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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

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Appellate Case No. 2013-001118

Duke Energy Carolina, LLC, Petitioner,

vs.

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

RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL'S *RETURN TO PETITION FOR WRIT OF CERTIORARI*

Jacquelyn S. Dickman
Deputy General Counsel

Stephen P. Hightower
Assistant General Counsel

South Carolina Department of Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201
TEL: 803-898-3350
FAX: 803-898-3367
EMAIL: hightosp@dhec.sc.gov

Attorneys for Respondent SC DHEC

TABLE OF CONTENTS

TABLE OF AUTHORITIES 2

COUNTERSTATEMENT OF QUESTIONS PRESENTED 4

COUNTERSTATEMENT OF THE CASE 5

ARGUMENTS IN REPLY 12

I. THE COURT OF APPEALS CORRECTLY GAVE EFFECT TO THE LEGISLATIVE INTENT EXPRESSED IN THE ENVIRONMENTAL PROTECTION FUND ACT, MANDATING THAT THE TIME SECHEDULES CONTAINED IN REGULATION 61-30 SHALL GOVERN THE 180-DAY TIME PERIOD FOR THE DEPARTMENT'S THOROUGH AND PROMPT REVIEW OF WATER QUALITY CERTIFICATION APPLICATIONS 12

A. The text of the Environmental Protection Fund Act explicitly mandates that the time schedule in Regulation 61-101 is repealed by the time schedule in Regulation 61-30. 14

B. The text of the Environmental Protection Fund Act implicitly mandates that the time schedule in Regulation 61-101 is repealed by Regulation 61-30. 16

C. Although Regulation 61-30's time schedule applies to more than the Department's review of water quality certification applications, it nevertheless has repealed the time schedules in Regulation 61-101 19

D. Pursuant to this Court's holding in *Spectre*, Regulation 61-30's time schedule is applicable to the Department's review under Regulation 61-101 21

II. THE DEPARTMENT'S LONGSTANDING APPLICATION OF THE TIME SCHEDULE IN REGULATION 61-30 TO ITS SUBSTANTIVE REVIEW OF WATER QUALITY CERTIFICATION APPLICATIONS IS ENTITLED TO DEFERENCE. 22

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 716 S.E.2d 877 (2011) 23

City of Rock Hill v. South Carolina Department of Health and Environmental Control, 302 S.C. 161, 394 S.E.2d 327, (1990) 18

Denman v. City of Columbia, 387 S.C. 131, 691 S.E.2d 465 (2012) 19

Duke Energy Carolinas, LLC v. South Carolina Department of Health and Environmental Control, Opinion No. 5062, December 12, 2012 12

Duke Energy Carolinas, LLC v. South Carolina Department of Health and Environmental Control, 404 S.C. 119, 744 S.E.2d 194 (2013) ..... passim

Dunton v. South Carolina Board of Examiners in Optometry, 291 S.C. 221, 353 S.E.2d 132 (1987) 23

Etiwan Fertilizer Company v. South Carolina Tax Commission, 217 S.C. 354, 60 S.E.2d 682 (1950) 23

Laurens County School Districts 55 & 56 v. Cox, 308 S.C. 171, 417 S.E.2d 560 (1992) 16

McNickel's Inc. v. South Carolina Department of Revenue, 331 S.C. 629, 503 S.E.2d 723 (1998) 21

Media General Communications, Inc. v. South Carolina Department of Revenue, 388 S.C. 138, 694 S.E.2d 525 (2010) 23

Murphy v. South Carolina Department of Health and Environmental Control, 396 S.C. 633, 723 S.E.2d 191 (2012) 16

Responsible Development, et al. v. South Carolina Department of Health and Environmental Control, 371 S.C. 547, 641 S.E.2d 425 (2007) 21, 22

Sonoco Products Company v. South Carolina Department of Revenue, 378 S.C. 385, 662 S.E.2d 599 (2008) 15, 19

South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control, 390 S.C. 418, 702 S.E.2d 246 (2010) 20

Spectre, LLC v. South Carolina Department of Health and Environmental Control, 386 S.C. 357, 688 S.E.2d 844 (2010) 22

