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

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

vs.

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

BRIEF OF RESPONDENT, SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL ON WRIT OF CERTIORARI

Jacquelyn S. Dickman, Esquire
Stephen P. Hightower, Esquire
South Carolina Department of Health and Environmental Control
Mailing Address: 2600 Bull Street
Columbia, SC 29201
Office Address: 2600 Bull Street
Columbia, SC 29201
Telephone: (803) 898-3350
Fax: (803) 898-3367

Attorneys for the Respondents, South Carolina Department of Health and Environmental Control

Columbia, South Carolina
November 12, 2014

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vs.

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

AFFIDAVIT OF JACQUELYN S. DICKMAN

PERSONALLY appeared before me, Jacquelyn S. Dickman, who being duly sworn, deposes and says:

1. I am a member in good standing of the South Carolina Bar.

2. I am employed by the South Carolina Department of Health and Environmental Control ("Department" or "DHEC") as a Chief Deputy General Counsel in DHEC's Office of General Counsel.

3. On Monday, November 3, 2014, I drove to the United States Post Office located at 2001 Dixiana Road, West Columbia, South Carolina, 29172, and deposited two envelopes addressed to the Court, each containing copies of the Respondent South

Carolina Department of Health and Environmental Control's Brief on Writ for Certiorari in the above-captioned case, into the collection boxes at that location. I also deposited copies addressed to the other counsel in this case. The collection boxes were designated as having the last collection at 8:00 p.m. I deposited the envelopes at approximately 7:00 p.m. I was informed by the administrative assistant in my office that the packages had adequate postage.

4. It has been confirmed that counsel in this case did receive copies which were mailed at the same time.

5. A copy of the November 3, 2014, cover letter and Brief on Writ for Certiorari are attached as "Exhibit A".

Jacquelyn S. Dickman

SWORN TO AND SUBSCRIBED before me

this 12th day of November, 2014.

Notary Public for South Carolina

My commission expires: 2/14/17

EXHIBIT "A"

D H E C
PROMOTE PROTECT PROSPER
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 3, 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 sixteen (17) copies of the Respondent, South Carolina Department of Health and Environmental Control's Brief on Writ for Certiorari, along with our Agency's Certificate of Service. I would appreciate your filing the original and returning the 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

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II. Whether the Department's interpretation of General Condition 1 is entitled to deference.

III. Whether Petitioners' claims that the Roper Pond's Nationwide Permit 29 ("NWP 29") permit was invalid and that Roper Pond coverage under the State Stormwater General Permit was invalid are moot; given that, the NWP 29 permit subject to this appeal expired in 2012 and when it was reissued later in 2012, the Department certified it without General Condition 1.

COUNTERSTATEMENT OF THE CASE

This appeal arises from Petitioners' contested case challenge of the decision of the South Carolina Department of Health and Environmental Control ("Department") to issue coverage under the State National Pollution Discharge Elimination System ("NPDES") General Permit for Storm water Discharges from Large and Small Construction Activities, Permit No. SCR100000 ("Stormwater GP") to Roper Pond, LLC ("Roper Pond"). Petitioners did not challenge the technical sufficiency of the Stormwater Pollution Prevention Plan submitted by Roper Pond reviewed by the Department. Instead, Petitioners attacked the Department's issuance of coverage by claiming that the water quality certification for the project was invalid because it did not consider the effects of excavating Roper Pond.

On December 30, 2008, Petitioners challenged the Department's action by requesting a final review conference. The South Carolina Board of Health and Environmental Control declined to hold a final review conference and Petitioners filed a request with the Administrative Law Court ("ALC"), on February 16, 2009. (App. p. 12). A merits hearing was held before the ALC on September 3 and 4, 2009. (App. p. 11). Based on the evidence and testimony presented and taking in to account Petitioners' burden of proof, the ALC issued a Final Decision and Order on January 21, 2010, in which the ALC determined that Petitioners lacked standing and upheld the Department's grant of coverage under the Stormwater GP. (App. pp. 11, 26-30, and 38). Petitioners filed a Motion to Reconsider and For Stay on February 1, 2010, which was denied on April 1, 2010, when the by ALC issued it Order Denying Motion for Reconsideration and For Stay. (App. p. 955).

