

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-06482
Appellate Docket No. 2013-000329

Harrison Partners, LLC, ... Appellant,

v.

Renewable Water Resources, ... Respondent.

RECORD ON APPEAL
VOLUME III

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SECTION 3 - PRIVATE WASTEWATER DISPOSAL

Section 3.1 - Responsibility for Construction and Operation

Where a public sanitary sewer is not available according to the provisions of this Regulation, building sewers shall be connected to private wastewater disposal systems subject to the requirements of the County or SCDHEC. Where the Owner desires ReWa to assume responsibility for the operation and maintenance of new treatment works, trunklines or lift stations, all such facilities shall be designed and constructed in accordance with ReWa's requirements and shall be subject to its review and approval and be in compliance with any applicable SCDHEC requirements. ReWa, subject to ReWa policies, may assume responsibility for the operation and maintenance costs of treatment systems and lift stations upon such terms and conditions, as it deems appropriate.

Section 3.2 - Tank Truck Transporter

The contents of a tank truck operated by a SCDHEC licensed transporter of holding tank waste shall be discharged to the POTW only at a location approved by the Director. The discharge of such wastes shall be subject to the procedures and limitations established by the Director, to the provisions of Attachment F – Grease Control Strategy for Food Service Establishments of this Regulation, and to fees established in Attachment B of this Regulation. Such wastewater must have prior written approval of the Director before being discharged. The discharge of these wastes shall be subject to the procedures, limitations, and fees set by the Director in his letter of acceptance, and a copy of this letter shall be attached to the Hauled Waste disposal form. No toxic materials or petroleum based grease and oils shall be accepted. The licensed Transporter shall provide the information requested on the Tank Truck Content Disposal Form as shown in Attachment A of the Regulation. Only wastes originating within ReWa's boundaries or Greenville County may be accepted. The Director may temporarily accept septage from any county in which ReWa is now located, even though the origin of the septage is outside of ReWa's territory but in the county. Such acceptance may only be made as a temporary accommodation and must be for a fixed time.

Section 3.3 - Requirements of Other Authorities

No requirement contained in this Section shall be construed to relieve the applicant of any additional requirements that may be imposed by other authorities having legal jurisdiction.

SECTION 4 - PROHIBITIONS AND LIMITATIONS ON WASTEWATER DISCHARGES

Section 4.1 - Prohibited Discharges

It shall be unlawful for any person to discharge wastewater which causes a hazard to human life, creates a public nuisance, exceeds specific limitations set forth hereinafter, or causes pass through or interference. These general prohibitions apply to all such Users of the POTW whether or not the User is subject to National Categorical Pretreatment Standards or any other

Federal, State, or Local regulations. When the Director determines that a User is discharging such wastewater, the Director shall advise the User of the potential impact of the discharge and develop effluent limitations for such discharge to protect the POTW. A User shall not discharge the following substances to the POTW:

1. Uncontaminated cooling water is prohibited in the ReWa system, but may be discharged to the storm sewer under the jurisdiction of ReWa in accordance with applicable SCDHEC requirements.
2. Liquids, solids or gases which by reason of their nature or quantity are, or may be, sufficient either alone or by interaction with other substances to cause fire or explosion or be injurious in any other way to the POTW or to the operation of the POTW. Wastewater shall not have a closed cup flashpoint of less than 140° F using test methods specified in 40 CFR 261.21. Materials specifically prohibited from discharge into the POTW include gasoline, kerosene, naphtha, fuel oil, lubricating oil, and any other substances which ReWa, the Subdistrict, State, or EPA has notified the User is a fire hazard or a hazard to the system.
3. Solid or viscous substances which may cause obstruction to the flow in a sewer or other interference, such as, but not limited to: floatable oil, garbage with particles greater than one-half (1/2") inch in any dimension, animal guts or tissues, paunch manure, bones, hair, hides or fleshings, entrails, whole blood, feathers, ashes, cinders, sand, spent lime, stone or marble dust, metal, glass, straw, shavings, grass clippings, rags, spent grains, spent hops, waste paper, wood, plastics, gas, tar, asphalt residues, residues from refining or processing of fuel or lubricating oil, mud or glass grinding or polishing wastes.
4. Wastewater having a pH-less than 5.0 standard units or greater than 11.5 standard units, unless other limits are approved by the Director, or wastewater having any other property capable of causing damage or hazard to structures, equipment, or personnel of the POTW.
5. Wastewater containing pollutants in sufficient quantity, either singly or by interaction with other pollutants which will cause interference, constitute a hazard to humans or animals, or create a toxic effect in the receiving waters of the POTW or cause a violation of ReWa's NPDES permit.
6. Noxious liquids, gases, or solids which either singly or by interaction with other wastes are sufficient to create a public nuisance or hazard to life or are sufficient to prevent entry into the sewers for their maintenance and repair.
7. Wastewater, liquid, or vapors having a temperature higher than 150°F, or results in a temperature higher than 104°F at the influent to the POTW or heat in such an amount as will inhibit biological activity in the POTW and result in interference.
8. Wastewater containing radioactive wastes or isotopes of such half-life or concentrations as may exceed limits established by applicable State or Federal regulations.
9. Wastewater which constitutes a slug discharge as defined herein.