Unisun Insurance Company v. Schmidt, 339 S.C. 362, 529 S.E.2d 280 (2000) 15

Statutes

4 S. C. Code ann. Regs. 61-30 (Supp. 2012) 16, 17

6 S.C. Code Ann. Regs. 61-68 (2012) 21

6 S.C. Code Ann. Regs. 61-69 (2012) 21

8 S.C. Code Ann. Regs. 61-101 (2012) ..... passim

S. C. Code Ann. § 48-1-30 (Rev. 2008 & Supp. 2012) 7, 22

S. C. Code Ann. § 48-1-50 (Rev. 2008) 7, 22

S.C. Code Ann. § 44-1-60 (Supp. 2012) 20

S.C. Code Ann. § 48-39-80 (Rev. 2008 & Supp. 2012) 22

S.C. Code Ann. §§ 48-2-10 through 48-2-90 (Rev. 2008 & Supp. 2012) ..... passim

S.C. Code Ann. § 48-2-30 (Rev. 2008 & Supp. 2012) 7

S. C. Code Ann. §48-2-40 (Rev. 2008) 7

S.C. Code Ann. Regulation 61-30 (2012) ..... passim

Other Authorities

Coastal Zone Management Act 22

Environmental Protection Fund Act ..... passim

Federal Clean Water Act 5

Pollution Control Act 21

Stormwater Management and Sediment Reduction Act 21

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Did the Court of Appeals correctly give effect to the legislative intent expressed in the Environmental Protection Fund Act, mandating that the time schedules contained in Regulation 61-30 shall govern the 180-day time period for the Department's thorough and prompt review of water quality certification applications?

II. Is the Department's longstanding application of the time schedules in Regulation 61-30 to its substantive review of water quality certification applications entitled to deference?

COUNTERSTATEMENT OF THE CASE

On June 8, 2008, Petitioner Duke Energy Carolina, LLC ("Duke") submitted an application to the Department for a water quality certification pursuant to Section 401 of the Federal Clean Water Act ("CWA") for a Federal Energy Regulatory Commission ("FERC") license to continue operating the Catawba-Wateree Hydroelectric Project (the "Project"). (Appendix pp. APX_000129; APX_000098, Affidavit of William R. Wenerick ("Wenerick Aff.") ¶ 5; Affidavit of E. Mark Oakley ("Oakley Aff.") ¶¶ 8 and 9). Pursuant to the federal CWA, an applicant for a federal permit to operate a facility that discharges into navigable waters is required to apply for a water quality certification from the state in which the project is located. 33 U.S.C. § 1341(a)(1) (2012). The state must act on the water quality certification ("certification") application within one year of receiving a certification application or the state waives its right to review the project for consistency with the applicable state and federal water quality standards. Id.

The review of certification applications is governed by the water quality certification regulation, 8 S.C. Code Ann. Regs. 61-101 (2012) (hereinafter referred to as "Regulation 61-101"), which authorizes Respondent South Carolina Department of Health and Environmental Control ("Department") to administer its provisions. Pertinent to this case, Regulation 61-101 provides that the Department has 180 days from the date that a complete application has been accepted to issue a decision on a certification application. 8 S.C. Code Ann. Regs. 61-101(A)(6). An application is deemed administratively complete if the Department does not request additional information within 10 days of receipt of the application. 8 S.C. Code Ann. Regs. 61-101(C)(2). At a minimum an application must contain the following information: 1) contact information of the applicant and its agents, if any; 2) a complete description of the project; 3) a

description of all activities associated with the proposed project; 4) a description of the dredging spoil or fill; 5) method of dredging or filling to be used and the method of disposal of associated wastes; and 6) the names and address of adjacent property owners. 8 S.C. Code Ann. Regs. 61-101(C)(1).

The certification application submitted by Duke to the Department failed to include the minimal required information necessary for the Department to commence processing the application. Specifically, Duke failed to include the names and addresses of the adjacent property owners. (Appendix pp. APX_000129 – APX_000130; APX_000185; APX_000098, Wenerick Aff. ¶ 6; Affidavit of Charles Hightower ("Hightower Aff.") ¶¶ 4 and 5; *cf.* Oakley Aff. ¶¶ 8 and 9). It took Duke almost seven (7) weeks, until July 29, 2008, to provide the Department with the names and addresses required by Regulation 61-101. (Appendix p. APX_000186, Hightower Aff. ¶ 8). On the same day that the Department received the information necessary to allow Duke's application to meet the minimally acceptable requirements of Regulation 61-101, the Department notified Duke that its application would be complete for processing when Duke filed its affidavit of publication and submitted payment of the application fee. (Appendix pp. APX_000130-APX_000131, Wenerick Aff. ¶ 7; see 8 S.C. Code Ann. Regs. 61-101(C)(1)).

While waiting for Duke to submit the affidavit of publication and the application fee, the Department sent a detailed request for additional information ("RAI") letter to Duke. In its RAI letter, the Department requested information regarding the draft Quality Assurance Program Plan ("QAPP") that Duke had submitted with the application. (Appendix pp. APX_000131 – APX_000132, Wenerick Aff. ¶ 9). In the letter, the Department also requested that Duke submit the requested information to the Department by October 19, 2008, notified Duke that pursuant to

Regulation 61-30 the Department had 180 days in which to process the application, and that Duke's application would not be complete for processing until the application fee and affidavit of publication was received. (Appendix pp. APX_000131 – APX_000132, Wenerick Aff. ¶ 9). The RAI letter also informed Duke that the Department's time period to process the application would be tolled until the date upon which the information was received.