On April 20, 2010, Petitioners filed their Notice of Appeal to the Court of Appeals. Oral argument was held before the Court of Appeals on May 8, 2012 and it issued an Opinion

affirming the ALC's Final Decision and Order on March 6, 2013. On March 21, 2013, Petitioners filed a Motion for Rehearing with the Court of Appeals. On June 12, 2013, the Court of Appeals withdrew the March 6, 2013 Opinion and substituted a new Opinion. That new Opinion also found that Petitioners lacked standing and affirmed the ALC's decision to uphold the Department's issuance of coverage to Roper Pond under the Stormwater GP.

Petitioners filed a Petition for Writ of Certiorari on July12, 2013. In its Return to Petition for Writ of Certiorari, the Department noted that it would be taking no position on the standing issued raised by Petitioners and would only present arguments applicable to the substantive issue of the validity of the water quality certification and impact on coverage under the Stormwater GP. This Court granted the Petition in an Order issued on August 22, 2014.

FACTS

Nationwide Permits

All projects that require the placement of fill into waters of the United States and their associated wetlands are required to obtain a permit under the Federal Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 – 1387 (2013). The Corps is charged under Section 404 of the CWA with the issuance of either an individual permit or by general permit commonly known as a Nationwide Permit ("NWP"). Individual permits may be issued to any type of project that requires the placement of fill into waters of the United States, no matter the level of impacts caused by the project. In contrast, NWPs are restricted to projects where "activities are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. § 1344(e)(1); (App. p. 99). Despite these restrictions, NWPs are beneficial and the Corps actively promotes their use. In fact, the Corps reviews "all incoming applications for individual permits for possible

eligibility under regional general permits or NWPs," and "[i]f the activity complies with the terms and conditions of one or more NWP . . . could comply after reasonable project modifications and/or activity-specific conditions," the Corps will notify the applicant of the availability of the NWP and request the necessary modification(s). 33 C.F.R. § 330.1(f) (2013).

Currently, there are approximately 50 categories of activities covered by various NWPs. These categories range from boat ramps to mining activities. The Corps has created general conditions that apply to all NWPs and each regional Corps District Engineer ("DE") may place conditions on the NWPs that apply in their region.

NWPs go through a public notice and comment period and must be reissued, modified, or revoked by the Corps and the state certifying agency every five years. "Proposed NWPs or modifications to or reissuance of existing NWPs will be adopted only after the Corps gives notice and allows the public an opportunity to comment on and request a public hearing regarding the proposals." 33 C.F.R. § 330.1(c). "An activity is authorized under a [NWP] only if the activity and the permittee satisfy all the NWPs terms and conditions." 33 C.F.R. § 330.1(c). "In most cases, permittees may proceed with activities authorized by NWPs without the DE [approval]" 33 C.F.R. § 330.1(e). While many NWPs do not require notice before commencing an activity, some of the NWPs do require "Preconstruction Notification" to the Corps. The Preconstruction Notification gives the Corps an opportunity to review the project details if it choices; however, this is not an application since direct approval of the Corps is not required.[1] This is consistent with purpose of NWPs – to streamline the permitting process by minimizing delay and paperwork for similar activities that have minimal environmental impacts. 33 C.F.R. § 330.1(b); (App. p. 99).

[1] "The permittee may presume that this project qualifies for the NWP unless he is otherwise notified by the [DE] within a 30-day period." 33 C.F.R. § 330.1(e).

Water Quality Certification

Under the CWA, all permits issued under Section 404 must receive a water quality certification issued by a State pursuant to CWA Section 401. 33 C.F.R. § 330.4(c); *see generally* 33 U.S.C. § 1341(a)(1). Specifically, in pertinent part, CWA Section 401 states that "[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence." 33 U.S.C. § 1341(a)(1). By South Carolina regulation, "[a]ny applicant for a Federal license or permit to conduct any activity which during construction or operation may result in any discharge in navigable waters, must obtain a water quality certification [pursuant to 8 S.C. Code Ann. Regs. 61-101(2012)] from the Department."[2] 8 S.C. Code Ann. Regs. 61-101(A)(2). Whether the Corps permit is an individual permit or a NWP, the Department conducts a water quality certification review in accordance with 8 S.C. Code Ann. Regs. 61-101 and issues a certification decision. 8 S.C. Code Ann. Regs. 61-101(A)(3). The only difference is when the Department conducts its certification review. With individual permits, the certification review and decision occurs after the applicant has submitted an application to the Corps and the Corps publically notices a Joint Public Notice. *See generally* 8 S.C. Code Ann. Regs. 61-101 (C)(1), (F), and (G). Unlike individual permits, the certification for NWPs occurs when the Corps issues the NWP and not when a permit application is received by the Corps. 33 C.F.R. § 330.4(c)(1) ("State 404 water quality certification pursuant to section 401 of the Clean Water Act, or waiver thereof, is required prior to the issuance or reissuance of NWPs authorizing activities which may result in a discharge into waters of the United States.").

