THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge
South Carolina Court of Appeals
Published Opinion No. 5062

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.

REPLY TO RESPONDENTS' RETURNS TO PETITION FOR WRIT OF CERTIORARI

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Petitioner Duke Energy Carolinas, LLC ("Duke Energy") hereby submits this Reply to the Respondent South Carolina Department of Health and Environmental Control's Return to Petition for Writ of Certiorari ("DHEC's Return") and Return of Respondents American Rivers and South Carolina Coastal Conservation League to Petitioner for Writ of Certiorari ("Environmental Groups' Return").

ARGUMENT

I. RESPONDENTS ACKNOWLEDGE THAT DHEC NEVER SUSPENDED ITS REVIEW OF DUKE ENERGY'S APPLICATION UNDER THE WQC REGULATION AND DHEC CONTINUED TO PROCESS THE APPLICATION DURING THE TIME PERIOD IN WHICH IT CLAIMS THE PROCESSING WAS TOLLED.

The Court of Appeals erred in holding that the tolling provision of S.C. Regulation 61-30, *Environmental Protection Fees* ("Environmental Fees Regulation"), applies to the calculation of the 180-day time limits for DHEC's decision on Duke Energy's application for a water quality certification ("WQC") for a new Federal Energy Regulatory Commission ("FERC") license to operate the Catawba-Wateree Hydroelectric Project (the "Project"). As fully discussed in Duke Energy's Petition, S.C. Regulation 61-101, *Water Quality Certification* ("WQC Regulation") expressly provides that DHEC must act on a WQC application within 180 days "[u]nless otherwise suspended or specified in this regulation." 25A S.C. CODE ANN. REGS. § 61-101(A)(6) (Supp. 2012). Respondents concede that DHEC never suspended processing of the application under the WQC Regulation. In their Return, the Environmental Groups assert that "DHEC reached its decision within the 180-day time period, without ever suspending the processing of the application." (Environmental Groups' Return, p. 8). Moreover, DHEC acknowledges that "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 application 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." (DHEC's Return, p. 17 (citing 8 S.C. CODE ANN. REGS. 61-101(C)(4)). Therefore, DHEC acknowledges the requirements to suspend the processing of Duke Energy's application. Both Respondents concede that DHEC never suspended its processing of Duke Energy's application pursuant to the WQC Regulation.

Additionally, the evidence on the records demonstrates that DHEC continued to process Duke Energy's WQC application even when it requested additional information in support of the application. In its Return, DHEC states that it requested additional information from Duke Energy by letters dated August 19, 2008, October 8, 2008, and October 21, 2008. (DHEC's Return, p. 9). DHEC states that the information requested in the August 19, 2008 letter was not provided to DHEC until January 19, 2009. (DHEC's Return, p. 7). Unquestionably, DHEC continued to process Duke Energy's application during the time in which DHEC contends the processing of the application was tolled since additional requests for information were issued prior to January 9, 2009, when DHEC alleges that processing was tolled. As such, it is clear that DHEC never suspended the processing of Duke Energy's application.

Even though Respondents concede that the processing of Duke Energy's application was never suspended under the WQC Regulation, they nonetheless argue that the tolling provision of the Environmental Fees Regulation applies to the calculation of the 180-day time period under the WQC Regulation to stop the 180-day clock under that regulation. DHEC recognizes that the requirements for suspension under the WQC Regulation differ from and are more "cumbersome" than the requirements for tolling under the Environmental Fees Regulation. (DHEC's Return, p. 18). Yet, while unequivocally recognizing that suspension and tolling are two separate and

distinct operations with differing requirements, Respondents argue that the method of calculating the tolling period under the Environmental Fees Regulation is applicable to calculating the 180-day time period under the WQC Regulation even though DHEC never suspended the processing of Duke Energy's application. The WQC Regulation expressly provides DHEC must issue a decision of a WQC application "[u]nless otherwise suspended or specified in **this** regulation." 25A S.C. CODE ANN. REGS. § 61-101(A)(6) (Supp. 2012) (emphasis added). Respondents agree that the processing of Duke Energy's application was never suspended and acknowledge that only suspension—not tolling—is included in the language of the WQC Regulation, but continue to argue that tolling under the terms of the Environmental Fees Regulation operates to stop the 180-day clock under the WQC Regulation. Respondents thus recognize that suspension and tolling are different operations, but then give tolling the same operative effect as suspension under the WQC Regulation. This argument is illogical and demonstrates the error of the Court of Appeal's ruling in this case.