In response to the RAI, Duke submitted the required affidavit of publication and application fee to the Department on August 25, 2008. However, Duke's response to the RAI regarding the draft Quality Assurance Project Plan ("QAPP") was not received until January 19, 2009, almost three months after it was requested. (Appendix p. APX_000134, Wenerick Aff. ¶ 18). Since Duke's failure to provide the information requested by the Department prevented the Department from evaluating the information as part of its decision-making process, the time was excluded from the 180-day review time period prescribed in Regulation 61-30. (Id.; see 4 S.C. Code Ann. Regs. 61-30(H)(1)(c)).

The Environmental Protection Fees regulation, 4 S.C. Code Ann. Regs. 61-30 (2011) ("Regulation 61-30") was promulgated pursuant to the legislative guidance set forth in the Environmental Protection Fund Act, S.C. Code Ann. §§ 48-2-10 through 48-2-90 (Rev. 2008 & Supp. 2012). The Environmental Protection Fund Act was enacted in 1993, three years after Regulation 61-101, to improve the Department's performance in permitting, certification, licensing, monitoring, investigating, enforcing, and administering its permitting review obligations under the Pollution Control Act, the Clean Air Act, the Safe Drinking Water Act, the Hazardous Waste Management Act, the Atomic Energy Act, and the Oil and Gas Act by charging fees. S.C. Code Ann. §§ 48-2-30(B) and 48-2-40. Since Regulation 61-101 was promulgated pursuant to Sections 48-1-30 and 48-1-50(17) of the Pollution Control Act, the

provisions of the Environmental Protection Fund Act expressly apply to the Department's review of water quality certifications applications. S.C. Code Ann. §§ 48-2-30(B)(1) and 48-2-50(H)(1)(b).

To ensure implementation of the legislative purpose of improving the Department's performance reviewing applications for permits, certifications, and licenses subject to the Environmental Protection Fund Act, the statute contains a provision entitled "[p]rocessing of permit applications; maximum time for review" that sets forth the legislature's intent for how the Department is to review water quality certifications. Specifically, the provision 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 this 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 application 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 [D]epartment fails to grant or deny the permit within the time frames established by the regulation, the [D]epartment shall refund the permit processing fee to the person in the permit application.

S.C. Code Ann. § 48-2-70 (emphasis added). In accordance with this mandate, Regulation 61-30 sets forth a time schedule that provides as follows:

> [i]n 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.

> [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.

4 S.C. Code Ann. Regs. 61-30(B)(22) (emphasis in original and added) and 61-30(H)(1)(c) (emphasis added).

In addition to the August 19, 2008 RAI, the Department sent two other RAI letters to Duke requesting information necessary for the Department to thoroughly review the project and render a decision. The second RAI letter was sent to Duke on October 8, 2008, and the information requested was to be provided on November 8, 2008. Unlike its response to the first RAI, which was provided more than two months late, Duke responded in a more timely, but still belated manner, providing the information on November 10, 2008, two days after it was due. (Appendix pp. APX_000132 – APX_000133, Wenerick Aff. ¶¶ 11 and 15). Similarly, the information requested in the third RAI letter was submitted late. The information was requested on October 21, 2008. A response was due on or before November 21, 2008. Duke served a partial response on November 21st but did not provide all the requested information until December 12, 2008. (Appendix pp. APX_000133, Wenerick Aff. ¶ 15). Each of these requests for information contained a statement that notified Duke that the Department's time to review the application would be tolled until the date upon which the Department received the information. (Appendix pp. APX_000145-146, Wenerick Aff. Exhibit 3; APX_000148-149, Wenerick Aff., Exhibit 4; and APX_000157-158, Wenerick Aff., Exhibit 7).

Because of Duke's tardy responses to the three RAI letters and follow-up requests for information prompted by the responses, the Department's review of Duke's certification was

spread over 263 calendar days, beginning on August 25, 2008 and ending on May 15, 2009. However, because of the tolling of the 180-day time period for review as a result of Duke's failure to provide the requested information in a timely manner, the actual time period in which the Department had the information necessary for its review was 94 days. (Appendix pp. APX_000136 – APX_000136, Wenerick Aff. ¶ 25).

The Department concluded its review on May 15, 2009, and issued a Notice of Department Decision ("Notice") and supporting Staff Assessment, granting Duke's certification application. (Appendix pp. APX_000031 - APX_00058). Respondents American Rivers and the South Carolina Coastal Conservation League (hereinafter the "Conservation Groups") appealed the Notice and a final review conference was held before the South Carolina Board of Health and Environmental Control ("Board") on July 9, 2009. (Appendix pp. APX_000009 – APX_000029, Conservation Groups' Request for Final Review). In a final agency decision issued on August 6, 2009, the Board overturned the Department staff's decision and denied Duke's certification application. (Appendix pp. APX_000006 – APX_000007, Final Agency Decision).

