. 2, R. pp. 127 and 137-39; Hrg. Tr., p. 32, ll. 2-14, R. p. 317). At no time after that date did FERC suspend the processing of the federal license application or did DHEC provide Duke with written notice that the processing of the FERC license or of the WQC application had been suspended. Accordingly, the 180-day time limit on DHEC's action on the WQC application expired no later than February 4, 2009. DHEC's proposed decision on Duke's WQC application was issued on May 15, 2009. Accordingly, the ALC correctly concluded that DHEC failed to act on the application within the mandatory 180-day time period.

D. The ALC correctly relied on the holding in *Responsible Economic Development*.

Appellants contend that the ALC improperly relied on *Responsible Economic Development v. South Carolina Department of Health and Environmental Control* because Regulation 61-101 and Regulation 61-30 necessarily overlap and therefore "Spectre controls this case, not *Responsible Economic Development*." (Environmental Groups' Brief, p. 19). Contrary to Appellants' assertion, *Responsible Economic Development* is directly on point with the instant case. In *Responsible Economic Development*, Appellants challenged the issuance of a stormwater permit, claiming *inter alia*, that the proposed development violated the anti-degradation rules set forth in DHEC Regulations 61-68 and 61-69. *Responsible Economic Development v. South Carolina Dep't of Health and Env'tl. Control*, 371 S.C. 547, 549, 641 S.E.2d 425, 426 (2007). In addressing this argument, the Supreme Court held that DHEC's review of an application for a stormwater permit must be conducted pursuant to the Stormwater Management and Sediment Reduction Act and the regulations promulgated thereunder:

The Stormwater Management and Sediment Reduction Act (Stormwater Act) requires a person who intends to engage in a land disturbing activity to submit a stormwater management and sediment control plan to the appropriate agency and obtain a permit before engaging in the activity, unless an exemption applies. S.C. CODE ANN. § 48-14-30 (Supp.2005). The Stormwater Act further requires DHEC to promulgate regulations for the “types of activities that require a stormwater . . . permit” and for “permit application and approval requirements.” *Id.* § 48-14-50(C)(3) & (9). DHEC fulfilled that duty by promulgating, in relevant part, Regulations 72-305 and -307. Regulation 72-305 outlines the permit application and approval procedure, and Regulation 72-307 sets forth the minimum standards and specifications and the specific design criteria for projects requiring a stormwater management and sediment control plan.

Id. at 551, 641 S.E.2d at 427. The Court further held that DHEC Regulations 61-68 and 61-69, which were promulgated under the Pollution Control Act, are not applicable in the review of an application for a stormwater permit:

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

Id. at 552-553, 641 S.E.2d at 428 (emphasis added). In the instant case, Regulation 61-101 and Regulation 61-30 were promulgated under two different enabling acts. As discussed *supra*, Regulation 61-101 was first promulgated in 1990 under the Pollution Control Act, and Regulation 61-30 was promulgated in 1995 under the Fund Act. As in

Responsible Economic Development, there is no authorization in either the Pollution Control Act or the Fund Act to apply these Acts and the regulations promulgated thereunder to each other. Regulation 61-101 governs DHEC's decision on a WQC application. As such, Regulation 61-30 cannot be applied in a manner which affects a decision made pursuant to Regulation 61-101.

At issue in *Spectre* was a stormwater permit for a proposed development in Horry County. The Coastal Zone Management Act, S.C. CODE ANN. §§ 48-39-10 *et seq.* ("CZMA"), required DHEC to develop a coastal management program ("CMP") and conferred on DHEC "the authority to review all state and federal permit applications in the coastal zone, and to certify that these do not contravene the management plan." S.C. CODE ANN. § 48-39-80(B)(11) (2008). By its express terms, the CZMA established an additional permitting requirement for counties in the coastal area of the State. In those counties, DHEC is required to determine whether federal and state permits are consistent with the coastal management plan. The *Spectre* court held that the *Responsible Economic Development* holding discussed above did not apply in that case "because § 48-39-80 provides explicit statutory authorization to apply the CMP to state permits." *Spectre, LLC v. South Carolina Dep't of Health and Envtl. Control*, 386 S.C. 357, 371, 688 S.E.2d 844, 851 (2010). In the instant case, the Fund Act does not confer on DHEC additional permitting authority. The Fund Act merely provides for the establishment of a separate fund to which DHEC permitting fees may be designated for the purpose of defraying the cost of administering certain regulatory programs. The fact that the Pollution Control Act is referenced in the Fund Act does not constitute "explicit statutory authority" to apply the Act and regulations promulgated thereunder in a

substantive decision on a permit issued under the Pollution Control Act. Accordingly, the ALC properly applied the *Responsible Economic Development* holding to the instant case.

E. As an additional sustaining ground, the Fund Act did not expressly or implicitly repeal any provision of the Pollution Control Act or any regulations promulgated thereunder.

As discussed *supra*, Regulation 61-101 unequivocally establishes the procedure for determining when the 180-day time frame established therein has run. Yet, DHEC contends that the more recent amendments of Regulation 61-30 in effect repealed those provisions of Regulation 61-101. "Repeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconciliation." *Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc.*, 368 S.C. 137, 141-42, 628 S.E.2d 38, 41 (2006). "The repugnancy must be plain, and if the two provisions can be construed so that both can stand, a court shall so construe them." *Spectre, LLC v. South Carolina Dep't of Health and Env'tl. Control*, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010). DHEC points to no particular provision of either the Fund Act or Regulation 61-30 which expresses an intent to repeal any provision of Regulation 61-101. Moreover, as discussed more fully below, Regulation 61-101 is in fact a more specific regulation than Regulation 61-30 with respect to DHEC's processing of a WQC application. Specific statutes are not to be considered repealed by a later general statute unless there is a direct reference to the earlier statute or the intent of the legislature to do so is explicitly implied. *Atlas Food Systems and Serv., Inc. v. Crane National Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995). As such, there is no basis for Appellants' contention that the promulgation of Regulation 61-30 repealed any provision of Regulation 61-101.

- F. As an additional sustaining ground, Regulation 61-101 would control to the extent that there is any perceived conflict between Regulation 61-101 and Regulation 61-30 because Regulation 61-101 is the specific regulation with regard to DHEC's determination on a water quality certification request.

In their briefs, the Appellants contend that the provisions regarding the tolling of the 180-day time period in Regulation 61-30 control with respect to any conflict with Regulation 61-101. (See Environmental Groups Brief, pp. 21-22; DHEC Brief, pp. 26-30). Appellants incorrectly interpret Regulation 61-30 to be the more specific regulation because it purportedly provides details on the calculation of the 180-day time period; however, Appellants improperly focus on one narrow issue. Looking comprehensively at the overall purpose of both regulations, Regulation 61-101 is unquestionably the “specific” statute with respect to DHEC’s substantive review of a WQC application. On the other hand, Regulation 61-30 addresses a vast number of permitting decisions to be rendered by DHEC, but does so only in the context of setting the fees and a schedule for refund of such fees. Again, the South Carolina Supreme Court has acknowledged that Regulation 61-101 governs the water quality certification process. See *South Carolina Coastal Conservation League v. South Carolina Dep’t of Health and Envtl. Control*, 390 S.C. 418, 430, 702 S.E.2d 246, 253 (2010) (“[Regulation 61-101] establishes procedures and policies for implementing water quality certification requirements of Section 401 of the Clean Water Act and requires DHEC to send notice to specific parties.”). Moreover, in ascertaining the purpose of a regulation, the South Carolina Supreme Court has examined the title of such regulation. *Spruill v. Richland County School Dist. 2*, 363 S.C. 61, 64, 609 S.E.2d 524, 526 (2005) (“The purpose of the regulation is reflected in its title, *Withdrawing a Request for a Hearing*, and the text reflects this limited application.”). The purpose of Regulation 61-30 is reflected in its title, “Environmental

Protection Fees.” Moreover, the application of the “Time Schedule” as defined therein is expressly limited to “a ‘schedule for time review’ for purposes of this regulation.” 24A S.C. CODE ANN. REGS. § 61-30(B)(22) (Supp. 2010). In contrast, Regulation 61-101 is entitled “Water Quality Certification” and “establishes procedures and policies for implementing State water quality certification requirements of Section 401 of the Clean Water Act, 33 U.S.C. Section 1341.” 25A S.C. CODE ANN. REGS. § 61-101(A)(1) (Supp. 2010). Accordingly, to the extent that there is any conflict between the manner in which the 180-day time frames in Regulation 61-101 and 61-30 are determined, the provisions of Regulation 61-101 are unquestionably the more specific regulation regarding the processing of a water quality certification and would therefore be given effect.

II. THE ALC CORRECTLY HELD THAT DHEC'S FAILURE TO ISSUE OR DENY THE WATER QUALITY CERTIFICATION WITHIN 180 DAYS CONSTITUTES WAIVER.

The ALC concluded that the mandatory 180-day time period in Regulation 61-101 was “the ‘reasonable period of time’ for consideration of a certification under 33 USCA § 1341.” (Order, p. 13, R. p. 379). Accordingly, the ALC held that “Regulation 61-101(A)(6) thus establishes a mandatory timeframe in which a decision must be issued in South Carolina before it is waived.” As discussed more fully below, the ALC properly held that DHEC had waived certification of the federal licensing for the Project by failing to issue a proposed decision issuing or denying the certification within the 180-day timeframe.

A. The 180-day time limit for processing a WQC application under Regulation 61-101 is mandatory and requires DHEC to act on the application within that time period.

Regulation 61-101 unequivocally provides that DHEC “shall issue a proposed decision on all applications within 180 days of acceptance or an application.” 25A S.C.

CODE ANN. REGS. § 61-101(A)(6) (Supp. 2010) (emphasis added). Regulation 61-101 was promulgated pursuant to the Pollution Control Act, which expressly authorizes DHEC to promulgate regulations to carry out the purposes of the Act, including regulations related to water quality standards. S.C. CODE ANN. §§ 48-1-30 and -40 (2008). “Regulations authorized by the legislature have the force of law.” *Gadson v. Mikasa Corp.*, 368 S.C. 214, 227, 628 S.E.2d 262, 269 (Ct. App. 2006) (citation omitted). “DHEC must follow its own regulations and the provisions of the Administrative Procedures Act in carrying out the legitimate purposes of the agency. Thus, any action taken by DHEC outside of its statutory and regulatory authority is null and void.” *Converse Power Corp. v. South Carolina Dep’t of Health and Envtl. Control*, 350 S.C. 39, 54-55, 564 S.E.2d 341, 350 (Ct. App. 2002) (citing *Triska v. DHEC*, 292 S.C. 190, 355 S.E.2d 531 (1987)). The use of “shall” in a regulation makes the subject provision mandatory. *Arnal v. Arnal*, 363 S.C. 268, 285, 609 S.E.2d 821, 830 (Ct. App. 2005) (citing *Charleston County Parents for Public Schools, Inc. v. Moseley*, 343 S.C. 509, 519, 541 S.E.2d 533, 538 (2001)). The 180-day time limit in Regulation 61-101 is mandatory. Any action taken by DHEC outside of its authority under Regulation 61-101 is “null and void.” Accordingly, the ALC correctly held that DHEC must act on a WQC application within 180 days.

B. The ALC correctly found that the 180-day time frame in Regulation 61-101 is the “reasonable period of time” for State action on a certification request.

The ALC held that the 180-day time period in Regulation 61-101 “implements the ‘reasonable period of time’ for consideration of a certification under 33 U.S.C. § 1341 [(CWA Section 401)].” (Order, p. 13, R. p. 379). Appellants contend that such finding is in error because “Regulation 61-101 cannot supersede federal law establishing

the 'reasonable period' of time for purposes of Section 401." (Environmental Groups' Brief, p. 30). However, while federal law requires certification by the State, federal law does not govern the method or substance of the certification. *City of Tacoma, Washington v. F.E.R.C.*, 460 F.3d 53, 67 (D.C. Cir. 2006) (finding that "the decision whether to issue a section 401 certification generally turns on questions of state law"); *City of Olmsted Falls, Ohio v. U.S. Environmental Protection Agency*, 435 F.3d 632, 636 (6th Cir. 2006) (finding that the Corps properly relied on the state agency to follow its own laws and regulations in acting on a water quality certification application); *U.S. v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir.1989) (finding that any defect in the state's water quality certification program is properly redressed in state court rather than federal court). Accordingly, the ALC properly found that the "reasonable period of time" for DHEC's decision on a WQC application is determined by Regulation 61-101.

C. The ALC correctly concluded that the consequence of failure to issue or deny the water quality certification within the 180-day time period is waiver.

Regulation 61-101 was promulgated for the express purpose of "establish[ing] procedures and policies for implementing State water quality certification requirements of Section 401 of the Clean Water Act, 33 U.S.C. Section 1341." 25A S.C. CODE ANN. REGS. § 61-101(A)(1) (Supp. 2010). Pursuant to Section 401 of the Clean Water Act, the State may take the following action on an application for certification:

- 1) Issue the certification;
- 2) Deny certification; or
- 3) Fail to act on the application within a reasonable time which shall be deemed a waiver of certification.

33 U.S.C. § 1341(a)(1). Regulation 61-101 recognizes these three possible actions on a WQC applicant and requires to DHEC to act on such application within 180 days:

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.

S.C. CODE ANN. REG. § 61-101(A)(6) (Supp. 2010). As discussed *supra*, the ALC properly concluded that the processing of Duke's WQC application was not suspended by FERC or DHEC. Accordingly, DHEC was required to issue a proposed decision granting or denying Duke's application within 180 days of the acceptance of the application and required by federal law to issue a final decision within one year.² Having failed to grant or deny Duke's application by the expiration of the 180-day time period, the ALC correctly concluded the DHEC had waived certification of the license for the Project. (Order, p. 12, R. p. 378).

Appellants contend that the holding in *Johnston v. South Carolina Department of Labor, Licensing & Regulation* allows DHEC to issue a proposed decision on the WQC application beyond the mandatory 180-day deadline in Regulation 61-101. (See Environmental Groups' Brief, pp. 24-30; DHEC Brief, pp. 38-39). The ALC correctly distinguished the holding in *Johnston*. Moreover, the holding in *Johnston* can easily be further distinguished from the instant case. In *Johnston*, our Supreme Court held that a licensing board's failure to timely serve a written decision suspending a real estate appraiser's license did not deprive the board of subject matter jurisdiction. *Johnston v.*

² The motion before the ALC and the only issue before this court is waiver under the state regulation for failure to issue a proposed decision within 180 days, a period that can only be enlarged by suspension of the processing of the application in accordance with Regulation 61-101(C)(4), which the ALC found DHEC failed to do.

South Carolina Department of Labor, Licensing & Regulation, 365 S.C. 293, 298, 617 S.E.2d 363, 365 (2005). The board's regulations provide for a hearing on disciplinary matters and authorize the board to issue subpoenas, place witnesses under oath, and rule on motions and procedural issues raised in such hearing. 27 S.C. CODE ANN. REGS. § 137-700.01 (Supp. 2010). As such, the board sits in a quasi-judicial capacity in conducting a disciplinary hearing pursuant to its regulations. See, e.g., *Garris v. Governing Bd. of South Carolina Reinsurance Facility*, 333 S.C. 432, 453, 511 S.E.2d 48, 59 (1998) (noting that an administrative board which conducts a hearing to render a decision sits in a quasi-judicial capacity). Indeed, the Supreme Court analyzed the effect of the board's failure to serve the decision in terms of the board's "subject matter jurisdiction," holding as follows:

Although the 30-day time requirement is mandatory, it is not jurisdictional. Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. *Dove v. Gold Kist*, 314 S.C. 235, 442 S.E.2d 598 (1994). The failure to comply with a mandatory time requirement for serving a written decision does not affect the jurisdiction of the Board to determine the real estate appraiser disciplinary matter.

Johnston, 365 S.C. at 297, 617 S.E.2d at 364-65. The holding in *Johnston* is limited to the review and serving of decisions in which an agency is acting in a quasi-judicial capacity and fails to comply with a post-decision service requirement. In this case, DHEC's wavier results from its staff's failure to act and make any timely decision on Duke's WQC application. It is a decision conducted by the staff—not the agency board sitting in a quasi-judicial capacity. Such decision is governed by Regulation 61-101. DHEC is required to follow its own regulations. *Converse Power Corp. v. South Carolina Dep't of Health and Envtl. Control*, 350 S.C. 39, 54-55, 564 S.E.2d 341, 350 (Ct. App. 2002). Regulation 61-101 requires DHEC to act on a WQC application within

180 days. The ALC properly held that the *Johnston* holding does not apply to negate the consequences of DHEC's failure to act within the mandatory time period established in Regulation 61-101 and the consequence of such failure to act in the instant matter is waiver.

III. DUKE IS NOT ESTOPPED FROM RAISING THE TIMELINESS OF DHEC'S ACTION ON ITS CERTIFICATION REQUEST.

Appellants contend that Duke should be estopped from raising the timeliness of DHEC's action on its WQC application because "Duke was repeatedly informed of DHEC's time schedule and the manner in which the time period was being calculated." (Environmental Groups' Brief, p. 34). The South Carolina law on equitable estoppel is well-settled. "To establish equitable estoppel, the party claiming estoppel must prove that he or she (1) lacked knowledge and means of obtaining knowledge of the truth of the facts in question; and (2) relied upon the conduct of the party to be estopped." *Kelly v. Logan, Jolley, & Smith, L.L.P.*, 383 S.C. 626, 682 S.E.2d 1, 7 (Ct. App. 2009) (citing *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107 n. 2, 531 S.E.2d 287, 292 n. 2 (2000)). "The party claiming estoppel must also establish that the party to be estopped (1) acted in a way amounting to a false representation or concealment of material facts; (2) intended such conduct to be acted upon by the other party; and (3) possessed knowledge, either actual or constructive, of the true facts." *Id.* In short, estoppel claims that it is unfair to allow a party (here Duke) to advance an argument or position, when another party (here DHEC) reasonably relied on some action or statement made by Duke. This fundamental unfairness is completely lacking in this case. There is simply no basis for a claim that DHEC "lacked knowledge and means of obtaining knowledge" regarding the operation of its own regulations. Indeed, it is untenable to assert that DHEC relied on

Duke for the determination of the running of the 180-day time frames in Regulation 61-101 and Regulation 61-30.

The DHEC staff is charged with implementing these Regulations on a daily basis. To the extent that the staff had any questions regarding the running of the 180-day time periods in either Regulation 61-30 or Regulation 61-101, DHEC has full-time legal counsel available to advise the staff of such matters. Indeed, DHEC was a party to a contested case in which the ALC ruled on the very matter which Appellants suggests DHEC “lacked knowledge”—i.e., the running of the 180-day time period in Regulation 61-101. *South Carolina Dep’t of Trans. v. South Carolina Department of Health and Envtl. Control and Friends of Congaree Swamp*, 2008 WL 1934476, 1 (Apr. 12, 2008 S.C.A.L.C) (a copy is attached hereto as Exhibit A). The ALC issued this ruling less than two months prior to Duke’s submittal of its WQC application and found that the 180-day time period in Regulation 61-101 continues to run unless processing of the application is suspended with written notice to the applicant. *Id.* at 12. Accordingly, there can be no basis for a claim that Duke had superior knowledge regarding the operation of Regulation 61-101 and thus should be estopped from raising the timeliness of DHEC’s action on its WQC application pursuant to Regulation 61-101.

IV. DUKE HAS NOT WAIVED ITS RIGHT TO CHALLENGE THE AGENCY DECISION IN A CONTESTED CASE.

Appellants contend that Duke cannot raise the timeliness issue before the ALC because it failed to challenge the staff decision at the hearing before the Board. Appellants argue: “Because Duke did not exhaust its administrative remedies by challenging the staff decision before the DHEC Board, it cannot attack the staff decision as ‘improperly issued.’” (Environmental Groups’ Brief, p. 40). There is simply no basis

for this argument. Pursuant to S.C. CODE ANN. § 44-1-60, the Board's decision following a final review conference of a staff decision is the final agency decisions. S.C. CODE ANN. § 44-1-60(F)(2) (Supp. 2010). The statute further provides: "Within thirty calendar days after the receipt of the 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." *Id.* Neither Section 44-1-60 nor the Administrative Procedures Act limits the issues which a party may raise in a contested case on a final agency decision. Moreover, the law is well settled that a hearing before the ALC is a *de novo* hearing. "A proceeding before the ALJ is in the nature of a *de novo* hearing, including the presentation of evidence and testimony, rather than an appellate proceeding." *Young v. South Carolina Dep't of Health and Envtl. Control*, 383 S.C. 452, 457, 680 S.E.2d 784, 787 (Ct. App. 2009) (quoting *Brownlee v. S.C. Dep't of Health & Envtl. Control*, 372 S.C. 119, 125, 641 S.E.2d 45, 48 (Ct.App.2007)). The position advocated by Appellants characterizes the contested case as merely an appellate review of the decision of the Board. Again, there is simply no support in the statute or case law for this position.

Finally, the doctrine of exhaustion of administrative remedies is not jurisdictional. In *Capital City Ins. Co. v. BP Staff, Inc.*, this Court distinguished the doctrine of exhaustion of administrative remedies as follows:

Subject matter jurisdiction is defined as "the power to hear and determine cases of the general class to which the proceedings in question belong." *See Skinner v. Westinghouse Elec. Corp.*, 380 S.C. 91, 93-94, 668 S.E.2d 795, 796 (2008); *Ward v. State*, 343 S.C. 14, 17 n. 5, 538 S.E.2d 245, 246 n. 5 (2000). This authority is distinct from the doctrine of exhaustion of administrative remedies, which "is generally considered a rule of policy, convenience and discretion, rather than one of law, and is not jurisdictional." *Ward*, 343 S.C. at 17 n. 5, 538 S.E.2d at 246 n. 5 (internal

quotation omitted). Additionally, the doctrine of exhaustion of administrative remedies is often leveraged “to avoid interference with the orderly performance of administrative functions.” *Id.* at 19 n. 7, 538 S.E.2d at 247 n. 7. Consequently, a “failure to exhaust administrative remedies goes to the prematurity of a case, not subject matter jurisdiction.” *Id.* at 17 n. 5, 538 S.E.2d at 246 n. 5.

382 S.C. 92, 100, 674 S.E.2d 524, 528-29 (Ct. App. 2009). There is no question that the there is a final agency decision in this matter and that the record on that decision is complete. As such, it cannot be argued that this case is premature. Accordingly, Appellants’ claim that Duke failed to exhaust its administrative remedies is without merit.

V. AS AN ADDITIONAL SUSTAINING GROUND, DHEC IS ESTOPPED FROM RELITIGATING THE EFFECT OF FAILURE TO MEET THE 180-DAY TIME FRAME IN REGULATION 61-101.

DHEC has fully litigated the effect of failure to meet the 180-day time frame in Regulation 61-101 in a prior action before the ALC. *See* Amended Final Order and Decision in *South Carolina Dep’t of Trans. v. South Carolina Department of Health and Envtl. Control and Friends of Congaree Swamp*, 2008 WL 1934476, 1 (Apr. 12, 2008 S.C.A.L.C) (hereinafter “SCDOT Case”) (a copy is attached hereto as Exhibit A). The principles of collateral estoppel are applicable to a decision of the ALC. *See, e.g., St. Philip’s Episcopal Church v. South Carolina Alcoholic Beverage Control Com’n*, 285 S.C. 335, 339, 329 S.E.2d 454, 456 (Ct. App. 1985) (“Although the proceedings here before the Commission may not have involved an ‘action’ resulting in a ‘judgment,’ these [collateral estoppel] principles are also applicable to a final decision of an administrative agency.”). Nonmutal collateral estoppel may be asserted against a party who previously had a full and fair opportunity to litigate the issue. *Carolina Renewal, Inc. v. South Carolina Dep’t of Transp.*, 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct.

App. 2009). There is no doubt that DHEC has fully litigated this issue.

In the SCDOT Case, DHEC unquestionably fully litigated the application of the 180-day time limit in Regulation 61-101 and the effect of its failure to make a decision on a WQC application within that mandatory time period. The ALC in that decision held in relevant part as follows:

The Environmental 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, the Environmental Groups point to *Johnston v. S.C. Dep't of Labor, Licensing, and Regulation*, 365 S.C. 293; 617 S.E.2d 363 (2005). I disagree.

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), 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 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 several ways. First, 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 provision of 33 USCA § 1341 into Regulation 61-101.

Second, regarding *Johnston*, because the Board's decisions do not become effective until they are served on the appraiser, the Board has an independent reason, other than the threat of losing its power to act, to promptly serve the appraiser. Here, however, other than the threat of losing its power to dictate 401 permit terms, DHEC generally has no independent reason to timely issue its NOPD. Proposed projects cannot go forward until a 401 permit is issued. Therefore, except in rare cases where a proposed project is expected to have a positive net impact on the environment, DHEC's environmental interests are not harmed by delaying the issuance of its NOPD (unless, of course, DHEC faces the possibility of losing its power to act).

Third, 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, 31 WILLIAMETTE L. REV. 851, 857 (1995). Therefore, unlike the situation in *Johnston*, finding that DHEC has waived its right to act does not mean that the public's interests will go wholly unprotected.

Finally, in this case, unlike the appraiser in *Johnston*, DOT has suffered prejudice as a result of DHEC's delay in the issuance of its NOPD. For instance, the delay has significantly increased the risk that DOT will be forced to perform maintenance on the currently-existing bridges, which are in increasing states of disrepair. Moreover, over the past several years, the costs of concrete, steel and other materials necessary to build the proposed bridges have increased at a rate much higher than inflation. Therefore, the delay has significantly increased the cost of the proposed project. Furthermore, because the currently-existing bridges are not as safe as the new bridges will be, the delay has prejudiced the safety of the traveling public.

For these reasons, I conclude that DHEC has waived its right to dictate the terms of DOT's 401 permit by failing to issue its NOPD within the time limits set forth in Regulation 61-101.

Id. at 15-17. It is unquestionable that DHEC has previously litigated the issue at the heart of this appeal—the application and effect of the 180-day time limit in Regulation 61-101. DHEC is thus estopped from relitigating such issue in this case.

VI. AS AN ADDITIONAL SUSTAINING GROUND, THE ENVIRONMENTAL GROUPS LACK STANDING TO CHALLENGE WAIVER OF THE CERTIFICATION OF THE PROJECT.

The Environmental Groups lack standing to challenge DHEC's waiver of the water quality certification for the Project because the Environmental Groups are no different from any other citizen of the State and have no "injury in fact" separate from any other citizen.³ DHEC's waiver cannot affect those Appellants' interests in their own rights. The Environmental Groups are not aggrieved parties as defined in *Bivens v. Knight*, 254 S.C. 10, 173 S.E.2d 150 (1970). The word aggrieved refers to a substantial

³ Duke raised the Environmental Groups' lack of standing in a motion for summary judgment filed on June 7, 2010. (See Motion for Summary Judgment against Respondent-Intervenors for Lack of Standing filed June 7, 2010, R. pp. 485-511).

grievance, a denial of some personal or property right or the imposition on a party of a burden or obligation. *Id.*

In *Sea Pines Association for the Protection of Wildlife, Inc. v. South Carolina Department of Natural Resources*, 345 S.C. 594, 550 S.E. 2d 287 (2001) the injury to these other Appellant must be “particularized” and it must affect the [Appellants] in a personal and individual way. *Id.* In *Beaufort Realty Company, Inc. v. Beaufort County*, 346 S.C. 298, 551 S.E. 2d 588 (Ct. App. 2001), the Court held that environmental groups lacked standing where a challenge to the government action is brought by one who is not the object of the action, but rather seeks to challenge government action or inaction because of alleged illegality.⁴ The Court of Appeals also noted that Rule 201, SCACR, provides that only a party aggrieved by an order, judgment, or sentence may appeal. A party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest. *Id.* The water quality certification is a means for the State to provide input to the federal agency controlling the action (FERC in this case). The Environmental Groups are parties to the federal permitting process and can provide, and have provided, extensive comments on the federal license. S.C. Const. art. I, § 22 does not apply to these Appellants; they have no private rights subject to judicial review. Therefore, the Environmental Groups do not have standing to challenge a decision of the ALC finding waiver by operation of law since their private rights are not affected and they have no injury in fact that can be remedied by judicial action.

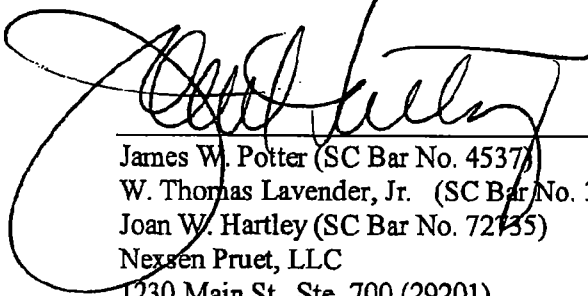
⁴ In fact, waiver occurs from the lack of action by SCDHEC. Thus, there is no action by SCDHEC that Appellants can take issue with.

CONCLUSION

For the forgoing reasons, Respondent respectfully requests that the Court affirm the Order on Motion for Summary Judgment issued by the Administrative Law Court.

Respectfully submitted,

August 15, 2011



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EXHIBIT A

2008 WL 1934476 (S.C.Admin.Law.Judge.Div.)

Administrative Law Court
State of South Carolina

*1 SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, PETITIONERS

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH & ENVIRONMENTAL CONTROL AND FRIENDS OF
CONGAREE SWAMP, WILDLIFE FEDERATION, AND AUDUBON SOUTH CAROLINA, RESPONDENTS

Docket No. 06-ALJ-07-0804-CC

April 12, 2008

APPEARANCES

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TROL

JAMES S. CHANDLER, JR., ESQUIRE, FOR FRIENDS OF CONGAREE SWAMP, SOUTH CAROLINA
WILDLIFE FEDERATION, AND AUDUBON SOUTH CAROLINA

AMENDED FINAL ORDER AND DECISION

STATEMENT OF THE CASE

This matter is before the Administrative Law Court upon two requests for a contested case hearing pursuant to the Administrative Procedures Act to review the issuance of and conditions attached to the 401 Water Quality Certification and Construction in Navigable Waters Permit issued by Respondent South Carolina Department of Health and Environmental Control (DHEC) for a bridge replacement project proposed by Petitioner South Carolina Department of Transportation (DOT). The first petition was filed by DOT and challenged the findings and conditions contained in the Notice of Proposed Decision Water Quality Certification and Construction in Navigable Waters Permit issued by DHEC on June 23, 2006 (NOPD or Proposed Decision). Specifically, DOT contested DHEC 401 water quality certification because:

- DHEC failed to meet the applicable regulatory time periods to issue the Certification and/or Permit;
- The 401 Water Quality Certification should have been issued without a condition for additional bridging;
and
- DHEC imposed conditions that do not accomplish an objective related to the project proposed by DOT.

The second petition was filed by Friends of Congaree Swamp, South Carolina Wildlife Federation, and Audubon South Carolina (Environmental Groups) and challenged the findings and conditions contained in the 401 Water Quality Certification and Construction in Navigable Waters Permit issued by DHEC on October 12, 2006 and

the January 12, 2007 Decision of the DHEC Board. Simultaneously with this filing, the Environmental Groups also filed a motion to intervene in the contested case proceeding initiated by DOT. In its contested case petition, the Environmental Groups alleged that the 401 Water Quality Certification and Construction in Navigable Waters Permit should not have been issued because the DOT project violated the 401 Water Quality Certification Regulations contained in subsection F of 25A S.C. Code Ann. Regs. 61-101 (Supp. 2006) and the Construction in Navigable Waters Permit Regulations contained in subsection 9 of 23 S.C. Code Ann. Regs. 19-450 (Supp. 2006). By an order dated March 26, 2007, contested case 07-ALJ-07-0804, which was filed by the Environmental Groups, was consolidated with this case. After notice to the parties, a contested case hearing on the merits was held on October 16-18, 2007, at the Administrative Law Court in Columbia, South Carolina.