10. Wastewater with color which causes interference or prevents the POTW from complying with NPDES permit or other State and Federal regulations.
11. Substances which may cause the POTW's effluent or any other product of the POTW such as residues, sludges, or scums, to be unsuitable for reclamation and reuse or to interfere with the process. In no case shall a substance discharged to the POTW cause the POTW to be in noncompliance with sludge use or disposal criteria, guidelines, or regulations developed under Section 405 of the Act; any criteria, guidelines, or regulations affecting sludge use or disposal developed pursuant to the SDWA, the Clean Air Act, the Toxic Substances Control Act, or State criteria applicable to the sludge management method being used.
12. Petroleum oil, non-biodegradable cutting oil, or products of mineral oil origin in amounts that may cause interference or pass-through.
13. Any pollutants which result in the presence of toxic gases, vapor or fumes within the POTW in a quantity that may cause acute worker health and safety problems.
14. Any trucked or hauled pollutants, except as permitted by ReWa at discharge points designated by ReWa.
15. Wastewater which includes excessive infiltration and inflow which shall be defined as a flow which exceeds the applicable Babbitt equation for the pipe in question during a 10 year rain event. For purposes of this regulation, excessive wet weather flows for any 3 consecutive rain events above 1" shall be considered non-compliant. In the case of a conflict between this provision and any separate Agreement between ReWa and the User regarding the I/I, the terms of the Agreement shall be controlling.

ReWa reserves the right to establish limitations and requirements which are more stringent than those required by State or Federal regulations.

Section 4.2 - Conditionally Prohibited Discharges

Certain discharges may be prohibited in the event the Director determines it necessary to protect the POTW, or receiving stream, or that the discharge will endanger lives, limbs, public property, or constitute a nuisance. The Director may revise the limitations established in this section if, in his opinion, different limitations are necessary to meet the above objectives. Wastewater as described below shall not be discharged to the POTW without the prior written approval of the Director.

1. Grease and Oils:

- a. Wastewater containing more than 100 mg/l of Silica Gel Treated N-Hexane Extractable Material (SGT-HEM); Non-polar Material such as petroleum oil, cutting oils, coolants, or products of mineral oil origin.

- b. Wastewater containing more than 200 mg/l of Polar Material including oil or grease of animal or vegetable origin. Analyses shall be performed in accordance with 40 CFR 136 - Guidelines Establishing Test Procedures for the analysis of Pollutants in the latest edition of 40 CFR 136. The difference between the N-Hexane Extractable Material (HEM) analysis and the SGT-HEM analysis will be considered Polar Material.
 - c. Wastewater containing substances which may solidify or become viscous at a temperature between 32° and 150°F.
 - d. Wastewater or waste containing oil or grease or septage that is hauled to ReWa facilities. Attachment F – Grease Control Strategy for Food Service Establishment is incorporated herein and reference is made to that attachment for its provisions as they are applicable to hauled waste.
- 2. Any radioactive wastes or isotopes of such half-life or concentration as may exceed limits established by the Director in compliance with applicable State or Federal regulations.
 - 3. Wastewater containing substances which are not amenable to treatment or reduction by the wastewater treatment processes employed.
 - 4. Holding tank waste.
 - 5. Wastewater with a pH less than 6.0 standard units or greater than 10.0 standard units.
 - 6. Any wastewater which imparts color which cannot be removed by the treatment process, such as, but not limited to, dye wastes and vegetable tanning solutions, which consequently imparts color to the treatment plant's effluent thereby violating ReWa's NPDES permit. Color (in combination with turbidity) shall not cause the treatment plant effluent to reduce the depth of the compensation point for photosynthetic activity by more than 10% from the seasonably established norm for aquatic life.
 - 7. Storm water, surface water, ground water, artesian well water, roof runoff, subsurface drainage, swimming pool drainage, condensate, deionized water, non-contact cooling water, and unpolluted industrial wastewater, unless specifically authorized by the Director.
 - 8. Any sludges, screenings, or other residues from the pretreatment of industrial wastes.
 - 9. Any medical wastes, except as specifically authorized by the Director in a wastewater discharge permit or a general permit.
 - 10. Any wastewater causing the POTW's effluent to fail a toxicity test.
 - 11. Any wastes containing detergents, surface active agents, or other substances which may cause excessive foaming in the POTW.

