THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Appellate Case No. 2013-001118

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 and American Rivers and South Carolina Coastal Conservation League are also Respondents.

RETURN OF RESPONDENTS AMERICAN RIVERS AND SOUTH CAROLINA COASTAL CONSERVATION LEAGUE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **Did DHEC pass upon the Water Quality Certification application in a timely way as shown by the plain language of the governing regulations and statutes, without a conflict between the regulations and in a way that does not "repeal" but rather applies and carries out the language of the governing regulations and statutes?**

2. **Should the Courts follow DHEC's reasonable interpretation of its own regulations and the statutes it administers?**

3. **Is the Court of Appeals decision consistent with this Court's decision in Responsible Economic Development v. South Carolina Department of Health and Environmental Control, 371 S.C. 547, 641 S.E.2d 425 (2007)?**

4. **Can Petitioner hide its timing objection and wait to object until it has lost on the merits?**

5. **Can Petitioner insert into the governing statute a penalty that the Legislature did not impose and that is different from and in addition to the Legislature's chosen consequence?**

6. **Did the Administrative Law Court Err in Finding that South Carolina waived its authority to protect the State's water quality without a clear Legislative mandate to do so?**

STATEMENT OF THE CASE

Under the federal Clean Water Act ("CWA"), each State has a sovereign right to review major federal projects and determine that they are consistent with the State's water quality standards and that they will not degrade the State's water quality. 33 U.S.C. § 1341 (a). An applicant for a federal permit for such a project must obtain a Water Quality Certification from the State under Section 401 of the Clean Water Act. Id. In South Carolina, the State's Water Quality Certification decision is made by the South Carolina Department of Health and Environmental Control ("DHEC").

Here, the Board of DHEC considered the application of Duke Energy Carolinas, LLC ("Petitioner") for South Carolina's Water Quality Certification for Petitioner's proposed water releases and other discharges from its Catawba-Wateree Hydroelectric

Project. That project and its plan for water discharges from the Wateree dam in South Carolina has a tremendous impact on the water resources of South Carolina, specifically the Catawba-Wateree basin that runs through the center of the State. Staff Assessment at p. 4, App. p. APX_000008.

After consideration of Petitioner's application, the Board unanimously denied the Water Quality Certification and found that Petitioner's application was not consistent with South Carolina's water quality standards. Final Agency Decision of August 6, 2009, App. pp. APX_000005-8.

During consideration of Petitioner's application by the DHEC staff and the DHEC Board, Petitioner never suggested or objected that the time had run on the State's consideration. In fact, the DHEC staff explained to Petitioner how it was counting the days, and Petitioner never objected. DHEC Letters of August 19, October 8, and October 21 2008, App. pp. APX_000145-146, 148-149, 157-58. Indeed, Petitioner continued to provide information to the DHEC staff during the period when it now contends the State's authority had been waived. During consideration by the DHEC Board, Petitioner never claimed that the time had run or that the State's right had been waived, but rather urged the DHEC Board to adopt the DHEC staff decision, which it now contends was a nullity due to the supposed waiver.

Petitioner made its counting-the-days argument only after it sought review of the DHEC Board's decision in the Administrative Law Court ("ALC"). The ALC adopted Petitioner's argument.

The Court of Appeals, however, found that the State had not waived its right to pass on the Water Quality Certification but instead that DHEC had calculated the time

period according to the plain language of the government regulations and statues in a proper way. Duke Energy Carolinas, LLC v. S.C. Dept. of Health and Environmental Control, 404 S.C. 119, 744 S.E.2d 194 (Ct. App. 2013).

SUMMARY OF ARGUMENT

The petition is based upon Petitioner's 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, Petitioner can prevail *only* by ignoring the plain language of the relevant statutes and regulations. In fact, the Court of Appeals did not "repeal" any regulation, and 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 Petitioner's argument fails.