II. RESPONDENTS ACKNOWLEDGE THAT THE CONSEQUENCE OF FAILING TO MEET THE 180-DAY TIME LIMIT IN THE ENVIRONMENTAL FEES REGULATION IS THE REFUND OF THE APPLICATION FEE.

Section 48-2-70 of the Fund Act expressly provides that the consequence of DHEC's failure to grant or deny the application within the applicable time frame is *refund of the fee to the applicant*. S.C. CODE ANN. § 48-2-70. DHEC states that "Section 70 [of the Fund Act] 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." (DHEC's Return, p. 15 (citing S.C. CODE ANN. § 48-2-70)). Likewise, the Environmental Groups acknowledge that "[t]he consequence of DHEC's failure to live up to the required

deadline is refund of the fee." (Environmental Group's Return, p. 6 (citing S.C. CODE ANN. § 48-2-70)). As such, Respondents concede that the consequence of failing to time review Duke Energy's WQC application under the Environmental Protection Fund Act, S.C. CODE ANN. §§ 48-2-10 *et seq.* (2008 & Supp. 2012) ("Fund Act"), and the Environmental Fees Regulation is the refund of the application processing fee. Respondents illogically argue that the General Assembly intended to repeal both the substantive review periods in WQC Regulation and the consequence for failing to comply with that review period.

DHEC notes that the Environmental Fees Regulation "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.'" (DHEC's Return, p. 15 (citing 4 S.C. CODE ANN. REGS. 61-30(B)(22) (emphasis in original)). DHEC argues that the Environmental Fees Regulation time schedule applies to the Department's technical review of certification applications, despite the fact that DHEC failed to mention the word "repealed" in its Environmental Fees Regulation or that it does not appear in the enabling statute. (DHEC's Return, p. 17). Such vague language is insufficient to implicitly repeal WQC Regulation's time schedule.

DHEC overstates the references to the substantive, technical review in the Fund Act and the Environmental Fees Regulation. The Fund Act expressly defers to the applicable enabling act for the requirements of the substantive review of a permit application. As DHEC correctly states, the Fund Act requires DHEC to promulgate a regulation which establishes criteria for determining the "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**." (DHEC's Return, p. 15 (citing S.C. CODE ANN. § 48-2-70 (underline emphasis in original; emphasis in bold

added)). The Fund Act itself defers to "the act under which the permit is sought" for the substantive criteria for DHEC's decision on a permit application. There is no basis for DHEC's claim that the Fund Act and the Environmental Fees Regulation implicitly repeal the WQC Regulation.

Additionally, there is no question that the Environmental Fees Regulation is a procedural, rather than substantive, regulation. The Environmental Groups note that the Fund Act was enacted "'*[i]n order to facilitate the proper administration* of' environmental laws, including the Pollution Control Act." (Environmental Groups' Return, p. 6 (citing S.C. Code Ann. § 48-2-50(A) (emphasis in original)). Even if the purpose of the Fund Act and the Environmental Fees Regulation may be "to facilitate the proper administration" environmental laws, there is no basis for Respondents' contention that any of the substantive provisions of those laws are superseded by the Fund Act or the Environmental Fees Regulation. The Court of Appeals thus erred in applying the tolling provision of the Environmental Fees Regulation to the calculation of the 180-day time period under the WQC Regulation. DHEC never suspended its processing of Duke Energy's application, and therefore, failed to issue a decision on the application within the regulatory time limit.

III. THE PENALTY FOR FAILURE TO ACT ON DUKE'S APPLICATION IN A TIMELY MANNER IS SET FORTH IN SECTION 401 OF THE CLEAN WATER AS INCORPORATED BY REFERENCE IN THE WQC REGULATION.

Environmental Groups argue that the consequence of DHEC's failure to act on Duke Energy's WQC application within 180 days cannot be waiver because "the General Assembly provided a very specific consequence for DHEC's failure to comply with the time period created in the regulations." (Environmental Groups' Return, p. 19 (quoting S.C. CODE ANN. § 48-2-70)). But such reasoning tacitly argues that there was no consequence at all prior to promulgation of Environmental Fees Regulation, for the 180-day period in WQC Regulation preceded adoption