Section 4.3 - National Categorical Pretreatment Standards or Local Limitations

Upon the promulgation of National Categorical Pretreatment Standards for an industrial subcategory, each National Categorical Pretreatment Standard, if more stringent than the corresponding limitation imposed under this Regulation for sources in that subcategory, shall immediately supersede the limitations imposed under this Regulation. The Director shall notify all affected Users of the applicable reporting requirements under 40 CFR 403.12 and SC R61-9 Section 403.12. Compliance with categorical pretreatment standards for existing sources subject to such standards or for existing sources which hereafter become subject to such standards shall be within three years following promulgation of the standards unless a shorter compliance time is specified in the standard. Specific pollutant limitation and compliance schedules shall be developed by the Director and made a part of the User's discharge permit or a general permit. Compliance with National Categorical Pretreatment Standards or Local Limitations for new sources shall be required within 90 days of initiation of a discharge. ReWa operates several wastewater treatment plants and specific pollutant limitations will vary by plant. These specific limits and definitions of duration and maximums shall be on file at ReWa's office and available upon request. A current listing shown in Attachment D is attached to the Regulation.

The Director may allow for a Categorical User to request a variance from an applicable Categorical Standard or local limitation. The request may be allowed when factors relating to a Categorical User are fundamentally different from the factors considered during the development of a categorical Pretreatment Standard applicable to the Categorical User. A revised standard may be allowed as follows:

1. Where a categorical Pretreatment Standard is expressed only in terms of either the mass or the concentration of a pollutant in wastewater, the Director may impose equivalent concentration or mass limits in accordance with paragraphs 4 and 5 of this Section.
2. When the limits in a categorical Pretreatment Standard are expressed only in terms of mass of pollutant per unit of production; the Director may convert the limits to equivalent limitations expressed either as mass of pollutant discharged per day or effluent concentration for purposes of calculating effluent limitations applicable to individual Industrial Users.
3. When wastewater subject to a categorical Pretreatment Standard is mixed with wastewater not regulated by the same Standard, the Director shall impose an alternate limit in accordance with 40 CFR 403.6(e) and SC R61-9 Section 403.6 (f).
4. When a categorical Pretreatment Standard is expressed only in terms of pollutant concentrations, an Industrial User may request that ReWa convert the limits to equivalent mass limits. The determination to convert concentration limits to mass limits is within the discretion of the Director. ReWa may establish equivalent mass limits only if the Industrial User meets all the conditions set forth as follows:
 - a. To be eligible for equivalent mass limits, the Industrial User must:

- i. Employ, or demonstrate that it will employ, water conservation methods and technologies that substantially reduce water use during the term of its individual wastewater discharge permit;
 - ii. Currently use control and treatment technologies adequate to achieve compliance with the applicable categorical Pretreatment Standard, and not have used dilution as a substitute for treatment;
 - iii. Provide sufficient information to establish the facility's total actual average daily flow rate for all wastestreams, based on data from a continuous effluent flow monitoring device, as well as the facility's long-term average production rate. Both the actual average daily flow rate and the long-term average production rate must be representative of current operating conditions;
 - iv. Not have daily flow rates, production levels, or pollutant levels that vary so significantly that equivalent mass limits are not appropriate to control the Discharge; and
 - v. Have consistently complied with all applicable categorical Pretreatment Standards during the period, at least three years, prior to the Industrial User's request for equivalent mass limits.
- b. An Industrial User subject to equivalent mass limits must:
- i. Maintain and effectively operate control and treatment technologies adequate to achieve compliance with the equivalent mass limits;
 - ii. Continue to record the facility's flow rates through the use of a continuous effluent flow monitoring device;
 - iii. Continue to record the facility's production rates and notify the Director whenever production rates are expected to vary by more than 20 percent from its baseline production rates determined in paragraph 4.3(4)(iii) of this Section. Upon notification of a revised production rate, the Director will reassess the equivalent mass limit and revise the limit as necessary to reflect changed conditions at the facility; and
 - iv. Continue to employ the same or comparable water conservation methods and technologies as those implemented pursuant to paragraphs 4.3(4)(a)(i) of this Section so long as it discharges under an equivalent mass limit.
- c. When developing equivalent mass limits, the Director:
- i. Will calculate the equivalent mass limit by multiplying the actual average daily flow rate of the regulated process(es) of the Industrial User by the

