

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

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Case No. 09-ALC-07-0069-CC  
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, Jr., 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 Steven Brown, ..... Petitioners,

vs.

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

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**PETITIONERS' RESPONSE IN OPPOSITION  
TO RESPONDENT DHEC'S MOTION  
TO SUPPLEMENT APPENDIX**

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TO: ALL PARTIES AND THE SUPREME COURT:

PLEASE TAKE NOTICE that the Petitioners hereby respond in opposition to DHEC's motion to supplement appendix on appeal pursuant to Rule 212(b), South Carolina Rules of Appellate Practice. Respondent DHEC's motion should be denied. The basis of this response is as follows:

## Background

This case arises from an appeal of the Department of Health and Environmental Control's ("DHEC") decision to issue a storm water permit and thereby grant coverage under the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") General Permit to Roper Pond, LLC ("Roper Pond"). Roper Pond requested the storm water permit and coverage under the NPDES permit to build a high density apartment complex on a 12.75 acre tract that includes 1.8 acres of wetlands, lying immediately adjacent to the Town of Arcadia Lakes in Richland County, South Carolina. The Petitioners challenge the storm water permit and corresponding coverage under the NPDES permit because Roper Pond's project fails to meet all of the legal requirements for those authorizations, including the requirement to obtain the appropriate State approvals for dredging and excavation of an on-site pond.

In order to undertake the proposed multi-family residential construction activities, Roper Pond has to obtain a number of approvals from DHEC and the U.S. Army Corps of Engineers ("the Corps"). One of those approvals is a DHEC stormwater permit for land-disturbing activities in connection with the proposed residential development. See 24 S.C. Code Ann. Regs. § 61-9.122.26(c). Regulation 61-9.122.28(a)(2) authorizes DHEC to issue general stormwater permits for discharges for categories of stormwater sources. On August 1, 2006, DHEC issued such a permit, Permit No. SCR100000, entitled "NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities" pursuant to Regulation 61-9.122.28(a)(2). To have a valid stormwater permit, the residential construction activities proposed by Roper Pond, LLC require approval under this NPDES General Permit for Storm Water Discharges (hereinafter "NPDES General Permit").

The NPDES General Permit and Stormwater Regulations require an applicant to obtain any required wetlands permit before DHEC will grant coverage under the NPDES General Permit. Regulation 72-307.C.(7) states that “Where existing wetlands are intended as a component of an overall stormwater management system, the approved stormwater management and sediment control plan shall not be implemented until all necessary federal and state permits have been obtained.” The wetlands permit is a Clean Water Act §404 permit from the Corps, which is triggered if an applicant proposes to place fill material in wetlands that are waters of the U.S. 33 U.S.C.A. § 1344(a). The Corps §404 permit in turn triggers the requirement for a §401 Water Quality Certification from DHEC that the §404 Permit is consistent with the §401 water quality regulations and State water quality standards. See 33 C.F.R. § 330.4 & S.C. Code Ann. Regs. 61-101, et seq.<sup>1</sup>

The Clean Water Act also authorizes categories of general permits under § 404 called Nationwide Permits (“NWP”) for certain activities deemed to have minimal adverse environmental impacts. 33 U.S.C.A. § 1344(e)(1). If a proposed project falls under one of these NWPs, the Corps will not undertake an individual 404 review. Specific to this case, the Corps issued NWPs #29 and #39 on March 12, 2007. 72 FR 11092 (11123). NWP #29 applies to residential developments and NWP #39 applies to commercial and institutional developments. DHEC may issue 401 water quality certifications for NWPs, and it did so on May 11, 2007 for NWPs #29 and #39, along with a number of other NWPs not relevant to this appeal. The

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<sup>1</sup>DHEC Regulations 61-101 govern the process and standards DHEC must follow and apply in its 401 certification review. S.C. Code Ann. Regulation 61-101.A.(2) states that “no Federal license or permit is to be granted until such [401 water quality] certification is obtained.” See also 33 U.S.C. § 1341.

certifications included general conditions that must be met in order for the DHEC §401 water quality certification to be valid and the Nationwide Permits to be effective. (App. p. 585; S.C. Code Ann. Reg. 61-10I.A).

Roper Pond, LLC did not obtain a valid and effective §404 permit prior to DHEC's approval under the NPDES General Permit. And the Roper Pond project does not qualify for NWP 401 certification because the dredging and excavation exceed the activities specifically authorized under the NWP and are thus inconsistent with DHEC's General Condition #1 that it consider the overall project, not just the land area specifically impacted by the NWP activity.