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[2] The term "Department" refers to the Department of Health and Environmental Control. 8 S.C. Code Ann. Regs. 61-101 (B)(4).

On March 12, 2007, the Corps reissued, among others, NWP 29 and NWP 39, which are at issue in this case.[3] (App. pp. 97, 99). The Department issued its Notification of Department Decision notifying the public that the Department intended, among others, to certify NWP 29 and NWP 39. [4] (App. pp. 97-98, 101, 103). In pertinent part, the Department issued certifications for NWP 29 and NWP 39 that contained identical specific conditions in addition to the general conditions applicable to all certified NWPs. (App. pp.101-02, 103-04). The sole condition focused upon by Petitioners is General Condition 1, which states:

> SCDHEC considers a 'single and complete project' to mean the overall project boundary under single ownership. It is not interpreted to mean only the land impacted by each NWP request Impacts to Geographical Areas of Particular Concern (GAPC) sites or adjacent waterbodies or wetlands resulting from an activity will be considered during the review of these actions.[5]

(App. pp. 100, 251). This condition is intended by the Department to notify permittees that the certification is not effective for a large project in which impacts could be permitted by the Corps pursuant to multiple different NWPs and that in such situations, the Department requires that the applicant apply for an individual permit.[6] (App. pp. 251-52, 290-91).

Roper Pond NWP Application

On May 5, 2008, Roper Pond's agent, George Whatley, filed a Preconstruction Notification to fill .075 acres of jurisdiction wetlands at the Site. (App. pp. 774-91). The Preconstruction Notification did not did not require Rope Pond to specify the particular NWP

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[3] NWP 29 is applicable to projects for the purpose of residential development. NWP 39 is applicable to commercial and intuitional development projects. (App. p. 98).

[4] NWP 29 and NWP 39 expired on March 18, 2012. 76 *Fed. Reg.* 32,9175 (February 16, 2011).

[5] On February 21, 2012, the Corps published the Final Notice of the Reissuance of n NWPs including 29 and 39 in the Federal Register. 77 *Fed. Reg.* 34,10217 & 34,10222 (February 21, 2012).

[6] The Corps regulations governing NWPs authorizes the use of two or more different NWPs to address impacts form a "single and complete project." 33 C.F.R. § 330.6(c).

being sought. (App. pp. 446, 774-91). On September 9, 2008, the Corps notified Mr. Whatley that "the activity meets the terms and conditions of Department of Army Nationwide Permit(s) #39." (App. p. 567). On October 2, 2008, the Department sent notification to Mr. Whatley that the "proposed work is consistent with the 401 Water Quality Certification issued for Nationwide Permit Number 39 on May 11, 2007, provided the applicant adheres to all the conditions of that certification . . ." (App. 575). In early 2009, Mr. Whatley contacted the Corps for clarification and verification that the project would be permitted under NWP 39, commercial and Institutional Development, and not NWP 29, Residential Development. (App. pp. 447-49, 792). The Corps responded in a letter dated February 25, 2009, in which it verified that Roper Pond was authorized to fill .075 acres of jurisdictional wetlands under NWP 29. (App. p. 772).

Charles Hightower, Section Manager for the Department's 401 Water Quality Section, testified that the fill of .075 acres proposed by for the Roper Pond project conformed to the general and specific water quality certification conditions issued by the Department for both NWP 29 and NWP 39. (App. pp. 270, 273). Mr. Hightower also testified that if a project meets the requirements for a NWP and its accompanying certification the permittee is not required to apply for an individual CWA 404 permit and accompanying CWA 401 water quality certification. (App. pp. 258, 293-94, 301).

Coverage under the Stormwater GP

Land disturbance activities impacting an acre of land or more are regulated by the Department. Under the established regulatory scheme, the CWA National Pollution Discharge Elimination Program ("NPDES") stormwater requirements are contained in 3 S.C. Code Ann. Regs. 61-9.122.26 (2011), and the state specific stormwater requirements are contained in 9 S.C. Code Ann. Regs. 72-300 (2012) *et seq.* ("State Stormwater Regulations"). Pursuant to the

NPDES stormwater regulations, the Department is authorized to issue general permits for discharges categories or subcategories of stormwater discharges from point sources. 3 S.C. Code Ann. Regs. 61-9.122.28(a)(2)(i). On August 1, 2006, the Department reissued the State Stormwater GP.[7] (App. pp. 493-545).