concentration-based Daily Maximum and Monthly Average Standard for the applicable categorical Pretreatment Standard and the appropriate unit conversion factor;

- ii. Upon notification of a revised production rate, will reassess the equivalent mass limit and recalculate the limit as necessary to reflect changed conditions at the facility; and
 - iii. May retain the same equivalent mass limit in subsequent individual wastewater discharger permit terms if the Industrial User's actual average daily flow rate was reduced solely as a result of the implementation of water conservation methods and technologies, and the actual average daily flow rates used in the original calculation of the equivalent mass limit were not based on the use of dilution as a substitute for treatment pursuant to Section 4.6 below. The Industrial User must also be in compliance with Section 4.11 regarding the prohibition of bypass.
5. The Director may convert the mass limits of the categorical Pretreatment Standards of 40 CFR Parts 414, 419, and 455 to concentration limits [SC R61-9 Section 403.6 (d)(5)] for purposes of calculating limitations applicable to individual Industrial Users. When converting such limits to concentration limits, the concentrations in the applicable subparts of 40 CFR Parts 414, 419, and 455 shall be applied. Also, documentation shall be provided that dilution is not being substituted for treatment as prohibited under Section 4.6 of this Regulation. The conversion is at the discretion of the Director.
 6. Once included in its permit, the Industrial User must comply with the equivalent limitations in lieu of the promulgated Categorical Standards from which the equivalent limitations were derived
 7. Many categorical Pretreatment Standards specify one limit for calculating maximum daily discharge limitations and a second limit for calculating maximum Monthly Average, or 4-day average, limitations. Where such Standards are being applied, the same production or flow figure shall be used in calculating both the average and the maximum equivalent limitation.
 8. Any Industrial User operating under a permit incorporating equivalent mass or concentration limits calculated from a production-based Standard shall notify the Director within two (2) business days after the User has a reasonable basis to know that the production level will significantly change within the next calendar month. Any User not notifying the Director of such anticipated change will be required to meet the mass or concentration limits in its permit that were based on the original estimate of the long term average production rate.

Section 4.4 - Limitations on Wastewater Strength and Flow Rate

No person shall discharge wastewater in excess of the concentration or mass limit set forth in National Categorical Pretreatment Standards or Local Limitations or their wastewater discharge permit or a general permit. The Director shall establish permit limitations on a case-by-case

basis in accordance with SCDHEC and EPA regulations and Attachment D of this Regulation. Where appropriate and allowed by applicable regulations, the Director may impose mass limitations on a discharge.

The Director may develop Best Management Practices (BMPs), or include BMPs in individual wastewater discharge permits or a general permit, to implement Local Limitations and the requirements of Section 4.0.

Section 4.5 - Revision of Limitations

The Director may impose limitations more stringent than the National Categorical Pretreatment Standards in wastewater discharge permits or a general permit where it is necessary to comply with the objectives of this Regulation.

Section 4.6 - Dilution Prohibition

Except where authorized by an applicable pretreatment standard, no User shall deliberately dilute a discharge as a partial or complete substitute for adequate treatment to achieve compliance with the limitations developed by ReWa or the State. This provision may be waived for National Categorical Pretreatment Standards or Local Limitations only if the standard or requirements specifically allow dilution and the Director determines the discharge would otherwise comply with the provisions of this Regulation.