Duke appealed the Board's Final Agency Decision by filing a request for a contested case hearing with the Administrative Law Court ("ALC"). (Appendix pp. APX_000059 – APX_000062, Notice of Request for Contested Case Hearing, September 4, 2009). On November 9, 2009, the ALC granted the petition of the Conservation Groups' to intervene in the case. (Appendix pp. APX_000063 – APX_000064, Order dated Nov. 9, 2009). The ALC also allowed the South Carolina Attorney General to intervene for the limited purpose of protecting the State's interest in the original jurisdiction water apportionment case between the State and North Carolina then pending in the United States Supreme Court. (Appendix pp. APC_000065 – APX_000066, Order dated Nov. 8, 2009).

Duke filed its Motion for Summary Judgment and Motion for Declaratory Judgment on January 21, 2010. (Appendix pp. APX_000067 – APX_000073, Motion for Summary Judgment and Motion for Declaratory Judgment dated January 21, 2010). Oral argument was held on May 6, 2010, and on June 10, 2010, the ALC issued an order granting the Motion for Summary Judgment. (Appendix pp. APX_000375 – APX_000389, Order on Motion for Summary Judgment dated June 10, 2010). In its Order, the ALC held that the Department failed to review Duke's certification application in accordance with the time schedule in Regulation 61-101 and, therefore, waived the State's right to issue a water certification on the Project. (Appendix pp. APX_000375 – APX_000389, Order on Motion for Summary Judgment dated June 10, 2010). The Department and the Conservation Groups filed a Joint Motion for Reconsideration on June 21, 2010. (Appendix pp. APX_000390 – APX_000394, Joint Motion for Reconsideration dated June 21, 2010). During the pendency of this motion, but within 30 days of the ALC's issuance of the Order on Motion for Summary Judgment, the Department and the Conservation Groups each filed separate a Notices of Appeal. (See Appendix pp. APX_000460 – APX_000479, Department's Notice of Appeal dated and filed July 8, 2010). On July 9, 2010, the ALC issued its Order on Motion for Reconsideration, denying the joint reconsideration motion. (Appendix pp. APX_000414 – APX_000416, Order on Motion for Reconsideration dated July 9, 2010). The Department and Conservation Groups filed separate Notice of Appeal from the denial of the Joint Motion for Reconsideration. (Appendix pp. APX_000487 – APX_000492, Department's Notice of Appeal dated July 15, 2010).

On August 3, 2010, the Court of Appeals notified the parties that the appeals of the Department and the Conservation Groups would be consolidated. Duke filed a Motion to Dismiss on January 31, 2011, which was denied on April 20, 2011. Following briefing and oral

arguments, the Court of Appeals issued Opinion No. 5062 on December 12, 2012, reversing the ALC Order and holding that "the ALC erred in finding, as a matter of law, that Regulation 61-30 had no application to Regulation 61-101." (Duke Energy Carolinas, LLC v. South Carolina Department of Health and Environmental Control, Opinion No. 5062, p. 11 December 12, 2012). Duke filed a petition for rehearing on January 10, 2013, which was granted on May 1, 2013. The same day, the Court of Appeals withdrew the December 12, 2012 opinion and substituted a new opinion dated May 1, 2013, 404 S.C 119, 744 S.E. 2d 194 (2013). Therefore, on June 28, 2013, Duke filed a Petition for Writ of Certiorari.

ARGUMENTS IN REPLY

I. THE COURT OF APPEALS CORRECTLY GAVE EFFECT TO THE LEGISLATIVE INTENT EXPRESSED IN THE ENVIRONMENTAL PROTECTION FUND ACT, MANDATING THAT THE TIME SCHEDULE IN REGULATION 61-30 SHALL GOVERN THE DEPARTMENT'S SUBSTANTIVE REVIEW OF WATER QUALITY CERTIFICATION APPLICATIONS.

The Petition for Writ of Certiorari should be denied because the Court of Appeals' decision correctly concluded that the time schedule contained in Regulation 61-30 clarifies how the 180-day time period for Department review contained in Regulation 61-101 is to be counted. Duke Energy Carolina, LLC, 744 S.E.2d at 199. To reach this conclusion, the Court of Appeals carefully reviewed the Environmental Protection Fund Act and its promulgated regulation, Regulation 61-30, to see if the Legislature intended such a result. In its review of the Environmental Protection Fund Act, the Court of Appeals found that the statutory language of Section 70, which requires that for each program in which a processing fee is established (the fee for water quality certifications is established at S.C. Code Ann. § 48-2-50(H)(1)(b)), "DHEC must establish by regulation a schedule for timely action on permit applications for a WQC." Duke Energy Carolinas, LLC, 744 S.E.2d at 200 (citing S.C. Code Ann. § 48-2-70 (Rev. 2008)).