Roper Pond filed a notice of intent form with the Department on September 24, 2008, for coverage under the Stormwater GP for the project. (App. pp. 561-62). On the form, Roper Pond identified that that the Site contained delineated/identified jurisdictional wetlands that would be impacted by the project. (App. p.561). Roper Pond also identified that there would be other delineated/identified waters. *Id.* Further, in response to a question on the form that requested the following: "[i]f yes for impacts in B.1, describe each impact and activity, and list **all permits (e.g., USACOE Nationwide permit, DHEC General Permit) and certifications that have been applied for or obtained for each impact**, Roper Pond indicated that it had applied for a USACOE Nationwide Permit had been applied for and obtained. *Id.* (emphasis added).

In addition to the notice of intent form, Roper Pond submitted a stormwater pollution prevention plan ("SWPPP"), which is required under the Stormwater GP and State Stormwater Regulations. (App. pp. 675-99, 701-53).

Under the State Stormwater Regulations, a SWPPP must address the quality and quantity of stormwater runoff associated with the proposed project. 9 S.C. Code Ann. Regs. 72-307(C) (2012). The Department Reviewer assesses the proposed best management practices ("BMP"), which can be designed features or actions to be taken to determine if the measures are adequate to meet the requirements of the State Stormwater Regulations and Stormwater GP. (App. pp. 211-12). Roper Pond's SWPPP utilized a number of BMPs to control erosion and sedimentation

[7] On October 12, 2012, the Stormwater GP was reissued by the Department. This permit became effective on January 1, 2013 and expires on December 31, 2017. None of the requirements at issue in this case have be changed in the current Stormwater GP. *See* http://www.scdhec.gov/Environment/docs/CGP-permit.pdf.

during construction. The SWPPP included a combination of berms, sedimentation, and silt fences basins throughout the Site and along its perimeter. (App. pp. 200-01).

Roper Pond's notice of intent and SWPPP were reviewed by Jill Stewart. Ms. Stewart is a licensed professional engineer in South Carolina and Manger of the Department's Stormwater Permitting Section. (App. pp. 167-68). Since 2006, when she became the Manager of the Stormwater Section, she has reviewed or supervised the review of in excess of 3,000 stormwater coverages. (App. pp. 228-29). Ms. Stewart testified that absent violations of the SWPPP, she did not expect any adverse impact from the Roper Pond project upon Roper Pond or Cary Lake, which is downstream of the pond. (App. p. 212). This professional opinion is based, in part on, Department recommended changes beyond the scope of the Stormwater GP.

In general coverage under the Stormwater GP terminates one a site is stabilized following the conclusion to construction activities. However, under Section 3.4(F) of the Stormwater GP, the Department requires all permittees to include "a description of all post-construction storm water management measures that will be installed during a construction process to control pollutants and storm water after the construction operations have been completed." (App. p. 510). Pursuant to this authority, Ms. Stewart recommended and Roper Pond agreed to use of an additional water quality treatment devise to filter more sediment and pollutants from post-construction runoff. (App. pp. 197-98). State Stormwater Regulations only require a sediment removal efficiency of 80 percent, when the project activities disturb more than 10 acres. 9 S.C. Code Ann. Regs. 72-307(C)(5)9b). Notwithstanding the fact that the Roper Pond project would disturb less than 10 acres, its SWPPP called for a sediment removal efficiency of at least 80 percent. (App. pp. 204-05).

Further, the State Stormwater Regulations also require that an applicant must demonstrate that the development of the site here would not result in a post-construction stormwater runoff rate greater than the pre-construction runoff rate. 9 S.C. Code Ann. Regs. 72-307(C)(4)(a). Proper Pond provided the Department with pre-construction and post-construction runoff rates for the two-year 24-hour duration storm event and the ten-year 24-hour duration storm event in order to demonstrate that the approved design would meet this regulatory requirement. (App. pp. 201-02). This design incorporated the pond as a means of satisfying the post-construction runoff rate requirement only, as it did not provide any erosion or sedimentation control. (App. p. 204). Both the Stormwater GP and the State Stormwater Regulations allow an existing pond to be used for control of post-construction stormwater runoff on a developed site. (App. p. 186).

