

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from the Administrative Law Court
John D. McLeod, Administrative Law Judge

Appellate Case No. 2013-001521

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S.C. Supreme Court

Town of Arcadia Lakes, Robert L. Jackson, Linda Z.
Jackson, Robert E. Williams, Barbara S. Williams,
Elizabeth M. Walker, Louis E. Spradlin, Mary Helen
Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron
Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr,
Sanford T. Marcus, Ruth L. Marcus and Steve Brown,

Petitioners,

vs.

South Carolina Department of Health and Environmental
Control and Roper Pond, LLC,

Respondents.

RESPONDENT
SOUTH CAROLINA DEPARTMENT OF HEALTH
AND ENVIRONMENTAL CONTROL'S
MOTION TO SUPPLEMENT APPENDIX ON APPEAL

The Respondent South Carolina Department of Health and Environmental Control (“Department”), pursuant to Rule 212(b), South Carolina Rules of Appellate Practice, hereby moves this Court for an order allowing the Department to supplement the Appendix on Appeal in order to address the issues presented by Petitioners in its final brief. In support of the motion, the Respondents show the following information in the Appendix (“App.”) to the court:

- 1) The substantive issue presented by Petitioners in the above-captioned appeal is the validity of the Nationwide Permit (“NWP”) issued by the United States Army Corps of Engineers (“Corps”) to Respondent Roper Pond, LLC (“Roper Pond”) on February 25, 2009;
- 2) NWPs expire five years from the date of issuance, 33 U.S.C. § 1344(e)(2) (2103);
- 3) On March 12, 2007, the Corps issued and reissued NWPs for certification by the States, including NWP 29 and NWP 39 at issue in this case (App. pp. 97, 99);
- 4) On April 25, 2007, the Department certified NWP 29 and NWP 39 (App. pp. 97, 99);
- 5) The Administrative Law Court heard this case on September 3 and 4, 2009; and
- 6) Petitioners’ filled their Final Brief and Record on Appeal on February 25 2011, *See* (App. pp.1056-82).

Since the filing of the Record on Appeal, the following facts pertinent to this appeal occurred:

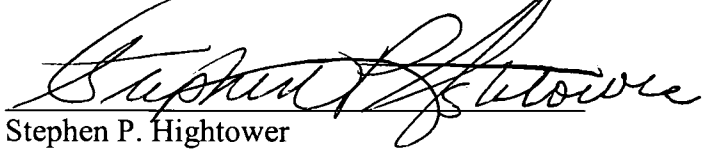
- 1) On March 18, 2012, all NWPs issued in 2007 expired, 76 *Fed. Reg.* 32,9175 (February 16, 2011);
- 2) On March 19, 2012, the Corps reissued NWP 29 and NWP 39, 77 *Fed. Reg.* 34,10184 (February 21, 2012);
- 3) On April 23, 2012, the Department certified the reissued NWPs and the certification did not include General Condition 1,
<http://www.scdhec.gov/Environment/docs/401nwwqc12.pdf>.

1. Leave to supplement the Appendix on Appeal will not prejudice the Petitioners because this Court has stated that when a court finds “that a question is moot, any judgment by this Court would constitute and advisory opinion.” *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 478 (2008). “It is elementary that the courts of this State have no jurisdiction to issue

an advisory opinion.” *Booth v. Grissom*, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975). Further, mootness is a jurisdictional issue that cannot be waived by the parties. *In re November 4, 2008 Bluffton Town Council Election, et al v. Fulgham, et al.*, 385 S.C. 632, 637, 686 S.E. 683, 685 (2009).

2. Supplementing the Appendix on Appeal is necessary to allow a full and fair appeal. Supplementation is also necessary so that the Court can determine whether if this Court were to decide this issue, the Court would be rendering an advisory opinion.

WHEREFORE, the Respondent South Carolina Department of Health and Environmental Control respectfully requests that the court permit it to supplement the Appendix on Appeal in order to address the issue of the scope of review for coverage of Nationwide Permit 29 as conditioned by General Condition 1 of the Department’s certification, raised by Petitioners in their final brief.



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Department of Health and Environmental Control

November 4, 2014

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No.: 09-ALC-07-0069-CC

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vs.

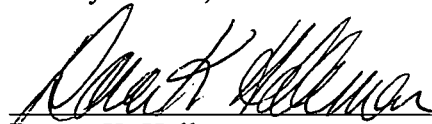
South Carolina Department of Health and Environmental Control
and Roper Pond, LLC,Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served copies of the Respondent, South Carolina Department of Health and Environmental Control's Motion to Supplement Appendix on Appeal upon counsel for the parties by placing the same in the United States Mail, First Class Postage Prepaid, addressed to:

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Donna K. Hellerman

November 4, 2014
Columbia, South Carolina



Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

OFFICE OF GENERAL COUNSEL
Phone: 803.898.3350 Fax: 803.898.3367

November 4, 2014

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office 11330
1231 Gervais Street
Columbia, South Carolina 29211

RE: Town of Arcadia Lakes, et al. v. SCDHEC & Roper Pond
Appellate Case No.: 2013-001521
OGC# 21395

Dear Mr. Shearouse:

Enclosed for filing please find the original and fifteen (15) copies of the Respondent, South Carolina Department of Health and Environmental Control's Motion to Supplement Appendix on Appeal, along with our Agency's Certificate of Service.

In addition, I have enclosed two (2) additional copies of the Motion, and I would appreciate your returning these clocked copies to our Agency in the enclosed self-addressed stamped envelope.

If you have any questions, or if I can provide any additional assistance, please do not hesitate to let our office know.

Very truly yours,

Stephen P. Hightower
Assistant General Counsel

SPH/dkh
Enclosures as stated
cc: W. Thomas Lavender, Jr., Esquire
Joan Hartley, Esquire
Amy Armstrong, Esquire

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