The Court of Appeals also found that Section 70's language mandated that the time schedule must set forth "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." Duke Energy Carolinas, LLC, 744 S.E.2d at 200 (emphasis added) (citing S.C. Code Ann. § 48-2-70 (Rev. 2008).

The Court of Appeals also found that the regulatory requirements set forth in Regulation 61-30 comport with the statutory mandate in Section 70 of the Environmental Protection Fund Act. The regulation defines time schedule as a "schedule for timely review" that "will include required technical review, required public notice, and end with a final decision by the Department to issue or deny the permit," and "may be tolled or extended in accordance with the conditions stipulated in Section H(1) of this regulation." 4 S.C. Code Ann. Regs. 61-30(B)(22) (emphasis added). Like the statute, Regulation 61-30 also lists the time schedule for various environmental permits including water quality certification application, which have the same 180-day time frame for processing prescribed in Regulation 61-101. Duke Energy Carolinas, LLC, 744 S.E.2d at 199-200 (citing 4 S.C. Code Ann. Regs. 61-30(H)(2)(a)(vii). Further, the Court of Appeals found that by reading the statutory and regulatory language together, they "provide DHEC more flexibility in the processing of permits [and] [b]oth 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." Duke Energy Carolinas, LLC, 744 S.E.2d at 200. In sum, the Court of Appeals found that the language of S.C. Code Ann. § 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." Duke Energy Carolinas, LLC, 744 S.E.2d at 200 (citing S.C. Code Ann. § 48-2-70) (emphasis added).

Despite the thoroughness of the Court of Appeals' review and decision, Duke now seeks to have this Court grant certiorari to review the Court of Appeals decision by arguing that under the rules of statutory interpretation there is no legislative intent to support applying the time schedule in Regulation 61-30 to the Department's review of water quality certification applications. Duke argues that this Court should review the Court of Appeals decision for the following four reasons: 1) the text of the Environmental Protection Fund Act and Regulation 61-30 do not explicitly repeal any provisions of Regulation 61-101; 2) the text of the Environmental Protection Fund Act and Regulation 61-30 do not implicitly repeal any provisions of Regulation 61-101; 3) that, as a specific regulation, Regulation 61-101 cannot be repealed by Regulation 61-30, a general regulation; and 4) that Regulation 61-30 cannot apply to Regulation 61-101 because they were authorized by different statutes. As will be shown below, Duke's arguments are without merit.

A. The text of the Environmental Protection Fund Act explicitly mandates that the time schedule in Regulation 61-101 is repealed by the time schedule in Regulation 61-30.

Duke's claim that the Environmental Protection Fund Act and Regulation 61-30 do not expressly mandate the repeal of Regulation 61-101's time schedule is rooted in the last sentence of Section 70 of the Environmental Protection Fund Act, which states that "[i]f 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." Petition p. 14 (citing S.C. Code Ann. § 48-2-70 (emphasis added)). By focusing solely on the last sentence of the statute, where the statute ensures that the Department does not retain a processing fee when it fails to thoroughly and promptly review in accordance with Regulation 61-30, Duke has misconstrued the legislature's intent. Adding the omitted portions of the statute, the language reveals that the

Department is mandated to promulgate a regulation that provides a schedule for timely action that "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," S.C. Code Ann. § 48-2-70 (emphasis added).

Put another way, by including the missing text, Section 70 provides that the mandated time schedules are to set forth how the Department is to conduct a thorough and prompt review of the permits subject to the Environmental Protection Fund Act, and that if the Department fails to conduct a thorough and prompt review using the promulgated time schedule within the applicable time frame, the Department is required to give back the fee. S.C. Code Ann. § 48-2-70. This is precisely the interpretation reached by the Court of Appeals when it concluded, "the regulations promulgated under its authority [(Regulation 61-30)] are to enhance DHEC's review process for any permits which require a processing fee, including a WQC." Duke Energy Carolinas, LLC, 744 S.E.2d at 200 (citing S.C. Code Ann. § 48-2-70).

Duke's interpretation must fail because as noted by this Court, "[w]e will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." Sonoco Products Company v. South Carolina Department of Revenue, 378 S.C. 385, 391, 662 S.E.2d 599, 602 (2008) (quoting Unisun Insurance Company v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000)).