PROCEDURAL HISTORY

*2 On or about June 23, 2006, DHEC issued an NOPD authorizing a 401 Water Quality Certification to DOT for its proposed project to replace four bridges on U.S. Highway 601 in Richland County. A Final Review Conference before the DHEC Board was requested by both DOT and the Environmental Groups and was granted by the DHEC Board. DOT sought the removal of a condition in the permit that required 1:1 slopes throughout the project. The Environmental Groups sought the denial of the permit or the inclusion of a condition that would require DOT to bridge the entire floodplain. Arguments were heard by the DHEC Board from the parties and DHEC staff at the Board's August 10, 2006 hearing. The DHEC Board did not announce a decision at that time but continued the matter to its September 14, 2006 meeting. Following the September 14, 2006, the DHEC Board issued a decision finding that:

[T]he Board concludes that although the 1:1 slope requirement is intended to reduce adverse ecological impact of the proposed project, it is not an appropriate condition. Because the Board is removing the 1:1 slope requirement it is necessary for staff to consider whether alternative measures are appropriate. Therefore, the Board remands the certification and permit issuance to staff to remove the 1:1 slope condition and to consider inclusion of alternative measures that would more appropriately reduce the adverse ecological impact of the proposed project.

On October 12, 2006, DHEC staff issued an "Agency Decision Upon Remand Water Quality Certification and Construction in Navigable Waters Permit" (Remand Permit). This document was similar to the June 23 NOPD, with two exceptions: it did not include the condition requiring 1:1 slopes throughout the project, and it included new language in Condition 15 requiring four additional spans of bridge. Following that decision, DOT filed a request for a contested case hearing on October 20, 2006. Therequest contested the new conditions raised in the Remand Permit and asked for a determination of its rights because DHEC failed to act in a timely manner on the permit application.

On October 27, 2006, the Environmental Groups filed a request for a Final Review Conference before the DHEC Board concerning the Remand Permit. They sought either the denial of the permit or the inclusion of a condition that would require DOT to bridge the entire floodplain. The DHEC Board granted the request for a third Final Review Conference on the project and scheduled it for December 14, 2006. This Court issued an order on December 7, 2006 in response to DOT's motion to stay the proceedings at the DHEC Board, holding that the DHEC Board no longer had jurisdiction over the case.

LEGAL ISSUES RAISED

The following issues were raised in this proceeding:

1. Did DOT request a Final Review Conference of DHEC's issuance of the 401 Water Quality Certification and the Construction in Navigable Waters Permit in a timely manner?

*3 2. What is the legal effect of the DHEC Board's attempt to remand this permit application back to DHEC staff following the Final Review Conference, and of the October 12, 2006 Decision Upon Remand issued by DHEC staff?

3. Did DHEC comply with the applicable time periods in issuing its 401 Water Quality Certification?

4. Does DHEC have the authority to require the conditions of one to one slopes on the causeway embankments and extra bridge spans as mitigation for wetlands impacts of the proposed project? **FINDINGS OF FACTS**

Having observed the witnesses and exhibits presented at the hearing and taking into consideration the burden of persuasion and the credibility of the witnesses, I make the following findings of fact by a preponderance of evidence:

General Findings

The project proposed by DOT is the replacement of four bridges%^[FN1] along US Highway 601 in lower Richland County south of the intersection of US 601 and S-48, Bluff Road. The existing highway between the bridges is built on a fill embankment that has been in place since at least 1942. This embankment elevates the road above the floodplain and is up to 30 feet high. Bridge One is a 150 foot bridge over a minor creek at the Northern end of the project. Bridge Two, which is at the beginning of the Congaree floodplain, is 1590 feet long and crosses part of an old oxbow known as Bates Old River. Bridge Three is 630 feet long and crosses another portion of Bates Old River. Bridge Four is a 1,760 foot bridge over the Congaree River at the Southern end of the project. Approximately 1.95 miles of this earthen embankment are in the Congaree floodplain.

The project would begin just south of the intersection between US 601 and SC 48, immediately south of the railroad tracks and continue south on US 601 to just across the Congaree River in Calhoun County. It consists of the following elements: a) replacement of the existing four bridges with structures that will have twelve (12) foot wide travel lanes and ten (10) foot wide shoulders; b) widening of the travel lanes on the entire causeway^[FN2] to twelve (12) feet and widening of the shoulders to ten (10) feet; c) shifting the roadway forty (40) feet upstream; d) paving a four (4) foot wide strip of the expanded shoulder adjacent to the travel lanes; e) ensuring that all slopes on the causeway are graded to a slope of 2:1; f) upgrading guardrails along the project corridor; and g) installing a new access ramp to and expanding the parking ramp for the existing boat landing. The bridge openings would also be slightly larger, due to the use of longer spans (122.5-foot spans instead of the existing 30-foot spans), which will reduce the number of columns used to support the bridge. The total length of the project is 4.3 miles.

The project is clearly needed and there are clearly no feasible alternatives to replacing the existing bridges.^[FN3] Each of the four bridges to be replaced is rated as structurally deficient and functionally obsolete, meaning that they have significant safety and repair needs and are insufficient for the traffic volume they carry. The bridges have undergone extensive repairs, costing between \$1.25 and \$1.5 million, in the last ten years. The condition of the bridges has deteriorated to the point where it may not be financially feasible to continue to repair them. Moreover, the existing bridges and causeways have travel lanes that are only eleven (11) feet wide. The bridges have two (2) foot wide unpaved shoulders and the causeways have ten (10) foot unpaved shoulders. Therefore, in addition to replacing the existing bridges, the proposed project would slightly widen the existing fill embankment in some areas to allow for a widening of the travel lane from 11 to 12 feet and for ten-foot wide

shoulders. This additional width would bring the bridges into currently accepted roadway safety standards.

*4 Furthermore, closing a portion of Highway 601 for the construction of the replacement bridges is not a feasible alternative to avoid or minimize the impact to wetlands. US 601 is a major thoroughfare for trucks and passenger traffic. The detour route would be approximately 74 miles. Accordingly, it would result in significant financial, safety, and convenience impacts to the traveling public and businesses in the area. The project designers calculated the cost to the traveling public to be approximately \$110,000 per day that the bridges would be closed. For instance, the International Paper Plant at Eastover would see a cost increase of \$3.5 million per year for pulpwood supplies plus additional costs to employees and suppliers if the highway were closed. In fact, a closure of six to ten hours for bridge repairs costs the firm roughly \$8,000. Therefore, the project is designed to replace the bridges without having to close the road. To do this, the new bridges will be built as close as possible to the East of the existing bridges and the new bridges will be tied into the existing road.

Application for the 401 Certification

The application submitted to DHEC for the 401 Water Quality Certification showed Barrett W. Stone, an employee of Florence and Hutcheson^[FN4], as the contact agent for the project. DOT's environmental office also had dealings with DHEC concerning the pending application. On June 26, 2006, DHEC mailed, via U.S. Postal Service, the NOPD/Staff Assessment to Wayne Hall at DOT. However, DOT did not receive that notice. DOT nevertheless received actual notice of DHEC's intention to issue the NOPD via an e-mail on June 26, 2006.^[FN5] Once DOT received that notice, it requested a copy of the NOPD. Upon receiving the copy of the NOPD, DOT filed its request for a hearing before the DHEC Board within one day. Therefore, I find that DOT timely requested a Final Review Conference.

Environmental Impacts

The project is located in the Congaree Swamp adjacent to a newly acquired portion of the Congaree National Park and extends over the Congaree River. The Congaree River is a major river in the South Carolina Midlands formed by the confluence of the Saluda and Broad Rivers near the City of Columbia that merges with the Wateree River to become the Santee River. In the area south of the City of Columbia, the Congaree River winds through a large old growth bottom land forest. The uniqueness of this area led to the area being recognized by the federal government as the Congaree Swamp National Monument and in 2003 as the Congaree National Park.^[FN6]

The Congaree River floodplain is part of a larger ecological concept known as the river continuum. Floodplain wetlands are linked to their associated river system, as water and materials that originate upstream will, during high flow periods, flow out into flood plain wetlands. They are considered waters of the State. Flow in the wetlands may be in channels, but will often be in the form of sheet flow -" non-directed horizontal flow.

*5 Floodplain wetlands also provide habitat for plants and animals through the sediment deposited when they are inundated with water. Typically, the water leaving a floodplain wetland is cleaner than when it entered the wetland because the wetland removes sediment, and excess nutrients and chemicals. Furthermore, the water leaving a floodplain wetland is higher in organic materials, which are exported downstream and are extremely important for other ecological functions that take place in downstream lakes, rivers, estuaries, and other floodplains.

The existing Highway 601 causeways constructed in 1942 have had a negative impact on the Congaree River

floodplain. Those impacts include the interference with sheet flow across the floodplain and animal migration. The construction of the new causeways, however, will not exacerbate those existing problems. Nevertheless, in light of the recognition of the impacts of this project in this important area, DOT offered to add one bridge length and two 60-inch culverts. DOT also proposed to purchase 43 acres of land for preservation and to "debit" 20 credits from DOT's Black River "mitigation bank." After the Board ordered that the additional 1:1 condition be removed, DHEC imposed the following condition in its Remand Permit:

[T]he applicant must remove existing roadway embankment for the purpose of restoring the hydrologic conditions. A total of 5.99 acres of embankment shall be removed and restored to wetland habitat. Further, bridge number 2 must be extended by 122.5 feet to the south, as agreed to, and 2 additional spans of 122.5 feet to the north, bridge number 3 must be extended 122.5 feet to the south and 122.5 feet to the north.

DHEC determined in its staff assessment that there are no feasible alternatives to the proposed project. While DHEC and the Environmental Groups have argued that the conditions they sought to include in the permit constitute "feasible alternatives" to the project, no argument has been raised that there is a feasible alternative to replacing the four bridges in a manner similar to that proposed by DOT. I find that the conditions sought by DHEC and the Environmental Groups are not feasible alternatives to building the project for purposes of determining whether the permit should be issued, but are simply related to what conditions can properly be required in the permit to minimize the adverse effects of the project.

Culverts

The language of Condition 2 of the proposed permit, requiring 60-inch floodplain pipes, states that the purpose of the pipes is to "help restore some of the sheetflow characteristics of the floodplain" in "the historical drainage areas along the causeway." The 60-inch culverts required in the proposed permit would, however, have no benefit for either wildlife passage or restoration of sheetflow. Terrestrial animals will not utilize a 60-inch culvert and fish will be unlikely to use it. Therefore, culverts that size would have little or no benefit to wildlife. Finally, the effect of flood waters being carried through two 60-inch pipes would be minuscule on a 2.7-mile wide floodplain. In fact, Hop Ridgell, DHEC's project manager who handled the permit, testified that he recommended removing the condition requiring the culverts because he did not believe the culverts were a cost-effective mitigation strategy.

*6 A biologist from the Department of Natural Resources nevertheless proposed the addition of larger 24-foot wide culverts for wildlife passage and the restoration of historic sloughs that existed prior to the placement of the existing fill causeways. However, there was no evidence presented as to the construction cost of such large culverts. In fact, the 60-inch culverts would cost between \$360,000 and \$400,000 each. Moreover, the purpose of culverts, in general, is not to minimize the adverse effect of a project, but as a compensatory restoration measure. However, even in this regard, the evidence did not establish that the culverts would effectively accomplish that goal.

Embankment

The existing embankments are constructed at a 2:1 slope and DHEC proposes to construct the new portions of the embankments also at a 2:1 slope. The Environmental Groups contend that the banks should be constructed at 1:1 slopes. Using 1:1 slopes would cut in half the amount of wetlands to be filled. However, if the embankments are constructed at 1:1 slopes instead of 2:1 slopes, it would add \$20 million (in 2006 dollars) to the cost of the project, and it would also lead to higher future maintenance costs. The preliminary cost estimate for the entire

project was \$25 million (in 2005 dollars) including both the roadway and new bridges. The most recent estimate is \$34 million (in 2007 dollars). Therefore, 1:1 slopes simply are not a cost-effective means to minimize the impacts of this project.

Bridge Spans

With DOT's approval, the June 23, 2006 NOPD required that one extra 122.5-foot bridge span be added, and the corresponding causeway be removed, at the Southern end of Bridge Two. The bridge span would be paid for using Federal Highway Administration (FHWA) bridge replacement funds.

DHEC now contends that additional bridge spans and removal of the existing roadway embankment are appropriate because the "additional bridge spans will eliminate approximately 4.4 acres (0.86 acres per span) of existing embankment to help restore the sheetflow characteristics of the floodplain in the area." The Remand Permit therefore added conditions requiring the construction of four 122.5-foot bridge spans. The proposal would require two spans at the North end of Bridge Two; one span at the South end of Bridge Three; and one span at the North end of Bridge Three.

DHEC contends that additional bridging should be required to compensate for the fill being placed in wetlands on account of the project. The additional bridge spans would cost \$600,000 for each 122.5-foot span. However, the four additional bridge spans would have a de minimis impact upon the placement of any new fill. Rather, the clear purpose in requiring the additional bridge spans is to improve the sheetflow. The evidence clearly shows that the project, as proposed by DOT without the additional bridge spans, does not have a negative impact on the sheetflow in the project area, and may in fact make slight improvements to the sheetflow characteristics.

*7 Nevertheless, requiring additional bridge spans would not increase sheet flow unless removal of the corresponding existing causeway was also required. The Environmental Groups' expert witness, Dr. Tufford, testified that six additional spans of bridge totaling 735 feet would not make a significant difference in the sheetflow due to the size of the floodplain. To make a significant difference, he believed that much of the existing causeway would need to be removed. He said that modeling could be performed to determine the amount of additional bridging required for restoration.

The Environmental Groups thus contend that the four spans proposed by DHEC are insufficient and, therefore, DOT should be required to bridge the entire Congaree floodplain. However, bridging the entire floodplain would result in an enormous cost to the State of South Carolina, most of which would not be funded by the Federal Bridge Replacement Program. Moreover, the purpose of bridging the entire Congaree floodplain is not to reduce the impact of the project upon the wetlands or waters of the State but to restore the sheet flow to the condition existing prior to the construction of the causeway. Although, at some point, more bridging is likely to sufficiently increase sheet flow so that the system will again behave like a natural floodplain, Respondent's expert, Dr. Dan Tufford, testified that modeling would be necessary to determine how much bridging would be required to accomplish such an improvement.

Fill

The project will result in placement of fill material on currently undisturbed wetlands. That fill will be placed parallel to the existing causeway along the upstream edge of the existing elevated roadway, so that the bridge and roadway system can be re-constructed upstream of the existing system. The original amount of fill required will be eight (8) acres. Upon completion of the new bridges and the new causeway embankments that are needed

to tie the new bridge spans back to the existing causeway embankments, DOT proposes to remove six acres of the existing causeway embankments. As a result of the removal of this fill material, the project will add a net of two acres of fill in the Congaree floodplain wetlands.

The functions and values of the wetlands alongside the existing embankment are not as high as those of other wetlands in the general area of the Congaree floodplain. Therefore, the impact of the proposed new fill will likewise not be as high as those of other wetlands in the general area. Furthermore, Respondents have no data or studies showing that the placement of fill in this project would degrade water quality in any way. Instead, they rely on statements that, in general, any loss of wetlands has a negative impact by reducing wetland habitat and existing uses. Though Congaree Park is a "special and unique habitat," the proposed activity will not significantly impact the Park. I find that the water quality impacts of the project will be "very minimal."

*8 Nevertheless, wetlands created from the excavation six acres downstream of the old roadway would not be the same quality of the wetlands that would be newly-impacted. Any recovery of this area will take many years. However, Respondents' evidence did not show that the fill proposed for this project is likely to produce an adverse impact on navigable waters or other associated natural resources. In fact, DHEC's Staff Assessment for the permit does not identify any potential adverse impacts on navigable waters. Therefore, I find that there is no credible evidence that the fill proposed to be placed by this project will cause an adverse effect on water quality. Furthermore, the loss of wetlands as a result of the fill will be compensated for by DOT's purchase of 43 acres of land for preservation and the "debit" credits from DOT's Black River mitigation bank. The proposed activity will thus not permanently alter the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired.

Cumulative/Animal Impacts

The Environmental Groups contend that the project will create a risk of wading birds being killed by predators. More specifically, John Grego, President of Friends of the Congaree Swamp, testified that, in his opinion, the cumulative impact of the project, considered with the existing adjacent power line easement, will create an increased risk of wading birds being killed by predators when they are attracted to the wider exposed area. However, the environmental studies prepared by a biologist for DOT found that the project would not cause a significant increase in cumulative and indirect impacts. Moreover, DOT's finding was adopted by the FHWA when it issued a Finding of No Significant Impact. Furthermore, the DHEC staff assessment states, "The cumulative impacts of the project are expected to be minimal in light of the fact that the existing structure had been there for 60 years." Therefore, I find that the cumulative impacts of the project on wading birds would be, at most, insignificant. Accordingly, I find that any requirement for additional bridge spans would not minimize any adverse cumulative impact effect of the proposed project.

Funding

The funding for this project comes from federal Highway Bridge Replacement and Rehabilitation Funds (BRR Funds). The use of BRR Funds is limited to the replacement of existing bridges. Thus, a project replacing existing fill with a longer bridge would only be eligible for those funds if the longer bridge were more cost effective. Here, replacement of existing fill with bridging on this project would not be cost effective. While the FHWA may allow some latitude with regard to the amount of fill that can be replaced with bridging, the amount of additional bridging that DOT can include in the project and still keep its eligibility for the project's funding source is limited. The project as proposed by DOT includes one additional bridge span beyond what is necessary for re-

placement of the current bridges. DHEC's proposal for four additional spans would yield a total of five spans replacing existing causeway. While there is evidence that FHWA might allow as many as three additional spans if the culverts condition were removed, there is no evidence that their approval could be extended beyond that point. Therefore, the permit condition requiring a total of five additional bridge spans would be likely to cause the project to become ineligible for BRR Funds.

Issuance of the NOPD

*9 A Joint Public Notice for this project was issued by the US Army Corps of Engineers and DHEC on July 8, 2005. That notice is the date that begins the one-year clock to determine the date by which a Water Quality Certification must be issued. The one-year period expired on July 8, 2006.

DOT's application for the permit was filed on June 24, 2005 and DHEC received DOT's application fee on September 16, 2005. Sixty days from September 16, 2005 was November 15, 2005. DHEC did not issue an NOPD on the permit within the 60-day period. The 180-day-period running from September 16, 2005 expired on March 15, 2006. DHEC did not issue an NOPD on the permit within the 180-day period.

DHEC did not request any additional information or materials from DOT necessary for reaching a certification decision, other than the permit fee. However, there is no evidence that DOT did not pay the permit fee within a reasonable time. Moreover, there is no evidence that any letter was ever sent from DHEC in this matter notifying DOT that DHEC was suspending its processing of the application. Therefore, I find that the processing of the application was never suspended by DHEC.

In the past several years, DOT has been forced to perform repair work to the existing bridges, which has caused significant cost to both DOT and surrounding businesses. For instance, Lee Floyd, DOT State Bridge Maintenance Engineer, testified that DOT has spent up to \$1.5 million repairing the existing bridges in the last ten years. Additionally, Susan McPherson, an employee of International Paper, testified that a closure of six to ten hours for bridge repairs costs her firm \$8,000.

Moreover, the new bridges will be safer than the existing bridges, which are in major states of disrepair. Photographs of the existing bridges reflect large cracks in the concrete and extensive repairs used to hold the bridge decks in place. A sign under Bridge Four warns motorists not to park under the bridge because DOT fears that falling pieces of the bridge may injure someone.^[FN7] Furthermore, current gaps at the bridges' expansion joints pose a risk to motorcyclists. The proposed project, in contrast, includes several features aimed at making the bridges safer for the traveling public, including wider shoulders on the bridge and road, and upgraded guardrails.

Finally, because the costs of concrete, steel and other materials necessary to build the proposed bridges have risen 35% to 40% in the past three or four years, the estimated construction costs for the project have increased significantly as a result of the delay.

Therefore, in light of the increased bridge repair and construction costs, as well as the delay in the safety improvements that will be afforded by the project, I find that DOT and the public have been prejudiced by DHEC's failure to timely issue its NOPD.

DHEC presented no evidence that it made any finding prior to November 15, 2005 that a feasible alternative to the proposed project existed, and I find that no such determination was made. On the contrary, the employee handling the permit application testified that he did not know enough about the project to make a request for in-

formation during that period of time.

CONCLUSIONS OF LAW

*10 This Court has subject matter jurisdiction in this case pursuant to S.C. Code Ann. § 1-23-310 *et seq.* (2005 & Supp. 2006) and S.C. Code Ann. § 44-1-60 (Supp. 2006). The hearing before the ALC is a contested case hearing pursuant to the APA and is heard *de novo*. Marlboro Park Hosp. v. S.C. Dep't of Health and Envtl. Control, 358 S.C. 573, 595 S.E.2d 851 (2004). The proper standard of proof to be applied is a preponderance of the evidence. Anonymous (M-156-90) v. State Bd. of Med. Examiners, 329 S.C. 371, 496 S.E.2d 17 (1998); National Health Corp. v. Dep't of Health and Envtl. Control, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989). Furthermore, the burden of proof is upon the party asserting the affirmative of an issue and, therefore, DOT bears the burden in this case of proving that the agency decision was in error under the statutory and regulatory standards. Leventis v. Dep't of Health and Envtl. Control, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000). Likewise, where the Environmental Groups seek to establish that DHEC's decision was in error, they too bear the burden of proof.^[FN8]

Generally, to have standing in South Carolina "one must have a personal stake in the subject matter of the lawsuit" and be a real party in interest. Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res., 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001). Furthermore, in environmental cases, a petitioner has standing if he or she meets the following three-pronged test:

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 conjectural 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 not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Smiley v. S.C. Dep't of Health and Envtl. Control, 374 S.C. 326, 649 S.E.2d 31 (2007) (quoting in part Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992)). The evidence established that the Petitioner and Environmental Groups have standing to pursue this case.

The issues in this case revolve around DHEC's issuance of a 401 Water Quality Certification and Navigable Waters Permit. The criteria for the 401 Water Quality Certification are found primarily at S.C. Code Ann. Regs. § 61-101 (Supp. 2006). The relevant provisions for a Navigable Waters Permit are found at S.C. Code Ann. Regs. § 19-450 (Supp. 2006) and 33 USCA § 1341 (1994).

Section 401(a)(1) of the Clean Water Act allows states to exercise veto authority over Federal licenses and permits for discharges to navigable waters if the proposed activity would violate state water quality standards. 33 U.S.C. § 1341(a)(1) and 1341(d). In carrying out its responsibilities, the Act requires states to adopt water quality standards meeting certain minimum national standards. DHEC's authority to act for the State in issuing or denying certifications required by Section 401 of the Clean Water Act derives from the S. C. Pollution Control Act, which authorizes and requires DHEC to "maintain reasonable standards of purity of the air and water resources of the State." S.C. Code Ann. § 48-1-20. Furthermore, pursuant to S.C. Code Ann. Regs. § 61-101 (A)(1), DHEC established procedures and policies for implementing State water quality certification requirements under the Clean Water Act. Regulation 61-101 provides that, in reviewing an application for a permit under the Clean Water Act, DHEC must address and consider the following factors:

- *11 (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.

S.C. Code Ann. Regs. § 61-101 (F)(3). Additionally, "[w]hen issuing certification for such activities, the Department shall condition the certification upon compliance with all measures necessary to minimize adverse effects...." S.C. Code Ann. Regs. § 61-101 (F)(4).

Certification is to be denied, in part, if "there is a feasible alternative to the activity, which reduces adverse consequences on water quality and classified uses." S.C. Code Ann. Regs. § 61-101 (F)(5)(b). Certification will also 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." S.C. Code Ann. Regs. § 61-101 (F)(6).

DHEC's Compliance with Time Frames for Issuance of Its NOPD

DOT argues that DHEC waived its right to issue a Water Quality Certification by failing to timely issue its NOPD and final decision. The Respondents argue that the deadlines were complied with because:

- The DOT application was suspended under State permitting agency procedures for failure to submit the application fee with the application;
- The DOT application was further suspended by the public hearing requirement contained in R. 61-101; and
- The determination of feasible alternatives was not made until June 23, 2006.

The Federal Water Pollution Control Act provides the underlying authority for the regulation of water quality in the states. See Am. Jur. Pollution Control § 718. Certification requirements for Section 401 of the Clean Water Act are set forth in 25A S.C. Code Ann. Regs. 61-101. See 25A S.C. Code Ann. Regs. 61-101 (A)(1) (Supp. 2006). Pursuant to Federal and state laws, there are three separate time periods regulating DHEC's review of this DOT application - a 60-day period^[FN9], a 180-day period^[FN10], and a general one-year period.^[FN11] The 60 and 180 day time frames apply to the issuance of the NOPD whereas the one year time frame applies to the final decision of the agency. Regarding the one year time frame, the federal Clean Water Act, which is the controlling legislative act, provides that:

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. 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.

*12 Additionally, Regulation 61-101 (A)(6) 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 ap-

plication unless processing of the application is suspended." Here, there is a question as to what is the final decision. In other words, is the final decision the day the staff issued its decision or the date the Board issued its decision after a Final Review Conference? Resolution of that issue is decisive as to whether DHEC was timely in issuing its decision. Nevertheless, I make no finding regarding this issue because I find that DHEC's failure to issue its NOPD timely precludes further review of this case.

180 Day Time Frame

As set forth above, the federal Clean Water Act provides that a state must act on a request for certification "within a reasonable period of time." In implementing that law, the South Carolina regulations provide two pertinent time frames. Unless an application is suspended, the Department must issue an NOPD within 180 days of acceptance of an application. As set forth above, the Respondents contend that DHEC met that requirement because the application was suspended at various times.

They first argue that the DOT application was suspended under State permitting agency procedures for failure to submit the application fee with the application. Indeed, the evidence established that although DOT's application was filed on June 24, 2005, it did not remit the application fee until September 16, 2005, approximately 70 days after the application. Regulation 61-30 (C)(1)(b) does set forth that "[t]he Department will not process an application until the application fee is received." 24A S.C. Code Ann. Regs. 61-30 (C)(1)(b) (Supp. 2006). However, the evidence does not establish that the Department refused to process the application until it received the payment of the filing fee. In fact, the evidence established that the Department had begun reviewing the application even though it had not received a filing fee.

Moreover, the Respondents rely upon some nebulous evidence that the processing of the application was suspended. I do not find that evidence convincing. Furthermore, 25A S.C. Code Ann. Regs. 61-101 (C)(4) (Supp. 2006) sets forth the specific instance in the Regulation as to when an application is suspended for the 180 day time frame. It provides 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.

Here, DHEC did not establish that there was any meaningful length of time when information was not provided. More importantly, DHEC never notified DOT at anytime that the processing of its application was suspended. "The essential requirements of due process... are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." Ross v. Medical University of South Carolina, 492 S.E.2d 62 (1997) quoting Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, (1985). 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. Finally, ignoring the above, DHEC did not issue its NOPD in this case until June 23, 2006. Even if its asserted time frame is accepted, the starting date for the 180-day time period would begin on September 16, 2005 and end on March 15, 2006.

*13 The Respondents also argue that the running of the 180-day time period was suspended because of the public hearing held in this matter. DHEC was required to hold a public hearing in this matter pursuant to 25A S.C. Code Ann. Regs. 61-101(E)(2) & (5) (Supp. 2006). Further, the regulations state that, if a public hearing is held,

the public comment period must be extended fifteen days after the date of the hearing. 25A S.C. Code Ann. Regs. 61-101(E)(4) (Supp. 2006). Here, the public hearing was held on November 15, 2005, so the public comment period did not end until December 1, 2005. Additionally, DOT did not respond to the written comments and the comments raised in the public hearing until February 2006. Again, however, DHEC never notified DOT at anytime that the processing of its application was suspended because of the public hearing requirement. Moreover, the Respondents have cited no provision in the Regulation that provides that the time frames are to be presumptively suspended while public hearings are held. Rather, those hearings would seemingly be an activity that is contemplated to occur within the 180-day time frame. Furthermore, as discussed above, to allow the Department to surreptitiously suspend the processing of an application and thereby its deadline to issue an NOPD under these circumstances would be a violation of due process. Thus, I conclude that the application process for this permit was never suspended by DHEC.

60-Day Time Limit

The Respondents argue that the 60-day time frame is not applicable in this case because the determination of feasible alternatives was not made until June 23, 2006, with the issuance of the Proposed Decision. Regulation 61-101 (F)(4) provides that:

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. The Department shall issue proposed certification decisions on such applications within sixty (60) days of acceptance of the application unless otherwise suspended or in accordance with State permitting agency procedures. The Department will also attempt to issue general certifications for such activities.

* * *

(b) filling necessary for public highways or bridges.

25A S.C. Code Ann. Regs. 61-101(F)(4) (emphasis added). Therefore, when there are no feasible alternatives to a project, DHEC must issue its NOPD "within sixty (60) days of acceptance of the application unless otherwise suspended or in accordance with State permitting agency procedures" in cases involving "filling necessary for public highways or bridges." Here, the sole request by DOT was to add fill in order to construct new bridging. The Respondents nevertheless argue that this regulation is not applicable because it considered "feasible alternatives" to this project. DHEC construes the term "feasible alternatives" to allow it to consider both its determination regarding avoidance of impacts and its determination of which conditions on the certification are necessary to mitigate for and minimize the unavoidable impacts of the project. The application of this regulation is thus contingent upon the meaning of the phrase "when there are no feasible alternatives."

*14 At the outset, I fail to see how DHEC's belated determination of whether there is a feasible alternative warrants a disregard for the 60-day requirement to make that very determination. Under their logic, the time frame for DHEC to make its decision should be ignored because DHEC failed to make its decision within that time frame. "Each word, clause, sentence, and section of a statute should be given meaning." Lee v. Thermal Engineering Corp., 352 S.C. 81, 94, 572 S.E.2d 298, 305 (Ct.App 2002). The Department's general interpretation of "feasible alternatives" however would make the 60-day time frame meaningless. In other words, if "feasible alternative" includes consideration of any conditions to impose upon the project, the Department can simply avoid the requisites of the time frame upon its contention that it is considering the conditions it wishes to impose.

Moreover, “[c]ourts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law.” Hernandez-Zuniga v. Tickle, 374 S.C. 235, 247, 647 S.E.2d 691, 697 (Ct. App. 2007). DHEC’s construction of the term “feasible alternatives” to include the conditions imposed on the certification is inconsistent with the plain language of the regulations. Regulation 61-101 (F)(4) provides that certification of projects involving the placement of fill for public highways or bridges will be issued “when there are no feasible alternatives.” The regulations further provide that:

Certification will be denied if:

* * *

(b) there is a feasible alternative to the activity, which reduces adverse consequences on water quality and classified uses....

25A S.C. Code Ann. Regs. 61-101(F)(5) (Supp. 2006) (emphasis added). Thus, the regulations provide for certification of projects involving the placement of fill for public highways and bridges only if there are no feasible alternatives. If there is a feasible alternative to the activity, certification must be denied. Clearly, under the plain language of the regulations, “feasible alternatives” cannot encompass conditions which DHEC seeks to impose upon a certification, for if feasible alternatives to an activity exist, there can be no certification of that activity.