The Department notified Roper Pond by letter dated December 15, 2008, that its SWPPP had been approved and that it had coverage under the Stormwater GP to commence land disturbing activities. Specifically, the Department authorized the disturbance of up to 9.9 acres during construction of the project. (App. pp. 60-61, 71, 561).

ARGUMENT

I. THE COURT OF APPEALS CORRCTLY HELD THAT ROPER POND'S PROJECT MEETS ALL OF THE CONDITIONS APPLICABLE TO THE WATER QUALITY CERTIFICATION ISSUED BY THE NATIONWIDE PEMRIT 29 AND COVERAGE UNDER THE STORMWATER GP IS APPROPRIATE.

Petitioners make two primary claims alleging that Rope Pond's coverage under the Stormwater GP is invalid and as a result the case should be remanded for further review by the Department. First, they claim the Court of Appeals correctly concluded that General Condition 1 authorized the Department to review impacts not covered under NWP. However, they claim that

the Court erred in not concluding the Roper Pond NWP was invalid and in not remanding the case for further review by the Department, since the Department did not conduct such a review. Second, Petitioners claim that since Roper Pond's project did not qualify for coverage under NWP 29, it did not qualify for coverage under the Stormwater GP. As will be shown, each of these claims are without merit.

A. Petitioners erroneously claim that pursuant to General Condition 1 of the water quality certification for NWP 29, the Department is authorized and required to review impacts caused to the pond by its excavation.

Petitioners claim that the Court of Appeals erred because it refused to conclude that Roper Pond was not entitled to the NWP 29 permit, because the impacts of the project were not independently reviewed by the Department. *Petitioners' Brief* ("*Pets Br.*") at 41. While individual permits and NWPs are both reviewed by the Department and must meet the applicable Scope of Review for Application requirements contained in 8 S.C. Code Ann. Regs. 61-101(F), there are two important distinctions in the review process. First, the Department's review for NWPs is not of a specific project, with its potentially unique issues. Rather, the review is of categories of activities, each with different restrictions on what can be done. Next, the Department's review of NWPs differs in that the certification occurs at the time the Corps issues or reissues the NWP, which occurs every five years. Instead of determining there is reasonable assurance that a particular project will be protective of water quality with NWPs, the Department is determining whether a particular type of activity, if performed in accordance with the certified permit, is protective of water quality. Thus, there is no legal basis for the review requested by Petitioners.

However, Petitioners claim that General Condition 1 provides the basis. They arrive at this conclusion by misinterpreting General Condition 1. General Condition 1 provides as follows:

> 1. SCDHEC considers a 'single and complete project' to mean the overall project boundary under single ownership. It is not interpreted to mean only the land impacted by each NWP request. Impacts to Geographical Areas of Particular Concern (GAPC) sites or adjacent waterbodies or wetlands resulting from an activity will be considered during the review of these actions.

(App. p. 100). The Department conditioned all NWPs certified in 2007 with this language in order to address a rampant problem – segmentation of projects. As explained at trial by Mr. Hightower, the Section Manager of the Department's 401 Wetland Section, the condition was imposed as follows:

> That is what it says, and the reason we put that condition on there, understanding is, we were having applicants come in and they would apply for a coverage under a Nationwide Permit, and then they would get that one, and then as they developed a project in phases, they would come back for another Nationwide, and they would come back for another Nationwide, and they would come back for another Nationwide, and the intent was that we'd look at all the **jurisdictional activities that required 404 permits at one time rather than piecemeal the projects**.

(App. p. 291 (emphasis added)). This unrefuted testimony is consistent with the anti-segmentation principles for the assessment of environmental impacts under federal law. *See, e.g. Defenders of Wildlife v. North Carolina department of Transportation,* 763 F.3d 364, 394 (4th Cir. 2014) ("Agencies may not engage 'in segmentation, which involves 'an attempt to circumvent NEPA by breaking up one project into smaller projects and not studying the overall impacts of the single overall project.'"); *Webster v. United States Department of Agriculture*, 685 F.3d 411, 425 (4th Cir. 2012) ("Agencies must consider connected actions in the same EIS. . .

This requirement is intended to prevent agencies from engaging in segmentation, which involves 'an attempt to circumvent [the] NEPA by breaking up one project into smaller projects and not studying the overall impacts of the single overall project.'") (internal citations omitted). By placing this condition on all NWPs the Department not only placed all applicants for NWPs in South Carolina on notice that they could not segment projects into phases through the use of multiple NWPs, but the language placed the Corps on notice that such projects should be permitted under and individual permit, which would allow the Department to conduct a water quality review of all the impacts holistically. *See* 33 U.S.C. § 1341(d).