of the Fund Act and its regulations. On the contrary, the purpose of the WQC Regulation is recited in the very first provision of the regulation: "This regulation 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). Section 401 of the Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251 *et seq.*, ("Clean Water Act"), expressly provides that when the state fails to act on a request for a water quality 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." 33 U.S.C.A. § 1341 (emphasis added). Moreover, the WQC Regulation recites the federal law requirement that DHEC "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." 25A S.C. CODE ANN. REGS. § 61-101(A)(6). As such, the South Carolina General Assembly does not dictate the consequences of the failure to issue a certification decision in a timely manner. Section 401 of the Clean Water Act governs the failure to timely act on a request for certification and the WQC Regulation acknowledges the time limits for such action as established in Section 401. But, the General Assembly is empowered to dictate the "reasonable period of time." In this case, the rule promulgated by DHEC and approved by the General Assembly fixed the reasonable period of time as 180 days, as determined in WQC Regulation.[1]

The Court of Appeals' application of the tolling provision of the Environmental Fees Regulation to the calculation of the 180-day time period in the WQC Regulation disregards both the operation of the one-year limitation on state action and the state's prerogative to set a lesser

[1] Even DHEC acknowledges that 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 application state and federal water quality standards." (DHEC's Return, p. 5 (citing 33 U.S.C. § 1341(a)(1) (2012)).

"reasonable period of time" under Section 401 of the Clean Water Act. As Judge Thomas notes in her dissent, the requirements of the Clean Water Act

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

(Opinion, p. 15, App. p. APX_000815 (Thomas, J., dissenting) (citation omitted). The Environmental Groups' contention that the sole consequence of failure to timely act on Duke Energy's WQC application not only ignores the clear language of the WQC Regulation, but it disregards the operation of the express waiver provision of Section 401 of the Clean Water Act.

DHEC argues that limiting the application of the Environmental Fees Regulation to determining "whether a refund is warranted would be contrary to any reasonable interpretation of the [Fund Act's] stated intent of improving the Department's performance in its review of permit application." (DHEC's Return, p. 18 (citing S.C. Code Ann. § 48-2-40)). To the contrary, applying the tolling provision of the Environmental Fees Regulation to the calculation of the 180-day time period under the WQC Regulation does not improve DHEC's performance in processing a WQC application. Stopping the 180-day clock every time DHEC requests information impedes the accomplishment of the WQC Regulation purpose of acting of request for certification in accordance with the requirements of Section 401 of the Clean Water Act. In fact, as discussed more fully below, under DHEC's own statement of the facts in its Return, DHEC failed to issue its decision on Duke Energy's WQC application within the mandatory one-year time frame in Section 401 of the Clean Water. Accordingly, the Court of Appeals erred in applying the tolling provision of the Environmental Fees Regulation to the WQC Regulation as such interpretation creates a regulatory framework which is in conflict with Section 401 of the

Clean Water Act and prevents DHEC from fulfilling the objectives of the WQC Regulation.

IV. UNDER DHEC'S OWN STATEMENT OF THE FACTS, DHEC EXCEEDED THE TIME PERIOD FOR ACTING ON DUKE ENERGY'S CERTIFICATION REQUEST.

DHEC argues for deference, but under its own statement of facts, DHEC's decision on Duke Energy's WQC application exceeded both the 180-day time period under the WQC Regulation and the one-year period under Section 401 of the Clean Water Act. DHEC begins its statement of facts by averring that on June 8, 2008, Duke Energy submitted an application for a WQC to DHEC. (DHEC's Return, p. 5). Additionally, DHEC states that "[a]n application is deemed administratively complete if the Department does not request additional information within 10 days of received of the application. *Id.* (citing 8 S.C. CODE ANN. REGS. 61-101 (A)(6)). DHEC further notes that the first request for additional information was sent to Duke Energy on August 19, 2008. (DHEC's Return, pp. 6 and 9). Accordingly, DHEC did not request additional information within 10 days of receiving the application on June 8, 2008, so by DHEC's own statement of the facts, there is no question that Duke Energy had submitted a complete WQC application on June 8, 2008.

DHEC notes that the WQC Regulation requires that the Department act within 180-days to issue a decision on a certification application. (DHEC's Return, p. 5). With respect to tolling under the Environmental Fees Regulation, DHEC identifies three requests for additional information which allegedly tolled the 180-day time period under the Environmental Fees Regulation. According to DHEC's calculations for the time period from August 25, 2008 through May 15, 2009, the 180-day time period for review was purportedly tolled such that "the actual time period in which the Department had the information necessary for its review was 94 days." (DHEC's Return, p. 10). However, DHEC's decision on Duke Energy's WQC application, i.e., denial of certification for the Project, was not issued until August 6, 2009.