Nowhere in the regulation is there any indication that the 60-day time frame does not apply when DHEC is determining whether there are feasible alternatives to the project. To the contrary, in order to determine that a project has no feasible alternatives, thus triggering the 60 day requirement, DHEC must necessarily determine whether there are indeed feasible alternatives to the activity. The regulations clearly contemplate that DHEC must act promptly upon all certification requests. 25A S.C. Code Ann. Regs. 61-101(C)(2) states 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.” Furthermore, if DHEC determines that it needs additional information in order to make its determination, “it will specify a time for submittal of such information. If the information is not timely submitted and is necessary for reaching a certification decision, certification will be denied without prejudice or processing will be suspended upon notification to the applicant by the Department. Any subsequent resubmittal will be considered a new application.” Regs. 61-101 (C)(4). In this case, DHEC failed to follow its own procedures, since there is no indication that it ever requested additional information from DOT or that it suspended the processing of the permit pending the receipt of additional information.

*15 The Respondents’ argument that the “conditions” DHEC seeks to impose upon the permit-“the construction of additional bridging-“constitute a feasible alternative to the project as proposed by DOT must likewise fail. The term “feasible alternative” is not defined in Regs. 61-101(F)(4) or (5). When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning. State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004). “Feasible” means “capable of being done or carried out;” “reasonable, likely.” Merriam-Webster’s Online Dictionary, www.m-w.com. Therefore, not only must a “feasible alternative” be possible, but it must also be reasonable. This construction of the term “feasible alternative” is also supported by the fact that DHEC is required to consider permits for construction in navigable waters in the context of this water quality certification review. See Regs. 61-101(A)(9) (water quality certification review for activities requiring both water quality certification and a permit for construction in navigable waters

will encompass issues pertaining to the navigable waters permit as well). Thus, the definitions governing navigable waters permits are instructive in this case.

The regulations governing permits for construction in navigable waters contain the following definition of "feasible":

Feasible (feasibility) is determined by the Department and is based upon the best available information, including but not limited to technical input from the agencies, and consideration of economic, environmental, social and legal factors bearing on the suitability of the proposed activity and its alternatives. It includes the concepts of reasonableness and likelihood of success of achieving the purpose. "Feasible alternatives" applies to both locations or sites and to methods of design or construction and includes a "no action" alternative.

24 S.C. Code Ann. Regs. 61-19-450.2(G) (emphasis added). Here, while DHEC and the Environmental Groups argue that the conditions they sought to include in the permit constitute "feasible alternatives" to the project, there was no evidence that there is a viable feasible alternative to replacing the four bridges in a manner similar to that proposed by DOT. Clearly, the bridges must be replaced at this location following the existing roadway. Furthermore, neither spanning the entire floodplain nor employing 1:1 slopes is an economically feasible alternative to replacing the four bridges in a manner similar to that proposed by DOT. The remaining conditions sought by DHEC and the Environmental Groups simply address what conditions should be required in the permit to minimize the adverse effects of the project.

Appropriate Sanction

The Environmental 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, the Environmental Groups point to Johnston v. S.C. Dep't of Labor, Licensing, and Regulation, 365 S.C. 293, 617 S.E.2d 363 (2005). I disagree.

*16 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),^[FN12] 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 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 several ways. First, 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 provision of 33 USCA § 1341 into Regulation 61-101.

*17 Second, regarding Johnston, because the Board's decisions do not become effective until they are served on the appraiser, the Board has an independent reason, other than the threat of losing its power to act, to promptly serve the appraiser. Here, however, other than the threat of losing its power to dictate 401 permit terms, DHEC generally has no independent reason to timely issue its NOPD. Proposed projects cannot go forward until a 401 permit is issued. Therefore, except in rare cases where a proposed project is expected to have a positive net impact on the environment, DHEC's environmental interests are not harmed by delaying the issuance of its NOPD (unless, of course, DHEC faces the possibility of losing its power to act).

Third, 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, 31 Williamette L. Rev. 851, 857 (1995). Therefore, unlike the situation in Johnston, finding that DHEC has waived its right to act does not mean that the public's interests will go wholly unprotected.

Finally, in this case, unlike the appraiser in Johnston, DOT has suffered prejudice as a result of DHEC's delay in the issuance of its NOPD. For instance, the delay has significantly increased the risk that DOT will be forced to perform maintenance on the currently-existing bridges, which are in increasing states of disrepair. Moreover, over the past several years, the costs of concrete, steel and other materials necessary to build the proposed bridges have increased at a rate much higher than inflation. Therefore, the delay has significantly increased the cost of the proposed project. Furthermore, because the currently-existing bridges are not as safe as the new bridges will be, the delay has prejudiced the safety of the traveling public.

For these reasons, I conclude that DHEC has waived its right to dictate the terms of DOT's 401 permit by failing to issue its NOPD within the time limits set forth in Regulation 61-101. ^[FN13]

Timeliness of DOT's request for a Final Review Conferences

During the trial of this matter, DHEC made a motion to dismiss this case because DOT failed to timely request review of this case. In pertinent part, S.C. Code Ann. 44-1-60 (E) (Supp. 2006) 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 agency 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.

*18 Furthermore, "[a]ll department decisions involving the issuance... of permits... which may give rise to a contested case shall be made using the procedures set forth in this section." S.C. Code Ann. § 44-1-60(A) (Supp. 2006). Therefore, filing a request for a final review conference is a procedural requirement for an entity or person to challenge a DHEC decision at the ALC. See MRI at Belfair, LLC v. S.C. Dep't of Health and Envtl. Control and Coastal Carolina Med. Center, 06-ALJ-07-0714-CC, 2006 WL 3232043 (Admin. Law Ct. October 18, 2006).

The timing of the issuance of the NOPD in this case creates a quandary. The NOPD was issued before 2006 Act 387 went into effect but the review of the case occurred after the effective date of Act 387. After noting several exceptions, Section 57 of Act 387 provides that: "For all other actions pending on the effective date of this act, the action proceeds as provided in this act for review." Therefore, it appears that the notice provisions of the prior law applied to this case but the review of the case is pursuant to the procedures of Act 387.^[FN14] The law setting forth the requisites for notice prior to Act 387 was found in 25 S.C. Code Ann. Regs. 61-72 § 201(A) (Supp. 2005), which provided that:

Any person may request an adjudicatory hearing by filing a Petition for Administrative Review with the Clerk of the Board. Any such Petition must be filed within 15 days, or other period provided by law, following actual or constructive notice of a final staff decision on a licensing matter as defined above, or following receipt of an administrative order.

Nevertheless, ALC Rule 11(C) provided that "[u]nless otherwise provided by statute, a request must be filed and served within thirty (30) days after actual or constructive notice of the agency's determination."^[FN15] Therefore, the time for serving a request for contested case review under Rule 11(C) and Regulation 61-72 differed. Clearly, however, ALC Rule 11(C) was the last legislative expression of a timeframe.^[FN16] Therefore, since Regulation 61-72 is not a "statute," the provisions of Rule 11(C) must prevail. Ramsey v. County of McCormick, 306 S.C. 393, 397, 412 S.E.2d 408, 410 (1991) ("Under the last legislative expression rule, where conflicting provisions exist, the last in point of time or order of arrangement, prevails.").^[FN17]

DOT thus 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.

*19 Finally, DOT is the party seeking the permit. It is simply unreasonable to conclude that DOT would not be a necessary party at such an early stage of the permitting process after the Environmental Groups timely filed their request for DHEC's Final Review Conference. See Spanish Wells Prop. Owners Ass'n v. Bd. of Adjustment of the Town of Hilton Head Island, 295 S.C. 67, 376 S.E. 160 (1988). The DHEC Board never made a ruling on

DHEC's objection to the timeliness of DOT's filing. If the DHEC Board was aware of the objection but didn't find it meritorious, the DHEC staff is bound by the Board's decision. See Director, Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding and Dry Dock Co., 514 U.S. 122 (1995). Therefore, even if DOT did not timely request a Final Review Conference, they were nevertheless a party to the proceeding.

DHEC Board's Authority to Remand

DOT and the Environmental Groups challenge DHEC's right to remand the permit back to staff for the imposition of additional conditions following the conclusion of the Final Review Conference. S.C. Code Ann. § 44-1-60(E) provides that the decision of DHEC's staff becomes the final agency decision unless a written Request for Final Review is filed with DHEC. After that final review, "the board, its designee, or a committee of three members of the board appointed by the chair shall issue a written final agency decision based upon the evidence presented." S.C. Code Ann. § 44-1-60(F)(2) (Supp. 2006). The language of the statute referring to the Board's hearing as a "final review" does not suggest that DHEC will engage in further review of the matter by staff. Thus, DHEC's authority to remand a permit to staff following the Final Review Conference is questionable. Nevertheless, in light of the fact that this case is properly before the ALC for a *de novo* review and the ALC's determination that DHEC waived its right to review the Certification, this issue need not be resolved in this case.

Mitigation for Wetlands Impacts

401 Water Quality Certification

DOT challenges DHEC's mitigation for wetlands impacts as a condition of the 401 Water Quality Certification. DHEC argues that it has the inherent right to require mitigation based on its right to include conditions to minimize adverse impacts on water quality and the aquatic eco-system. Regulation 61-101 (F)(3) provides that:

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;
 - *20 (4) the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others.

25A S.C. Code Ann. Regs. 61-101 (F)(3) (Supp. 2006). As noted above, a Certification will be denied if "there is a feasible alternative to the activity, which reduces adverse consequences on water quality and classified uses." 25A S.C. Code Ann. Regs. 61-101 (F)(5)(b) (Supp. 2006). Here, there were no feasible alternatives to the project.

A Certification will also not be issued "unless the Department is assured appropriate and practical steps... will be taken to minimize adverse impacts on water quality and the aquatic ecosystem." 25A S.C. Code Ann. Regs. 61-101 (F)(6) (Supp. 2006). Therefore, the issue for consideration for this project is whether the potential water

quality impacts of the project warrant conditions upon the permit and whether the appropriate and practical steps were taken to minimize adverse impacts on water quality and the aquatic ecosystem. Here, the potential water quality impacts of the project are negligible. DOT has further taken the appropriate and practical steps to insure that impacts to water quality and the aquatic ecosystem are minimal.

Navigable Waters Permit

The Environmental Groups argue that the more comprehensive standards, and in particular the mitigation requirements, of navigable waters permits must be considered in evaluating the issuance of this Water Quality Certification. Regulation 61-101 (A)(9) provides that:

If an activity also requires a permit for construction in State navigable waters pursuant to applicable laws and regulations, the review for the water quality certification will consider issues of that permit and the Department will not issue a separate permit for construction in State navigable waters. The certification will serve as the permit.

25A S.C. Code Ann. Regs. 61-101 (A)(9) (Supp. 2006). Since this project involves construction in State navigable waters, both the Water Quality Certification and Construction in Navigable Waters Permit should be jointly considered in this case. However, the requirement that the Navigable Waters Permit be considered does not necessarily warrant the application of the more comprehensive standards in deciding the issues of this case. Rather, the Navigable Waters Permit must be considered in the context of the issues in this case.

A state Navigable Waters Permit is required "for any dredging, filling or construction or alteration activity:

- in, on, or over a navigable water, or
- in, or on the bed under navigable waters, or
- in, or on lands or waters subject to a public navigational servitude under Article 14 Section 4 of the South Carolina Constitution and 49-1-10 of the 1976 S.C. Code of Laws including submerged lands under the navigable waters of the state, or
- for any activity significantly affecting the flow of any navigable water."

23 S.C. Code Ann. Regs. § 19-450.1.A (Supp. 2006) (bullets added). A navigable water is defined in the Regulation as "those waters which are now navigable, or have been navigable at any time, or are capable of being rendered navigable by the removal of accidental obstructions, by rafts of lumber or timber or by small pleasure or sport fishing boats." 23 S.C. Code Ann. Regs. § 19-450.2.C (Supp. 2006). Lands or waters subject to a public navigational servitude is defined as "those lands below the mean high water line in tidally influenced areas, or below the ordinary high water mark of any nontidal navigable waterway of the state." 23 S.C. Code Ann. Regs. § 19-450.2.D (Supp. 2006). Inversely, "no permit is required by the Department for any activity or construction on private highlands above the mean high water line or ordinary high water mark which does not affect directly and significantly any navigable water or water or land subject to a public navigational servitude." 23 S.C. Code Ann. Regs. § 19-450.3 (Supp. 2006).

*21 The issues of this case involve *solely* the impact of fill in the floodplain and the benefits associated with the removal of existing fill. There is no evidence that the fill at issue to be placed by DOT in the construction of the bridges is: 1) in a navigable water; 2) in, or on the bed under navigable waters; 3) in, or on lands or waters subject to a public navigational servitude; or 4) for any activity significantly affecting the flow of any navigable water. See also 23 S.C. Code Ann. Regs. § 19-450.2 (E), (F) (Supp. 2006) (defining "mean high water line" and "ordinary high water mark"). In other words, the proposed activities that Respondents are *specifically* objecting to will take place on "highlands above the mean high water line or ordinary high water mark," and they will not "affect directly and significantly any navigable water or water or land subject to a public navigational ser-

vitute." Therefore, the requirements of the Navigable Waters Permit have no application to the issues presented in this case. ^[FN18]

Conclusions

There are two distinct environmental issues presented by Respondents in this case -" the impact that the proposed project will have to the area and the desire to have the impact of the existing causeway either lessened or eliminated. I find that restoration of the sheet flow to be a laudable goal. However, I do not find the facts of this case or the existing law supports that aspiration. In fact, the Department of Natural Resources proposed to have the entire floodplain bridged, which would constitute an enormous cost to the State of South Carolina, most of which would not be funded by the Federal Bridge Replacement Program. Rather, the more feasible and reasonable consideration is the minimization of the impact of this project.

If the issue was the filling of the wetlands to create four new bridges, the impact to the wetlands would be a grave concern. In fact, it is quite clear that the existing causeways have interrupted the sheet flow in this area and thus had an environmental impact. ^[FN19] Nevertheless, it is equally clear that the footprint of the causeways at issue in this case has existed since 1942. Moreover, though the foot print of those causeways will change as a result of this project, there are three important details concerning that change. The most important detail is that the fill will only be placed along the side of the causeways. Therefore, the impact to sheet flow which was the most pervasive concern presented by the Respondents would be de minimis. Secondly, as a result of the change of the bridge design, the bridge spans will be increased. In the areas where the spans are lengthened the resulting unneeded causeway will be removed. Consequently, the project will actually increase sheet flow. Finally, the only significant impact this project will have upon the floodplains is the impact to the wetlands where the fill is placed. ^[FN20] However, the evidence clearly showed that DOT will offset that impact by purchasing 43 acres of land for preservation and debiting 20 credits from its Black River "mitigation bank."

*22 The project, without a condition requiring additional bridge spans, has no negative impact on sheetflow. Rather, the reasoning behind requiring the four additional bridge spans or bridging the entire Congaree floodplain is not to reduce the placement of new fill by the project, but to remove fill from the pre-existing causeway. In other words, the condition requiring additional bridging was a mitigation compensation measure. However, there is no such requirement in the above statutes or regulations.

Nevertheless, DOT agreed to place two 60-inch pipes through the causeway of this area to help increase sheet flow. However, the evidence overwhelmingly established that the flood waters carried through two 60-inch pipes would be minuscule. Instead of the pipes, adding bridging south of Bridge # 2 would be more beneficial for movement of water, and additional bridging north of Bridge # 2 would be more beneficial for movement of wildlife. I therefore find that the permit, if properly reviewed, should be amended to eliminate the 60-inch pipes and add additional bridging to the north and south ends of Bridge Two.

ORDER

IT IS HEREBY ORDERED that Condition 2 of the Water Quality Certification and Construction in Navigable Waters Permit contained in the June 23, 2006 Notice of Proposed Decision shall be removed; and

IT IS FURTHER ORDERED that Condition 1 of the Water Quality Certification and Construction in Navigable Waters Permit contained in the June 23, 2006 Notice of Proposed Decision is amended to read, "All disturbed land surfaces and sloped areas must be stabilized and sloped with a minimum 2:1 embankment slope

upon project completion;" and

IT IS FURTHER ORDERED that the disputed portions of Condition 14 of the Water Quality Certification and Construction in Navigable Waters Permit contained in the June 23, 2006 Notice of Proposed Decision is amended to read:

As proposed, the applicant must provide compensatory mitigation, not inconsistent with this order, for wetlands impacts associated with the proposed work as proposed in the compensation plan dated September 16, 2005. This will be through the purchase and preservation of 43 acres of high quality wetlands on-site, or by providing monetary assistance to the National Park Service for the acquisition of additional lands suitable for 60.2 mitigation credits for addition into the Congaree National Park. The applicant must also provide documentation of withdrawal of 20.2 restoration/enhancement credits from the SCDOT Black River Mitigation Bank. In addition, the applicant must extend Bridge #2 by 122.5 feet on each side and remove any unnecessary causeway that may currently exist in the areas where Bridge #2 will be extended.^[FN21]

and

IT IS FURTHER ORDERED that though the above portions of the NOPD dealing with 401 Water Quality Certification are amended, this case is nonetheless dismissed in keeping with the Findings of Fact and Conclusions of Law contained in this Final Order and Decision.

***23 AND IT IS SO ORDERED.**

Ralph King Anderson III
Administrative Law Judge

FN1. For ease of reference, these bridges will be referred to by numbers One through Four.

FN2. A causeway is "a raised way across wet ground or water." Merriam-Webster Online Dictionary (2006).

FN3. DHEC and the Environmental Groups argue that the conditions they sought to include in the permit constitute "feasible alternatives" to the project. However, there was no evidence that there is a feasible alternative to replacing the four bridges in a manner similar to that proposed by DOT.

FN4. Florence and Hutcheson is a consultant that was hired by DOT to manage the environmental permitting for the 601 Bridge Replacement Project.

FN5. No certified letter containing the June 23, 2006 NOPD was ever sent from DHEC. However, as explained below, I do not find that a certified letter was required at the time of the sending of the NOPD

FN6. Congaree National Park is located west of the US 601 causeway and bridges. Congress has also authorized the national park to expand its boundaries eastward to the confluence of the Congaree and Wateree Rivers. If or when the NPS purchases all of the land authorized for Congaree National Park, the US 601 causeway and bridges would bisect the park.

FN7. In 2003, an employee of a contractor attempting to repair Bridge Four was killed on the job when he fell from scaffolding.

FN8. In making this conclusion, it is notable that this case is a consolidation of separate cases filed by DOT and the Environmental Groups.

FN9. 25A S.C. Code Ann. Regs. 61-101 (A)(4) (Supp. 2006).

FN10. 25A S.C. Code Ann. Regs. 61-101 (A)(6) (Supp. 2006).

FN11. 33 U.S.C.A. § 1341 (a) (1) (1994).

FN12. 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."

FN13. Though I find that DHEC failed to comply with the 60-day time limit, I do not find that failure alone warrants a determination that DHEC waived its right to dictate the terms of the NOPD. Nevertheless, DHEC's failure to comply with the 180-day time frame, especially in light of its failure to comply with the 60-day time limit, does warrant this determination.

FN14. In fact, DHEC concedes that the notice provisions of the prior law apply in making its argument that it was not required to send the notice by certified mailing.

FN15. Prior to the enactment of Act 387, requests for contested case hearings following a DHEC staff decision were filed with the ALC.

FN16. The last time that Regulation 61-72 was amended was April 23, 1993, which was prior to the formation of the ALC. 1993 Act No. 181, § 19 (creating ALC).

FN17. Act 387 also amended S.C. Code Ann. § 1-23-600 (Supp. 2005) to provide that: "All requests for a hearing before the Administrative Law Court must be filed in accordance with the court's rules of procedure. S.C. Code Ann. § 1-23-600 (C) (Supp. 2006). A subsequent statutory amendment may be interpreted as clarifying original legislative intent. Buist v. Huggins, 367 S.C. 268, 625 S.E.2d 636 (2006).

FN18. While mitigation requirements are not applicable in this case, DOT nonetheless has previously agreed to provide compensatory mitigation. Therefore, in keeping with their prior agreement, I presume that DOT will provide compensatory mitigation for this project.

FN19. Though there was much testimony about that impact, the Congaree National Park which is adjacent to the four bridges is still considered a pristine area.

FN20. In fact, the project is consistent with plans for the national park and will not have an adverse impacts on federally protected species or critical habitat.

FN21. I am amending the NOPD in this Decision to set forth what I deem to be a proper resolution of the factual issues in this case in the event the appellate court finds that DHEC did have the authority to proceed with the review of this permit.

2008 WL 1934476 (S.C.Admin.Law.Judge.Div.)

END OF DOCUMENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge

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

RECEIVED
AUG 15 2011
SC Court of Appeals

Duke Energy Carolinas, LLC Respondent,

v.

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

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

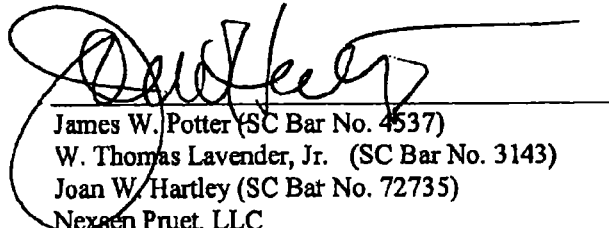
PROOF OF SERVICE

I certify that I have served the Brief of Respondent and Certificate of Counsel on counsel of record for South Carolina Department of Health and Environmental Control, American Rivers and The South Carolina Coastal Conservation League by depositing a copy of it in the United States Mail, postage prepaid, on August 15, 2011, addressed to:

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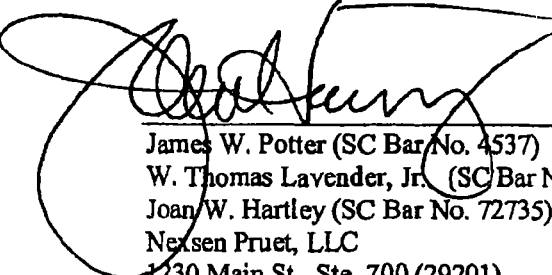
South Carolina Department of Health and Environmental
Control, South Carolina Attorney General, American Rivers, and
The South Carolina Coastal Conservation League. Defendants,

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Brief of Respondent comply with Rule
211(b), SCACR.

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Defendants,

Of whom South Carolina
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and American Rivers and South
Carolina Coastal Conservation
League are,

Appellants.

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AUG 12 2011

NEXSEN PRUET, LLC

FINAL REPLY BRIEF OF APPELLANTS AMERICAN RIVERS AND SOUTH
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The Appellants American Rivers and South Carolina Coastal Conservation League (the “Conservation Groups”) submit this Reply to the brief of Duke Energy Carolinas, LLC (“Duke”), and in further support of their appeal.

RESPONSES TO DUKE’S ARGUMENTS

Duke’s litigation strategy is based upon the disregard of some of the most fundamental black-letter rules governing the conduct of litigation and interpretation of statutes and regulations:

First, Duke did *not* present its counting-the-days argument at the relevant, first opportunity, or even at the second opportunity – but instead kept quiet about this objection until after it lost on the merits.

Second, Duke can prevail *only* by ignoring the plain language of the relevant statutes and regulations. The simple, direct language of Regulation 61-30 and its authorizing statutes sets out the rules governing the tolling of the time period, and DHEC clearly followed those rules. It is undisputed that, if Regulation 61-30 applies, the time period was tolled, and Duke’s argument fails.

Third, Duke asks the Court to *discard* the agency’s interpretation of the regulations and statutes it is charged with administering and enforcing – contrary to the standard rule of interpretation.

Fourth, Duke must impose a sanction upon DHEC, the State of South Carolina, and the people of the State – waiver of the right of South Carolina to protect the water quality for the people of the State – that the Legislature itself *did not* mandate or suggest, and that is far more extreme than and different from the consequence expressly selected by the Legislature.

Finally, Duke would require a waiver of the authority of the State of South Carolina and the waiver of an important and fundamental right of the public – the protection of water quality – *without* a clear, express Legislative determination to do so.

1. Duke cannot hide its timing objection and wait to object until it has lost on the merits.

From the outset, DHEC told Duke how it was counting the days. Duke never objected to DHEC, even though DHEC cited Rule 61-30 in its correspondence to Duke and Duke understood that DHEC was relying on that regulation to determine timing. While its permit application was being considered, Duke never objected or contended that the time period was not tolled while Duke gathered information that it had not yet submitted. Duke never asked if or claimed that waiver had occurred or that the clock had run. In fact, Duke itself controlled the running of the clock, because Duke determined how long it would take to respond to DHEC's requests for information. Duke never objected that it need not gather information because waiver had occurred.

To the utter contrary, instead of claiming that DHEC had waived the right of the State to protect water quality, Duke actually asserted and defended *the validity of the DHEC staff's decision* on appeal before the DHEC Board. Duke never contended that the DHEC staff's decision was a nullity. Rather, Duke affirmed the validity of and sought to gain the full benefit of the agency's decision on the merits.

Only after Duke had lost on the merits before the DHEC Board did Duke pull out its waiver argument. This is a classic "hide-the-ball" litigation tactic. According to Duke, it could conceal its waiver argument and play this card only if it otherwise lost. Duke would like the rules of litigation to permit a party to take the approach of "Heads I win, tails you lose."

Every governing rule bars this sort of gamesmanship in litigation, a process with serious consequences for the litigants and, especially in this instance, for the public at large. "A litigant is not entitled to remain mute and await the outcome of an agency's decision and, if it is unfavorable, attack it on the ground of asserted procedural defects not called to the agency's attention when, if in fact they were defects, they would have been correctible at the administrative level." First-Citizens Bank and Trust Co. v. Camp, 409 F.2d 1086, 1088-89 (4th Cir. 1969). A litigant is equitably stopped from relying upon a time deadline when it "invited the very delay [it] now assert[s] as a defense." Dillon County Sch. Dist. v. Lewis Sheet Metal Works, 286 S.C. 207, 219, 332 S.E.2d 555, 562 (Ct. App. 1983). As well, a litigant waives a position when it remains silent and engages in "[a]cts inconsistent with the continued assertion of a right, such as the failure to insist upon the right." Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981).

Duke hopes to prevail by (1) never asserting or even mentioning its timing theory at a time when the DHEC staff could have reacted to it; (2) remaining silent in the face of DHEC's explanation of how time would be counted; (3) delaying in responding to DHEC's requests for information, thus running out the clock under Duke's theory of counting; (4) encouraging DHEC staff to continue working on its application at a time when Duke claims DHEC had waived its right to make a decision; (5) taking advantage of the DHEC's staff decision on the merits and asking the DHEC Board to adopt it; (6) never asserting the untimeliness of the decision before the DHEC Board or asking the Board to rule that DHEC had waived any rights; (7) then, claiming a waiver only *after* the Board ruled against it on the merits and *after* it was impossible for DHEC to take any action in response.

This is exactly the kind of litigation behavior that the Courts abhor and reject.

2. The plain language of the regulation and the statute demonstrates that the DHEC decision was timely.

Duke can prevail *only if* Regulation 61-30 does not apply to the calculation of the 180-day period for a DHEC decision on a water quality permit. It is undisputed that, if the rules of Regulation 61-30 apply, then the DHEC decision was made within 180 days. Duke tries to avoid that Regulation by arguing that its timing rules apply only for the purpose of calculating refunds of permit fees. That is *not* what the plain language of the Regulation and its authorizing statutes provides.

In defining its purpose and scope, Regulation 61-30 plainly states – without qualification or limitation --that the Regulation “*establishes schedules for timely action on permit applications.*” S.C. Code Regs. 61-30 (A) (emphasis added.).

The Regulation defines “time schedules” generally and does not limit the definition to a refund of fees:

“[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.”

S.C. Code Regs. 61-30 (B) (22). In its brief, Duke emphasizes the phrase “for purposes of this regulation.” However, as set out above, the “purposes of this regulation” include “establish[ing] schedules for timely action on permit applications” – and are not limited to fee refunds.

Likewise, the Regulation describes the methods of tolling the time period, without limiting the effect of tolling to fee refunds. In a section generally titled "Time Schedules," the Regulation provides, among other things:

"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. 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."

S.C. Code Regs. 61-30 (H) (1) (c).

Further, the plain language of the statutes which authorize environmental fees also makes clear that the purpose of those statutes reaches beyond merely charging fees, and also encompasses generally the timely administration of the permitting process.

Those statutes were enacted and fees were authorized "[i]n order to facilitate the proper administration of" environmental laws, including the Pollution Control Act. S.C. Code § 48-2-50 (A) (emphasis added). Duke's position is conclusively rejected by the direct wording of Section 48-2-70, which provides – without qualification or limitation:

"Under each program for which a permit processing fee is established pursuant to this article, *the promulgating authority also shall establish by regulation a schedule for timely action* by the Department of Health and Environmental Control on permit applications under that program. 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."

S.C. Code § 48-2-70 (emphasis added). The consequence of DHEC's failure to live up to the required deadline is refund of the fee. Ibid.

The clear and direct language of the regulations and the statutes controls. Their language is the end of the inquiry. “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.” Miller v. Aiken, 364 S.C. 303, 306, 613 S.E.2d 364, 366 (2005). The timing provisions of Regulation 61-30 are not limited to the granting of refunds. Rather, they apply generally, and a refund of fees is the consequence of DHEC’s failure to abide by them.¹

Duke tries to avoid the plain language of Regulation 61-30 and its authorizing statutes by concocting a supposed conflict with Regulation 61-101. However, there is no conflict in general and certainly no conflict in this situation.

Like Regulation 61-30, Regulation 61-101 sets out a 180-period for consideration of a permit. S.C. Code Regs. 61-101 (A) (6). Nowhere does it address the tolling of the time period while DHEC is processing a permit, as does Regulation 61-30. Instead, Regulation 61-101 provides a procedure when DHEC denies a certification without prejudice or *suspends processing* of an application. S.C. Code Regs. 61-101 (C) (4). Regulation 61-101 contains no instructions for calculating the 180-day period when DHEC does not suspend processing of an application but rather keeps processing the application while requesting information. Those instructions are contained in Regulation 61-30.

¹ The Administrative Law Court labeled S.C. Code §§ 48-2-10 the “Fees Act,” and Duke calls it the “Fund Act,” while Section 48-2-10 adopts the label the “Environmental Protection Fund Act.” However, the title and headings of a statute “may not be construed to limit the plain meaning of the text,” and “they cannot undo or limit what the text makes plain.” Garner v. Houck, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993) (rejecting limitations in a title and holding that rule by its plain language reached further than its title).

In this instance, DHEC never suspended consideration of the application. Instead, the DHEC staff worked with Duke to obtain the necessary information and worked to process the application in a timely way. Under the clear terms of both Regulation 61-30 and Regulation 61-101, the running of the time period was occasionally tolled while Duke gathered additional information, and DHEC reached its decision within the 180-day time period, without ever suspending the processing of the application.

As the Conservation Groups explain in their initial brief, if a reader could find a conflict, the terms of Regulation 61-30 would prevail, and the regulations should be read in a way to reconcile them in accordance with the tolling provisions of Regulation 61-30. But in fact, here, there is no conflict. DHEC never suspended the processing of Duke's application as provided in Regulation 61-101, but instead continued processing the application and decided it within the 180-day period, as calculated under the tolling provisions of Regulation 61-30.

Nor does Responsible Economic Development v. South Carolina Department of Health and Environmental Control, 371 S.C. 547, 641 S.E.2d 425 (2007), require this Court to disregard statutory and regulatory language. Unlike the situation in that case, here both Regulation 61-101 and Regulation 61-30 were expressly enacted to address the South Carolina Pollution Control Act. Duke concedes, and it is undisputed, that Regulation 61-101 addresses permit applications under the Pollution Control Act. Duke Brief at 13.