Second, in creating a complex and convoluted interpretation of the regulatory language in order to concoct a conflict in the regulations, Petitioner 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.

Third, the Court of Appeals decision is entirely consisted with this Court's decision in Responsible Economic Development v. South Carolina Department of Health and Environmental Control, 371 S.C. 547, 641 S.E.2d 425 (2007).

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

Fourth, Petitioner 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 Petitioner is estopped from making it.

Fifth, Petitioner 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, Petitioner 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.

ARGUMENT

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 and no "repeal" of a regulation.

Petitioner 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 Certification. It is undisputed that, if the rules of Regulation 61-30 apply, then the DHEC decision was made within 180 days. Petitioner tries to avoid that Regulation by arguing that the

Regulation's 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 Court of Appeals 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 Ann. § 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 Ann. 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 Ann. Regs. 61-30(B)(22). 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 Ann. 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 Ann. § 48-2-50(A) (emphasis added). Petitioner'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 Ann. § 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]

Petitioner 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 Ann. 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 Ann. 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 Court of Appeals explained, Regulation 61-30 sets out the rules applicable to tolling. Regulation 61-101 does not address tolling but only suspension, and, as the dissent in the Court of Appeals concludes, DHEC "did not suspend the processing of Petitioner's application." 744 S.E.2d at 203. Instead, the

[1]The Administrative Law Court labeled S.C. Code §§ 48-2-10 the "Fees Act," and Petitioner 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 plain language of a rule reaches further than its title).

DHEC staff worked with Petitioner 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 Petitioner gathered additional information, and DHEC reached its decision within the 180-day time period, without ever suspending the processing of the application.

Every effort should be made to read the statutes and regulations 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 Court of Appeals explained, "[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. 744 S.E.2d at 200. 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 Petitioner'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. Indeed, DHEC accommodated and worked with Petitioner to obtain the needed

information without formally suspending its consideration of Petitioner's application and now – but not before the DHEC Board, as set out below – Petitioner is attempting to use against DHEC – and the people and natural resources of South Carolina – DHEC's accommodation of Petitioner's delays.

The petition is based in significant part on Petitioner's contention that the Court of Appeals applied the plain language of Regulation 61-30 in a way that somehow "repealed" provisions of Regulation 61-101. In fact, as the Court of Appeals explained, 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, Petitioner's argument is attacking a straw man – "repeal" – that the Court of Appeals decision does not contain.

Indeed, it is Petitioner 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.

The dissent from the Court of Appeals 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 concludes that Regulation 61-101 alone applies to this case based 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." 744 S.E.2d at 202-03.

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 CWA.

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, Regulation 61-30 throughout references a keystone Clean Water Act program, NPDES permits – 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 Petitioner 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 CWA, which requires a State's Water Quality Certification before certain federal actions can be taken, including the federal authorizations required for Petitioner'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." 744 S.E. 2d at 203.

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 CWA. 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 Ann. § 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 statute under which Regulation 61-30 was promulgated – the Environmental Protection Fund Act – expressly encompasses the "Pollution Control Act" and all "environmental permits, licenses, certificates, and registrations" issued under it. S.C. Code Ann. § 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 the Environmental Protection Fund 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 requests for water quality certification." 744 S.E.2d at 203. 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 authorizing statute 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 Environmental Protection Fund 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 its authorizing statute are expressly designed to provide for prompt action on CWA 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." 744 S.E.2d at 202-03. Because of its mistaken belief that only Regulation 61-101 deals with the CWA 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 CWA, 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 Petitioner's application in a timely manner. Petitioner's convoluted arguments about phrases, clauses, and sections of DHEC's regulations do not create ambiguity where none exists. Moreover, Petitioner'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 Petitioner 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, Petitioner, of the effect of its *own* delays and failures to provide complete and adequate information.

3. The Court of Appeals decision is entirely consistent with this Court's decision in *Responsible Economic Development*.

