

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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Appellate Case No. 2013-001521

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**RECEIVED**

DEC 12 2014

**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.

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

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The Respondent South Carolina Department of Health and Environmental Control ("Department"), pursuant to Rule 212(b), South Carolina Rules of Appellate Practice ("SCRAP") and Rule 240(f) SCRAP, hereby submits this Reply to the Response Petitioners filed to the Department's Motion to Supplement Appendix on Appeal.

## **Background**

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"). Roper Pond sought coverage under the Stormwater GP in order to commence land disturbance activities to construct an apartment building complex on a 12.75 acres land parcel located adjacent to Petitioner Town of Arcadia Lakes and some of the individual Petitioners. As a prerequisite to its application for coverage under the Stormwater GP, Roper Pond applied for a Clean Water Act Section 404 permit from the United States Army Corps of Engineers ("Corps") in order to place fill into jurisdictional wetlands located on the site. Because the project called for the placement of fill on only 0.075 acres of the jurisdictional wetlands, which are waters of the United States and subject to the Clean Water Act, Roper Pond applied for a Nationwide Permit from the Corps. Pursuant to the Clean Water Act, the Corps is authorized to issue general permits such as Nationwide Permits, which are applicable throughout the country, for a variety of activities that the Corps has determined will only produce only minimal impacts to jurisdictional waters.

Nationwide Permits ("NWP") are issued by Corps every five years. As with any federal permit subject to the Clean Water Act, the must be reviewed by the States for consistency with the water quality requirements for each State and either approved, denied, or waived by the State. When Roper Pond applied for its NWP in 2008, the NWPs at issue on this case were issued by the Corps and certified by the Department in 2007. The Department's certification included

General Condition 1, which was applicable to all certified NWP's. General Condition 1 stated 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.

Initially, the Corps determined that the project should be permitted under NWP 39, which applies to commercial and institutional development projects. The Department was notified of the application and based on its review it notified Roper Pond that "the activity meets the terms and conditions of Department of Army Nationwide Permit(s) #39." Subsequently, the Corps determined that the project should be permitted under NWP 29, which applies to residential housing development. Because the certification it placed on NWP 29 was identical to NPW 39, the Department determined that the activity meet the terms and conditions of NWP 29.

The NWP's issued and certified in 2007 expired in 2012. NWP 29 and NWP 39 were reissued by the Corps and certified by the Department in 2012. The certification for NWP 29 and NWP 30 did not include the language contained in General Condition 1.

The central point in this appeal is Petitioners' claim that pursuant to General Condition 1 the Roper Pond project did not meet the terms and conditions of NWP 29 because the project included the dredging of a pond on the site to be used as a stormwater control device. Petitioners claim that since the Department was required under the Pollution Control Act to review the potential impacts caused to the pond caused by the excavation Roper Pond is liable for damages caused by the alleged violation of the Pollution Control Act.

### Analysis

Petitioners assert two claims against the Department's Motion to Supplement Appendix on Appeal. First, Petitioners claim that by seeking permission to supplement the record to include information relevant to showing how this case is now moot, the Department is retroactively applying law and facts not before the Administrative Law Court. Petitioners claim is misplaced. The Department is merely seeking to put before the Court facts necessary for a complete adjudication of all the issues in this case including whether subsequent events have rendered this case moot. As noted in the Department Motion, 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). Therefore, seeking permission to present facts to the Court to establish how and why a case is moot is proper even if the facts were not available before the trial court.

Petitioners also claim that the case is not moot because the evidence purportedly is not relevant to "whether the 401 certification and general permit *at issue in this case* are valid." Petitioners Response p. 5 (emphasis in original). In support of this claim, Petitioners cite a United States Supreme Court case *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326 (2013). As will be shown, Petitioners reliance on *Decker* is misplaced.

In *Decker*, the respondent, Northwest Environmental Defense Center filed a Clean Water Act's citizen suit pursuant to 33 U.S. C, § 1365 (2013) against Oregon State officials and timber companies for allowing channelized stormwater from logging roads to be discharged into waters of the United States without a National Pollution Discharge Elimination System ("NPDES") Permit. *Decker*, 133 S. Ct. at 1333. Three days before the case was to be argued before the Supreme Court, the Environmental Protection Agency issued a final rule amending the Industrial

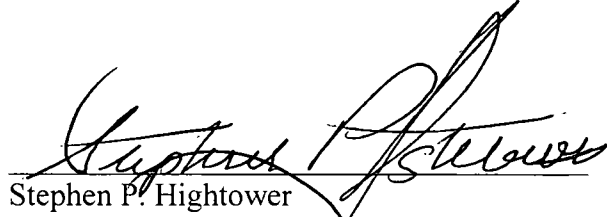
Stormwater. *Decker*, 133 S. Ct. at 1332. In determining that the case was not mooted by the amendment of the rule, the Supreme Court stated that the live controversy remained because of the “the case remain live and justifiable, for the possibility of some remedy for a proven past violation was real and not remote.” *Decker*, 133 S. Ct. at 1335.

Here, in stark contrast there is no possibility for proving a pass violation of the Pollution Control Act. In order for Petitioners to have a viable controversy they would have to have a remedy availability to them if this Court were to hold in their favor. No such remedy would be available since the excavating a pond is not proscribed by the Pollution Control Act. Specifically, the Pollution Control Act provides that “[i]t shall be unlawful for a person, directly or indirectly to throw, drain, run, allow to, or otherwise *discharge* into the environment of the State organic or inorganic matter, including sewage, industrial waste, and other wastes, except in compliance with a permit issued by the department.” S.C. Code Ann. § 48-1-90(a) (Rev. 2008 & Supp. 2013). In this case, the removal of material from the pond by excavation is not a discharge. The discharge is the placement of the removed material back into the environment that is the discharge and since that material was placed in the jurisdictional wetlands of the United States, it was discharged in compliance with a permit certified by the Department. Therefore, this case is moot since there is not live controversy for which the Court can grant the relief sought by Petitioners. Accordingly, the Court should grant the Department’s Motion to Supplement Appendix on Appeal.

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.

Respectfully submitted,



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Attorney for Respondent South Carolina  
Department of Health and Environmental Control

December 1, 2014

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

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Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson,  
Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker,  
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Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown,.....Petitioners,

vs.

South Carolina Department of Health and Environmental Control  
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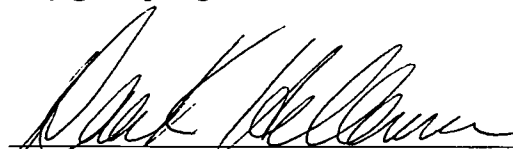
CERTIFICATE OF SERVICE

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

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Donna K. Hellerman

December 1, 2014  
Columbia, South Carolina



Catherine B. Templeton, Director

*Promoting and protecting the health of the public and the environment*

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December 1, 2014

DEC 02 2014

Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
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**S.C. SUPREME COURT**

RE: Town of Arcadia Lakes, et al. v. SCDHEC & Roper Pond, LLC  
Appellate Case No.: 2013-001521  
OGC# 20827

Dear Mr. Shearouse:

Enclosed for filing please find the original and six (6) copies of the Respondent, South Carolina Department of Health and Environmental Control's Reply 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 Reply 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