And so does Regulation 61-30. The Environmental Protection Fund Act, S.C. Code §§ 48-2-10 et seq., expressly applies to and is directed at applications under the Pollution Control Act, including Duke's application in this case. S.C. Code §§ 48-2-30

(B) (1) and 48-2-50 (H) (1). Specifically, the timing regulations contemplated by the Act (Regulation 61-30) expressly apply to “each program for which a permit processing fee is established pursuant to this article,” including the Pollution Control Act under which Duke applied. S.C. Code § 48-2-70.

Regulation 61-30 itself recites that it is adopted pursuant to S.C. Code § 48-2-50. Again, that statute expressly encompasses “each act listed in Section 48-2-30(B).” The Pollution Control Act is the very first act cited by that statute, S.C. Code § 48-2-30 (B) (1).

As set out above, under well-established rules governing the conduct of litigation, Duke is not permitted to rely upon the timing argument that it pulled out only after it lost on the merits. Even if Duke could rely belatedly upon that argument, the language of the governing statutes and regulations demonstrates that DHEC acted timely on Duke’s application.

3. If there were any ambiguity, DHEC’s reasonable interpretation of its own regulations and the statutes it administers must prevail.

Not only was DHEC’s decision timely under the plain language of the governing laws, but it was also timely under DHEC’s interpretation of the regulations, which is due considerable deference. It is a long-established principle that courts give deference to an agency’s interpretation of its own regulations and the statutes it administers. E.g., Glover v. Suitt Constr. Co., 318 S.C. 465, 469, 458 S.E.2d 353, 537 (1995) (agency’s interpretation “will be accorded the most respectful consideration and will not be overruled absent compelling reasons”).

As set out above, the plain language of the statutes and the regulations demonstrates that DHEC processed Duke’s application in a timely manner. Duke’s

convoluted arguments about phrases, clauses, and sections of DHEC's regulations do not create ambiguity where none exists. Moreover, Duke's arguments are premised on the notion that it can disregard DHEC's interpretation of DHEC's own regulations which determine the effect of delays by applicants like Duke upon regulatory time deadlines.

This technical variety of regulation – a procedural regulation enacted by the agency to guide its own internal operations – especially calls for deference to the agency's interpretation. EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 125 (1988) (O'Connor, J., concurring) (explaining that, in case involving agency's interpretation of regulation governing timing of agency action, "deference is particularly appropriate on this type of technical issue of agency procedure") (cited with approval in Edelman v. Lynchburg College, 535 U.S. 106, 123 (2002) (O'Connor & Scalia, JJ., concurring)).

This deference is even more appropriate here, because the alternative is the interpretation of the applicant, Duke, of the effect of its *own* delays and failures to provide complete and adequate information.

4. Duke cannot insert into the statute a penalty that the Legislature did not impose and that is different from and in addition to the Legislature's chosen consequence.

Nowhere did the General Assembly provide that South Carolina waives its right to protect its water quality if DHEC fails to process an application within 180 days; the South Carolina Code and the regulations do not so provide. Instead, the General Assembly provided a very specific consequence for DHEC's failure to comply with the time periods created in the regulations: "If the department fails to grant or deny the permit within the time frame established by regulation, the department shall refund the permit processing fee to the permit applicant." S.C. Code § 48-2-70.

“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.” Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). Even when the Legislature has not set out a consequence for an agency's failure to comply with a time deadline, the Court “will not assume the Legislature intended the [agency] to lose its power to act for failing to comply with the statutory time limit.” Johnston v. S.C. Dep't of Labor, Licensing, and Regulation, 365 S.C. 293, 298, 617 S.E.2d 363, 365 (2005).

The rule in Johnston applies with even more force in a case like this one, where the Legislature *has* spelled out a consequence for an agency's failure to meet a time deadline – but *has not* chosen to deny the agency its power to act. See Dema v. Tenet Physician Servs.-Hilton Head, Inc., 383 S.C. 115, 122, 678 S.E.2d 430, 434 (2009) (refusing to imply a remedy when the Legislature had provided for specific remedies, but not the one suggested); Linder v. Ins. Claims Consultants, Inc., 348 S.C. 477, 496-97, 560 S.E.2d 612, 623 (2002) (same). This rule has yet greater applicability here, because on repeated occasions the Legislature has mandated the approval of applications for failure to act within a specified time period, but did not do so in this instance. See, e.g., S.C. Code § 30-4-30 (c); S.C. Code Regs. 72-305 (B) (2).

5. The authority of the State of South Carolina and the public right to water quality are not waived absent a clear Legislative mandate to do so.

Duke would have the Court find that the State of South Carolina lost its sovereign authority and that the public of South Carolina lost its right to a water quality determination because of an arcane dispute over how to count the tolling periods under

two regulations – when there is not one word in the South Carolina Code or the regulations that provides for such a result.

The policies at stake are not trivial or arcane. At issue are key principles of federalism and the public's right to clean and safe water. "State certifications under Section 401 are essential in the scheme to preserve state authority" and to ensure that "[n]o polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]." S.D. Warren Co. v. Me. Bd. of Envl. Prot., 547 U.S. 370, 386 (2006). The Legislature has declared that it is a fundamental "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" and 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 § 48-1-20.

It is important to underscore that DHEC has determined that Duke's application does *not* satisfy the requirements of the Pollution Control Act.

Much is at stake in this application: the authority of the State of South Carolina, the welfare of its public, and the quality of its waters. Waiver of those rights should not be assumed or implied and should be accepted only upon a clear expression of Legislative intent. As Duke and the Administrative Law Court admit, there is no such clear expression in this case.

ADDITIONAL SUSTAINING GROUNDS

Duke has included four additional sustaining grounds in various sections of its brief. None of them has any merit.

First, Duke contends that the Environmental Protection Fund Act, S.C. Code §§ 48-2-10 et seq., did not repeal any provision of the Pollution Control Act or its regulations. Duke Brief at p. 15. As set out above, there is no need to contend that the Act or Regulation 61-30 repealed any provision of Regulation 61-101, much less any provision of the Pollution Control Act, nor did the Conservation Groups make this argument in their brief as Duke claims. Instead, by their express language, the two Regulations and the two Acts complement each other.

However, if a conflict could be found between the Environmental Fund Act and Regulation 61-30, on the one hand, and Regulation 61-101 on the other, then the terms of Regulation 61-30 would control, as the Conservation Groups explain in their brief. Conservation Groups' Brief at 21-22. Regulation 61-30 is both more recent and more specific.

Second, Duke argues that if there is a conflict between the two regulations, then Regulation 61-101 should control. Duke's Brief at p. 16-17. However, despite its lengthy attempt to do so, Duke cannot overcome the fact that Regulation 61-30 is more recent and that, by its clear terms, it more expressly and specifically addresses the calculation of the 180-day period and describes how to calculate tolling periods.

Third, Duke contends that DHEC is estopped from disputing the effect of its alleged failure to process Duke's application within 180 days, because of a 2008 decision by the same Administrative Law Judge who issued the decision below, South Carolina

Department of Transportation v. South Carolina Department of Health and Environmental Control, 2008 WL 1934476 (S.C. A.L.C. Apr. 12, 2008). Duke's Brief at 25-28 and attachment. For the reasons set out above, the Court need not reach this issue, since Duke cannot assert its belatedly-presented time calculation arguments and since, in any event, DHEC processed Duke's application within the 180-day period.

In addition, Duke has already litigated this issue and lost. This argument was one of the bases for Duke's Motion to Dismiss Appellants' Appeal on the Basis of Mootness and Lack of Standing. Duke Motion to Dismiss Appellants' Appeal on the Basis of Mootness and Lack of Standing (filed January 31, 2011). This Court rejected that argument and denied the motion. Court's Order Denying Duke's Motion (Apr. 20, 2011). Having lost this argument before this Court only recently, Duke cannot bring out this argument a second time.

Even if Duke could make this argument, the Conservation Groups are not estopped from litigating the issue, since they were not parties to the administrative proceeding that Duke cites. Moreover, neither is DHEC, because government agencies in general are not subject to nonmutual collateral estoppel, as the U.S. Supreme Court has held. U.S. v. Mendoza, 464 U.S. 154 (1984). Any other rule would fail to recognize that government agencies are involved in many suits involving many parties, that they must be free to challenge legal decisions before different courts, and that changes in administrations through the democratic process can and may result in different policy choices that affect litigation decisions. Id. at 159-64. As well, "[a]s a general rule, estoppel does not lie against the government to prevent the due exercise of its police

power or to thwart the application of public policy” – as it would in this case. Town of Sullivans Island v. Byrum, 306 S.C. 539, 544, 413 S.E.2d 325, 328 (Ct. App. 1992).

As the U.S. Supreme Court has stated, there is “a great principle of public policy, applicable to all governments alike, which 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, 270 (1986). Even if DHEC made a mistake in an unrelated case three years ago, and even if it did not prevail on some issue in that case, and even if it chose not to prosecute an appeal of that decision, those factors provide no basis for prejudicing the interests of the public – including the Conservation Groups and their members – in the clean and safe water of our State.

As a final argument, Duke contends that the Conservation Groups lack standing. Duke Brief at 28-29. As with the estoppel argument, Duke has already made and lost this argument. Duke moved to dismiss the Conservation Groups’ appeal for alleged lack of standing, and the Court denied the motion. Duke Motion to Dismiss Appellants’ Appeal on the Basis of Mootness and Lack of Standing (filed January 31, 2011); Court’s Order Denying Duke’s Motion (Apr. 20, 2011). Duke cannot re-litigate this point by way of an additional sustaining ground just after losing it on a motion to dismiss the appeal.

As the Conservation Groups explained in their response to Duke’s motion to dismiss, Duke is arguing that even though the Conservation Groups properly intervened and participated as parties to oppose Duke’s challenge to the DHEC Board’s decision before the Administrative Law Court (“ALC”), they now have no standing to appeal the ALC’s order granting summary judgment in favor of Duke on the very same challenge to the very same agency action. This argument, such as it is, must fail.

The Conservation Groups initiated the current matter by challenging DHEC's proposed decision to issue a water quality certification ("WQC") allowing Duke to discharge unacceptably low flows through its hydroelectric power plants on the Catawba-Wataeree River. When the DHEC Board agreed with the Conservation Groups and ordered the denial of the WQC, Duke challenged that denial in the ALC, and the Conservation Groups intervened to protect the same interests that led them to initially challenge the proposed certification. In their motion for leave to intervene filed with the ALC on October 16, 2009, the Conservation Groups described in detail their interest in protecting the Catawba-Wataeree River – and the aquatic wildlife that depends on the river – from excessively low flows, and the injury that would result if Duke succeeds in preventing DHEC from imposing protective conditions on its FERC license through the WQC process. R.p. 412-18.

In response to the motion to intervene, Duke sent a letter to the ALC, stating simply that it took "no position on whether the Court should grant intervention to American Rivers and South Carolina Coastal Conservation League." See R.p. 420. A week later, Duke sent a second letter to the ALC, reversing itself and opposing intervention; it based its opposition not on whether the Conservation Groups met the standard for intervention or for standing, but rather on the basis that the Conservation Groups had asked for certain prehearing deadlines to be extended if necessary, based on the timing of the ALC's order on intervention. See R.p. 421-22. The ALC nevertheless entered an order allowing the Conservation Groups to intervene as full parties under Rule 20 of the Administrative Law Court. R.p. 59-60. Duke did not seek reconsideration of

that order or appeal it; it is therefore law of the case. Charleston Lumber Co., Inc. v. Miller Housing Corp., 338 S.C. 171, 525 S.E.2d 869 (2000).

Even if not barred by waiver, *res judicata*, or estoppel, Duke's standing argument is meritless. Three standards arguably apply to the status of the Conservation Groups: the standards for intervention under the ALC rules, the status of aggrieved party under the appellate rules, and standing. The Conservation Groups satisfy all three. For intervention, an entity must show:

(1) [it] will be aggrieved or adversely affected by the final order; (2) [its] interests . . . 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.

South Carolina Administrative Law Court Rule ("SCALCR") 20(B). The South Carolina Supreme Court has characterized the burden of making this showing as "minimal" "to permit liberal intervention." Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 189-91, 394 S.E.2d 712, 714-15 (1990) (addressing S.C. R. Civ. P. Rule 24, which involves similar requirements to those rules governing intervention in the ALC). The Conservation Groups alleged these factors in their motion for leave to intervene, which Duke did not oppose on the merits and which the ALC granted without restrictions. R.p. 59-60. Duke never appealed from that order and has thus waived the right to challenge it, and it is the law of the case.

Significantly, once a party intervenes, it has all the rights of a party, including the right to appeal adverse rulings. SCALC 20(D) ("A person granted leave to intervene is a party to the proceeding."). Yet, without saying so directly, Duke hints that the Conservation Groups, once allowed to intervene at the trial level, need to make a further showing to establish that they have the right to participate in later stages of the litigation,

as by appealing from the adverse judgment by the ALC. Duke is mistaken on this point, and offers no authority for the proposition.

According to Rule 201, SCACR, “Appeal may be taken . . . from any final judgment, appealable order or decision. . . . Only a party aggrieved by an order, judgment, sentence or decision may appeal.” The erroneous order of the ALC that is the subject of this appeal is undeniably a final judgment. It granted Duke’s motion for summary judgment on the basis that DHEC waived its right to deny the WQC by untimely making its decision. Through its ruling, the ALC resolved all of Duke’s claims against DHEC and the Conservation Groups, leaving no claims left to adjudicate.

Moreover, by erroneously entering judgment in favor of Duke on all claims, the ALC harmed the very interests that the Conservation Groups intervened in order to protect, and the Groups are thus clearly aggrieved by the ALC’s judgment. As they explained in detail in their motion to intervene and as their representatives testified in deposition (see below), an order preventing DHEC from imposing conditions to protect the Catawba-Wateree River – on any basis including, as the ALC ruled, waiver – will adversely affect the Conservation Groups’ interest in protecting and restoring rivers and streams in South Carolina, and will specifically injure their members who use, value, and recreate in the Catawba-Wateree River. Accordingly, the Conservation Groups are aggrieved by the ALC’s final judgment and have properly appealed from it.

It makes little sense for a respondent-intervenor, participating in a role akin to a defendant, to need to establish standing, which is a requirement typically imposed only on plaintiffs. See ATC South, Inc. v. Charleston County, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). To the extent this Court determines that they must show they have

standing, however, the Conservation Groups can meet that standard. South Carolina courts look to United States Supreme Court precedent for the three-part test for standing: (1) an “injury-in-fact” that is “concrete and particularized” and “actual or imminent,” (2) “a causal connection between the injury and the conduct complained of,” and (3) redressibility. Id. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1977)). An organization may show standing by alleging “that it or its members will suffer an individualized injury.” Beaufort Realty Co. v. Beaufort County, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001) (quoting Carolina Alliance for Fair Employment v. S.C. Dep’t of Labor, Licensing & Regulation, 337 S.C. 476, 487, 523 S.E.2d 795, 800 (Ct. App. 1999)).

The Conservation Groups – to the extent possible as participants in this suit as respondents and not as plaintiffs, claimants, or petitioners – established these elements of standing through their unchallenged allegations and deposition testimony. Although no hearing on the merits of the case has yet taken place, the Conservation Groups alleged in their pleadings that they and their members would be directly and imminently injured by a ruling that prevented DHEC from imposing conditions to protect the Catawba-Wateree River from the adverse impacts of Duke’s operation of its hydroelectric power plants, and that these injuries would be redressed by denying Duke the relief it sought. R.p. 412-18; see also R.p. 426-30 (generally describing harms that will result from the relief sought by Duke in this matter).

Moreover, representatives of both of the Conservation Groups testified in deposition, and identified additional witnesses to testify at the hearing, regarding specific

injuries to specific members caused by the low river flows at issue in this matter.² In the case cited by Duke as an example of environmental groups lacking standing, the Court found that the groups failed to establish standing because they did not provide any witness testimony detailing specific injuries to their members. Beaufort Realty Co., 346 S.C. at 302, 551 S.E.2d at 590. In contrast, American Rivers representative Gerrit Jobsis testified that approximately 320 members of his organization live in South Carolina, including those who live in the vicinity of the rivers and the hydroelectric power plants at issue in this case and “use and value” the waters of the river and whose interests “are affected by the operation of [the] dams.” R.p. 435, line 19-p. 436, line 2.. He further testified that among those members were people whose interests include boating, fishing, nature viewing, and other types of river-based recreation, all of which depend on an adequate river flow and a healthy aquatic ecosystem for fish and wildlife of the river and all of which would be enhanced by higher river flows, which is a central issue in this case. R.p. 437, line 2-p. 440, line 4.

Similarly, Coastal Conservation League representative Patrick Moore testified that approximately 5,000 of its members live in South Carolina and that some of those live in the counties along the river whose flow is at issue in this matter. R.p. 441, line 23-p.442, line 15. He further testified regarding two specific members who “regularly use and enjoy the river,” value the health of the species that live in the rivers, and, in

² Duke did not seek the depositions of those specific members during discovery below. Because of concern regarding their members’ privacy and First Amendment rights to assembly, speech, and petition, both representatives declined to name the specific members whose interests were implicated during the deposition, without first having gotten permission from the members. R.p. 436, lines 14-17; R.p. 442, line 24-p. 443, line 25. The Groups, however, identified three of their members as witnesses to establish standing through testimony regarding the Groups’ interests at a hearing on the merits before the ALC. R.p. 448-59.

particular, “regularly boat, photograph, fish up and down the Catawba-Waterree basin,” and he explained that they will be injured by the harm that inadequate flows cause to those interests, activities, and values if Duke prevails in this action. R.p. 442, lines 12-21; R.p. 444, line 1-p. 447, line 11.

Accordingly, the Conservation Groups have more than satisfied their burden to establish standing with the above-described allegations, testimony, and projected hearing evidence. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). The Conservation Groups have indeed have established just the sort of environmental, aesthetic injury for standing in such a case.³

Duke also argues that the Conservation Groups have no standing because their injuries are no different than any other citizen of the State. The latter argument is a red herring; it is applicable only to cases involving taxpayers who seek to base standing on an injury that they have in common with all other taxpaying citizens. ATC South, Inc., 380 S.C. at 198, 669 S.E.2d at 340-41. In other cases, a person can sue even if other citizens share the identical injury.

In addition, as a separate basis for standing, South Carolina courts have “long recognized the ‘public importance’ exception” for cases that “fall within the ambit of important public interest;” in such cases, standing will be conferred “without requiring the plaintiff to show he has an interest greater than other potential plaintiffs.” Id. (citations omitted). In the present case, the protection of river habitat for wildlife and human recreation epitomizes such a public interest. Thus, even assuming that the

³ Even if uniqueness is required, the record here shows that the Appellants’ membership includes those who actually use and are specifically impacted by the degradation of the subject waters. This distinguishes the present matter from a taxpayer appeal.

Conservation Groups, as non-plaintiffs, must show standing and an injury-in-fact to appeal the adverse ruling on Duke's claims, they have standing for this reason also.

In sum, the Court has previously rejected Duke's arguments when it denied Duke's motion to dismiss the appeal. Further, the Conservation Groups were properly granted leave to intervene below, a ruling that Duke has not challenged and by which it is bound. To the extent that they must prove more as respondent-intervenors, the Conservation Groups have established that they are aggrieved by the ALC's entry of final judgment in favor of Duke and that they have standing to participate in the matter and to appeal the ALC's adverse ruling.

CONCLUSION

For these reasons and for the reasons set out in our brief, the Appellants Americans Rivers and the South Carolina Coastal Conservation League respectfully request that the Court reverse the Administrative Law Court's Orders of June 10, 2010, and July 9, 2010.

August 11, 2011


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CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

I certify that the foregoing Final Reply Brief of Appellants complies with Rule
211(b), SCACR.



Christopher K. DeScherer

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

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

Duke Energy Carolinas, LLC,

Respondent,

v.

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

Defendants,

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

Appellants.

CERTIFICATE OF SERVICE

I hereby certify that I am counsel for Appellants in the above-captioned matter,
and that on the 11th day of August, 2011, I served a copy of the foregoing Final Reply
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from the Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge **NEXSEN PRUET, LLC**

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

Duke Energy Carolinas, LLC,

Respondent,

vs.

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

Of Whom South Carolina Department of
Health and Environmental Control, American
Rivers, and The South Carolina Coastal
Conservation League are, Appellants.

FINAL REPLY BRIEF OF APPELLANT
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STATEMENTS OF ISSUES ON APPEAL

Appellant adopts the Statement of Issues on Appeal submitted in Appellant's Brief of Appellant filed with this Court.

STATEMENT

Appellant adopts the Statement submitted in Appellant's Brief of Appellant filed with this Court.

ARGUMENTS

I. THE ALC INCORRECTLY INTERPRETTED REGULATION 61-101 AND REGULATION 61-30 SO AS NOT TO GIVE EFFECT TO BOTH REGULATIONS.

A. Regulation 61-101 and Regulation 61-30 conflict because each has a method of calculating the timing of the Department's review of water quality certifications that cannot be reconciled without producing absurd results.

Duke argues that there is no conflict between the regulations because the time schedule in Regulation 61-30 purports to apply only to the calculation of fees. (Respondent's Brief p. 6). As discussed infra (Section B), the time schedules are mandated by the Legislature to apply to the Department's review of all permits and other authorizations under seven enumerated statutes including the Pollution Control Act, which is the authorizing authority for the Department's issuance of water quality certifications. However, assuming arguendo that the time schedule in Regulation 61-30 only applies to the calculation of fees as Duke advocates, the regulations still conflict because the Department could not legally "earn" its fee. The conflict arises if the Department requests information during the review process. Regulation 61-101 mandates that Department review of an application continues unabated from the date of acceptance of an application until a decision is issued. 25A Code Ann. Regs. 61-101

(A)(6) (Supp. 2010) (“[u]nless otherwise suspended or specified in this regulation, the Department shall issue a proposed decision on all applications within 180 days of acceptance or [(sic)] and application”) (emphasis added). If additional information is needed the only way the Department’s review is halted is a burdensome process that suspends processing permanently. 25A Code Ann. Regs. 61-101 (C)(4) (Supp. 2010). However, under Regulation 61-30, this same review is treated differently in that whenever the Department requests information in writing, by operation of law the Department’s review is “tolled” and does not review until the information is received. 24A S.C. Code Ann. Regs. 61-30(H)(1)(c) (Supp. 2010) (“[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”) (emphasis added). Since each regulation uses the term “shall” the Department is obligated to perform both tasks simultaneously. See Johnston v. South Carolina Department of Labor, Licensing, and Regulation, 365 S.C 293, 296-97, 617 S.E.2d 363, 364 (2005) (stating “[t]he term “shall” in a statute means that the action is mandatory”). This produces the conflict.

To reconcile this conflict the Department has determined that the time schedule in Regulation 61-101 should not be followed. The basis for the Department determination is the fact that the time schedule in Regulation 61-101 governs the procedure the Department should conduct its review, to wit, the 180-day time period; the sixty-day limit for requesting additional information, and the method for terminating Department review. 25A S.C. Code Ann. Regs. 61-101(A)(6), (C)(2), and (C)(4), respectively. Each of these provisions impacts the timing and thoroughness of Department reviews. For example,

the 180-day time period without a tolling provision leaves the Department's review at the mercy of the applicant to provide the requested information in a timely manner and more importantly reduces the time available for review by essentially requiring the Department to "sit on its hands" while awaiting information from the applicant. However, the Department is barred from following such a course of action. Durant v. South Carolina Department of Environmental Control, 361 S.C. 416,420-21, 604 S.E.2d 704, 707 (Ct. App. 2006) (stating that "DHEC must act only within the authority granted to it by the legislature"). Similarly, the sixty (60) day time bar on Department informational requests constrains the thoroughness of the Department's review by artificially reducing the amount of information that the Department can seek, particularly in response to comments received from the public and resources agencies such as the South Carolina Department of Natural Resources.

However, none of these provisions alter the substantive or decision making requirements for water quality reviews. They do not change the requirements that the Department must consider in Regulation 61-101(F), which governs the Department's substantive review of the water quality applications. 25A S.C. Code Ann. Regs. 61-101(F) (Supp. 2010). Indeed, because the time schedule tolling provision allows the Department more time to review an application, the Department's review is enhanced. S.C. Code Ann. § 48-2-70 (providing "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 fee for a thorough and prompt review required by the act under which the permit is sought.") (emphasis added).

Moreover, as the more recent regulation, it is proper that the Department interprets the time schedule in Regulation 61-30 as superseding the time schedule in Regulation 61-101. See Southeastern Freight Lines v. City of Hartsville, 313 S.C. 466, 469, 443 S.E.2d 395, 397 (1994) (“[w]hen two statutes are incapable of reasonable reconciliation, the latest statute passed repeals any earlier statute to the extent of repugnancy between the two statutes”). Accordingly, since the Department’s interpretation reconciles the conflict between the regulations so that all but three provisions of Regulation 61-101 are given full effect and comports with legal precedent, the Court should uphold the Department’s interpretation. See Transportation Insurance Company, et al. v. South Carolina Second Injury Fund, 389 S.C. 422, 699 S.E.2d 687, 689 (2010) (stating “[t]he construction of a statute by an agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons”).

B. Regulation 61-30 was promulgated to carry the purposes of the Environmental Protection Fund Act, which includes creating a time schedule to govern the Department’s review of water quality certification applications.

Despite conceding that Regulation 61-30 applies to the processing of water quality certification applications and was promulgated to carry out the purposes of the Environmental Protection Fund Act, Duke argues that the time schedule imposed by Regulation 61-30 is limited solely to determining “when a refund is due an applicant in Section 48-2-70 of the [Fund] Act.” (Respondent’s Brief, p. 7). This argument is unsupported by the law because the statutory authority for the regulation has no such limiting language. S.C. Code Ann. § 48-2-70. Duke’s reliance on the clause “for purposes of this regulation” in the definition for time schedules is misplaced. See

Sanford v. South Carolina State Ethics Commission, et al., 385 S.C. 483, 498, 685 S.E.2d 600, 608 (2009) (stating that “[a]lthough regulations authorized by the Legislature generally have the force of law, a regulation may not alter or add to the terms of a statute.”) (emphasis added). Indeed, such language would frustrate the statutory mandate that the time schedules ensure a “thorough and prompt review.” See S.C. Code Ann. § 48-2-70.

Moreover, the Department has never interpreted that language as limiting the applicability of the time schedule in Regulation 61-30 to the calculation of fees for review of water quality certification applications. It is well settled that the interpretation of regulation by the agency charged with its administration will be accorded great deference and will not be overruled absent compelling reasons. Transportation Insurance Company, et al., 389 S.C. at 427, 699 S.E.2d at 689, citing Dunton v. South Carolina Board of Examiners in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987). Thus, Duke’s reliance on the language in Regulation 61-30(B)(22) purporting to limit the scope of the time schedules is misplaced.

Conceding this point, Duke forgoes an analysis of S.C. Code Ann. § 48-2-70, “Processing of permit applications; maximum time for review” and instead cites S.C. Code Ann. § 48-2-60, “Challenges to fees; petition, hearing, and determination of challenge,” to support its contention that the time schedule in Regulation 61-30 is limited to challenges of fees. (Respondents’ Brief, p. 7). Duke cites this statute to support its claim that the regulatory time schedules must apply solely to determining challenges to fees because the Department’s “substantive decision” on a permit is appealable under S.C. Code Ann. § 44-1-60. (Respondent’s Brief, pp. 7-8). This claim is meritless

because S.C. Code Ann. § 44-1-60 expressly provides that “[a]ll department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other action of the department which may give rise to a contested case shall be made using the procedures set forth in this section.” S.C. Code Ann. § 44-1-60(A) (emphasis added). Thus, applicant can challenge the Department’s imposition of a fee under S.C. Code Ann. § 44-1-60. Further, even before S.C. Code Ann. § 44-1-60 became the exclusive method for appeal Department permitting decisions, the fact that the Fund Act has an appeal provision for fee challenges did not limit the statutorily mandated time schedules to solely calculating fees in the absence of express.

Finally, Duke’s claim that the South Carolina Supreme Court has acknowledged that “Regulation 61-101 governs the water quality certification process” does not alter the fact that the Legislature intended the time schedules in Regulation 61-30 to govern the Department’s review of water quality certification applications is meaningless in the context of this appeal. (Respondent’s Brief, p. 8). In South Carolina Coastal Conservation v. South Carolina Department of Health and Environmental Control, 390 S.C. 418, 702 S.E.2d 246 (2010), the South Carolina Supreme Court was not asked to review and, in fact, did not determine how the Department is to calculate the running of the time period for reviewing applications for water quality certifications. Rather, the Court was asked to determine the narrow issue of whether the notice provision contained in Regulation 61-101(G)(1) conflicted with the notice provision in the statute governing appeals of Department permitting decisions, S.C. Code § 44-1-60(E). South Carolina Coastal Conservation, 390 S.C. at 430, 702 S.E.2d at 253. Thus, the Court was only reviewing one specific regulatory provision, not applicable in this case, and not analyzing

full force and effect of all provisions of Regulation 61-101. Therefore, Duke's claims do not support the argument that the time schedules in Regulation 61-30 are limited to resolving fee calculation disputes.

C. The ALC incorrectly concluded that the Department failed to act on Duke's WQC application within the 180-day time limit for processing of WQC application under Regulation 61-101.

Duke claims that the Administrative Law Court ("ALC") correctly determined that the Department failed to issue a decision on its water quality certification application within 180 days because the Department did not apply the time schedule contained in Regulation 61-101. As set forth in detail in Section B of this Reply Brief, the Department is mandated by the Fund Act to apply the time schedule in Regulation 61-30 to its review of a water quality certification application. Because of this fact, Duke's argument that the time schedule in Regulation 61-30 is limited to calculating fees is meaningless since the Department is required to use the time schedule in conjunction with its review of the application. Since the time schedules necessarily produce differing results that be cannot reconciled, the schedules conflict and cannot both be used. If the Department were to only use the time schedule in Regulation 61-101 as advocated by Duke, the Department would be in breach of the Fund Act. S.C. Code Ann. § 48-2-70 ("Under each program for which a permit processing fee is established pursuant to this article, the promulgating authority also **shall establish by regulation a schedule for timely action by the Department of Health and Environmental Control on permit applications under that program.** . .") (emphasis added). As a regulatory body, Department is thus obligated to use the schedule contained in Regulations 61-30. Captain's Quarters Motor Inn v. South Carolina Coastal Conservation Counsel, 306 S.C 488, 490, 413 S.E.2d 13,

14 (1991) (stating the Department possesses “only those powers express conferred or necessarily implied for it to effectively fulfill the duties with which it is charged”). Therefore, the Department was obligated to use its power as a regulatory body to interpret the regulations so that it could give effect to both. See City of Columbia, v. South Carolina Department of Health and Environmental Control, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987) (stating regulatory bodies not only have the powers conferred upon them “but also those which must be inferred or implied for it to effectively carry out the duties with which it is charged”). Accordingly, Duke’s claim that the Department was required to review its application in accordance with the Regulation 61-101 time schedule is without merit and should be rejected by the Court.