Moreover, in pertinent part, Regulation 61-30 expressly defines the term "time schedule" as including "required technical review, required public notice, and end [(sic)] with a final decision by the Department to issue or deny the permit." 4 S.C. Code Ann. Regs. 61-30(B)(22)

(emphasis added). This language and the language of Section 70, while not using the term "repeal," nevertheless state that the Regulation 61-30 time schedule is to be used for the thorough and prompt technical review of applications. Since the language of the statute and the regulation clearly state that the time schedules are to be used by the Department in conducting permit review of any permit applications subject to the statute, the legislature has expressly repealed that portion of the acts that provide otherwise. See S.C. Code Ann. § 48-2-70; see 4 S.C. Code Ann. Regs. 61-30(B)(22); see also, Murphy v. South Carolina Department of Health and Environmental Control, 396 S.C. 633, 640, 723 S.E.2d 191, 195 (2012) (stating "[r]egulations are interpreted using the same rules of construction as statutes").

Furthermore, by focusing on the fee provision in Section 70 and not the section as a whole, Duke's interpretation violates this Court's admonishment in Laurens County School Districts 55 & 56 v. Cox, 308 S.C. 171, 174, 417 S.E.2d 560, 561 (1992) that "[i]n applying the rule of strict construction the courts will not give to particular words a significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent."). Thus, no further review is necessary.

B. The text of the Environmental Protection Fund Act implicitly mandates that the time schedule in Regulation 61-101 is repealed by the time schedule in Regulation 61-30.

To the extent that the express repeal of a regulatory provision depends on the language of the superseding statute or regulation containing the term, "repeal," the text of the Environmental Protection Fund Act and Regulation 61-30 implicitly mandate that the time schedule of Regulation 61-30 repealed the time schedule of Regulation 61-101. While the Court of Appeals correctly found that Regulation 61-30 and Regulation 61-101 "can exist without negating the other, as Regulation 61-30 clarifies how Regulation 61-101's 180-day time period of review will

be counted," Duke claims that the regulations are not repugnant because Regulation 61-30 applies to the calculation of time for the purpose of providing a refund if the Department fails to conduct its review within the 180-day time period and Regulation 61-101 applies to the calculation of time for the review of water quality certification applications. Petition p. 15-16. This claim misapprehends the fact that Regulation 61-30 and its authorizing statute expressly provide that they apply to the Department's review of applications for water quality certifications. As such they create a conflict on the proper method for calculating the running of the 180-day review period for certification applications. Under Regulation 61-30, whenever the Department requests information from the applicant, the 180-day time period is tolled until the Department receives the requested information. 4 S.C. Code Ann. Regs. 61-30(H)(1)(c). In contrast, under Regulation 61-101, the only time the 180-day time period stops is when the Department sends a written request for information to the applicant with a specified date for submittal of the information, the applicant fails to timely provide the information which the Department determines is important, and the Department notifies the applicant that it is suspending processing of the application. 8 S.C. Code Ann. Regs. 61-101(C)(4). Since Regulation 61-30 states that its time schedule applies to the Department's technical review of certification applications, even with the fact that the talismanic word "repealed" is not contained in Regulation 61-30 or its enabling statute, the language is nevertheless sufficient to implicitly repeal Regulation 61-101's time schedule.

Although courts disfavor repealing a regulation by implication, courts will nevertheless find that the legislature intended to repeal the regulation if the conflict is plainly evident and the provisions of the regulations are incapable of "any reasonable reconcilement." City of Rock Hill v. South Carolina Department of Health and Environmental Control, 302 S.C. 161, 166, 394

S.E.2d 327, 331 (1990). As stated above, Regulation 61-101's time schedule only stops the Department's technical review after the Department has requested information in writing, provided the applicant with a date for submittal, the date passed without receipt of the information, the information is necessary for the Department's decision, and the Department notifies the applicant that the process will be suspended. This cumbersome process penalizes the Department for the failure of the applicant to provide the information by reducing the time available to it to review the application by the amount of time given the applicant to comply. Such a scheme necessarily negatively affects the thoroughness and promptness of the Department's review. In contrast, Regulation 61-30's time schedule, by tolling the time for review until the Department has received the requested information, encourages thorough and prompt review by the Department by allowing the Department to retain time for its review that otherwise would be lost under the Regulation 61-101 schedule. Clearly so long as these time schedules govern the same portion of the Department's review they conflict and cannot be reconciled.

Without acknowledging the reasonableness of the Regulation 61-30 time schedule to the Department's review, Duke claims that there is no conflict because Regulation 61-30 is limited to calculating time for the purpose of refunding the application fee if the Department's review exceeds the 180-day time period. Using Regulation 61-30 only in regard to whether a refund is warranted would be contrary to any reasonable interpretation of the statute's stated intent of improving the Department's performance in its review of permit applications. See S.C. § 48-2-40. The Court of Appeals noted this absurdity when it stated "[w]e have difficulty understanding how the processing of a permit hinges upon the receipt of the fee, but then once that fee is received, there is a separate time schedule applied to each." Duke Energy Carolinas, LLC, 744

S.E.2d at 200. Such a construction must be rejected because the result is "so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." See Sonoco Products Company, 378 S.C. at 391, 662 S.E.2d at 602. Thus, contrary to Duke's claim, the language of the Environmental Protection Fund Act implicitly evidences the legislature's intent that the time schedule in Regulation 61-101 is repealed by Regulation 61-30's time schedule.