In this case, DHEC did not conduct a review to ensure that its 401 certification conditions of the Nationwide Permit had been met nor consider impacts beyond those authorized by the NWP. Indeed the project fails to meet the qualifying conditions. Because of this failure Roper Pond does not have a 401 water quality certification, and thus it does not have a valid and effective wetlands permit. DHEC granted coverage under the NPDES General Permit despite the fact that Roper Pond, LLC, did not have a valid and effective wetlands permit, in violation of Regulation 72-307.C.(7).

#### **Analysis**

DHEC now seeks to introduce new facts and law relating to certifications not at issue in this case, which were not adjudicated before the Administrative Law Court. Such retroactive application of the law would be improper in this case. See Rehkopf v. Kuhland, 30 S.C. 234, 238, 9 S.E. 99, 101 (1899); Leventis v. S.C. DHEC, 340 S.C. 118, 133, 530 S.E.2d 643, 651 n.8 (Ct. App. 2000) ("Our analysis focuses on whether DHEC followed the regulatory procedures in effect during the permit review process. We therefore apply the regulations effective during the actual

permit review . . .”). Respondent DHEC itself argued against retroactive application of regulations before the Court of Appeals a few years ago in its Final Reply Brief of Appellant for EAGLE v. S.C. DHEC, No. 08-AJL-07-0425-CC (Apr. 27, 2010).

This court’s review is also limited to evidence which was considered below. Risher v. S. Carolina Dep’t of Health & Env’tl. Control, 393 S.C. 198, 203, 712 S.E.2d 428, 431 (2011) (“The review of the administrative law judge’s order must be confined to the record.”) . The parties have litigated the certification and permit issued in conjunction with the 2007 NWP, and review of that litigation is the proper role for this court on appeal. Id.

Furthermore, DHEC’s argument that a supplement is needed to show mootness is prejudicial to petitioners and futile. DHEC seek to distract the court with inapplicable new certification. Such evidence could not render petitioners’ case moot, as it has no bearing on petitioners’ standing or whether the 401 certification and general permit *at issue in this case* are valid. See Decker v. Nw. Env’tl. Def. Ctr., 133 S. Ct. 1326, 1335 (2013) (“A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.”) (internal quotation marks omitted).

In Decker, the Environmental Protection Agency’s amendment to its Industrial Stormwater Rule, issued three days before case was argued in the Supreme Court, did not render moot action brought by an environmental organization alleging that Oregon officials and timber companies violated the Clean Water Act by discharging stormwater from ditches alongside logging roads in state forest without NPDES permits. This is because, despite the recent amendment, a live controversy continued to exist regarding whether defendants could be held liable for unlawful discharges under the earlier version of the regulation, and the possibility of some remedy for a

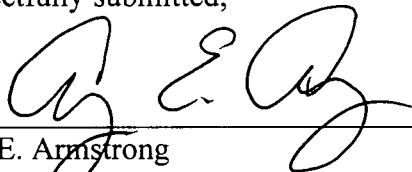
proven past violation was real and not remote. Id. at 1335-36. Similarly, in this case there continues to be a live controversy as to whether Roper Pond's certification and permit are valid despite the issuance of new NWP's.

The court is conducting an administrative review of an agency's determination that was made pursuant to the 2007 NWP. Roper Pond is not applying for a permit today, thus the 2012 NWP's are not applicable. Furthermore, the new NWP's are not capable of rendering the Petitioners' case moot. Thus, DHEC's motion should be denied and the court should not consider the irrelevant materials DHEC seeks to submit.

**Conclusion**

WHEREFORE, the Petitioners request that the Supreme Court enter an order denying DHEC's motion to supplement appendix on appeal.

Respectfully submitted,



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November 18, 2014

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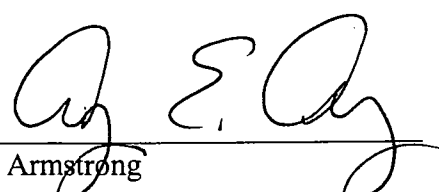
**CERTIFICATE OF SERVICE**

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I hereby certify that on this date I served copies of the Petitioners' Reply Brief and Response to Motion to Supplement Appendix upon counsel for the Respondents by placing same in the United States Mail, First Class Postage Prepaid, addressed to:

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November 18, 2014