D. The ALC incorrectly relied on the holding in Responsible Economic Development.

Duke contends that the ALC properly relied upon the case of Responsible Economic Development, et al. v. South Carolina Department of Health and Environmental Control and Wal-Mart Stores East, LP, 371 S.C. 547, 641 S.E.2d 425 (2007) to conclude that the Legislature never intended the time schedule in Regulation 61-30 to apply to the Department’s review of water quality certification applications. (Respondent’s Brief, p. 12). Duke’s reliance on Responsible Economic Development, et al., is misplaced because, as the Supreme Court correctly observed in that case, none of the provisions of the Pollution Control Act (“PCA”) refers to or mandates that regulations promulgated thereto apply to the Stormwater Management and Sediment Reduction Act (“Stormwater Act”), S.C. Code Ann. §§ 48-14-10 et seq. (Rev. 2008 & Supp. 2010) or regulations promulgated thereto. Similarly, the Stormwater Act, which was enacted in 1991, approximately 30 years after the enactment of the PCA, does not refer to or

mandate that regulations promulgated thereto apply to the PCA or regulations promulgated thereto.

This, however, is not the situation regarding the PCA and the Fund Act. The Fund Act, which was enacted in 1993, expressly states that it applies, inter alia, to the issuance of water quality certifications, which are issued pursuant to the PCA. S. C. Code Ann. § 48-2-30(B)(1). Further, the Fund Act mandates that the regulation authorized by the statute shall establish a schedule for timely action of mandated departmental reviews. S.C. Code Ann. § 48-2-70. Thus, Duke's contention that Responsible Economic Development is controlling is meritless.

Further, Duke's contention that the Supreme Court's analysis in Spectre, LLC v. South Carolina Department of Health and Environmental Control, et al., 386 S.C. 357, 688 S.E.2d 844 (2010) is not applicable to this case is also meritless. (Respondent's Brief, p. 14). The pertinent issue in Spectre, was whether Responsible Economic Development, et al. barred the Department's review of stormwater permits for consistency with the Coastal Management Program, S.C. Code Ann. § 48-39-80 (Rev. 2008 & Supp. 2010). Spectre, 386 S.C. at 371, 688 S.E.2d at 851. In distinguishing Responsible Economic Development, et al., the Court held that "[t]he instant case differs from Responsible Economic Development because S.C. Code Ann. § 48-39-80 provides explicit statutory authorization to apply the CMP to state permits. When a state stormwater permit is sought, DHEC is authorized to enforce the CMP." Spectre, 386 S.C. at 371, 688 S.E.2d at 851 (emphasis added).

Here, the Fund Act, as the Coastal Management Program at issue in Spectre, mandates that its requirements "shall" apply to the PCA and all its the most recent

legislation, the Fund Act, expressly states that it applies to the regulations authorizing the issuance of permits, licenses, certifications, and registrations authorized by the PCA. See S.C. Code Ann. § 48-2-70 (“Under each program for which a permit processing fee is established pursuant to this article, the promulgating authority also shall establish by regulation a schedule for timely action by the Department of Health and Environmental Control on permit applications under that program.”) (emphasis added); see also, S.C. Code Ann. § 48-39-80(B)(11) (“In devising the management program the department shall consider all lands and waters in the coastal zone for planning purposes. In addition, the department shall [d]evelop a system where by the department shall have the authority to review all state and federal permit applications in the coastal zone, and to certify that these do not contravene the management act.”) (emphasis added). Accordingly, Duke’s contentions that the application of the time schedules in Region 61-30 to Department review of water quality certification applications under Regulation 61-101 are barred by the holding in Responsible Economic Development, et al., and that Spectre, are distinguishable and meritless, and should be rejected by the Court.

E. The time schedule Regulation 61-30 is more than the schedule in Regulation 61-101 and as the last enacted regulation governs the timing of the Department’s review of water quality certification applications.

As an additional sustaining ground, Duke contends that the Department incorrectly interprets Regulation 61-30 as the more specific regulation in light of South Carolina Coastal Conservation v. South Carolina Department of Health and Environmental Control, 390 S.C. 418, 702 S.E.2d 246, (2010). (Respondent’s Brief, p. 16). However, the South Carolina Supreme Court in South Carolina Coastal Conservation, did not review the appropriateness of the time schedule in light of mandate

in Section 70 of the Fund Act. Although, the Court's holding that "the notice provisions in Regulation 61-101 does not add to or alter § 44-1- 60(E), and the regulation therefore remains valid" suggests that if that Court were to review this matter it would have little trouble concluding that the mandatory language in Section 70 of the Fund Act imposing a time schedule on all permits issued under the PCA, at a minimum, adds to Regulation 61-101 and is in fact supportive of the Department's interpretation that the time schedule imposed by the Fund Act supersedes the time schedule in Regulation 61-101.

Similarly, Duke's contention that the language in Regulation 61-30 defining the term "time schedules" limits the schedules to the calculation of fees is misplaced. As discussed supra (Section I-B), the "for the purposes" language cited by Duke in the definition of "time schedules" contained in Regulation 61-101 does limit the use of the schedule because the Legislature placed no such limitation in the authorizing statute. Nowhere does the statute limit the schedules to calculation of fees. Indeed, the purported limiting language in definition section of Regulation 61-30 cannot limit the application of the statutorily mandated schedule absent an amendment of Section 70 of the Fund Act. See Sanford, 385 S.C. at 498, 685 S.E.2d at 608 (stating that "[a]lthough regulations authorized by the Legislature generally have the force of law, a regulation may not alter or add to the terms of a statute.") (emphasis added).

Moreover, it is settled law that the interpretation of regulation by the agency charged with its administration will be accorded great deference and will not be overruled absent compelling reasons. Transportation Insurance Company, et al., 389 S.C. at 427 699 S.E.2d at 689, citing Dunton v. South Carolina Board of Examiners in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987). Since the Department has never

interpreted that language in Regulation 61-30(B)(22) to limit the applicability of the time schedule to the calculation of fees for review of water quality certification applications, Duke's reliance on the language in Regulation 61-30(B)(22) purporting to limit the scope of the time schedules is misplaced.

Finally, Duke's contention that the title of Regulation 61-30 is dispositive is without merit. The regulation at issue in Spruill v. Richland County School District 2, 363 S.C. 61, 609 S.E.2d 524 (2005) is distinguishable from Regulation 61-30. Regulation 67-609 is a provision found in the Contested Case Procedure for the South Carolina Workers Compensation Commission. See 25A S.C. Code Ann. Regs. 67-202 through 67-1603 (Supp. 2010). The Contested Case Procedure consists of twelve (12) individual regulations, each of which addresses a single issue. In particular, Regulation 67-609, which is entitled "Withdrawing a Request for Hearing" takes up less than one page in the Code book and has four subsections, some of which are divided in additional subdivisions. In addition, none of these subsections has a title. See generally, 25A S.C. Code Ann. Regs. 67-609.

In contrast, Regulation 61-30 is a comprehensive regulation divided into ten (10) sectional headings listed alphabetically A through J. Section (H) is the section entitled "Time Schedules." See generally, 24A S.C. Code Ann. Regs. 61-30. Moreover, as argued several times above, the scope of the "time schedules" contained in Regulation 61-30 were established by Section 70 of the Fund Act, and cannot be limited by language contained in the regulation. See Sanford, 385 S.C. at 498, 685 S.E.2d at 608. Similarly, as argued previously, the Department has never interpreted Regulation 61-30 or its time

schedules as limited to fee calculation. See Transportation Insurance Company, et al., 389 S.C. at 426, 699 S.E.2d 689. Accordingly, Duke's arguments are without merit.

II. THE ALC ERRED IN HOLDING THAT THE DEPARTMENT WAIVED ITS RIGHT TO ISSUE A WATER QUALITY CERTIFICATION TO DUKE.

A. The Department complied with the 180 time period for processing Duke's water quality certification application.

Although couched in terms of the giving effect to mandatory language in Regulation 61-101, Duke again argues that Regulation 61-101 controls all aspects of the Department's review of water quality certification applications. (Respondent's Brief, pp. 17-22). As discussed above in Argument I and its subparts, the time schedule in Regulation 61-101 has been superseded by statute and the Department can no longer give effect to it. Since the Department is obligated to follow the legislative mandate in the Fund Act, the Department would be acting in derogation of its duty to follow duties imposed by statute. Captain's Quarters Motor Inn, 306 S.C. at 490, 413 S.E.2d at 14. Accordingly, Duke's claim is without merit.

B. The ALC incorrectly found that the 180-day time frame as determined by Regulation 61-101 constituted a "reasonable period of time" for State action on a certification request.

Duke contends that the ALC correctly determined that the 180-day time frame in Regulation 61-101 satisfied the statutory time period mandated by the Federal Clean Water Act because the Regulation incorporates the term "shall." (Respondent's Brief, p. 17-18). The Legislature, however, has chosen to supersede the regulatory mandate in Regulation 61-101 by the statutory mandate in the Fund Act. See S.C. Code Ann. § 48-2-70. Since the Fund Act is a statute and constitutes the most recent expression of

legislative intent, the ALC erred in determining that the 180-time frame in Regulation 61-101 constituted the “reasonable period of time” for the Department’s action on Duke’s application.

C. The ALC erred in concluding that the consequence of the Department’s purported failure to issue or deny Duke’s application within the 180-day time period as determined by Regulation 61-10 constituted a waiver.

Duke’s argument that the ALC correctly determined that the Department had waived the State’s right to issue a certification decision in response to Duke’s application for a water quality certification is without merit. In addition to all the reasons previous stated regarding the fact that the timing of the reviews of water quality certification applications has been governed by Regulation 61-30 since 1995, the ALC’s decision was in contravention of the time schedule in Regulation 61-101.

Regulation 61-101 provides two time frames for the review of applications, one year and 180-days. 25A S.C. Code Ann. Regs. 61-101(A)(6) (“[t]he 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 . . . the Department shall issue a proposed decision on all applications within 180 days of acceptance or an (sic) an application”). If the Department does not meet the one-year time period, the regulation mandates that the Department has waived its authority to issue a certification decision. However, if the Department does not meet the 180-day time period, the regulations is consciously silent.

In its Brief, the Department argued that ALC’s decision contravened the South Carolina Supreme Court’s precedence in Johnston v. South Carolina Department of Labor, Licensing & Regulation, 365 S.C. 293, 617 S.E.2d 363 (2005). (Department’s

Brief, p. 34-36). Duke challenges the application of this case on the purported ground that the holding is limited to an agency's action when it is action in a quasi-judicial capacity. (Respondent's Brief, p. 21). While it is true that the Court in Johnston engaged in an analysis of subject-matter jurisdiction, it did so because that was the issue before the Court – whether the Disciplinary Board's failure to act within a statutorily mandated time frame barred its ability to act thereafter. Indeed, the case cited by the Court in Johnston, to support its decision that the Board was not barred from acting outside the statutory time period was Brock v. Pierce County, 476 U.S. 253, 1006 S.Ct. 1834, 90 L.Ed.2d 248 (1986).

The issue in Brock was whether the Secretary of Labor lost the power to recover misused funds after the expiration of the statutory time period. As explained by the Supreme Court, Section 106(b) of the Comprehensive Employment and Training Act ("CETA") provides that "whenever the Secretary has reason to believe, through a complaint, an audit, or otherwise, that any grant recipient is misusing CETA funds or violating any statutory or regulatory standards, the Secretary 'shall investigate the matter.' The same section goes on to require that the Secretary 'shall' determine 'the truth of the allegation or belief involved, not later than 120 days after receiving the complaint.'" Brock, 476 U.S. at 255-56, 106 S.Ct. at 1837. The Supreme Court held that "CETA's requirement that the Secretary 'shall' take action within 120 days does not, standing alone divest the Secretary of jurisdiction to act after that time." Brock, 476 U.S. at 266, 106 S.Ct. at 1842.

The South Carolina Supreme Court in citing Brock included a parenthetical explaining the salient points of the case that it felt were applicable to its decision in

Johnston. Despite the fact that the facts in Brock hinged in part on the Secretary's authority to investigate and enforce matters arguably quasi-judicial in nature, the Johnston Court expanded the scope of Brock so that the holding is applicable to all agency action in which the statute in question does not expressly set a time limit and specify a consequence. Johnston, 365 S.C. at 298, 617 S.E.2d at 365, citing Brock ("courts should not assume Congress intended agency to lose its power to act; agency does not lose jurisdiction for failing to comply with statutory time limit unless statute expressly sets time limit and specifies a consequence") (emphasis in origin and added). Accordingly, there is no merit to Duke's attempt to distinguish Johnston on the ground that its applicability is limited to "quasi-judicial" cases.

III. THE DEPARTMENT'S APPEAL OF THE ALC'S GRANT OF SUMMARY JUDGMENT OF RESPONDENT IS NOT BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

Duke's claim that the Department is barred by the doctrine of nonmutual collateral estoppel from appealing the ALC's decision to grant summary judgment to Duke is not supported by the law. As a threshold matter, before the ALC, Duke did not claim that prior case barred the Department from litigating the issues contained in the Motion for Summary Judgment. The doctrine of collateral estoppel, as sought to be used in this case, is an affirmative defense that must be specifically pled. Normandy Corporation v. South Carolina Department of Transportation, 386 S.C. 393, 408, 688 S.E.2d 136, 144 (Ct. App. 2009), rehearing denied, (2010) (stating that "'the defense of preclusion by a former judgment is an affirmative defense which ordinarily must be specifically pleaded"). "The failure to plead an affirmative defense is deemed a waiver of the right to assert it." Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 615, 703

S.E.2d 221, 225 (2010) quoting Whitehead v. State, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002). Duke did not comply with these fundamental requirements. Specifically, Duke, neither specially pleaded in its Motion for Summary Judgment nor its Reply to the Responses of the Department and the Environmental Groups that pursuant to South Carolina Department of Transportation v. South Carolina Department of Health and Environmental Control, et al., Docket No. 06-ALJ-07-0804-CC, 2008 WL 1934476 (April 12, 2008 S.C.A.L.C) (hereinafter “Highway 601 case”) it was entitled to summary judgment as a matter of law because of nonmutual collateral estoppel. Further, although raised in discussion, Duke did not specially plead nonmutual collateral estoppel as a basis for granting it summary judgment during the oral argument of its motion before the ALC. See (R. p. 348, line 23 – p. 349 line 6; R. p. 355, line 16 – p. 356, line 11). Duke’s failure to specially plead the doctrine of collateral estoppel constitutes an irrevocable waiver of the affirmative defense, which unlike a claim of subject matter jurisdiction, bars Duke from asserting this claim on appeal. See Duckett v. Goforth, 374 S.C. 446, 465, 649 S.E.2d 72, 82 (Ct. App. 2007)(holding “collateral estoppel is an affirmative defense that must be pled” and barring the Respondent’s attempt to raise it on appeal); see also, Jones v. State Farm Mutual Auto Insurance Company, 364 S.C.222, 235, 612 S.E.2d 79, 726 (Ct. App. 2005) (holding issue of collateral estoppels not preserved because it was not raised below).

Even if Duke had specifically pleaded the defense as required under this Court’s precedent, Duke’s claim would still fail. South Carolina follows the general rules of collateral estoppel set forth in the Restatement (Second) of Judgments. South Carolina Property and Casualty Insurance Guaranty Association v. Wal-Mart Stores, Inc., 304 S.C.

210, 213, 403 S.E.2d 625, 627 (1991) (adopting the general rules of collateral estoppel set forth in Restatement (Second) of Judgments §§ 27, 28, and 29 [1982]). Under these rules, issue preclusion in subsequent litigation with other, or nonmutual collateral estoppel is not appropriate when “[t]reating the issue as conclusive would be incompatible with an applicable scheme of administering the remedies in the actions involved.” Restatement (Second) of Judgments § 29(1).

As a contested case proceeding, this case arose in the ALC. In general, rulings by individual administrative law judges are not binding on other judges of the court. In order to make a ruling binding on other administrative law judges, the procedures set forth in Rule 70, Rules of Procedure for the Administrative Law Court (“RPALC”) governing “Judges Sitting En Banc” must be followed. See Cost Plus, Inc. v. South Carolina Department of Revenue, Docket No. 05-ALJ-17-0256-CC, 2005 WL 3062001 (S.C. Adm. Law Judge Div.) (holding en banc decision in Piedmont Petroleum Corporation v. South Carolina Department of Revenue, Docket No. 03-ALJ-17-0337-CC (S.C. Admin. Law Ct. July 20, 2004)(en banc) construing S.C. Code Ann. § 61-4-510(A) and § 61-6-210(C) on the question of the authorization of the sale of beer and wine for off-site consumption on Sundays binding and granting the Department of Revenue’s motion for summary judgment denying the Petitioner’s application for a license); see also, South Carolina Dept. of Revenue v. Blue Moon of Newberry, Inc., 387 S.C. 467, 471-472, 693 S.E.2d 21, 23 (2010) (noting the lower court had found informative and persuasive a nonbinding prior decision of the ALC). Under Rule 70, a party to contested case proceeding can request en banc consideration of a matter by filing a petition with the Clerk of the Court. Rule 70(C), RPALC. The rule also allows the administrative law judge presiding over a

contested case to at anytime during the proceedings to request en banc consideration of an issue. Id. Thus, had the Court in the Highway 601 case wanted the decision in that case binding on the Department in future litigation, that Court could have made a request in accordance with Rule 70(C), RPALC. Since that Court and the parties to that case, made no such request, as a matter of law, the decision in the Highway 601 case is not binding upon the ALC decision at bar, a fact reflected in the decision under review. Indeed, the administrative law judge who presided over the Highway 601 case is the same judge who rendered the decision now under review. Therefore, under the exception set forth in Restatement (Second) of Judgments § 29(1), nonmutal collateral estoppel does not apply.

Duke's claim that nonmutal collateral estoppel forecloses the Department's appeal is also undermined by the nature of the issue it seeks to preclude. The law of nonmutal collateral estoppel excludes circumstances when "[t]he issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based." Restatement (Second) of Judgments § 29(7). Accordingly, collateral estoppel does not bar this Court from deciding this appeal on the merits.

CONCLUSION

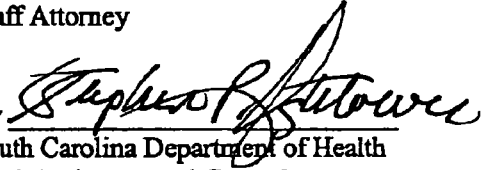
For the reasons stated, this Court should verse the Final Order and Judgment of the Administrative Law Court and remand the case to that Court for merits hearing.

Respectfully submitted,

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August 18, 2011
Columbia, South Carolina

**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

Duke Energy Carolinas, LLC, Respondent,

vs.

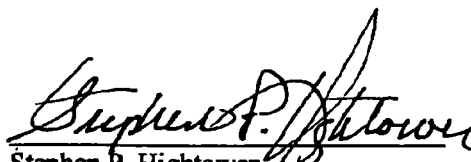
South Carolina Department of Health and
Environmental Control, South Carolina
Attorney General, American Rivers, and The
South Carolina Coastal Conservation League, Defendants,

Of Whom South Carolina Department of
Health and Environmental Control, American
Rivers, and The South Carolina Coastal
Conservation League are, Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b),
SCACR.

August 22, 2011


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

Duke Energy Carolinas, LLC, **Respondent,**

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

Of Whom South Carolina Department of Health and Environmental Control, American Rivers, and The South Carolina Coastal Conservation League are, Appellants.

I, Sandra R. Wessinger, Paralegal for the South Carolina Department of Health and Environmental Control, hereby certify that I have on this 22nd day of August, 2011, served a copy of *South Carolina Department of Health and Environmental Control's Final Reply Brief of Appellant* upon all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid, addressed as follows:

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August 22, 2011
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

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

Duke Energy Carolinas, LLC Respondent,

v.

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

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

RESPONDENT'S PETITION FOR REHEARING

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SC Court of Appeals

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondent Duke Energy Carolinas, LLC (“Duke”) respectfully petitions this Court for a rehearing of Opinion No. 5062 issued December 12, 2012 (“Opinion”). The basis for this petition is that the Opinion overlooks and misapprehends key points of law. Specifically, the Court’s interpretation of Regulation 61-30 effectively repeals relevant provisions of Regulation 61-101 despite the absence of the requisite express or implied intent to give such effect to Regulation 61-30. Indeed, the Court’s application of the tolling provision of Regulation 61-30, for the calculation of the 180-day fee refund period, to DHEC’s decision under Regulation 61-101 creates a conflict between the two regulations which would not otherwise exist. Additionally, in support of this interpretation, the Court improperly distinguishes this case from the holding in *Responsible Economic Development v. South Carolina Dep’t of Health and Envtl. Control*, 371 S.C. 547, 549, 641 S.E.2d 425, 426 (2007). Finally, the Court improperly interpreted the legal effect of the DHEC staff statements to Duke regarding tolling of the 180-day time period for a fee refund provided in Regulation 61-30 and improperly characterized such statements as an agency interpretation entitled to deference by the Court.

I. THE COURT’S INTERPRETATION OF REGULATION 61-30 EFFECTIVELY REPEALS THE SUSPENSION PROVISIONS OF REGULATION 61-101 DESPITE THE ABSENCE OF AN IMPLIED OR EXPRESS REPEAL OF SUCH PROVISIONS IN EITHER THE ENVIRONMENTAL PROTECTION FUND ACT OR REGULATION 61-30.

The Court finds that Regulation 61-30 “allows for tolling as well as suspension of the time schedule” and further finds that the “tolling provisions of 61-30 are also applicable to Regulation 61-101.” Opinion, p. 11. This attempt to blend the running of

the 180-day time periods in Regulation 61-101 and 61-30 effectively repeals the suspension provisions which govern the running of the 180-day time period in Regulation 61-101. Regulation 61-101 provides for very specific circumstances under which the running of the 180-day time period for review of an application for a water quality certification ("WQC") may be suspended by DHEC. These circumstances are far more narrow than those under which the running of the 180-day period is tolled under Regulation 61-30.

The Court's effort to reconcile the running of the separate 180-day time periods in these Regulations effectively negates relevant provisions of Regulation 61-101. Specifically, Section (H)(1)(c) of Regulation 61-30 tolls the running of the 180-day time period for a fee refund upon the written request of information from an applicant. Such time is tolled until DHEC receives the requested information. 24A S.C. CODE ANN. REGS. § 61-30(H)(1)(c) (Supp. 2011) Under Regulation 61-30, the 180-day time period for a fee refund is tolled as of the date on which DHEC makes the written request for information from the applicant. In contrast, Section (C) of Regulation 61-101 suspends the running of the 180-day time period for an action on a WQC application only when a DHEC request for additional information is not timely provided by the applicant according to the deadline stated in the request, DHEC determines that such information is necessary to its decision on the application, and DHEC provides the applicant with notice that the processing of the WQC application is suspended.

Obviously, the criteria for suspending a WQC application under Regulation 61-101 is much more demanding than tolling under Regulation 61-30 and requires additional consideration by DHEC on the effect of the absence of requested information.

Regulation 61-101(A) expressly provides that DHEC must act on a WQC application within 180 days: “Unless otherwise suspended or specified in this regulation, the Department shall issue a proposed decision on all applications within 180 days of acceptance or [sic] an application.” 25A S.C. CODE ANN. REGS. § 61-101(A)(6) (Supp. 2011) (emphasis added). Regulation 61-101 clearly establishes specific conditions under which processing of a WQC is suspended and the 180-day clock stops. Regulation 61-101 provides that DHEC may suspend its processing of the WQC application if the federal licensing agency suspends processing of the application for the license. 25A S.C. CODE ANN. REGS. § 61-101(A)(6) (Supp. 2010). Regulation 61-101(C)(4) also authorizes DHEC to suspend processing of the WQC application when the applicant fails to provide additional information requested by DHEC. However, unlike the tolling provisions in Regulation 61-30, Regulation 61-101 provides that DHEC’s request for additional information suspends processing of the WQC application only when all of the following criteria are met:

- First) DHEC requests additional information and specifies a time for submittal of the additional information;
- Second) Information requested is not timely submitted to DHEC;
- Third) DHEC determines that such information is necessary to reach a decision on the application; and
- Fourth) DHEC gives the applicant notice that the certification is denied without prejudice or that processing is being suspended.

See 25A S.C. CODE ANN. REGS. § 61-101(C)(4) (Supp. 2010). If tolling under Regulation 61-30 is applied to the calculation of time under Regulation 61-101, then the 180-day clock under Regulation 61-101 will be stopped when only the first of the four criteria identified is partially met since the written request for information under

Regulation 61-30 need not even include a deadline for submittal of the requested information. Moreover, the second, third and fourth criteria expressly specified in the regulation will become meaningless. The application of tolling under Regulation 61-30 to the calculation of the 180-day time period in Regulation 61-101 thereby drastically alters the method for making such calculations and effectively repeals Section (C)(4) of Regulation 61-101.

Although the Court's application of tolling under Regulation 61-30 to the calculation of the 180-day period under Regulation 61-101 effectively repeals relevant provisions of Regulation 61-101 which govern suspension of DHEC's processing of a WQC application, neither the Environmental Protection Fund Act, S.C. CODE ANN. §§ 48-2-10 *et seq.* ("Fund Act"), nor Regulation 61-30 contains an express repeal of any provision of Regulation 61-101. The Court finds that the Fund Act's "plain language indicates the time schedule provided in Regulation 61-30, as well as any corresponding explanation of how to count the days in that time schedule, would be applicable to any previous regulation under which the permit is authorized." Opinion, p. 10. However, while time schedules *for a fee refund* under Regulation 61-30 apply to permits authorized by prior regulation, the Fund Act does not provide that a regulation promulgated pursuant to the Fund Act amends or supersedes *permitting requirements* promulgated under a prior regulation. Indeed, Section 48-2-70 expressly provides that the sole effect of failure to meet the time frame in Regulation 61-30 is the refund of the application fee imposed under the Regulation.

Under each program for which a permit processing fee is established pursuant to this article, the promulgating authority also shall establish by regulation a schedule for timely action by the Department of Health and Environmental Control on permit applications under that program. 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.

S.C. CODE ANN. § 48-2-70 (2008). Neither this provision of the Fund Act nor Regulation 61-30 promulgated thereunder expressly repeals any provision of prior regulations establishing the procedural and substantive requirements governing DHEC permitting decisions.

Additionally, neither the Fund Act nor Regulation 61-30 implicitly repeals any provision of prior permitting regulations, including Regulation 61-101. "Repeals by implication are not favored by courts and to repeal a statute on account of an asserted conflict or repugnancy with another, 'the repugnancy must not only be plain, but the provisions of the two statutes must be incapable of any reasonable reconciliation; for if they can be construed so that both can stand, the Court will so construe them.'" *City of Rock Hill v. South Carolina Dep't of Health and Envtl. Control*, 302 S.C. 161, 167-68, 394 S.E.2d 327, 331-32 (1990) (quoting *Pearson v. Mills Mfg. Co.*, 82 S.C. 506, 509, 64 S.E. 407, 409 (1909)). Unquestionably, neither the Fund Act nor Regulation 61-30 is repugnant to Regulation 61-101. As discussed fully in Respondent's Brief, Regulation 61-30 and 61-101 were enacted under different enabling statutes to achieve distinctly different purposes. Regulation 61-30 is promulgated pursuant to the Fund Act. The purpose of the Fund Act is to establish a fund separate from the State's general fund to be used to defray DHEC's costs in administering certain regulatory programs, including permitting programs under the Pollution Control Act. S.C. CODE ANN. §§ 48-2-30 and -

40 (2008 and Supp. 2010). Regulation 61-30 expressly provides for the limited application of the time schedules defined therein.

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

24A S.C. CODE ANN. REGS. § 61-30(B)(22) (Supp. 2011) (emphasis added). There is no doubt that the “time schedules” set forth in Regulation 61-30 are solely “for purposes of this regulation” and established in accordance with Section 48-2-70 of the Fund Act which provides for refund of fees upon DHEC’s failure to process application within the time period established by regulation. Additionally, the Fund Act requires DHEC to establish a process whereby the applicant may appeal the calculation of the fee.

A person required to pay the fees set forth in this article who disagrees with the calculation or applicability of the fee may petition the department for a hearing by submitting a petition setting forth the fee which is challenged, the grounds on which relief is sought, and the total amount of the fee due. The petition and the fee must be received by the department no later than thirty days after the due date. The hearing must be conducted in accordance with contested case provisions set forth in the Administrative Procedures Act and department regulations. If it is finally determined that the amount in dispute was improperly assessed, the department shall return the amount determined to be improperly assessed with interest not to exceed the statutory rate.

S.C. CODE ANN. § 48-2-60 (2008). Accordingly, the Fund Act provides for appeal of the calculation or application of a fee authorized by the Act only—not for an appeal of the substantive decision on a permit application. This narrow appeal provision is further evidence of the limited legislative purpose of the Fund Act.

Regulation 61-101, in contrast, was promulgated pursuant to the Pollution Control Act to satisfy Section 401 of the Clean Water Act. As Judge Thomas notes in her dissent, the requirements of the Clean Water Act “include prompt action by state agencies on requests for water quality certification, an objective important enough to warrant a legislative mandate in the Clean Water Act that unreasonable delay by a state agency in acting on such a request for water quality certification would be tantamount to a waiver by the State of its right to deny certification and thus delay the applicant’s pursuit of any federal license or permit for which state water quality certification is a prerequisite.” Opinion, p. 15 (citing *South Carolina Coastal Conservation League v. South Carolina Dep’t of Health & Envtl. Control*, 390 S.C. 418, 430, 702 S.E.2d 246, 253 (2010), which states that Regulation 61-101 “establishes procedures and policies for implementing water quality certification requirements of Section 401 of the Clean Water Act”). Regulation 61-101 provides not only the criteria for DHEC’s substantive decision on a WQC certification, but also the procedural requirements and deadlines established to conform to the statutory framework of Section 401 of the Clean Water Act.

Unquestionably, Regulation 61-101 and Regulation 61-30 are not repugnant and can be easily reconciled. The purpose of Regulation 61-101 is to establish the procedures and criteria by which DHEC makes a water quality certification decision as required by Section 401 of the Clean Water Act. The purpose of Regulation 61-30, in contrast, is to establish the procedures and criteria to carry out the purposes of the Fund Act, which authorizes the collection of application fees to be placed in a special fund separate from the State’s general fund. Despite the absence of any repugnancy between Regulation 61-30 and Regulation 61-101, this Court interprets the application of the

tolling provisions of Regulation 61-30 in a manner than implicitly repeals the operation of the suspension provisions of Regulation 61-101. "Repeals by implication are not favored by courts and to repeal a statute on account of an asserted conflict or repugnancy with another, 'the repugnancy must not only be plain, but the provisions of the two statutes must be incapable of any reasonable reconciliation; for if they can be construed so that both can stand, the Court will so construe them.'" *City of Rock Hill v. South Carolina Dep't of Health and Envtl. Control*, 302 S.C. 161, 167-68, 394 S.E.2d 327, 331-32 (1990) (quoting *Pearson v. Mills Mfg. Co.*, 82 S.C. 506, 509, 64 S.E. 407, 409 (1909)) (emphasis added). In this case, Regulation 61-30 and 61-101 are capable of a "reasonable reconciliation." Indeed, the ALC interpreted these regulations in a manner that reconciles the differences in the calculation of time periods under each regulation and allows all provisions of both regulations to stand. Accordingly, the ALC's decision should be affirmed.

II. THE COURT'S APPLICATION OF THE TOLLING PROVISION OF REGULATION 61-30 TO THE CALCULATION OF THE 180-DAY TIME PERIOD UNDER REGULATION 61-101 CREATES A CONFLICT BETWEEN THE TWO REGULATION WHICH DOES NOT OTHERWISE EXIST.