Petitioners do not address the Department's interpretation. Instead, they state that the language in General Condition 1 together with language contained in the State Water Quality Certification Regulation imposes a duty on the Department to review, as a matter of state law, impacts that they concede as non-jurisdictional under the CWA. *Pets Br.* P. 42 ("The lower court is correct in that the CWA permit is not needed for Excavation."). Specifically, they claim that this Court's rulings in *Spectre, LLC v. South Carolina Department of Health and Environmental Control*, 386 S.C. 357, 688 S.E.2d 844 (2010) and *Georgetown County League of Women Voters v. Smith Land Company, LLC*, 393 S.C. 350, 713 S.E.2d 287 (2011) (hereinafter referred to as "*Georgetown County LWV*") stand for the proposition that 'federal [CWA} jurisdiction is not essential to [State] consistency review.' *Spectre, LLC*, 386 S.C. at 368, 713 S.E.2d at 850. Petitioners' reliance on these cases is misplaced, as each case is distinguishable

In *Spectre, LLC*, this Court reviewed a decision of the ALC that the Department lacked the authority to conduct a water quality review of isolated wetlands. To decide that appeal, this Court considered the effect of the CWA Section 404 permits as interpreted pursuant to the United States Supreme Court's decision in *Solid Waste Agency of Northern Cook County v.*

United States Army Corps of Engineers, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001) ("*SWANC*") and the State's Coastal Zone Management Act. *Spectre, LLC*, 386 S.C. at 363-64, 368, 713 S.E.2d at 847, 849. Based on a detailed review, this Court concluded that since the Coastal Zone Management Act, expressly authorized the Department to conduct water quality certification review anywhere in the coastal zone, it authorized the Department to act notwithstanding the fact that there was no jurisdiction under the CWA. *Spectre, LLC*, 386 S.C. at 368, 713 S.E.2d at 849-50 (citing S.C. Code Ann. § 48-39-80)[8]

In *Georgetown County LWV*, this Court decided two issues germane to this appeal. First, the Court revisited its holding in *Spectre, LLC* and upheld its determination that pursuant to the Coastal Zone Management Act, the Department had jurisdiction to regulate isolated wetlands despite the fact that they are not regulated under federal law. *Georgetown County LWV,* 393 S.C. at 352-53, 713 S.E.2d 288-89. Next, the Court held that under the Pollution Control Act, a permit is required to place fill into an isolated wetland. *Georgetown County LWV,* 393 S.C. at 353, 713 S.E.2d 2889.

Here, the State Water Quality Certification Regulations expressly tie its jurisdiction and authority to the CWA. 8 S.C. Code Ann. Regs. 61-101(A)(1) ("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.") (emphasis added). Thus, the Department's review criteria must be considered in the context of water quality review tied to the limiting factors of the CWA, i.e., discharges into jurisdictional water of the United States, which excludes isolated wetlands or non-navigable ponds, such as Roper Pond. This is in stark contrast

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[8] In pertinent part the statute states "[t]he [D]epartment shall develop a comprehensive coastal management program, and thereafter have the **responsibility for enforcing and administering** the program in accordance with the provisions of this chapter and any rules and regulations promulgated under this chapter. In developing the program the [D]epartment shall . . . consider the planning and review of existing water quality standards and classification in the coastal zone." S.C. Code Ann. § 48-39-80(B)(10)(D) (emphasis added).

to the Coastal Zone Management Act, which refers to the development of a "comprehensive coastal management program" with enforcement and administrative power to plan and review water quality standards and classifications in the coastal zone, which is not tied to the CWA. *See generally*, S.C. Code Ann. §§ 48-39-10 *et seq.* (Rev. 2008). Moreover, this Court's finding in *Georgetown County LWV,* that under the Pollution Control Act, a permit is needed to discharge into isolated wetlands does not support Petitioners' position since the review sought is regarding the impact of the excavation of the pond and not the placement of fill into the pond. Further, since this Court's decision in *Georgetown County LWV*, the Legislature has amended the Pollution Control Act to state in pertinent part that "[t]he permit requirements of subsection (A)(1), Section 48-1-100 (Rev. 2008 & Supp. 2013), and Section 48-1-110 (Rev. 2008 & Supp. 2013) do not apply to: discharges for which the [D]epartment has no regulatory permitting program." S.C. Code Ann. 48-1-90(A)(2)(b) (Rev. 2008 & Supp. 2013). Accordingly, neither *Spectre, LLC* nor *Georgetown County LWV* are applicable as they are clearly distinguishable and, instead of supporting Petitioners' claim, the cases highlight the reasons why Petitioners' are not entitled to the relief that they seek.