(DHEC's Return, p. 10). Indeed, DHEC acknowledges in its Return that the application period for review of an application will "end with a final decision by the Department to issue or deny the permit." (DHEC's Return, p. 8 (quoting 4 S.C. CODE ANN. REGS. 61-30(B)(22)). As such, even if the tolling provision of the Environmental Fees Regulation had been applicable to the decision on Duke Energy's WQC application under the WQC Regulation, which it was not, DHEC's own calculation of the time period during which the review of the application was allegedly tolled results in the elapse of **at least 249 days** from the submittal of Duke Energy's application on June 8, 2008, to the denial of certification for the Project on August 6, 2009.[2] DHEC therefore cannot dispute that it failed to issue a decision on Duke Energy's application within the 180 days required under the WQC Regulation. Moreover, as discussed above, under DHEC's own statement of the facts, DHEC failed to issue the agency's decision on Duke Energy's application within one year of the submittal of the application—the outside limits of the "a reasonable period of time" for State action on an application under Section 401 of the Clean Water Act.

V. RESPONDENTS' INTERPRETATION WOULD INVALIDATE THE 60-DAY CERTIFICATION PROVISION OF THE WQC REGULATION.

As discussed above, DHEC argues that "[s]ince 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." (DHEC's Return, p. 17). Contrary to DHEC's contention, there is no implicit repeal

[2] Even if the start date is July 29, 2008, when DHEC admits it had all the information required by the regulation, and assuming that tolling applies, there were an additional 22 days of from July 29, 2008, to August 19, 2008. Another 83 days elapsed from the staff decision recommending certification until the Board's denial of certification on August 6, 2009. Therefore, the total time period from the submittal of Duke Energy's application to the decision on certification was at least 198 days, if July 29, 2008 is used as the start date, and more than one year also elapsed under the maximum period provided under federal law.

of the WQC Regulation in the Fund Act or the Environmental Fees Regulation. The decision of the Administrative Law Court ("ALC") harmonizes these two regulations by interpreting differing methods of calculating the 180-time periods in a manner which gives full effect to both regulations. 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. (Order on Motion for Summary Judgment dated June 10, 2010, p. 7, R. p. APX_000381).

The Environmental Fees Regulation and the WQC Regulation were enacted at different times under different enabling statutes to achieve distinctly different purposes. The Fund Act established a funding mechanism for DHEC's administration of certain regulatory programs, including WQC applications. S.C. CODE ANN. §§ 48-2-30 and -40. The Environmental Fees Regulation promotes this purpose by providing for the limited application of the time schedules defined therein. *See* 24A S.C. CODE ANN. REGS. § 61-30(B)(22). The WQC Regulation, in contrast, was promulgated pursuant to the South Carolina Pollution Control Act to satisfy Section 401 of the Clean Water Act. The WQC Regulation provides both the criteria for DHEC's substantive decision on a WQC certification and the procedural requirements and deadlines established to conform to the statutory framework of Section 401 of the Clean Water Act. The Court of Appeals' grafting of the tolling provisions of the Environmental Fees Regulation onto the WQC Regulation does not harmonize the two regulations, but in fact creates direct conflicts where none would otherwise exist.

The most obvious conflict is with the 60-day time period for certain WQC applications under the WQC Regulation. *See* 25A S.C. CODE ANN. REGS. § 61-101(F)(4). This provision of the WQC Regulation requires DHEC to issue its decision on an application for certification in

for permits authorizing certain activities, including, *inter alia*, discharges into waters for public highways or bridges, public utility crossings, and maintenance of public navigational channels and ports. If the Fund Act and the Environmental Fees Regulation were interpreted to resolve any purported conflict with the WQC Regulation in favor of the Environmental Fees Regulation, as advocated by DHEC, then the 180-day time period for a fee refund under the Environmental Fees Regulation overrides the 60-day period set forth in the WQC Regulation—thereby *tripling* the time DHEC has to act on these requests for certification for permits for public purposes.

VI. RESPONDENTS HAVE FAILED TO IDENTIFY AN AGENCY INTERPRETATION WHICH IS ENTITLED TO DEFERENCE.

The Environmental Groups contend that "DHEC's interpretation of DHEC's own regulations" are entitled to deference. (Environmental Groups' Return, p. 13). Yet, the Environmental Groups fail to identify any policy or written interpretation of the applicable regulations by DHEC. The Environmental Groups appear to be arguing that DHEC's interpretation is embodied in its application of the regulations. Similarly, DHEC argues that "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." (DHEC's Return, p. 24). If this were the guiding principle under which an agency is entitled to deference, DHEC's permitting decisions would never be overturned as the staff would presumably always act in accordance with its interpretation of the applicable regulation. This 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). The purported agency interpretation identified by the Respondents can be no more than the staff interpretation of the regulations in its application of such regulation over time.