Regulation 61-30 sets the time period for DHEC's decision on a WQC application at 180 days. The Court notes that the 180-day time schedule for processing a WQC application under Regulation 61-30 "mirrors Regulation 61-101's time schedule for permit review." Opinion, p. 11. The Court further notes that "many portions of Regulation 61-30's requirements and procedures regarding the application procedure mirror the requirements in Regulation 61-101." *Id.* The Court thus concludes: "Reading the statutory mandates and regulatory requirements in their plain and ordinary

sense indicates that Regulation 61-30 and 61-101 were to be read together to provide DHEC more flexibility in the processing of permits. Both of the regulations can exist without one negating the other, as Regulation 61-30 clarifies how Regulation 61-101's 180-day time period of review will be counted." *Id.* (footnote omitted). As a preliminary matter, the reference to the 180-day time frame in both Regulation 61-30 and 61-101 does not support the Court's ruling. For example, Regulation 61-101 also mandates a 60-day time period for DHEC's review of certain activities requiring a WQC. 25A S.C. CODE ANN. REGS. § 61-101(F)(4) (Supp. 2011). While Regulation 61-30 may be read to provide for greater flexibility for determining when DHEC's failure to timely process an application requires the refund of an application fee, such flexibility cannot be extended to change the required time periods for review of all WQC applications, including those subject to the 60-day time period under Regulation 61-101. The Court's reasoning is therefore flawed.

The Court's application of the "time schedule" provisions of Regulation 61-30 to Regulation 61-101 does not harmonize the two regulations, but in fact creates direct conflicts where none would otherwise exist. The most obvious conflict is the difference in the 60-day time period for certain WQC applications under Regulation 61-101 and the 180-day time period for a fee refund for all WQC applications under Regulation 61-30. Moreover, as discussed above, the Court's application of the tolling provision of Regulation 61-30 to the calculation of the 180-day time period under Regulation 61-101 renders Section (C)(4) of the Regulation meaningless. Indeed, the only means of harmonizing the two regulations to give effect to both is the ALC's interpretation. The ALC's decision harmonizes these two regulations by interpreting differing methods of

calculating the 180-time periods in a manner which gives full effect to both regulations. "It is well settled that statutes in apparent conflict should, if possible, be construed so as to allow both to stand and to give effect to each." *National Advertising Co., Inc. v. Mount Pleasant Bd. of Adjustment*, 312 S.C. 397, 400, 440 S.E.2d 875, 877 (1994). "Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative." *Hodges v. Rainey*, 341 S.C. 79, 88, 533 S.E.2d 578, 583 (2000) (citation omitted). As the ALC correctly held, any perceived dissimilarity between these regulations does not create a direct conflict because each regulation determines the applicable method for calculating the 180-day time periods for distinctly separate and unrelated purposes. The ALC thereby interprets Regulation 61-30 and 61-101 in a manner which renders both regulations fully operative and should therefore be affirmed.

Moreover, to the extent that the application of both regulations creates a conflict, Regulation 61-101 would govern the calculation of the 180-day time period required thereunder. Specific statutes are not to be considered repealed by a later general statute unless there is a direct reference to the earlier statute or the intent of the legislature to do so is explicitly implied. *Atlas Food Systems and Serv., Inc. v. Crane National Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995). As discussed *supra*, neither the Fund Act nor Regulation 61-30 contains an express or implied legislative intent to amend or supersede any provision of Regulation 61-101. Looking comprehensively at the overall purpose of both regulations, Regulation 61-101 is unquestionably the "specific" statute with respect to DHEC's substantive review of a WQC application. On the other hand, Regulation 61-30 addresses a vast number of permitting decisions to be rendered by DHEC, only one of which involves WQCs, but

does so only in the context of setting the fees and a schedule for refund of such fees. Moreover, as the Court noted, the South Carolina Supreme Court has acknowledged that Regulation 61-101 governs the water quality certification process. *See South Carolina Coastal Conservation League v. South Carolina Dep't of Health and Env'tl. Control*, 390 S.C. 418, 430, 702 S.E.2d 246, 253 (2010) (“[Regulation 61-101] establishes procedures and policies for implementing water quality certification requirements of Section 401 of the Clean Water Act and requires DHEC to send notice to specific parties.”).

Additionally, in ascertaining the purpose of a regulation, the South Carolina Supreme Court has examined the title of such regulation. *Spruill v. Richland County School Dist. 2*, 363 S.C. 61, 64, 609 S.E.2d 524, 526 (2005) (“The purpose of the regulation is reflected in its title, *Withdrawing a Request for a Hearing*, and the text reflects this limited application.”). The purpose of Regulation 61-30 is reflected in its title, “*Environmental Protection Fees*.” Finally, the application of the “*Time Schedule*” as defined therein is expressly limited to “a ‘schedule for timely review’ for purposes of this regulation.” 24A S.C. CODE ANN. REGS. § 61-30(B)(22) (Supp. 2010). In contrast, Regulation 61-101 is entitled “*Water Quality Certification*” and “establishes procedures and policies for implementing State water quality certification requirements of Section 401 of the Clean Water Act, 33 U.S.C. Section 1341.” 25A S.C. CODE ANN. REGS. § 61-101(A)(1) (Supp. 2010). Accordingly, to the extent that any conflict between the manner in which the 180-day time frames in Regulation 61-101 and 61-30 are calculated may be found, the provisions of Regulation 61-101 are unquestionably the more specific regulation regarding the processing of a water quality certification and would therefore be given effect.

While this Court is clearly troubled with the apparent incongruity of two DHEC regulations, both touching on water quality certifications, each with a 180-day period, it is not for the Court to fix this apparent incongruity. These are legislative rules. It is the Court's duty to interpret these rules and to give each full effect, if possible. As the ALC determined, it is possible to give each full effect, and the ALC's decision should therefore be affirmed.

III. THE SUPREME COURT RULING IN *RESPONSIBLE ECONOMIC DEVELOPMENT* GOVERNS THE INTERPRETATION OF REGULATION 61-101 AND REGULATION 61-30 IN THIS CASE.

The Court finds that *Responsible Economic Development v. South Carolina Department of Health and Environmental Control* can be distinguished from the facts in this case. However, the Court recites the holding in *Responsible Economic Development* as follows:

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

Opinion, p. 10. Under the Court's own recitation of the holding, *Responsible Economic Development* is directly on point with the instant case. In the instant case, Regulation 61-101 and Regulation 61-30 were promulgated under two different enabling acts. Regulation 61-101 was first promulgated under the Pollution Control Act, and Regulation 61-30 was promulgated under the Fund Act. As in *Responsible Economic Development*, while the regulations may touch on common general subjects, there is no authorization in either the Pollution Control Act or the Fund Act to apply these Acts and the regulations promulgated thereunder to each other. Regulation 61-101 governs DHEC's decision on a WQC application. As such, the provisions of Regulation 61-30

cannot be applied in a manner which affects a decision on a WQC application made pursuant to the specific procedures and criteria established in Regulation 61-101.

IV. THE COURT IMPROPERLY DEFERS TO AN INTERPRETATION OF DHEC STAFF AND IMPROPERLY INTERPRETS THE LEGAL EFFECT OF THE DHEC STAFF NOTICE OF TOLLING.

The Court finds that DHEC's interpretation of its regulations is entitled to deference and cites to an October 19, 2008 letter from DHEC staff to Duke for such interpretation. The Court states:

Additionally, DHEC explained its interpretation of the time schedule to Duke Energy in their letter dated October 19, 2008, as well as in other documents. It cited Regulation 61-30, and stated that while DHEC had 180 days to complete its action on the application, only the days on which DHEC was actively reviewing the application would be counted. DHEC maintained the clock stopped when information was requested and DHEC was awaiting a response. We give DHEC's interpretation deference because we believe it complies with the regulations' plain language.

Opinion, p. 11. As a preliminary matter, deference to an agency interpretation is limited to cases in which the meaning and intent of a statute or regulation is truly doubtful. *See Davidson v. Eastern Fire & Casualty Ins. Co.*, 245 S.C. 472, 477-78, 141 S.E.2d 135, 137-38 (1965). The Court's reliance on deference to the agency in support of its holding shows that there is no plain and unambiguous intent in Regulation 61-30 to supersede the suspension provisions of Regulation 61-101. As discussed *supra*, such intent is clearly required to apply the tolling provisions in Regulation 61-30 to Regulation 61-101 in a manner which effectively repeals the suspension provisions therein. Moreover, a statement made by DHEC staff in a communication to an applicant does not constitute an agency interpretation of a regulation entitled to deference by a court interpreting the regulation. The Supreme Court has held that the courts should give deference to the policy decisions and regulatory interpretations of an agency, but not to interpretations

and decisions of agency staff. See *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005) (holding that the circuit improperly deferred to a staff interpretation of an undefined term in a regulation, but should have deferred only to interpretations of the Coastal Zone Management Appellate Panel of the Department's Office of Ocean and Coastal Resource Management (OCRM)). Accordingly, the staff explanation of the tolling of the 180-day time period under Regulation 61-30 is not an agency interpretation entitled to deference by the Court.

Even if such statements were an agency interpretation entitled to deference, which they are not, the statements by DHEC staff do not even purport to interpret the provisions of the regulation governing suspension of the processing of a WQC application. As the Court notes, DHEC staff referenced Regulation 61-30 and advised Duke on the manner in which DHEC was counting the days under Regulation 61-30. Indeed, DHEC staff correctly explains the operation of the tolling provision under Regulation 61-30: "the clock stopped when information was requested and DHEC was awaiting a response." *Id.* However, while this accurately explains tolling under Regulation 61-30, it does not in any manner suggest that such tolling has the effect of suspending the WQC application processing under Regulation 61-101. Indeed, as Judge Thomas notes in her dissent, "Regulation 61-101 does not authorize DHEC to suspend processing during the interval between the time it requests more information and the deadline that it gives the applicant when it makes the request." Opinion, p. 14. Instead, "the processing of an application for water quality certification is suspended only after the applicant has failed to meet the given deadline for submitting additional requested

information and DHEC has notified the applicant about the suspension.” *Id.* Moreover, as Judge Thomas further notes, DHEC did not thereafter suspend processing of Duke’s WQC application: “DHEC’s own actions, then, show it did not suspend the processing of Duke’s application according to Regulation 61-30.H.1.c; rather, it continued to review it actively after it requested supplemental information.” *Opinion*, p. 16. Accordingly, even if the communications from DHEC staff to Duke were an agency interpretation, such interpretation is limited to DHEC’s interpretation of the tolling pursuant to Regulation 61-30—not the suspension under Regulation 61-101.

Finally, as discussed more fully in Respondent’s Brief and contrary to the statement by DHEC staff, DHEC was fully aware of the requirements for suspension of its review of a WQC application under Regulation 61-101. On April 12, 2008, the ALC issued its final decision in *South Carolina Department of Transportation v. South Carolina Department of Health and Environmental Control and Friends of Congaree Swamp*, 2008 WL 1934476, 1 (Apr. 12, 2008 S.C.A.L.C). (A copy of this decision is attached to Brief of Respondent as Exhibit A). In that case, the ALC held that the processing of the WQC certification at issue had never been suspended because DHEC failed to suspend the processing and provide the applicant with notice of suspension pursuant to the requirements of Regulation 61-101. *Id.* at 12. The ALC issued this ruling less than two months prior to Duke’s submittal of its WQC application. Accordingly, to the extent that the October 19, 2008 letter might be construed as the agency’s interpretation of the provisions governing suspension of a WQC application, DHEC’s statement of that interpretation would be in direct conflict with the ALJ’s interpretation of the requirements for suspension of a WQC application under Regulation

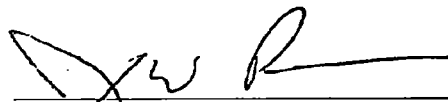
61-101.

CONCLUSION

For the forgoing reasons, Respondent respectfully requests that this Court grant its Petition for Rehearing and affirm the ALC's decision granting summary judgment to Respondent.

Respectfully submitted,

January 10, 2013



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

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

Duke Energy Carolinas, LLC, Respondent,

v.

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

Defendants,

Of whom South Carolina
Department of Health and
Environmental Control is
and American Rivers and South
Carolina Coastal Conservation
League are also

Appellant,

Appellants.

RETURN OF APPELLANTS AMERICAN RIVERS AND SOUTH CAROLINA
COASTAL CONSERVATION LEAGUE TO RESPONDENT'S REHEARING
PETITION

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The Appellants American Rivers and South Carolina Coastal Conservation League (the "Conservation Groups") submit this Return to the Petition for Rehearing of Duke Energy Carolinas, LLC ("Duke").

In this case, Duke is trying to negate the determination of the Board of the Department of Health and Environmental Control ("DHEC") that the quality of South Carolina's waters would be damaged by Duke's proposed project. Duke is arguing that the State of South Carolina lost its sovereign right under the federal Clean Water Act to protect South Carolina's natural resources because DHEC staff supposedly miscounted the days under two regulations. In fact, Duke is wrong.

RESPONSES TO DUKE'S ARGUMENTS

Duke's petition is based upon its attempt to manufacture a nonexistent conflict between two thoroughly consistent DHEC regulations and to disregard some of the most fundamental black-letter rules governing the interpretation of statutes and regulations and the conduct of litigation.

First, Duke can prevail *only* by ignoring the plain language of the relevant statutes and regulations. In fact, there is no conflict between Regulation 61-30 and Regulation 61-101. The simple, direct language of Regulation 61-30 and its authorizing statutes sets out the rules governing the tolling of the time period, and DHEC clearly followed those rules. It is undisputed that, if Regulation 61-30 applies, the time period was tolled, and Duke's argument fails.

Second, in creating a complex and convoluted interpretation of the regulatory language in order to concoct a conflict in the regulations, Duke asks the Court to *discard*

the agency's interpretation of the regulations and statutes it is charged with administering and enforcing – contrary to the standard rule of interpretation.

In addition, because the panel found that in fact there was no conflict between the regulations, it did not reach the following definitive reasons for rejecting Duke's position:

Third, Duke did *not* present its counting-the-days argument at the first opportunity, or even at the second opportunity – but instead kept quiet about this objection and thus endorsed DHEC's decision making authority until after it lost on the merits. The argument is waived, and Duke is estopped from making it.

Fourth, Duke asks this Court to impose a sanction upon DHEC, the State of South Carolina, and the people of the State – waiver of the right of South Carolina to protect water quality for the people of the State – that the Legislature itself *did not* mandate or suggest, and that is far more extreme than and different from the consequence that *was* expressly selected by the Legislature.

Finally, Duke would imply a waiver of the authority of the State of South Carolina and the waiver of a fundamental right of the public – the protection of water quality – *without* a clear, express Legislative determination to do so.

1. The plain language of the regulation and the statutes demonstrates that the DHEC decision was timely, and there is no conflict between the regulations.

Duke can prevail *only if* Regulation 61-30 does not apply to the calculation of the 180-day period for a DHEC decision on a water quality permit. It is undisputed that, if the rules of Regulation 61-30 apply, then the DHEC decision was made within 180 days. Duke tries to avoid that Regulation by arguing that its timing rules apply only for the purpose of calculating refunds of permit fees. That is *not* what the plain language of the Regulation and its authorizing statutes provide.

As the majority pointed out, the authorizing statute mandates that DHEC “shall establish by regulation a schedule for timely action by [DHEC] on permit applications.” S.C. Code § 48-2-70. The resulting regulation, in defining its purpose and scope, plainly states – without qualification or limitation – that the Regulation “*establishes schedules for timely action on permit applications.*” S.C. Code Regs. 61-30 (A) (emphasis added.).

The Regulation defines “time schedules” generally and does not limit the definition to a refund of fees:

“[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.”

S.C. Code Regs. 61-30 (B) (22). In its petition, Duke emphasizes the phrase “for purposes of this regulation.” Duke Petition at p. 6. However, as set out above, the “purposes of this regulation” include “establish[ing] schedules for timely action on permit applications” – and are not limited to fee refunds.

Likewise, the Regulation describes the methods of tolling the time period, without limiting the effect of tolling to fee refunds. In a section generally titled “Time Schedules,” the Regulation provides, among other things:

“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. 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.”

S.C. Code Regs. 61-30 (H) (1) (c).

Further, the plain language of the statutes which authorize environmental fees also makes clear that the purpose of those statutes reaches beyond merely charging fees, and also encompasses generally the timely administration of the permitting process.

Those statutes were enacted and fees were authorized “[i]n order to facilitate the proper administration of” environmental laws, including the Pollution Control Act. S.C. Code § 48-2-50 (A) (emphasis added). Duke’s position is conclusively rejected by the direct wording of Section 48-2-70, which provides – without qualification or limitation:

“Under each program for which a permit processing fee is established pursuant to this article, *the promulgating authority also shall establish by regulation a schedule for timely action* by the Department of Health and Environmental Control on permit applications under that program. 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.”

S.C. Code § 48-2-70 (emphasis added). The consequence of DHEC’s failure to live up to the required deadline is refund of the fee. *Id.*

The clear and direct language of the regulations and the statutes controls. Their language is the end of the inquiry. “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.” *Miller v. Aiken*, 364 S.C. 303, 306, 613 S.E.2d 364, 366 (2005). The timing provisions of Regulation 61-30 are not limited to the granting of refunds. Rather, they apply generally, and a refund of fees is the consequence of DHEC’s failure to abide by them.¹

¹The Administrative Law Court labeled S.C. Code §§ 48-2-10 the “Fees Act,” and Duke calls it the “Fund Act,” while Section 48-2-10 adopts the label the “Environmental

Duke tries to avoid the plain language of Regulation 61-30 and its authorizing statutes by concocting a supposed conflict with Regulation 61-101. However, there is no conflict in general and certainly no conflict in this situation.

Like Regulation 61-30, Regulation 61-101 sets out a 180-period for consideration of a permit. S.C. Code Regs. 61-101 (A) (6). Nowhere does it address the tolling of the time period while DHEC is processing a permit, as does Regulation 61-30. Instead, Regulation 61-101 provides a procedure when DHEC denies a certification without prejudice or *suspends processing* of an application. S.C. Code Regs. 61-101 (C) (4). Regulation 61-101 contains no instructions for calculating the 180-day period to take into account DHEC requests for information or for calculating it when DHEC does not suspend processing of an application but rather continues processing the application while requesting information. Those instructions are contained in Regulation 61-30.

In this instance, as the majority explains, Regulation 61-30 sets out the rules applicable to tolling. Regulation 61-101 does not address tolling but only suspension, and, as the dissent concludes, DHEC “did not suspend the processing of Duke’s application.” Opinion at 16. Instead, the DHEC staff worked with Duke to obtain the necessary information and worked to process the application in a timely way. Under the clear terms of both Regulation 61-30 and Regulation 61-101, the running of the time

Protection Fund Act.” However, the title and headings of a statute “may not be construed to limit the plain meaning of the text,” and “they cannot undo or limit what the text makes plain.” *Garner v. Houck*, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993) (rejecting limitations in a title and holding that plain language of a rule reaches further than its title). For these reasons, Duke cannot contradict or overcome the content of the regulations and certainly not the plain language of the statutes by citing to some of the abbreviated titles of regulations in the codification. Duke Petition at 11.

period was occasionally tolled while Duke gathered additional information, and DHEC reached its decision within the 180-day time period, without ever suspending the processing of the application.²

Every effort should be made to read the statutes as consistent, and, in fact, by their plain language they do not conflict. If a reader could find a conflict, the terms of Regulation 61-30 would prevail because it is more recent and specific. Regulation 61-30 was enacted after Regulation 61-101, and it specifically addresses in detail how to calculate tolling, which Regulation 61-101 does not. Denman v. City of Columbia, 387 S.C. 131, 138, 691 S.E.2d 465, 467-468 (2010) (where two statutes “deal[] with the same subject matter,” they “are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result,” but “where two statutes are in conflict, the more recent and specific statute should prevail”).

But in fact, here, there is no conflict. As the panel decision explains, “[b]oth of the regulations can exist without one negating the other,” and the express and clear tolling provisions of Regulation 61-30 govern without conflicting with Regulation 61-101. Opinion at 10. Regulation 61-30 contains express provisions explaining how to determine the tolling of the time period, while Regulation 61-101 does not. Further, DHEC never suspended the processing of Duke’s application as provided in Regulation

² Duke’s petition is based in significant part on its contention that the majority’s application of the plain language of Regulation 61-30 somehow “repealed” provisions of Regulation 61-101. In fact, as the majority explains, there is no conflict between the two regulations, they should be read to be consistent, and Regulation 61-30 is the regulation that describes how tolling affects the calculation of the time period. Therefore, Duke’s argument is attacking a straw man – “repeal” – that the majority opinion does not contain.

Indeed, it is Duke that is arguing for repeal and disregard of the tolling provisions of Regulation 61-30, even though they specifically address the situation presented by this case.

61-101, but instead continued processing the application and decided it within the 180-day period, as calculated under the tolling provisions of Regulation 61-30. Indeed, DHEC accommodated and worked with Duke to obtain the needed information without formally suspending its consideration of Duke's application and now – but not before the DHEC Board, as set out below – Duke is attempting to use against DHEC – and the people and natural resources of South Carolina – DHEC's accommodation of Duke's delays.

Nor does Responsible Economic Development v. South Carolina Department of Health and Environmental Control, 371 S.C. 547, 641 S.E.2d 425 (2007), require this Court to disregard the statutory and regulatory language. Unlike the situation in that case, here both Regulation 61-101 and Regulation 61-30 were expressly enacted to address the South Carolina Pollution Control Act. Duke concedes, and it is undisputed, that Regulation 61-101 addresses permit applications under the Pollution Control Act. Duke Brief on Appeal at 13.

And so does Regulation 61-30. The Environmental Protection Fund Act, S.C. Code §§ 48-2-10 et seq., expressly applies to and is directed at applications under the Pollution Control Act, including Duke's application in this case. S.C. Code §§ 48-2-30 (B) (1) and 48-2-50 (H) (1). Specifically, the timing regulations contemplated by the Act (Regulation 61-30) expressly apply to “each program for which a permit processing fee is established pursuant to this article,” including the Pollution Control Act under which Duke applied. S.C. Code § 48-2-70.

Regulation 61-30 itself recites that it is adopted pursuant to S.C. Code § 48-2-50. Again, that statute expressly encompasses “each act listed in Section 48-2-30(B).” The

Pollution Control Act is the very first act cited by that statute, S.C. Code § 48-2-30 (B) (1).

The dissent from the panel's decision reached the opposite conclusion based on a fundamental oversight and error in the dissent's reading of Regulation 61-30 and on its misunderstandings of the federal Clean Water Act. The dissent bases its support for Duke's position on its conclusions that "[n]owhere does Regulation 61-30 reference the Clean Water Act" and that Regulation 61-30 "does not further the mandates of the Clean Water Act or the policy favoring prompt action by the states on requests for water quality certification." Opinion at 16.

First, in fact Regulation 61-30 throughout references the Clean Water Act specifically and directly. In two places, Regulation 61-30 by name references the "Clean Water Act" and "CWA," the abbreviation for the federal Act, Regulation 61-30 G. (4) (c) & (f), and indicates that water pollution testing under the Regulations is undertaken pursuant to Clean Water Act.

Further, throughout its provisions Regulation 61-30 references and sets out timelines and requirements for permitting programs and the certification created by the federal Clean Water Act.

The federal Act, in Section 402, creates the *National* Pollution Discharge Elimination System ("NPDES") permit, which is required for discharges into waters of the United States. 33 U.S.C. § 1342. DHEC administers this federal permitting program in South Carolina pursuant to a Memorandum of Agreement with the United States Environmental Protection Agency. 33 U.S.C. § 1342 (b). Issuing federal NPDES permits is one of DHEC's principal functions. Consequently, NPDES permits are

referenced throughout Regulation 61-30, contrary to the statements in the dissent.

Regulation 61-30 B (2), G (1) (a), G (1) (c) (v), and H (2) (a) (i).

In addition, Regulation 61-30 of course addresses water quality certifications like the one sought by Duke in this case and denied by the DHEC Board. Regulation 61-30 A, B (14), G (1) (b), H (2) (a) (vii). Water quality certifications are issued by States pursuant to Section 401 of the federal Clean Water Act, 33 U.S.C. § 1341 (a), which requires a State's water quality certification before certain federal actions can be taken, including the federal authorizations required for Duke's Wateree facility at issue in this case. Id. Thus, the dissent failed to realize that in this way, too, Regulation 61-30 throughout both references the Clean Water Act and "furthers the mandates of the Clean Water Act." Opinion at 16.

There are other references throughout Regulation 61-30 to programs required by the federal Clean Water Act, including MS4 Storm Water Permits and municipal wastewater treatment. *E.g.* Regulation 61-30 G (1) (a). Indeed, when Regulation 61-30 speaks of "Water Pollution Control," in significant part it is referencing programs, permits, and requirements of the federal Clean Water Act. Regulation 61-30 G (1), H (2) (a).

It should be emphasized that DHEC administers federal programs such as the NPDES permitting requirements of the federal Clean Water Act through its powers granted by the S.C. Pollution Control Act. S.C. Code § 48-1-50 (17) (DHEC may "[t]ake all action necessary or appropriate to secure to this State the benefits of the Federal Water Pollution Control Act or the Federal Air Quality Act and any and all other Federal and State acts concerning air and water pollution control"); Regulation 61-9.122.1 (a) (1)

(“The regulatory provisions contained in R.61-9.122 and 124 implement the National Pollutant Discharge Elimination System (NPDES) Program under . . . the Clean Water Act (CWA) . . . and the South Carolina Pollution Control Act, S.C. Code Ann. 48-1-10, et seq.”).

The Act under which Regulation 61-30 was promulgated expressly encompasses the “Pollution Control Act” and all “environmental permits, licenses, certificates, and registrations” issued under it. S.C. Code § 48-2-30 (B) (1). Indeed, the Pollution Control Act is the first statute listed. As a result, Regulation 61-30, which is promulgated pursuant to that Act, of course encompasses all permits and certifications issued under the S.C. Pollution Control Act, including NPDES permits and water quality certifications issued by DHEC pursuant to the federal Clean Water Act.

Likewise, contrary to the assertion of the dissent, Regulation 61-30 does indeed “further . . . the policy favoring prompt action by the states on request for water quality certification.” Opinion at 16. Regulation 61-30 itself states that it “establishes schedules for timely action on permit applications,” Regulation 61-30 (A), and the Legislature plainly stated that the Act provides for “a schedule for timely action by [DHEC] on permit applications” and “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,” taking “into account the nature and complexity” of the application. S.C. Code § 48-2-70. Since both the Regulation and the Act encompass federal Clean Water Act permits and certifications issued by DHEC pursuant to its authority under the Pollution Control Act, the Regulation and the Act are expressly designed to provide for prompt action on Clean Water Act water quality certifications.

In sum, the dissent was simply wrong when it concluded that “[n]owhere does Regulation 61-30 reference the Clean Water Act” and that Regulation 61-30 “does not further mandates of the Clean Water Act or the policy favoring prompt action by the states on request for water quality certification.” Opinion at 16. Because of its mistaken belief that only Regulation 61-101 deals with the Clean Water Act programs and that Regulation 61-30 does not, the dissent chose to prefer Regulation 61-101 over Regulation 61-30. The dissent made this choice even though Regulation 61-30 is more recent and also provides the method for accounting for tolling and for counting the time periods when DHEC has not suspended its consideration of a water quality certification, as in this case.

However, since Regulation 61-30 does indeed address the Clean Water Act and permits and certifications issued under the federal Act, since it is more recent, and since it does address the method of calculating time when DHEC’s consideration of a certification has been tolled, the provisions of Regulation 61-30 must be followed – even if there were a supposed conflict between the regulations. As set out above, in fact no conflict exists.

2. If there were any ambiguity, DHEC’s reasonable interpretation of its own regulations and the statutes it administers must prevail.

Not only was DHEC’s decision timely under the plain language of the governing laws, but it was also timely under DHEC’s interpretation of the regulations, which is due considerable deference. It is a long-established principle that courts give deference to an agency’s interpretation of its own regulations and the statutes it administers. E.g., Glover v. Suitt Constr. Co., 318 S.C. 465, 469, 458 S.E.2d 353, 537 (1995) (agency’s

interpretation “will be accorded the most respectful consideration and will not be overruled absent compelling reasons”).

As set out above, the plain language of the statutes and the regulations demonstrates that DHEC processed Duke’s application in a timely manner. Duke’s convoluted arguments about phrases, clauses, and sections of DHEC’s regulations do not create ambiguity where none exists. Moreover, Duke’s arguments are premised on the notion that it can disregard DHEC’s interpretation of DHEC’s own regulations which determine the effect of delays by applicants like Duke upon regulatory time deadlines.

This technical variety of regulations, including procedural rules enacted by the agency to guide its own internal operations, especially calls for deference to the agency’s interpretation. EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 125 (1988) (O’Connor, J., concurring) (explaining that, in case involving agency’s interpretation of regulation governing timing of agency action, “*deference* is particularly appropriate on this type of technical issue of agency *procedure*”) (cited with approval in Edelman v. Lynchburg College, 535 U.S. 106, 123 (2002) (O’Connor & Scalia, JJ., concurring) (emphasis added).

This deference is even more appropriate here, because the alternative is the interpretation of the applicant, Duke, of the effect of its *own* delays and failures to provide complete and adequate information.

3. Duke cannot hide its timing objection and wait to object until it has lost on the merits.

The panel did not reach this issue, because it found that DHEC acted timely. But regardless, Duke cannot argue that DHEC acted untimely when Duke throughout the

administrative process did not make this claim and instead sought to benefit from supposedly untimely decision of DHEC staff.

From the outset, DHEC told Duke how it was counting the days. Duke never objected to DHEC, even though DHEC cited Rule 61-30 in its correspondence to Duke and Duke understood that DHEC was relying on that regulation to determine timing. While its permit application was being considered, Duke never objected or contended that the time period was not tolled while Duke gathered information that it had not yet submitted. Duke never asked if or claimed that waiver had occurred or that the clock had run. In fact, Duke itself controlled the running of the clock, because Duke determined how long it would take to respond to DHEC's requests for information. Duke never objected that it need not gather information because waiver had occurred.

To the utter contrary, instead of claiming that DHEC had waived the right of the State to protect water quality, Duke actually asserted and defended *the validity of the DHEC staff's decision* on appeal before the DHEC Board. Duke never contended that the DHEC staff's decision was a nullity. Rather, Duke affirmed the validity of and sought to gain the full benefit of the agency's decision on the merits.

Only after Duke had lost on the merits before the DHEC Board did Duke pull out its waiver argument. This is a classic "hide-the-ball" litigation tactic. According to Duke, it could conceal its waiver argument and play this card only if it otherwise lost. Duke would like the rules of litigation to allow a party to take the approach of "Heads I win, tails you lose."

Every governing rule bars this sort of gamesmanship in litigation, a process with serious consequences for the litigants and, especially in this instance, for the public at

large. “A litigant is not entitled to remain mute and await the outcome of an agency’s decision and, if it is unfavorable, attack it on the ground of asserted procedural defects not called to the agency’s attention when, if in fact they were defects, they would have been correctible at the administrative level.” First-Citizens Bank and Trust Co. v. Camp, 409 F.2d 1086, 1088-89 (4th Cir. 1969). A litigant is equitably stopped from relying upon a time deadline when it “invited the very delay [it] now assert[s] as a defense.” Dillon County Sch. Dist. v. Lewis Sheet Metal Works, 286 S.C. 207, 219, 332 S.E.2d 555, 562 (Ct. App. 1983). As well, a litigant waives a position when it remains silent and engages in “[a]cts inconsistent with the continued assertion of a right, such as the failure to insist upon the right.” Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981).