Further, Petitioners' assertion in their brief that Mr. Hightower testified that "DHEC has to make a 'specific determination' to insure that a project qualifies for the NWP certification before it issues a certification letter" is erroneous. *See, Pets Br.* at 41 (citing App. p. 621). No such concession was made, as the following colloquy between Petitioners' counsel and Mr. Hightower establishes:

> Q. All right. **Let me take you outside nationwide permit section, and let's say you get an individual 404 permit application that been submitted for review under the 401 certification program**. In that case, do you apply the scope of review that's specified in section 61-101 F3?

A. Do you mind if I pull out my regulations?

Q. Not a bit.

A. Yes, sir.

Q. Okay. And that particular section requires that the Department to address and consider a number of factors, including – and I'm not going to read them all, but you have to look at whether they're feasible alternatives; isn't that correct?

A. For which project are you –

Q. **For a project – any project that comes in for an individual 404 Permit and 401 certification**.

A. Yes, sir.

Q. You have to look at feasible alternatives, right?

A. Yes, sir.

(App. p. 621) (emphasis added). Indeed, Petitioners' counsel express references to individual certification reviews clearly establishes that he was aware that NWP certification reviews are fundamentally different from the review for individual permits and what is appropriate one context is not in the other.

Finally, Petitioners' assertion that Roper Pond's NWP 29 was invalid because Roper Pond did not initially disclose the fact that it intended to dredge the pond is of no import. As discussed at length above, any impacts caused by dredging the pond had no bearing on the validity of the certification of NWP 29 and its applicability to the Roper Pond project since CWA Section 404 permits are limited to impacts from discharges into navigable jurisdictional waters, authorizing the Department to review such impacts. Accordingly, this Court should reject all of Petitioners claims regarding the water quality impacts upon the pond.

B. Petitioners claim that since Roper Pond's project did not qualify for coverage under NWP 29, it did not qualify for coverage under the Stormwater GP is without merit.

Petitioners claim that Roper Pond should not have coverage under the Stormwater GP is baseless. They do not challenge the technical sufficiency of the SWPPP submitted by Roper Pond and reviewed by the Department. Instead, they claim that coverage is invalid because Roper Pond purportedly did not receive a valid NWP because the Department did not consider the impacts of excavation of the pond. Then they argue that not having a proper NWP is a jurisdictional bar to coverage under the Stormwater GP pursuant to Part2, Section 2.1(C) of the Stormwater GP. However, as discussed previously, coverage of Roper Pond's project under NWP 29 was valid. Accordingly, Petitioners claim is without merit.

C. The Department's interpretation of the General Condition is entitled to deference.

"[A]s a general rule, 'agencies charged with enforcing statues . . . receive deference from the courts as to their interpretation of those laws.' Thus, the reviewing tribunal will defer to the relevant administrative agency's decision unless there is a compelling reason to differ." *Savanah Riverkeeper v. South Carolina Department of Health and Environmental Control*, 400 S.C. 196, 205, 733 S.E.2d 903, 908 (2012) (citations omitted). *see Murphy v. South Carolina Department of Health and Environmental Control and District 5 of Lexington and Richland Counties*, 396 S.C. 633, 641, 723 S.E.2d 191, 195 (2012). Here, several decisions of the Department are entitled to deference. First, the Department's decision that the NWP certification process did not allow the review of the impact from the excavation of the pond is entitled to deference. As discussed *supra*, Mr. Hightower testified that such impact was not cognizable under a NWP or under applicable state law. Second, the Department's interpretation of General Condition 1, which it drafted and placed on the certifications of the 2007 NWPs is entitled to deference. This

is particularly so since General Condition 1 is not a statute and not a regulation. It is language drafted by the Department as part of a general permit which has been appealable since April 25, 2007.

II. THIS APPEAL IS NOW MOOT SINCE REISSUED NWP 29 WAS CERTIFIED WITHOUT THE LANGUAGE THAT PETITIONERS' ENTIRE CASE RELIES UPON.