C. ALTHOUGH REGULATION 61-30'S TIME SCHEDULE APPLIES TO MORE THAN THE DEPARTMENT'S REVIEW OF WATER QUALITY CERTIFICATION APPICATIONS, IT SUPERSEDES THE TIME SCHEDULES IN REGULATION 61-101.

Duke claims that the Court of Appeals decision should be reviewed because the effect of that Court's decision is the repeal of a specific regulation by a later general regulation. See Petition p. 16-17. Reviewing the language of the Environmental Protection Fund Act and the regulatory requirements promulgated therefrom in their plain and ordinary sense, the Court of Appeals found they indicate "that Regulation 61-30 and Regulation 61-101 were to be read together to provide DHEC more flexibility in the processing of permits," and "to enhance DHEC's review process for any permits which require a processing fee, including a WQC." Duke Energy Carolinas, LLC, 744 S.E.2d at 200 (citing S.C. Code Ann. § 48-2-70). The language of the Environmental Protection Fund Act and Regulation 61-30 both directly refer to water quality certifications and, when read in their plain and ordinary sense, clearly convey that the legislature intended the interpretation found by the Court of Appeals. Since a specific statute may be repealed by a later general statute that either directly refers to the earlier statute or whose language indicates that the legislature intended the repeal, Duke's claim is meritless. See Denman v. City of Columbia, 387 S.C. 131, 138-39, 691 S.E.2d 465, 469 (2012).

Duke's reliance on this Court's statement in 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) that water quality certifications are governed by Regulation 61-101 is misplaced. Petition p. 17. In that case, the Department asked this Court to review the findings by the lower courts that the decision notification provisions of Regulation 61-101 were invalid because they conflicted with the statutory notification procedures for all Department decisions contained in S.C. Code Ann. § 44-1-60(E). South Carolina Coastal Conservation League, 390 S.C. at 429, 702 S.E.2d at 252. In reversing the lower court's decision, this Court held that although the appellate procedures set forth in S.C. Code Ann. § 44-1-60(E) prescribe to whom and how notification of Department decisions are to be made, the statute did not prohibit the Department from expanding the list of persons to be notified by regulation. South Carolina Coastal Conservation League, 390 S.C. at 430, 702 S.E.2d at 253.

In contrast here, "the language contained in 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." Duke Energy Carolinas, LLC, 744 S.E.2d at 200 (citing S.C. Code Ann. § 48-2-70). Since the "primary rule of statutory construction is to ascertain and give effect to the intent of the legislature," the legislative mandate in section 48-2-70 must be given effect. See South Carolina Coastal Conservation League, 390 S.E.2d at 425, 702 S.E.2d at 250. This statutory mandate overrules the Regulation 61-101(A)(6) requirement that Regulation 61-101 solely governs the Department's review of water quality certifications. See South Carolina Coastal Conservation League, 390 S.C. at 429, 702 S.E.2d at 252 (stating that "[a]lthough a regulation has the force of law, it must fall when it alters or adds to a statute") (citing McNickel's Inc. v. South Carolina Department of Revenue, 331 S.C. 629, 634, 503

S.E.2d 723, 725 (1998). Thus, Duke's claim is meritless and further review of this case is not necessary.

D. PURSUANT TO THIS COURT'S HOLDING IN *SPECTRE*, REGULATION 61-30'S TIME SCHEDULE IS APPLICABLE TO THE DEPARTMENT'S REVIEW UNDER REGULATION 61-101.

Duke claims that this Court's decision in Responsible Development, et al. v. South Carolina Department of Health and Environmental Control, 371 S.C. 547, 641 S.E.2d 425 (2007) bars the applicability or Regulation 61-30's time schedule to the Department's review of water quality certification applications under Regulation 61-101. In Responsible Development, this Court reviewed the Department's issuance of a stormwater permit challenged by the appellants on the ground that the proposed development would violate the antidegradation rules set forth in the Water Classifications and Standards regulation, 6 S.C. Code Ann. Regs. 61-68 (2012) (hereinafter "Regulation 61-68"), and the Classified Waters Regulation, 6 S.C. Code Ann. Regs. 61-69 (2012) (hereinafter "Regulation 61-69"). The stormwater regulations were promulgated pursuant to the Stormwater Management and Sediment Reduction Act ("Stormwater Act"), and the Water Classification and Standards regulation and the Classified Water regulation were promulgated pursuant to the Pollution Control Act. Responsible Economic Development, 371 S.C at 550-51, 641 S.E.2d at 427. In rejecting this claim, the Court held that since the regulations of the Pollution Control Act and the regulations of the Stormwater Act do not reference each other and are authorized by different enabling acts, "[i]n 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." Id., 371 S.C at 553, 641 S.E.2d at 429.