Duke hopes to prevail by (1) never asserting or even mentioning its timing theory at a time when the DHEC staff could have reacted to it; (2) remaining silent in the face of DHEC’s explanation of how time would be counted; (3) delaying in responding to DHEC’s requests for information, thus running out the clock under Duke’s theory of counting; (4) encouraging DHEC staff to continue working on its application at a time when Duke claims DHEC had waived its right to make a decision; (5) taking advantage of the DHEC’s staff decision on the merits and asking the DHEC Board to adopt it; (6) never asserting the untimeliness of the decision before the DHEC Board or asking the Board to rule that DHEC had waived any rights; (7) then, claiming a waiver only *after* the Board ruled against it on the merits and *after* it was impossible for DHEC to take any action in response.

This is exactly the kind of litigation behavior that the courts abhor and reject.

4. Duke cannot insert into the statute a penalty that the Legislature did not impose and that is different from and in addition to the Legislature's chosen consequence.

The panel also found it unnecessary to address this point, because it found that DHEC acted timely. But even if DHEC had not acted in a timely way, Duke cannot prevail in this appeal.

Nowhere did the General Assembly provide that South Carolina waives its right to protect its water quality if DHEC fails to process an application within 180 days; the South Carolina Code and the regulations do not so provide. Instead, the General Assembly provided a very specific consequence for DHEC's failure to comply with the time periods created in the regulations: "If the department fails to grant or deny the permit within the time frame established by regulation, the department shall refund the permit processing fee to the permit applicant." S.C. Code § 48-2-70.

"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." Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). Even when the Legislature has not set out a consequence for an agency's failure to comply with a time deadline, the Court "will not assume the Legislature intended the [agency] to lose its power to act for failing to comply with the statutory time limit." Johnston v. S.C. Dep't of Labor, Licensing, and Regulation, 365 S.C. 293, 298, 617 S.E.2d 363, 365 (2005).

The rule in Johnston applies with even more force in a case like this one, where the Legislature *has* spelled out a consequence for an agency's failure to meet a time deadline – but *has not* chosen to deny the agency its power to act. See Dema v. Tenet Physician Servs.-Hilton Head, Inc., 383 S.C. 115, 122, 678 S.E.2d 430, 434 (2009)

(refusing to imply a remedy when the Legislature had provided for specific remedies, but not the one suggested); Linder v. Ins. Claims Consultants, Inc., 348 S.C. 477, 496-97, 560 S.E.2d 612, 623 (2002) (same). This rule has yet greater applicability here, because on repeated occasions the Legislature has mandated the approval of applications for failure to act within a specified time period, but did not do so in this instance. See, e.g., S.C. Code § 30-4-30 (c); S.C. Code Regs. 72-305 (B) (2).

5. The authority of the State of South Carolina and the public right to water quality are not waived absent a clear Legislative mandate to do so.

Duke would have the Court find that the State of South Carolina lost its sovereign authority and that the public of South Carolina lost its right to a water quality determination because of an arcane dispute over how to count the tolling periods under two regulations – when there is not one word in the South Carolina Code or the regulations that provides for such a result.

The policies at stake are not trivial or arcane. At issue are key principles of federalism and the public's right to clean and safe water. "State certifications under Section 401 are essential in the scheme to preserve state authority" and to ensure that "[n]o polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]." S.D. Warren Co. v. Me. Bd. of Envl. Prot., 547 U.S. 370, 386 (2006). The Legislature has declared that it is a fundamental "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" and 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 § 48-1-20.

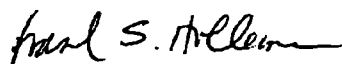
It is important to underscore that DHEC has determined that Duke's application does *not* satisfy the requirements of the Pollution Control Act.

Much is at stake in this application: the authority of the State of South Carolina, the welfare of its public, and the quality of its waters. Waiver of those rights should not be assumed or implied and should be accepted only upon a clear expression of Legislative intent. As Duke and the Administrative Law Court admit, there is no such clear expression in this case.

CONCLUSION

For these reasons, the Appellants Americans Rivers and the South Carolina Coastal Conservation League respectfully request that the Court deny the petition for rehearing.

February 25th, 2013

 (by ed wiperman)

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

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

Duke Energy Carolinas, LLC, Respondent,

v.

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

Of whom South Carolina
Department of Health and
Environmental Control is
Appellant,
and American Rivers and South
Carolina Coastal Conservation
League are also Appellants.

CERTIFICATE OF SERVICE

I certify that I have served the Return of Appellants American Rivers and South Carolina Coastal Conservation League to Respondent's Rehearing Petition on all parties by depositing a copy of it in the United States Mail, postage prepaid, on February 25th, 2013 addressed to their attorneys of record, as indicated below:

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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
Appellate Case No. 2010-166486

Duke Energy Carolina, LLC, ... Respondent,

v.

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

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

**APPELLANT SOUTH CAROLINA DEPARTMENT
OF HEALTH AND ENVIRONMENTAL CONTROL'S
*RETURN TO PETITION FOR REHEARING***

The Appellant South Carolina Department of Health and Environmental Control ("Department" or "DHEC") respectfully submits this Return to Respondent Duke Energy Carolinas, LLC's ("Duke") Petition for a Rehearing of Opinion No. 5062 issued on December 12, 2012, available on Westlaw as Duke Energy Carolinas, LLC v. South Carolina Department of Health and Environmental Control, et al., ___ S.E.2d ___, 2012 WL 6178081 ("Petition"), pursuant to Rule 240, South Carolina Appellate Court Rules ("SCACR"), and the Orders of the Court dated February 1, 2013, and February 20, 2013. For the following six reasons, the Court should deny Duke's Petition.

First, the Court correctly held that Department's water quality certification ("WQC") determination was timely. Second, the Court's determination that Regulation 61-30 and Regulation 61-101 could be read together so that Regulation 61-30 clarifies Regulation 61-101 is fully supported by the language of the regulations and the Environmental Protection Fund Act ("Fund Act").¹ Third, the Court correctly held that the holding in Responsible Economic Development v. South Carolina Department of Health and Environmental Control, 371 S.C. 547, 641 S.E.2d (2007) is not controlling. Fourth, the Department's interpretation of Regulation 61-30 and Regulation 61-10 is entitled to deference. Fifth, Duke's appeal of the issue of the applicability of Regulation 61-30's time schedule to the review of WQC applications Regulation 61-101 is not preserved. Finally, in the absence of clear legislative intent, the State's right to issue a decision on Duke's WQC application was not waived, even if the Department's Review took more than 180 days.

I. THE COURT CORRECTLY HELD THAT THE DEPARTMENT'S DECISION WAS TIMELY

Duke challenges the Court's holding by claiming that the time schedule in Regulation 61-101 should govern the Department's processing of WQC applications because it believes that the purported more detailed process in that regulation is a more desirable method of governing the Department's review process than the time schedule in Regulation 61-30. This claim violates the mandate in the Environmental Protection Fund Act (Fund Act), which provides that:

[u]nder each program for which a permit processing fee is established pursuant to this article, the promulgating authority also shall establish by regulation a schedule for timely action by the Department of Health and Environmental Control on permit applications under that program. These schedules shall contain criteria for determining in a timely manner when an application is complete and the maximum length of time

¹ Regulation 61-101 is codified at 8 S.C. Code Regs. 61-101 (2012) and Regulation 61-30 is codified at 4 S.C. Code Ann. Regs. 61-30 (2011).

necessary and appropriate for a thorough and prompt review of each categories 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 the regulation, the department shall refund the permit processing fee to the permit applicant.

S.C. Code Ann. § 48-2-70 (Rev. 2008). The goal of thorough WQC reviews not only benefits the Department, but also ensures the applicant that the Department's review is based on all available information.

Under Regulation 61-101, the Department's ability to request information about an application is limited to the first sixty days after the application was deemed complete. 8 S.C. Code Ann. Regs. 61-101(C)(2). Such requests must be made in writing and include a date for submittal of the requested information. If the requested information is not received by the submittal date, the Department can either deny the application or suspend processing if the information is necessary to reaching a decision on the application and the Department sent notification of its intended action to the applicant. 8 S.C. Code Ann. Regs. 61-101(C)(4). During the time period in which the information request is outstanding, the Department's 180-day time period continues to run. 8 S.C. Code Ann. Regs. 61-101(A)(6) and (C)(4).

In contrast, Regulation 61-30 while providing the same 180-day time period for review, places no limit upon when during the 180-day time period the Department may request additional information. 4 S.C. Code Ann. Regs. 61-30(H)(1) and (H)((2)(vii). In addition, Regulation 61-30 provides that the 180-day time period is "tolled" from the date of the written request and does not resume until the date the Department receives the requested information. 4 S.C. Code Ann. Regs. 61-30(H)(2)(c). Thus, comparing the time schedules in Regulation 61-101 and Regulation 61-30, it is clear that only Regulation 61-30 achieves the legislative goal of more thorough reviews of WQC applications, since it allows the Department to request additional

information at any time during the review process and it does not penalize the Department for seeking the additional information by excluding the time during the pendency of the request from the 180-day review period. Regulation 61-30 achieves the legislative goal through review set forth in S.C. Code Ann. § 48-2-70.

Nevertheless, Duke argues that the Regulation 61-101 time schedule governs WQC because Regulation 61-30 is limited to determining when the Department must refund the fee imposed by the regulation. This argument, which was previously raised by Duke, is based on the misguided premise that the Legislature intended the Fund Act and its regulation to establish a bifurcated review of WQC applications in which the Department conducts its substantive review under the time scheduled in Regulation 61-101, while simultaneously calculating when it would have to refund the process fee for reviewing such applications pursuant to Regulation 61-30.

Duke's argument is undercut by the rules of statutory construction. Specifically, Duke's argument seeks to contravene the admonitions of the Supreme Court in Beaufort County v. South Carolina State Election Commission, 395 S.C. 366, 718 S.E.2d 432 (2011) that state "a statute shall not be construed by concentrating on an isolated phrase" Id. 395 S.C. at 371, 718 S.E.2d. at 435. In addition, the argument also contravenes the Supreme Court's admonition in Laurens County School Districts 55 and 56 v. Cox, 308 S.C. 171, 417 S.E.2d 560 (1992) that "[t]he true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose." Id. 308 S.C. at 174, 417 S.E.2d. at 561 (emphasis added). Under these rules, it is clear the Legislature enacted the Fund Act for the purpose of enhancing the Department's review of WQC certification applications by requiring that the Department conduct such review under a new time schedule that would ensure thorough and prompt reviews, while taking into account the complexity of the review. Thus, the time schedule in Regulation 61-30 must prevail.

Furthermore, Duke's claim fails because the time schedule in Regulation 61-30 expressly addresses Department actions that can only be considered substantive in nature. For example, the regulation provides as follows:

(e) Change in Project.

(i) Determination of Change. The Department may determine that the applicant had filed a new application whenever additional information is provided by the applicant during any Department review period, in response to any statement identifying deficiencies in the application or supporting materials, or during any period allowed for public comment, either:

1. Results in a change in the category in which the permit application is classified, or:
2. Significantly increases or changes the nature of the potential effects of the proposed project or activity on public health and safety or the environment. Upon making a determination that the applicant has filed a new application, the Department shall promptly notify the applicant in writing. The notice shall indicate the basis for the determination and summarize the provisions relative to such determinations. The determination that a project had changed shall not be grounds for an adjudicatory hearing; however, an applicant aggrieved by such a determination may seek review of the determination as an issue in any appeal of the permit decision.

(ii) Effects of determination on schedule.

1. Immediately upon issuance of the notification, the schedule for timely action shall be suspended.
2. If the determination resulted from a proposed change in design or operation of the proposed project or activity the applicant may, within 30 days, withdraw the change and return to the previously proposal by notifying the

Department in writing. If the applicant so notifies the Department, the schedule for timely action shall resume at the point at which it was suspended.

3. If the determination resulted from any other cause, or if the applicant does not elect to withdraw the change, the Department shall begin a review of the new application pursuant to the relevant schedule or timely action.

- (iii) Effects of the determination on fee. Unless the applicant elects to proceed with the previous application, the original application shall be deemed withdrawn, and the fee shall be forfeited; provided, that the Department shall credit any amount to be refunded toward the permit application fee payable for the new permit unless the applicant requests a refund.

4 S.C. Code Ann. Regs. 61-30(H)(1)(e) (emphasis added). This language unambiguously establishes that the time schedule in Regulation 61-30 is not for computing when an applicant is entitled to a refund, but for governing the Department's substantive review of an application.

Moreover, in light of these facts, the Dissent's view that the Department's review of Duke's WQC application was untimely because it did not strictly follow the requirements in Regulation 61-101 cannot be sustained. Nevertheless, the Dissent attempts to negate the applicability of Regulation 61-30 to the review of WQC applications by noting that unlike Regulation 61-101, it does not require that the Department specify a date for submittal of information requested from an applicant. Duke Energy, LLC, 2012 WL 6178081 *9. While it is correct Regulation 61-30 does not require a date for submittal, such a date, if mandated, would not impact the Department's review, since the regulation tolls all time from the date of request of the information until the date of receipt of the information. 4 S.C. Code Ann. Regs. 61-30(H)(1)(c). Furthermore, it is the practice of the Department to include a submittal date on all

written requests for information under Regulation 61-30. See Record at pp. 141- 46, and 153-54 (Department requests to Duke for additional information). Thus, the Dissent's observation is of no consequence.

In addition, although acknowledging that Regulation 61-30 “establishes time schedules for timely action on permit application,” the Dissent argues that the regulation cannot apply because Regulation 61-30 does not reference the Clean Water Act. Duke Energy, LLC, 2012 WL 6178081 *9. The Dissent's argument is belied by the fact that the Pollution Control Act expressly applies to the Clean Water Act. S.C. Code Ann. § 48-1-50(17)(stating the Department may “[t]ake all action necessary or appropriate to secure to this State the benefits of the Federal Water Pollution Control Act, the Federal Air Quality Act and any and all other Federal and State acts concerning air and water pollution control”). Given that the Fund Act is a State statute establishing requirements, including those set forth in its promulgated regulation, Regulation 61-30, controlling the Department's processing of permits authorized by the Pollution Control Act, and that the Pollution Control Act expressly refers to the Clean Water Act and any and all other Federal water pollution control statutes, Regulations 61-30 out of necessity references by incorporation and references the Clean Water Act.

In addition, Regulation 61-30 references the Clean Water Act when it provides that its time schedule applies to the Department's review of applications for new or increased capacity NPDES permits. 4 S.C. Code Ann. Regs. 61-30(H)(2)(a)(i). NPDES or National Pollution Discharge Elimination Systems permits are authorized pursuant to Section 402 of the Clean Water Act, which is codified at 33 U.S.C. § 1342 (2012). As defined in Regulation 61-9, which governs the issuance of water pollution control permits, “[t]he regulatory provisions of R.61-9.122 and 124 implement the National Pollution Discharge Elimination System (NPDES) Program under sections 318, 402, and 405 of the Clean Water Act (CWA) (Public Law 92-

500), as amended by Pub. L. 95-217, Pub. L. 95-576, Pub. L. 96-483, Pub. L. 97-117, and Pub. L. 100-4, 33 U.S.C. 1251 et seq.) and the South Carolina Pollution Control Act, S.C. Code Ann. 48-1-10 et seq.” 3. S.C. Code Ann. Regs. 61-9.122.1(a)(1) (emphasis added). This irrefutable evidence clearly establishes that Regulation 61-30 applies to the Clean Water Act and negates a primary tenet of the Dissent’s argument. Therefore, Duke’s claims and its reliance upon the Dissent are without merit.

II. THE COURT’S DETERMINATION THAT REGULATION 61-30 AND REGULATION 61-10 COULD BE READ TOGETHER SO THAT REGULATION 61-30 CLARIFIES REGULATION 61-101 IS FULLY SUPPORTED BY THE LANGUAGE OF THE REGULATIONS AND THE FUND ACT.

Duke next challenges the Court’s holding by claiming that applying Regulation 61-30’s tolling provision to the calculation to Regulation 61-101’s 180-day time period creates a conflict between the two regulations that would not ordinarily exist. As a preliminary matter, as noted by the Court, it is long a rule of statutory construction that “statutes dealing with the same subject are in part material and must be construed together.” Beaufort County v. South Carolina State election Commission, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011). The Court, in applying this rule, correctly determined that the regulations could be read together since the Legislature mandate that each would apply the Department review of WQC applications and that the time schedule in Regulation 61-30 would clarify the calculation of the 180-day time period for review.

First, Duke claims that the Court’s application of the regulations creates a conflict because the flexibility provided by the Regulation 61-30 tolling provision cannot be applied to Regulation 61-101’s 60-day time period. In pertinent part, Regulation 61-101 provides that for five enumerated categories of projects for the public benefit in which there has been a determination of no feasible alternatives, the Department shall issue a certification within sixty

(60) days of acceptance of the application. 8 S.C. Code Ann. Regs. 61-101(F)(4). This provision contains the legislative determination that for particular projects of importance to the public as a whole in which there is no other feasible alternative for a particular project, a detailed review is not necessary as the Legislature has determined that the project must be certified, and any concerns of the Department shall be addressed by conditions to the certification. Id. The exceptional nature of this time period is underscored by the fact that it is not found in Section A of the Regulation where the generally applicable 180-day time period is found. Instead, this exception is found in Section F ("SCOPE OF REVIEW FOR APPLICATION DECISIONS"), which contains the provisions of Regulation 61-101 that govern the criteria that the Department is to apply in reaching a decision on a WQC application. By citing this provision, Duke does not advance its cause since, while the time schedule in Regulation 61-30 generally applies to a time frame of 180 days, many of the permits that it applies to have a time period longer or shorter than the standard time period. See 4 S.C. Code Ann. Regs. 61-30(H)(2)(a)(ii) (construction permit for new water treatment plant or expansion – 120 days); (H)(2)(a)(iii) (construction permit for water treatment plant upgrade – 90 days); (H)(2)(a)(v) (sewer construction permit – 60 days); (H)(2)(a)(vi) (coverage under stormwater General Permit – 7 days); (H)(2)(g)(ii)(2) (review of industrial solid waste landfill permit – 360 days); (H)(2)(h)(iii) (underground storage tank construction permit – 15 days, in the coastal zone – 45 days); and (H)(2)(j)(i) (individual residential well – 48 hours). Thus, Duke's claim is without merit.

Second, Duke claims that the Administrative Law Court ("ALC") interpretation of Regulation 61-30 and Regulation 61-101 gave proper effect to the regulations by determining that each regulation calculated the 180-day time period for separate and unrelated purposes. This claim must be rejected because as discussed above, it is in opposition to the Fund Act. The Fund Act, in pertinent part, applies to all environmental permits promulgated pursuant to the Pollution

Control Act and expressly cited WQCs. S.C. Code Ann. §§ 48-2-30(B) and 48-2-50(H)(1)(b). It was enacted to “facilitate the proper administration of” all environment laws enumerated therein. S.C. Code Ann. § 48-2-50(A). Further, the Fund Act expressly mandated that the Department was to promulgate Regulation 61-30 and its time schedule, and that the time schedule was to govern the thorough and prompt processing of applications, taking into consideration the complexity of review necessary for each type of applicable permit. S.C. Code Ann. § 48-2-70. Thus, Duke’s argument must fail as it is in opposition with the legislative mandate contained in the Fund Act.

Lastly, Duke claims that the term “fee” in the title of Regulation 61-30 determines that regulation is limited to only the calculation of when the Department has earned its fee or must issue a refund. This claim flies in the face the Supreme Court’s admonition that the heading or title cannot construe the plain meaning of the language of a statute, regulation, or their provisions. Broadhurst v. City of Myrtle Beach Election Commission, 342 S.C. 373, 381, 537 S.E.2d 543546-47 citing Garner v. Houck, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993) (“[f]or interpretive purposes, the title of a statute and heading of a section are of use only when they shed light on some ambiguous word or phrase and as tools available for resolution of doubt, but they cannot undo or limit what the text makes plain.”) (emphasis added). Here, while the Fund Act and its Regulation 61-30 have the terms “fee” and “fund” in their titles and in some of their headings, the language in their provisions, when considered in light of the legislative intent contained in their language, clearly establishes that they are to govern the thorough, prompt, administration and review of environmental permits, including WQCs. Therefore, Duke’s claim must fail.

III. THE COURT CORRECTLY HELD THAT THE HOLDING IN *RESPONSIBLE ECONOMIC DEVELOPMENT V. SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL* IS NOT CONTROLLING.

Duke claims that the Court erred in distinguishing Responsible Economic Development because there is no authorization in either the Pollution Control Act or the Fund Act to apply the Acts and their promulgated regulations together. Duke's reliance on Responsible Economic Development is misplaced since in Spectre, LLC v. South Carolina Department of Health and Environmental Control, 386 S.C. 357, 688 S.E.2d 844 (2009), the Supreme Court held that where a statute expressly states it applies to other state permits, even generally, the Department may invoke the provision of one statute and its regulations to the other applicable statutes and regulations. Id., 386 S.C. at 371, 688 S.E.2d at 851 (holding that because the Coastal Zone Management Act expressly provides that the Coastal Management Plan applies to state permits, stormwater permits under the Stormwater Management and the Sediment Reduction Act and apply to the Coastal Management Plan). Indeed, Duke does not even mention, much less attempts to address the holding of Spectre on this argument. The Fund Act provides that its provisions are to apply to, *inter alia*, all permits issued pursuant to the Pollution Control Act. S.C. Code Ann. § 48-2-30(B)(1). The issuance of WQCs is authorized under Regulation 61-101. South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control, 390 S.C. 418, 430, 702 S.E.2d 246, 253 (2010) (stating "[t]his regulation [(Regulation 61-101)] establishes procedures and policies for implementing water quality certification requirements of Section 401 of the Clean Water Act). Regulation 61-101 is authorized under the Pollution Control Act. S.C. Code Ann. §§ 48-1-30 (Rev. 2008 and Supp. 2012) and 48-1-50(17) (Rev. 2008). The Fund Act applies to all permits under the Pollution Control Act and the Fund Act and is authorized by the promulgation of Regulation 61-30. S.C.

Code Ann. §§ 48-2-30(B(1) and 48-2-70. Consequently, here, as in Spectre, the provision of two regulations that do not reference each other may, nevertheless, apply to each other when the authorizing statute for one regulation expressly states it is applicable to the statute authorizing the other regulation. Thus, Duke's claim is meritless.

IV. THE DEPARTMENT'S INTERPRETATION OF REGULATION 61-30 AND REGULATION 61-101 IS ENTITLED TO DEFERENCE.

Although acknowledging the well established fact that "[t]he construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons," Duke claims that deference is not appropriate in this case. See Sloan v. South Carolina Board of Physical Therapy Examiners, 370 S.C. 452, 468-69, 636 S.E.2d 598, 607 (S.C. 2006) citing Emerson Electric Company v. Wasson, 287 S.C. 394, 397, 339 S.E. 2d 118, 120 (1986); Brown v. Bi-Lo, Inc., 436 S.C. 436, 440, 581 S.E.2d 836, 838 (S.C. 2003). In particular, Duke makes the following arguments against deference: 1) deference shows that there is no plain and unambiguous intent in that the time schedule in Regulation 61-30 applies to the substantive review under Regulation 61-101, since deference is limited to cases where the intent of the statute or regulation is in doubt; 2) regulatory interpretations of the staff are not entitled to deference; 3) that, even if deference is proper, the staff only interpreted the tolling provision in Regulation 61-30, and not the suspension provision in Regulation 61-101; and 4) that the staff interpretation is not entitled to deference because it is in opposition to a prior determination of the Administrative Law Court. The arguments are without merit.

Duke misapprehends the basis of the Court's holding when it claims that deference to the Department establishes the fact that there is no plain and unambiguous intent supporting and applying the time schedule in Regulation 61-30 to the substantive review under Regulation 61-

101. Contrary to Duke's claim, the Court did not base its opinion on the Department's interpretation of Regulation 61-30 and Regulation 61-101. Rather, the Court, after a lengthy discussion and analysis of the statutory and regulatory scheme related to the review of WQC applications, made the following findings:

[t]here are multiple references to the substantive permit process in Regulation 61-30 and many portions of Regulation 61-30's requirements and procedures regarding the application procedure mirror the requirements in Regulation 61-101. Reading the statutory mandates and regulatory requirements in their plain and ordinary sense indicates that Regulation 61-30 and 61-101 were to be read together to provide DHEC more flexibility in the processing of permits. Both of the regulations can exist without negating the other, as Regulation 61-30 clarifies Regulation 61-101's 180-day time period of review will be counted.

Duke Energy Carolinas, 2012 WL 6178081 *6 (emphasis added). Based on these findings, the Court stated that "[b]ecause we find Regulation 61-101 and Regulation 61-30 are applicable to each other, we believe that the tolling provisions of 61-30 are also applicable to Regulation 61-101. Additionally, DHEC explained its interpretation of the time schedule to Duke Energy in their letter dated October 19, 2008, as well as other documents . . . "We give DHEC's interpretation deference because we believe it complied with the regulations' plain language." Duke Energy Carolinas, 2012 WL 6178081 *7 (emphasis added). Since the Court made an independent finding that the language of the regulations, in conjunction with the intent of the Fund Act, lead to the conclusion that the tolling provision of Regulation 61-30 were to apply to the substantive review under Regulation 61-101, the Court's holding is not harmed by the fact that the Court noted and approved of the Department's identical interpretation of the regulations.

Next, Duke misapprehends the law when it claims that the Department is not entitled to deference since the interpretation was made by staff. The Supreme Court case, South Carolina

Coastal Conservation League v. South Carolina Department of Health and Environmental Control, 363 S.C. 67, 610 S.E.2d 482 (2005), is easily distinguished from this case. In that case, the staff and the Coastal Zone Management Appellate Panel of the Department's Office of Coastal Zone Management differed in interpreting which regulation applied to the building of a bridge over marsh land in the state's coastal zone. Although the Supreme Court concluded that deference should be accorded to the Coastal Zone Appellate Panel, it did so after concluding that the panel, and not staff, had analyzed the matter using the correct regulation. South Carolina Coastal Conservation League, 363 S.C. at 75-76, 610 S.E.2d at 486. Here, the staff's interpretation that the tolling provision of Regulation 61-30 governed the calculation of the 180-day review period was not overruled by the South Carolina Board of Health and Environmental Control ("Board").² Indeed, the issue of the applicability of the Regulation 61-30's time schedule and tolling provisions to the calculation of the 180-day review period was not even raised by Duke in the proceedings before the Board. Record at pp 118-19 and 255-56.

Moreover, the Supreme Court has recently accorded deference to the interpretation of a Department staff member in a provision of Regulation 61-101. In Murphy v. South Carolina Department of Health and Environmental Control, 396 S.C. 633, 723 S.E.2d 1919 (2012), the Supreme Court deferred to the interpretation of the staff member who conducted the review of the WQC application that the "'vicinity of a project' is determined on a case-by-case basis." Murphy, 396 S.C. at 640-41, 723 S.E.2d at 195 (stating that because the staff member's "interpretation is both reasonable and consistent with the plain language of the regulation, we see no reason to deviate from DHEC's construction and application"). Thus, Duke's claim is without merit.

² Although the Board overruled the Department staff decision, it did so based solely on "the Water Quality Certification as issued does provide sufficient flow to protect classified uses, the endangered shortnose sturgeon and adequate assurance that certification requirements and water quality standards in the Catawaba River in South Carolina will be met." Record at p.2.

Similarly, Duke's argument that, even if deference were proper, the Department only notified Duke of its interpretation of the time schedule in Regulation 61-30, and not Regulation 61-101, is meritless. As noted by the Court, the Department notified Duke in numerous correspondences that, while the Department is awaiting receipt of information requested, the 180-day review period was stopped. Notification was first sent on July 29, 2008, in an e-mail regarding what would be contained in the public notice that would be issued on August 8, 2008. Record at pp. 134-35. Notification was also contained in each written request for additional information sent to Duke. Record at pp. 141-76. While the time schedule in Regulation 61-101 was not expressly referenced, there was no need since the clear import of the notifications were for the purpose of the Department's review of the WQC application in reference to the time schedule in Regulation 61-101, and was not necessary since the time schedule in Regulation 61-30 was the process that the Department was following. Moreover, when Duke inquired about the passage of the 180-day time period, Duke responded that "[b]ased on the dates in the fee letter and the QAPP [(Quality Assurance Program Plan)] letter, I agree with your assessment." Record at pp. 128-29. Thus, this claim is meritless.

Finally, Duke's claim that deference should not be accorded to the Department's interpretation of Regulation 61-30 and 61-101 because of it clashes with a prior ruling in the Administrative Law Court is meritless. Specifically, Duke claims that since the Administrative Law Court in South Carolina Department of Transportation v. South Carolina Department of Health and Environmental Control and Friends of Congaree Swamp, 2008 WL 1934476, 1 (Apr. 12, 2008 S.C.A.L.C.) held that the Department's process of a WQC application was not suspended in accordance with the requirements of Regulation 61-101, the Department was not entitled to interpret that its review of Duke's application was governed under the time schedule in Regulation 61-30. However, as set forth in the Rules of the Administrative Court, the only

decisions binding upon future cases are those in which the Administrative Law Court sits en banc. Rule 70(F) South Carolina Rules for the Administrative Law Court (**Effect of an En Banc Order**). The issues(s) addressed in en banc decisions by the administrative law judges are **binding upon all individual administrative law judges in all subsequent cases**, unless a majority of the judges determine otherwise) (emphasis in original and added). Since neither the South Carolina Department of Transportation case nor the current case were heard and decided by an en banc panel of the Administrative Law Court, the rulings of that Court have not precedential effect.

Accordingly, the Department's interpretation of the time schedules in Regulation 61-30 and Regulation 61-101 comply with the plain language of the regulations; therefore, the Department interpretation is entitled to the deference accorded it by this Court.

V. DUKE'S APPEAL OF THE ISSUE OF THE APPLICABILITY OF REGULATION 61-30'S TIME SCHEDULE TO THE REVIEW OF WQC APPLICATIONS UNDER REGULATION 61-101 IS NOT PRESERVED.

As discussed in the previous section, Duke argues, in part relying on the Dissent, that the Department staff's interpretation of Regulations 61-30 and 61-101 are not entitled to deference because such interpretations must come from the Board. Duke Energy, LLC, 2012 WL 6178081 *10. "[I]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." South Carolina Department of Transportation v. First Carolina Corporation of South Carolina, et al., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (citations omitted). In order to place the issue before this Court, Duke was required to establish that the issue was preserved for review by showing that the issue was "(1) raised to and ruled upon by the trial court, (2) raised by the [Respondent], (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." Walterboro Community Hospital, Inc. v. Meacher, et al., 703 S.E.2d 233, 240 (Ct.

App. 2010) (citation omitted). When the Department raised this issue before the Administrative Law Court and to this Court, with regard to Duke's Motion to Dismiss, Duke claimed that it was not required to raise the issue before the Board to preserve it because the Administrative Law Court reviews contested cases de novo and, therefore, are not bound by judgments of the Board. Record at p. 255-56. However, by challenging this Court's acknowledgment of deference to the Department staff interpretation on the grounds the Board did not rule on the issue, Duke highlights the error in reliance on the scope of the Administrative Law Court's review. De novo review is meant to allow a reviewing court the latitude to access matters before it without being bound by the determination of a prior court or tribunal. Blizzard v. Miller, 306 S.C. 373, 375, 412 S.E.2d 406, 407 (1991). However, not being bound by the determination of a prior body is distinguishable from the situation where a party seeks to base its appeal solely on a matter that it never raised in the prior administrative proceeding. See Carson v. South Carolina Department of Natural Resources, 371 S.C. 114, 120, 638 S.E.2d 45, 48 (2002) (finding that issues not raised to and ruled upon by the agency are unpreserved for judicial review).