As an additional sustaining ground, this appeal should be dismissed as moot. A moot case exists where a judgment rendered by the court will have no practical legal effect on the existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court." *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2008) *citing Mathis v. South Carolina State Highway Department*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). Where a court finds "that a question is moot, any judgment by this Court would constitute an advisory opinion." *Sloan*, 369 S.C. at 26, 630 S.E.2d at 478. "It is elementary that the courts of this State have no jurisdiction to issue advisory opinions." *Booth v. Grissom*, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975). "Issues related to subject matter jurisdiction may be raised at any time. The lack of subject matter jurisdiction may not be waived, even by the consent of the parties, and should be taken notice of by this Court." *In re November 4, 2008 Bluffton Town Council Election, et al. v. Fulgham, et al.*, 385 S.C. 632, 637, 686 S.E.2d 683, 685 (2009) (internatl citations omitted).

Here, the intervening event is the expiration of the NWP 29 in 2012. Specifically, NWP 29, which was certified on April 25, 2007, expired on March 18, 2012. (App. pp. 100-02); 76 *Fed. Reg.* 32,9175 (February 16, 2011).[9] In their brief, Petitioners state that this matter should remanded to the Department to undertake a review set forth in the Court of Appeals decision

[9] The Department, pursuant to Rule 212(b), South Carolina Rules of Appellate Practice, will file a Motion to Supplement the Record on Appeal to include the date that the Department certified the NWP reissued by the Corps in 2012 and the language of the certification.

(*Town of Arcadia Lakes, et al. v. South Carolina Department of Health and Environmental Control*, 404 S.C. 515, 534, 745 S.E.2d 385, 395 (Ct. App. 2013)). *Pets Br.* P. 45 ("the court should have further concluded that the project fails to comply with the 401 Certification of NWP 39 [(sic)] and remanded the case back to DHEC . . ."). This relief would be merely advisory since the NWP in question has expired. Therefore, Petitioners are seeking an advisory opinion of this Court, which should not be granted. Further, since the validity of that permit is the basis for Petitioners' claim that the Department's issuance of coverage under the Stormwater GP is invalid, that issue is also moot. Accordingly, the issue of the validity of the NWP 29 permit issued to Roper Pond and its effect on the validity of Roper Pond's coverage under the Stormwater GP are moot.

CONCLUSION

Based on the foregoing arguments, Respondent South Carolina Department of Health and Environmental Control would respectfully request that this Court

Jacquelyn S. Dickman
Deputy General Counsel

Stephen P. Hightower
Assistant General Counsel

By: Stephen P. Hightower
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
dickmajs@dhec.sc.gov
Attorneys for Respondent SCDHEC

November 12, 2014
November 3, 2014
Columbia, South Carolina

Stephen P. Hightower

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

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

vs.

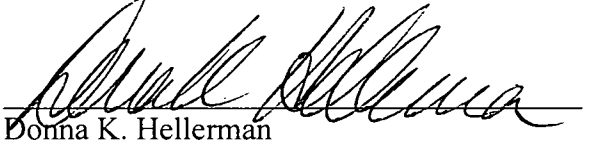
South Carolina Department of Health and Environmental Control and Roper Pond, LLC, ...Respondents.

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 Brief on Writ of Certiorari upon counsel for the parties via Electronic Mail and by placing the same in the United States Mail, First Class Postage Prepaid, addressed to:

W. Thomas Lavender, Jr. Esquire
Joan W. Hartley, Esquire
Nexsen Pruet, LLC
1230 Main Street, Suite 2426
Columbia, South Carolina 29202

Amy E. Armstrong, Esquire
The South Carolina Environmental Law Project
Post Office Box 1380
Pawleys Island, South Carolina 29585



Donna K. Hellerman

November 12, 2014
Columbia, South Carolina

D H E C
PROMOTE PROTECT PROSPER
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 12, 2014

VIA HAND DELIVERY
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 Brief on Writ for Certiorari, with the Certificate of Service in the above-entitled matter. The Department originally filed its Respondent's Brief on Monday, November 3, 2014, by mailing an original brief and fifteen copies to your attention. The Department has contacted your office twice, Friday, November 7, 2014 and on Monday, November 10, 2014 to determine whether the Court has received the Department's filing. Since your office has informed the Department that the filing had not been received, the Department is refiling an original and fifteen (15) copies, along with an affidavit of the attorney who physically placed the mailing in the mail collection box located at the United States Postal Facility. To indicate that this is a refiling, each of the copies of the brief and the original have a copy of the original signature page, which I have resigned and dated with today's date.

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 by

Stephen P. Hightower
Assistant General Counsel

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