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. There, the Court held that regulations enacted pursuant to one statute could not be applied to a permit sought under regulations enacted pursuant to a different statute, because of "the absence of statutory authorization" for the application of the regulations enacted pursuant to both statutes. 371 S.C. at 553, 641 S.E.2d at 428.

Unlike the situation in that case, here both Regulation 61-101 and Regulation 61-30 were expressly enacted to address permits issued pursuant to the South Carolina Pollution Control Act. Petitioner concedes, and it is undisputed, that Regulation 61-101 addresses permit applications under the Pollution Control Act. Petition at 2.

And so does Regulation 61-30. The Environmental Protection Fund Act, S.C. Code Ann. §§ 48-2-10 et seq., expressly applies to and is directed at applications under the Pollution Control Act, including Petitioner's application in this case. S.C. Code Ann. §§ 48-2-30(B)(1) and 48-2-50(H)(1). Specifically, the timing regulations contemplated by the Environmental Protection Fund 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 Petitioner applied. S.C. Code Ann. § 48-2-70.

Regulation 61-30 itself recites that it is adopted pursuant to S.C. Code Ann. § 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).

This case is controlled by this Court's subsequent decision in 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 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. Spectre controls this case, not Responsible Economic Development.

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

The Court of Appeals did not reach this issue, because it found that DHEC acted timely. But regardless, Petitioner cannot argue that DHEC acted untimely when Petitioner throughout the administrative process did not make this claim and instead sought to benefit from a supposedly untimely decision of DHEC staff.

From the outset, DHEC told Petitioner how it was counting the days. Petitioner never objected to DHEC, even though DHEC cited Rule 61-30 in its correspondence to Petitioner and Petitioner understood that DHEC was relying on that regulation to determine timing. While its permit application was being considered, Petitioner never objected or contended that the time period was not tolled while Petitioner gathered information that it had not yet submitted. Petitioner never asked if or claimed that waiver had occurred or that the clock had run. In fact, Petitioner itself controlled the running of the clock, because Petitioner determined how long it would take to respond to DHEC's requests for information. Petitioner 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, Petitioner actually asserted and defended *the validity of the DHEC staff's decision* on appeal before the DHEC Board. Petitioner never contended that the DHEC staff's decision was a nullity. Rather, Petitioner affirmed the validity of and sought to gain the full benefit of the agency's decision on the merits.

Only after Petitioner had lost on the merits before the DHEC Board did Petitioner pull out its waiver argument. This is a classic "hide-the-ball" litigation tactic. According to Petitioner, it could conceal its waiver argument and play this card only if it otherwise

lost. Petitioner 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).

Petitioner 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 Petitioner's theory of counting; (4) encouraging DHEC staff to continue working on its application at a time when Petitioner 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.

5. Petitioner 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 Court of Appeals also found it also unnecessary to address this point, because it found that DHEC acted timely. But even if DHEC had not acted in a timely way, Petitioner cannot prevail in this case.

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 Ann. § 30-4-30(c); S.C. Code Ann. Regs. 72-305(B)(2).

6. 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.

Petitioner 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 Petitioner's application does *not* satisfy the requirements of the Pollution Control Act.

Much is at stake in this case: 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 Petitioner and the Administrative Law Court must admit, there is no such clear expression in this case.

CONCLUSION

For these reasons, the Respondents Americans Rivers and the South Carolina Coastal Conservation League respectfully request that the Court deny the petition for writ of certiorari.

August 28th, 2013

Frank Holleman (by cleared w/ permission)

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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

Appellate Case No. 2013-001118

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 South Carolina Coastal Conservation League are also Respondents.

CERTIFICATE OF SERVICE

I certify that I have served the Return of Respondents American Rivers and South Carolina Coastal Conservation League to the Petition for Writ of Certiorari on all parties by depositing a copy of it in the United States Mail, postage prepaid, on August 28th, 2013 addressed to their attorneys of record, as indicated below:

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