Moreover, contrary to the Dissent's assertion, the statute authorizing appeals from Department decisions does limit appeals of Department decisions in which a final review conference is held to matters raised before the Board. See S.C. Code Ann. 44-1-60(G)(3)([a]) "applicant, permittee, licensee, or affected person may file a request for a contested hearing within thirty calendar days after: the final agency decision resulting from the final review conference is received by the parties." (emphasis added). As a result, Duke's Motion for Rehearing can be denied on this additional ground.

VI. IN THE ABSENCE OF CLEAR LEGISLATIVE INTENT, THE STATE'S RIGHT TO ISSUE A DECISION ON DUKE'S WQC APPLICATION WAS NOT WAIVED, EVEN IF THE DEPARTMENT'S REVIEW TOOK MORE THAN 180 DAYS.

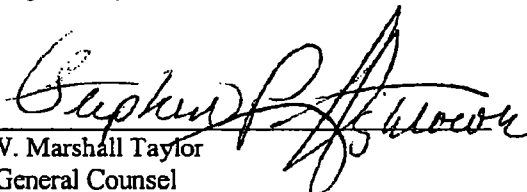
Duke's Motion for Rehearing can also be dismissed on the ground that, even if the Court's holding that "the ALC erred in finding, as a matter of law, Regulation 61-30 had no application to Regulation 61-101" were reversed. Although Regulation 61-101 established a 180-day time period for the review of WQC application, it did not impose a remedy to correct the failure or to punish the Department for its failure to review the application in a timely manner. 8 S.C. Code Ann. Regs. 61-101(A)(6). The only time period for which the regulation sets forth a remedy for violating is the one year time period established under Section 401 of the Federal Clean Water Act, which mandates that a state must issue a decision on a WQC application within one-year of receipt of the application. 8 S.C. Code Ann. Regs. 61-101(A)(6) accord 33 U.S.C. § 1341 (a)(1) (2012). The 180-day time period is not the only time period for which the regulation provides no remedy if the Department fails to conduct a timely review. The regulation also provides a time period with regard to WQC applications for the following categories of projects: 1) public boat ramps; 2) placement of fill for public highways or bridges; 3) disturbances or the placement of fill for construction of electric transmission line; 4) dredging or filling to maintain Federal or State navigational channels; and 5) public water supplies, the Department shall issue proposed certification decisions within sixty (60) days. 8 S.C. Code Ann. Regs. 61-101(F)(4). Since the regulation only contemplates the waiver of WQC review when the Department has violated federal law and taken more than one-year to render its decision, it is clear that the regulation does not intend the waiver of a WQC application when the time period is either of the state mandated 180-day or 60-day review time periods. See Cox, 308 S.C. at 174, 417 S.E.2d at 561 ("[t]he true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose." Id. 308 S.C. at 174, 417 S.E.2d. at 561 (emphasis added)).

Moreover, since the language of Regulation 61-101 imposes no penalty against the Department for not issuing a decision on a WQC application within the 180-day or 60-day time periods, the judiciary cannot impose such a penalty in the absence of express legislative intent. As the Supreme Court stated in Johnston v. South Carolina Department of Labor, Licensing, and Regulation, 365 S.C. 293, 617 S.E.2d 363 (2005) when a statute omitted a consequence “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 298, 617 S.E.2d at 365, citing Brock v. Pierce County, 476 U.S. 253, 106 S.Ct. 1834, 90L.Ed.2d 248 (1986) (“courts should not assume Congress intended an agency to lose its power to act; agency does not lose jurisdiction for failing to comply with statutory time limit unless statute expressly sets time limit and specifies a consequence”). Accordingly, the Court should not impose and the ALC was wrong to impose a waiver as the penalty for the failure to issue a decision on Duke’s WQC application within 180-days, but less than one year from receipt of the application.

CONCLUSION

For the reasons set forth above, Appellant South Carolina Department of Health and Environmental Control respectfully requests that the Court deny the Petition for Rehearing.

Respectively submitted,


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February 26, 2013
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
Appellate Case No. 2010-166486

Duke Energy Carolina, LLC, ... Respondent,

v.

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

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

CERTIFICATE OF SERVICE

I, Sandra R. Wessinger, paralegal for the South Carolina Department of Health and
Environmental Control, hereby certify that I have, on this 26th day of February, 2013, served a
copy of the Department's **Return to the Petition for Rehearing** upon the counsels of record by
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February 26, 2013
Columbia, South Carolina

The South Carolina Court of Appeals

Duke Energy Carolinas, LLC, Respondent,

v.

South Carolina Department of Health and Environmental Control, South Carolina Attorney General, American Rivers, and The South Carolina Coastal Conservation League, Defendants, Of whom South Carolina Department of Health and Environmental Control and American Rivers and The South Carolina Coastal Conservation League are, Appellants.

Appellate Case No. 2010-166486

ORDER

RECEIVED

MAY 02 2013

NEXSEN PRUET, LLC

The petition for rehearing is granted. We dispense with further briefing and argument. The attached opinion is substituted for the previous opinion, which is withdrawn.

H. R. Weir J.

James E. Cobb J.
Paul D. Thomas J.

I adhere to my dissent.

Columbia, South Carolina

APX_000795

cc:

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W. Thomas Lavender, Jr.

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Stephen Philip Hightower

FILED

1 May 2013

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Duke Energy Carolinas, LLC, Respondent,

v.

South Carolina Department of Health and Environmental Control, South Carolina Attorney General, American Rivers, and The South Carolina Coastal Conservation League, Defendants, Of whom South Carolina Department of Health and Environmental Control and American Rivers and The South Carolina Coastal Conservation League are, Appellants.

Appellate Case No. 2010-166486

Appeal From Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Published Opinion No. 5062
Heard May 23, 2012 – Filed December 12, 2012
Withdrawn, Substituted and Refiled May 1, 2013

REVERSED AND REMANDED

Stephen P. Hightower, of Columbia, for Appellant South Carolina Department of Environmental Control.
Christopher K. DeScherer, J. Blanding Homan, IV, and Frank S. Holleman, III, all of the Southern Environmental Law Center, of Charleston, for Appellants American Rivers and South Carolina Coastal Conservation League.

James Wm. Potter, W. Thomas Lavender, Jr., Joan W. Hartley, all of Nexsen Pruet, LLC, of Columbia, for Respondent.

LOCKEMY, J.: In this administrative action, South Carolina Department of Health and Environmental Control (DHEC) appeals the administrative law court's (ALC) decision, arguing that the ALC erred in finding: (1) DHEC's review of Duke Energy Carolinas, LLC's (Duke) water quality certification application was not timely and (2) DHEC waived its right to issue a water quality certification to Duke. American Rivers and South Carolina Coastal Conservation League (Coastal Conservation) (collectively Conservation Groups) also appeal the ALC's decision and contend the ALC erred in: (1) refusing to give effect to Regulation 61-30; (2) finding DHEC's decision untimely; (3) misconstruing Regulation 61-101; (4) ignoring facts that showed Duke was estopped from arguing DHEC's decision was untimely; and (5) failing to find that Duke waived any challenge to DHEC's certification decision and the State's certification authority.¹ We reverse and remand.

FACTS

We first review the relevant statutory framework for these facts. Section 401 of the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2010), "requires States to provide a water quality certification [WQC] before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters." *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 707 (1994); *see* 33 U.S.C. § 1341 (2010). States "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." 33 U.S.C. § 1341(a)(1). Further, section 401 of the CWA 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

¹ DHEC and the Conservation Groups will be collectively referred to as Appellants.

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.

Id.

"The Pollution Control Act [PCA] empowers DHEC to 'take all action necessary or appropriate to secure to this [s]tate the benefits of the Federal [CWA].'" S.C. Code Ann. § 48-1-50(17) (Rev. 2008). Section 48-1-30 of the South Carolina Code (Rev. 2008) authorizes generally that DHEC shall promulgate regulations guiding the procedures for permits under the PCA. Regulation 61-101 was then promulgated pursuant to section 48-1-30 to establish procedures and policies for implementing the WQC requirements of Section 401 of the CWA. S.C. Code Ann. Regs. 61-101 (Supp. 2011); *S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control*, 390 S.C. 418, 430, 702 S.E.2d 246, 253 (2010).

Regulation 61-101 requires that any applicant for a federal license or permit, including those issued by Federal Energy Regulatory Commission (FERC), to conduct any activity which during construction or operation may result in any discharge in navigable waters, must obtain a water quality certification from DHEC. S.C. Code Ann. Regs. 61-101(A)(2). Further, it establishes a time frame for review of the applications, stating

[DHEC] 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 of the applicant or [DHEC] or of its own volition, suspension of processing of application for certification will also occur, unless specified otherwise in writing by [DHEC]. Unless otherwise suspended or specified in this regulation, [DHEC] shall issue a proposed decision on all applications within 180 days of acceptance of an application.

S.C. Code Ann. Regs. 61-101(A)(6). Review can begin when an applicant has presented DHEC with a complete application in the manner specified by

Regulation 61-101. S.C. Code Ann. Regs. 61-101(C)(1). An application must contain the names and addresses of adjacent property owners. S.C. Code Ann. Regs. 61-101(C)(1)(f).

Regulation 61-101(C)(2) states

[i]f [DHEC] 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.

Moreover, Regulation 61-101(C)(4) provides

[w]hen [DHEC] 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 [DHEC]. Any subsequent resubmittal will be considered a new application.

The Environmental Protection Fund Act (Fund Act), sections 48-2-10 to 48-2-90 of the South Carolina Code (Rev. 2008 & Supp. 2011), was enacted for the purpose of creating a fund whose "monies must be used for improved performance in permitting, certification, licensing, monitoring, investigating, enforcing, and administering [DHEC's] functions." S.C. Code Ann. § 48-2-40 (Rev. 2008). The Fund Act applies to the processing of all environmental permits, licenses, certificates, and registrations authorized by the PCA, Clean Air Act, Safe Drinking Water Act, Hazardous Waste Management Act, Atomic Energy Act, and the Oil and Gas Act. S.C. Code Ann. § 48-2-30(B) (Rev. 2008 & Supp. 2011). WQCs are also covered by the Fund Act. S.C. Code Ann. § 48-2-50(H)(1)(b) (Supp. 2011).

The Fund Act contains a provision entitled, "Processing of permit application; maximum time for review," which mandates that DHEC promulgate regulations governing the timeliness, thoroughness, and completeness of DHEC's processing

of application subject to the Fund Act. S.C. Code Ann. § 48-2-70 (Rev. 2008).
Section 48-2-70 states

[u]nder each program for which a permit processing fee is established pursuant to this article, the promulgating authority also shall establish by regulation a schedule for timely action by [DHEC] on permit applications under that program. 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.

§ 48-2-70. DHEC promulgated the Environmental Protection Fees, S.C. Code Ann. Regs. 61-30 (2011), in accordance with the Fund Act. Its purpose and scope is described as follows:

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. This regulation also establishes procedures for the payment of fees, provides for the assessment of penalties for nonpayment, and establishes an appeal process to contest the calculation or applicability.

S.C. Code Ann. Regs. 61-30(A). Regulation 61-30 also provides in pertinent part that "[a]pplication fees shall be due when the application is submitted. The Department will not process an application until the application fee is received."
S.C. Code Ann. Regs. 61-30(C)(1)(b). Further, the regulation maintains that

[t]he 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.

S.C. Code Ann. Regs. 61-30(H)(1)(c).

On June 5, 2008, Duke filed an application with DHEC to obtain a WQC for a FERC license authorizing Duke's continued operation of the Catawba-Wateree Hydroelectric Project in South Carolina. The application was submitted without the required names and addresses of the adjacent property owners. Additionally, Duke did not provide the regulatory application fee.

On June 27, 2008, Duke supplied DHEC with several lists that contained the names of interested citizens and stakeholders who had contacted Duke and requested notification of matters regarding Duke's FERC application. However, the lists still did not contain all the names and addresses of the adjacent property owners. On July 29, 2008, Duke provided DHEC with a list of the names and addresses of all the adjacent property owners. In response to Duke's fulfillment of that requirement, DHEC notified Duke by email that it was placing Duke's application on public notice. However, DHEC also specified it still required an affidavit of publication and the required application fee from Duke before its review would commence and the 180 day clock would start. DHEC placed Duke's application on public notice on August 8, 2008.

DHEC also sent a letter to Duke dated August 19, 2008 (Letter 1), requesting additional information regarding the draft Quality Assurance Program Plan (QAPP) that Duke had submitted with their application. Letter 1 further requested that Duke submit the information to DHEC by October 19, 2008, and notified Duke that pursuant to Regulation 61-30, DHEC had 180 days to issue a decision once the application was complete. Letter 1 also stated Duke's application would not be complete for processing until the application fee and affidavit of publication requested previously was received, and that "the clock stops when information is requested and [DHEC] is waiting on a response."

DHEC received the affidavit and application fee on August 25, 2008. DHEC then sent two more letters to Duke requesting additional information needed to process Duke's application. One letter (Letter 2) was sent to Duke on October 8, 2008, requesting the additional information by November 8, 2008. On November 10, 2008, DHEC received the information requested in the October 8 letter. Another letter (Letter 3) was sent to Duke on October 21, 2008, requesting information to be sent to DHEC by November 21, 2008. DHEC received a partial response on the due date for the information. The remainder of the information was received by DHEC on December 12, 2008.

On May 15, 2009, DHEC issued its Notice of Department Decision (Notice), granting Duke's WQC. The Conservation Groups appealed the Notice on May 15, 2009, challenging DHEC's proposed WQC on the grounds that it would permit Duke to operate its project in violation of water quality standards. The South Carolina Board of Health and Environmental Concern (Board) granted the Conservation Groups' request for a final review conference, which was held on July 9, 2009. On August 6, 2009, the Board issued a final agency decision, overturning DHEC's issuance of Duke's WQC.

Duke appealed the Board's decision by filing a request for a contested case proceeding in the ALC on September 5, 2009. By an order dated November 9, 2009, the ALC admitted the Conservation Groups and the South Carolina Attorney General as respondent-intervenors.² On January 21, 2010, Duke filed two motions with the ALC, one for summary judgment and the second for declaratory judgment. Duke based its argument for summary judgment on two grounds: (1) pursuant to regulation 61-101(A)(6) of the South Carolina Code (Supp. 2011), DHEC was required to issue a proposed decision on Duke's application for a WQC within 180 days of receiving the application on June 5, 2008, and (2) by operation of law, the State waived its right to issue certification when DHEC failed to either issue or deny the WQC on or before December 2, 2008.

DHEC filed a response on February 12, 2010 in which it argued for denial of Duke's motions. A hearing was held on May 6, 2010, and on June 10, 2010, the ALC granted Duke's motion for summary judgment, but failed to rule on Duke's

² The ALC limited the participation of the South Carolina Attorney General to issues impacting the State's law suit against the State of North Carolina seeking a ruling from the United States Supreme Court on the proper apportionment of water from the Catawba River.

motion for declaratory judgment. DHEC and the Conservation Groups filed a joint motion for reconsideration, which the ALC denied. Both DHEC and the Conservation Groups filed timely appeals from the ALC's decision to grant summary judgment to Duke and its denial of their joint motion for reconsideration, which this court has consolidated under this caption.

STANDARD OF REVIEW

"Appeals from the ALC are governed by the Administrative Procedures Act (APA)." *MRI at Belfair, LLC v. S.C. Dept. of Health and Env'tl. Control*, 394 S.C. 567, 572, 716 S.E.2d 111, 113 (Ct. App. 2011). "Pursuant to the APA, this court may reverse or modify the ALC if the appellant's substantial rights have been prejudiced because the administrative decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by an error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *Id.* (citing S.C. Code Ann. § 1-23-380(5) (Supp. 2010)).

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011) (citing *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)). "Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted 'if 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 the moving party is entitled to a judgment as a matter of law.'" *Media Gen. Commc'ns, Inc. v. S.C. Dept. of Revenue*, 388 S.C. 138, 144, 694 S.E.2d 525, 527 (2010) (citing Rule 56(c), SCRCP); *see also* ALC Rule 68 (stating the South Carolina Rules of Civil Procedure may be applied in proceedings before the ALC to resolve questions not addressed by the ALC rules). In determining whether a genuine issue of material fact exists, "the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009).

LAW/ANALYSIS

Application of Regulation 61-30 to Regulation 61-101

"Regulations are interpreted using the same rules of construction as statutes." *Murphy v. S.C. Dep't of Health and Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012); *see S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n*, 389 S.C. 380, 389, 699 S.E.2d 146, 151 (2010). "When interpreting a regulation, we look for the plain and ordinary meaning of the words of the regulation, without resort to subtle or forced construction to limit or expand [its] operation." *Murphy*, 396 S.C. at 639-40, 723 S.E.2d at 195 (quoting *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 350 S.C. 39, 47, 564 S.E.2d 341, 346 (Ct. App. 2002)). "Furthermore, we give deference to the interpretation of a regulation by the agency charged with it [sic] enforcement." *Id.* at 640, 723 S.E.2d at 195; *see Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006) ("The construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons.").

"The primary rule of statutory construction is to ascertain and give effect to the intent of the [legislature]." *Beaufort Cnty. v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) (citing *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011)). "This [c]ourt has held that a statute shall not be construed by concentrating on an isolated phrase." *Id.* (citing *Laurens Cnty. Sch. Dists. 55 & 56 v. Cox*, 308 S.C. 171, 174, 417 S.E.2d 560, 561 (1992)) ("The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose. In applying the rule of strict construction the courts may not give to particular words a significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent.")); *see also Sloan*, 370 S.C. at 468, 636 S.E.2d at 606-07 ("A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers."). "Moreover, it is well settled that statutes dealing with the same subject matter are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Beaufort Cnty.*, 395 S.C. at 371, 718 S.E.2d at 435.

First, we briefly address Appellants' argument that the ALC erred in finding *Responsible Economic Development, et al. v. South Carolina Department of*

Health and Environmental Control and Wal-Mart Stores East, LP, 371 S.C. 547, 641 S.E.2d 425 (2007) applied to the instant case. *Responsible Economic* held that regulations from different enabling acts could not be applied to each other when the regulations did not reference each other and there is an absence of statutory authorization to apply the two acts and their corresponding regulations to each other. We agree with the Conservation Groups' contention that the present case is distinguishable from *Responsible*.

Section 48-2-70, under which Regulation 61-30 is promulgated, explicitly states DHEC must establish by regulation a schedule for timely action on permit applications for a WQC. S.C. Code Ann. § 48-2-70 (Rev. 2008). It further states the schedule must have criteria for determining in a timely manner when an application is complete along with the maximum length of time necessary and appropriate for a thorough and prompt review required by the act under which the permit is sought. *Id.* The statute's plain language indicates the time schedule provided in Regulation 61-30, as well as any corresponding explanation of how to count the days in that time schedule, would be applicable to any previous regulation under which the permit is authorized.

Regulation 61-30 "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.*" S.C. Code Ann. Regs. 61-30(A) (emphasis added). The regulation defines "time schedule" as follows:

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.

S.C. Code Ann. Regs. 61-30(B)(22) (emphasis added). Section H(2)(a)(vii) lists the time schedules for environmental permits for water pollution control and

allows 180 days for a WQC permit to be processed; this time schedule mirrors Regulation 61-101's time schedule for permit review. Regulation 61-30 also states an application is not to be processed until the required processing fee is received. Duke argues that the 61-30 solely governs the time schedule by which a fee must be returned due to untimely action, and has no bearing upon the time schedule of the actual substantive decision of whether a permit will be granted. We have difficulty understanding how the processing of a permit hinges upon receipt of the fee, but then once that fee is received, there is a separate time schedule applied to each. There are multiple references to the substantive permit review process in Regulation 61-30, and many portions of Regulation 61-30's requirements and procedures regarding the application procedure mirror the requirements in Regulation 61-101. Reading the statutory mandates and regulatory requirements in their plain and ordinary sense indicates that Regulation 61-30 and 61-101 were to be read together to provide DHEC more flexibility in the processing of permits.³ Both of the regulations can exist without one negating the other, as Regulation 61-30 clarifies how Regulation 61-101's 180-day time period of review will be counted.

Section H(1) of Regulation 61-30 sets the procedure for counting the days in a given time schedule, and allows for tolling as well as suspension of the time schedule. S.C. Code Ann. Regs. 61-30(H)(1)(c)-(d). Because we find Regulation 61-101 and Regulation 61-30 are applicable to each other, we believe that the tolling provisions of 61-30 are also applicable to Regulation 61-101. Additionally, DHEC explained its interpretation of the time schedule to Duke Energy in their letter dated October 19, 2008, as well as in other documents. It cited Regulation 61-30, and stated that while DHEC had 180 days to complete its action on the application, only the days on which DHEC was actively reviewing the application would be counted. DHEC maintained the clock stopped when information was requested and DHEC was awaiting a response. These documents reflect DHEC's understanding of its own regulations, and Duke Energy was made fully aware of that understanding. Further, we believe DHEC's interpretation complies with the regulations' plain language.

³ We are not encouraging untimely action by state agencies. Further, we make no determinations in the present case as to the reasonableness of DHEC's requests for information, as that is not an issue on appeal. Simply put, we believe that these regulations recognize the need for some flexibility in making these complex permitting decisions, such as under these facts, where the applicant is untimely with their responses to DHEC's requests.

We find the language of section 48-2-70 provides that the regulations promulgated under its authority are to enhance DHEC's review process for any permits which require a processing fee, including a WQC. S.C. Code Ann. § 48-2-70 (Rev. 2008). Accordingly, we hold the ALC erred in finding, as a matter of law, that Regulation 61-30 had no application to Regulation 61-101. Thus, we reverse the ALC.

Estoppel

The Conservation Groups argue that because Duke had full knowledge that DHEC was operating by the full time period provided by reading Regulation 61-101 and Regulation 61-30 in conjunction, Duke is now estopped from maintaining that Regulation 61-30 is not applicable to Regulation 61-101. We decline to make a ruling on this issue, as it is moot in light of our above holding. *See Byrd v. Irmo High Sch.*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) (noting an issue becomes moot when a decision, if rendered, will have no practical legal effect upon the existing controversy).

Waiver of Water Quality Certification

Because we reverse and remand the ALC's grant of summary judgment based upon our finding that Regulation 61-30 does apply to Regulation 61-101, it is unnecessary for us to determine DHEC's arguments and additional sustaining grounds regarding waiver. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that if an appellate court's ruling on a particular issue is dispositive of an appeal, rulings on remaining issues are unnecessary).

CONCLUSION

For the foregoing reasons, we reverse and remand the ALC's decision to grant summary judgment.

REVERSED AND REMANDED.

WILLIAMS, J., concurs.

THOMAS, J., dissenting: I respectfully dissent and would affirm the order of the ALC.

As the majority has stated, Regulation 61-101 was promulgated pursuant to the South Carolina Pollution Control Act, S.C. Code Ann. §§ 48-1-10 through -350. (2008 and Supp. 2012). This regulation, which is entitled "Water Quality Certification," "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." 8A S.C. Code Ann. Regs. 61-101.A.1 (Supp. 2012).

Paragraph A.6 of Regulation 61-101 references the requirement in the Clean Water Act quoted by the majority that a State must act on a request for water quality certification within a reasonable period of time. Under the Federal Clean Water Act, this period is not to exceed one year after receipt of a certification request unless processing of the application is suspended. If the deadline is not met, "the certification requirements of this subsection shall be waived with respect to such Federal application." 33 U.S.C. § 1341(a)(1) (2006). Regulation 61-101.A.6 references the one-year deadline in the Clean Water Act for a state to act on a request for water quality certification, but imposes a shorter time limit of one hundred eighty days for DHEC to act on such a request. This regulation further provides that "[u]nless otherwise suspended or specified *in this regulation*, [DHEC] shall issue a proposed decision on all applications within 180 days of acceptance or [sic] an application." (emphasis added).

The circumstances under which Regulation 61-101 allows DHEC to suspend processing of application for water quality certification or to delay a decision past one hundred eighty days after it is received by DHEC are explained in paragraphs 2 through 4 of subsection C of the regulation.⁴ Under paragraph 2, DHEC may request additional information within sixty days after receiving an application even if the application has already been deemed complete for processing. Paragraph 3 specifies the type of information that DHEC can request, such as water quality monitoring data, water quality modeling results, or other environmental assessments. Central to this appeal is paragraph 4, which provides as follows:

⁴ Regulation 61-101.A.6 also provides that the suspension of the application process can occur "if the Federal permitting or licensing agency suspends processing of the application on request by the applicant or [DHEC] of its own volition"; however, none of these circumstances are present here.

When [DHEC] 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 [DHEC]. Any subsequent resubmittal will be considered a new application.

8A S.C. Code Ann. Regs. 61-101.C.4 (2012) (emphasis added). Under Regulation 61-101.C.4, the processing of an application for water quality certification is suspended only after the applicant has failed to meet the given deadline for submitting additional requested information and DHEC has notified the applicant about the suspension. Significantly, Regulation 61-101 does not authorize DHEC to suspend processing during the interval between the time it requests more information and the deadline that it gives the applicant when it makes the request.

On August 19, 2008, DHEC sent a letter to Duke requesting additional information about the draft Quality Assurance Program Plan that Duke submitted with its application. In the letter, DHEC instructed Duke to submit the information by October 19, 2008. DHEC sent two more letters requesting more information, one on October 8, 2008, with a deadline of November 8, 2008, and another on October 21, 2008, with a deadline of November 21, 2008. The ALC found that these requests were ineffective to suspend the processing of Duke's application. I agree with this finding. Even assuming the information that DHEC requested was both necessary to process Duke's application and not provided by the stated deadlines, DHEC never, as required by Regulation 61-101.C.4, provided Duke with a notice of suspension after any of the specified due dates. Moreover, as I have explained in the preceding paragraph, DHEC was not authorized under Regulation 61-101 to suspend its processing of Duke's application during the interval between the date of its request and the date by which Duke was to produce the required information.

The majority quotes Regulation 61-101.C.4 and does not appear to question its relevance to the processing of applications for water quality certification. However, instead of applying the unambiguous provisions of this paragraph to determine when the processing of an application is suspended, it looks to Regulation 61-30, which provides in pertinent part:

The time schedule shall be tolled when [DHEC] makes a written request for additional information and shall resume when [DHEC] receives the requested information from the applicant. If an applicant fails to respond to such a request within 180 days, [DHEC] will consider the application withdrawn and the application fee will be forfeited. [DHEC] shall notify the applicant no later than 10 days prior to expiration of the 180-day period.

4 S.C. Code Ann. Regs. 61-30.H.1.c (2011). The tolling provisions in this regulation are inconsistent with those in Regulation 61-101.C.4. Under Regulation 61-101.C.4, the processing of an application continues after DHEC requests additional information from an applicant. The processing is suspended only when the applicant misses the deadline to comply with the request *and* DHEC informs the applicant that a suspension is to take place. In contrast, under Regulation 61-30.H.1.c, the time schedule to process an application is tolled at the time DHEC makes a written request for more information and remains tolled until the applicant satisfies the request. Furthermore, Regulation 61-30.H.1.c does not require DHEC to impose any deadline on such a request. DHEC itself has acknowledged these two regulations are inconsistent with each other with regard to the method of determining whether it has acted timely on an application.

The ALC held that the issue of whether the processing of Duke's application had been suspended should be analyzed under Regulation 61-101.C.4 and DHEC could not invoke Regulation 61-30.H.1.c to support its claim that it issued a timely decision. I would affirm these holdings. First, although both regulations purport to address the issue of when DHEC can suspend processing of an application for water quality certification, Regulation 61-101 specifically covers water quality certification and was expressly promulgated to fulfill requirements of the Federal Clean Water Act. These requirements include prompt action by state agencies on requests for water quality certification, an objective important enough to warrant a legislative mandate in the Clean Water Act that unreasonable delay by a state agency in acting on such a request for water quality certification would be tantamount to a waiver by the State of its right to deny certification, which in turn would delay the applicant's pursuit of any federal license or permit for which state water quality certification is a prerequisite. *See South Carolina Coastal Conservation League v. South Carolina Dep't of Health & Env'tl. Control*, 390 S.C. 418, 430, 702 S.E.2d 246, 253 (2010) (stating Regulation 61-101 "establishes procedures and policies for implementing water quality certification requirements

of Section 401 of the Clean Water Act"). In contrast, Regulation 61-30, which is entitled "Environmental Protection Fees," covers permitting decisions for all environmental programs administered by DHEC pursuant to federal and state law and regulation. Although Regulation 61-30 "establishes schedules for timely action on permit applications," the issue of timeliness is presented in the context of determining when an application fee is deemed to be forfeited by the applicant. Nowhere does Regulation 61-30 reference the Clean Water Act.

DHEC has argued in its brief, that Regulation 61-30.H.1.c controls here because it was enacted later than Regulation 61-101.C.4 and has been amended as late as 2004. Although its provisions apply to requests for water quality certification, Regulation 61-30, does not further the mandates of the Clean Water Act or the policy favoring prompt action by the states on requests for water quality certification. Therefore, I would hold that the ALC correctly followed Regulation 61-101.C.4 in concluding that DHEC waived its right to deny certification to Duke. *Cf. City of Rock Hill v. South Carolina Dep't of Health & Env'tl Control*, 302 S.C. 161, 167-68, 394 S.E.2d 327, 331 (1990) ("[T]he general rule is that statutes of a specific nature . . . are not to be considered as repealed in whole or in part by later general statutes . . . , unless there is a direct reference to the former statute or the intent of the legislature to repeal is explicitly implied therein.").

Furthermore, as Duke has noted, DHEC issued requests for information on October 8, 2008, and November 8, 2008, while it was awaiting information it requested on August 19, 2008. DHEC's own actions, then, show it did not suspend the processing of Duke's application according to Regulation 61-30.H.1.c; rather, it continued to review it actively after it requested supplemental information.

I would further reject Appellants' arguments that the doctrines of estoppel and waiver preclude Duke from raising the issue of timeliness of DHEC's action on its application. DHEC, as the party claiming estoppel, must prove not only reliance on Duke's conduct, but also that "lack of knowledge and of the means of [obtaining] knowledge of the truth as to the facts in question." *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107 n.2, 531 S.E.2d 287, 292 n.2 (2000). Here, DHEC cannot reasonably claim it lacked knowledge and the means of obtaining knowledge about its own regulations.

As to Appellants' contention that Duke could not raise the issue of timeliness during proceedings before the ALC because it did not raise this issue to the DHEC staff or board, I note the appealed order resulted from a contested case hearing, not

a judicial review proceeding. The governing statute does not limit the parties to asserting only those issues that had been litigated before the administrative agency. *See* S.C. Code Ann. § 44-1-60(G) (Supp. 2012) (setting forth procedures for contested case proceedings).

For the foregoing reasons, I would hold that DHEC's processing of Duke's application for water quality certification was never suspended pursuant to Regulation 61-101.C.4. When DHEC issued its staff decision on May 15, 2009, it had already waived its right to act on the requirement for the state water quality certification that Duke would otherwise have been required to satisfy in order to obtain a FERC license to continue operating the Catawba-Wateree Hydroelectric Project. I would therefore affirm the ALC's decision.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

Duke Energy Carolinas, LLC Petitioner,

v.

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

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

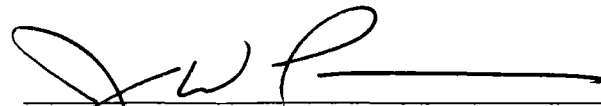
PROOF OF SERVICE

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

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