The Court of Appeals held that Duke's reliance on Responsible Economic Development is misplaced since the case at bar is governed by this Court's holding in Spectre, LLC v. South Carolina Department of Health and Environmental Control, 386 S.C. 357, 688 S.E.2d 844 (2010). Duke Energy Carolinas, LLC, 744 S.E.2d at 199. In Spectre, LLC the appellant sought to challenge the Department's denial of its stormwater permit application, in pertinent part, on the ground that Responsible Economic Development bars the Department's application of consistency determinations under the Coastal Zone Management Act ("CZMA") to stormwater permits. Spectre, LLC, 386 S.C. at 371, 688 S.E.2d at 851. This Court distinguished Responsible Economic Development by concluding that the Department was authorized to apply the Coastal Management Plan requirements to stormwater permits because the CZMA, S.C. Code Ann. § 48-39-80, " provides explicit authority to apply the [Coastal Management Plan] to state permits." Spectre, LLC, 386 S.C. at 371, 688 S.E.2d at 851. Here, as in Spectre, LLC, Responsible Economic Development is not applicable because the explicit statutory authority of the Environmental Protection Fund Act is to apply the statute and its promulgated regulatory requirements to water quality certifications. S.C. Code Ann. §§ 48-2-30(B), 48-2-50(H)(1)(b), and 48-2-70. Accordingly, applying the time schedule contained in Regulation 61-30 to the Department's review under Regulation 61-101 is not barred by Responsible Economic Development.

II. THE DEPARTMENT'S APPLICATION OF THE REGULATION 61-30 TIME SCHEDULE TO CLARIFY THE REGULATION 61-101 TIME SCHEUDLE IS ENTITLED TO DEFERENCE.

The Department is authorized by the Pollution Control Act to promulgate and administer the water quality certification regulation. S.C. Code Ann. §§ 48-1-30 and 48-1-50(17). Also, the Department is authorized by the Environmental Protection Fund Act to promulgate and

administer Regulation 61-30 and its time schedules as part of its review of Pollution Control Act permit applications. S.C. Code Ann. §§ 48-2-30 and 48-2-70. "'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.'" CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 77, 716 S.E.2d 877, 882 (2011) (quoting Dunton v. South Carolina Board of Examiners in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)). Moreover, "[a]n agency's long-standing interpretation of a statute is usually entitled to be given deference and should not be overruled by a reviewing court in the absence of cogent reasons, but the interpretation will not be sustained if it contradicts a statute's plain language." Media General Communications, Inc. v. South Carolina Department of Revenue, 388 S.C. 138, 149, 694 S.E.2d 525, 530 (2010) (citing Etiwan Fertilizer Company v. South Carolina Tax Commission, 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950)).

It is the Department's interpretation that the regulatory language of Regulation 61-30 is set forth in the regulation's Purpose and Scope section and in its definition of the term "Time Schedule." 4 S.C. Code Ann. Regs. 61-30(a) and 61-30(B)(22). These provisions, which have never been amended, became law when the regulation became effective almost 18 years ago on June 23, 1995. As discussed extensively in prior sections, the Department's promulgation of the regulation and the statement of purpose for the time schedules were explicitly mandated by the Environmental Protection Fund Act. This statutory language along with the regulatory language in Regulation 61-30 has been interpreted by the Department as providing it with more time in which to conduct a thorough and prompt review of a water quality certification application than would otherwise be possible under Regulation 61-101. This interpretation naturally springs from the plain and ordinary sense of the statutory and regulatory language and, as such, the

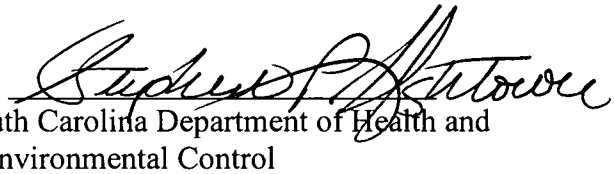
Department's interpretation clearly comports with the plain language of Regulation 61-30 and the Environmental Protection Fund Act. Given these factors, the Department's longstanding interpretation of how to conduct its review of water quality certifications is entitled to deference and should not be disturbed by this Court.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Court of Appeals decision, this case was correctly decided by the Court of Appeals. Accordingly, Respondent South Carolina Department of Health and Environmental Control respectfully asks that this Court deny the Petition for Writ of Certiorari.

Jacquelyn S. Dickman
Deputy General Counsel

Stephen P. Hightower
Assistant General Counsel

By: 
South Carolina Department of Health and
Environmental Control
2600 Bull Street
Columbia, South Carolina 29201
TEL: 803-898-3350
FAX: 803-898-3367

Attorneys for Respondent SCDHEC

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