Moreover, 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 is this decision is attached hereto 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 Energy's submittal of its WQC application. Accordingly, DHEC was aware of the ALC's interpretation of the suspension provision in the WQC Regulation when it processed Duke Energy's application.

Finally, DHEC cannot now claim that the suspension provisions of the WQC Regulation were implicitly repealed by the Fund Act and the Environmental Fees Regulation, when it allowed the suspension provisions of the WQC Regulation to stand for 18 years without a clarifying amendment. In its Return, DHEC argues that its interpretation of the Environmental Fees Regulation is entitled to deference because "[t]hese provisions, which have never been amended, became law when the regulation became effective almost 18 years ago on June 23, 1995." (DHEC's Return, p. 23). In a recent United States Supreme decision, the Court explained the limitation of deference to an agency's interpretation of its own regulations and states that such deference in not warranted in a number of circumstances, including "when it appears that the interpretation is nothing more than a 'convenient litigating position.'" *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156, 2166-67 (2012) (citations omitted). As noted, DHEC claims that the Environmental Fees Fund implicitly repealed the calculation of

the 180-day time period in the WQC Regulation when promulgated in 1995. Yet, DHEC has never issued a policy statement or formal interpretation clarifying the effect of the Environmental Fees Regulation on the WQC Regulation suspension provision and has not amended the WQC Regulation in the 18 years since such implicit repeal allegedly occurred. The plain language of the WQC Regulation provides that the 180-day time period (or 60-day time period for certain certifications) runs unless suspended in the manner provided in the regulation. As such, it is reasonable to characterize DHEC's current interpretation of the regulations as a "convenient litigating position." Accordingly, the interpretation of the regulations advocated by DHEC in this case is not entitled to deference.

VII. THIS COURT'S HOLDING IN *RESPONSIBLE ECONOMIC DEVELOPMENT* CONTROLS IN THIS CASE.

Respondents argue that 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), controls in this case.

Spectre involved a stormwater permit for a proposed development in Horry County. By the express terms of the Coastal Zone Management Act, S.C. CODE ANN. §§ 48-39-10 *et seq.* ("CZMA"), 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. Unlike *Spectre*, 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

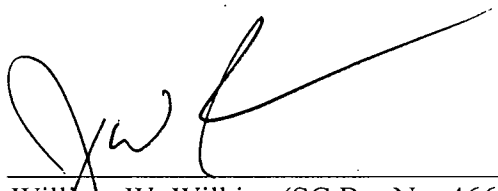
permit issued under the Pollution Control Act. Accordingly, the Court of Appeals decision is in conflict with this Court's holding in *Responsible Economic Development v. South Carolina Department of Health and Environmental Control*, 371 S.C. 547, 641 S.E.2d 425 (2007).

VIII. ISSUES RAISED FOR DETERMINATION BY THE ALC ARE NOT LIMITED TO THOSE RAISED PRIOR TO THE FINAL AGENCY DECISION.

The Environmental Groups contend that Duke Energy cannot raise the timeliness issue for the first time in the contested case before the ALC because it failed to challenge the staff decision at the hearing before the Board. As Respondents acknowledge, the final agency decision was the Board denial of certification for the Project on August 6, 2009. 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. 2012). 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. *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). The position advocated by Respondents mischaracterizes the contested case as merely an appellate review of the decision of the Board. Moreover, the Environmental Groups, not Duke Energy, was the party challenging the staff decision in the review by the Board. The burden of proof at the Board review conference was on the Environmental Groups as the party challenging the staff decision. S.C. CODE ANN. § 44-1-60(F)(2) (Supp. 2012). Duke Energy had no such burden. Duke Energy did not and could not waive any grounds for challenging the agency decision by failing to raise such grounds during

the Board review conference.

September 16, 2013



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PROOF OF SERVICE

I certify that I have served the Respondent Duke Energy Carolinas, LLC's Reply to Returns to Petition for Writ of Certiorari on counsel of record for Respondents and Clerk of Court of Appeals by depositing a copy of it in the United States Mail, postage prepaid, on September 16, 2013, addressed to:

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