Section 4.7 - Accidental Discharge/Slug Control Plans

The Director may require an Industrial User to develop and implement an accidental discharge/slug control plan. Facilities to prevent accidental discharge of prohibited materials shall be provided and maintained at the expense of the Owner. When required, detailed plans showing facilities and operating procedures to provide this protection shall be submitted to the Director for review, and shall be approved before construction of the facility. No person who commences discharge to the POTW after the effective date of this Regulation shall be permitted to discharge until accidental discharge procedures have been approved by the Director. Review and approval of such plans and operating procedures shall not relieve the responsibility to modify the facility as necessary to meet the requirements of this Regulation. In the case of an accidental discharge or a slug load, it is the responsibility of the User to immediately notify the Director of the incident. The notification shall include location of discharge, type of waste, concentration and volume, and corrective actions.

1. Within five days following an accidental discharge or slug load, the User shall submit to the Director a detailed written report describing the cause of the discharge and the measures to be taken to prevent similar future occurrences. Such notification shall not relieve the User of any expense, loss, damage, or other liability which may be incurred as a result of damage to the wastewater disposal system, fish kills, or any other damage to person or property; nor shall such notification relieve the User of any fines, civil penalties, or other liability which may be imposed by this Regulation or other applicable law.

2. The accidental discharge/slug control plan, when required, shall be submitted to the Director containing at a minimum the following:
 - a. Description of discharge practices, including non-routine batch discharges;
 - b. Description of stored chemicals;
 - c. Procedures for immediately notifying the POTW of any accidental or slug discharge or change at its facility affecting potential for a slug discharge. Such notification must also be given for any discharge which would violate any of the prohibited discharges; and
 - d. Procedures to prevent adverse impact from any accidental or slug discharge. Such procedures include, but are not limited to, inspection and maintenance of storage areas, handling and transfer of materials, loading and unloading operations, control of plant site run-off, worker training, building of containment structures or equipment, measures for containing toxic organic pollutants (including solvents), and/or measures and equipment for emergency response.

The Director will evaluate within one (1) year of a User being designated a Significant Industrial User, whether the User needs a plan, and thereafter at least once every three years.

Section 4.8 - Upset Provision, An Affirmative Defense

1. Definition

For the purposes of this section, "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with categorical pretreatment standards because of factors beyond the reasonable control of the Industrial User. An Upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

2. Effect of an Upset

An Upset shall constitute an affirmative defense to an action brought for noncompliance with categorical Pretreatment Standards if the requirements of paragraph (c) are met.

3. Conditions Necessary For Demonstrating Upset

Any User which experiences an Upset in operations which places the User in a temporary state of noncompliance shall comply with the requirements of 40 CFR 403.16 and SC R61-9 Section 403.16 if the User seeks to establish an affirmative defense of Upset. The following information must be given to the Director within 24 hours of becoming aware of the Upset (if given orally, written submission must follow within five days):

- a. Description of the Upset, the cause thereof, and the expected impact on the User's compliance status;

- b. Duration of noncompliance, including exact dates and times of noncompliance, and if the noncompliance is continuing, the time by which compliance is reasonably expected to occur; and
- c. All steps taken or to be taken to reduce, eliminate and prevent recurrence of such an Upset or other conditions of noncompliance.

4. User Responsibility in Case of Upset

The Industrial User shall control production of all discharges to the extent necessary to maintain compliance with categorical pretreatment standards upon reduction, loss, or failure of its treatment facility until the facility is restored or an alternative method of treatment is provided. This requirement applies in the situation where, among other things, the primary source of power of the treatment facility is reduced, lost or fails.

Section 4.9 - Notice of Process Change/Interruption of Operation

Notice by the User shall be given to the Director in advance or at the earliest possible time when normal operations of the industry as identified by the industry in its permit application will be interrupted for 48 hours or longer, when wastewater will not be discharged, or prior to implementation of a process change which will alter characteristics of the wastewater.

Section 4.10 - Pretreatment

1. Pretreatment Measures

Users shall provide pretreatment as required to comply with this Regulation or discharge permit or a general permit, and shall achieve compliance with this Regulation and all pretreatment standards within the specified time limitations. Any facilities required to pretreat wastewater shall be constructed, operated, and maintained at the expense of the Owner. A permit to construct pretreatment facilities shall be obtained from SCDHEC. Detailed plans showing the pretreatment facilities and operating procedures shall be submitted to the Director for review. Submittal of such plans and operating procedures will in no way relieve the User from the responsibility of modifying the facility as necessary to produce an effluent acceptable to the Director under the provisions of this Regulation. Any subsequent changes in the pretreatment facilities or method of operation shall be reported to the Director prior to the initiation of the changes.

2. Additional Pretreatment Measures

- a. Whenever deemed necessary, the Director may require Industrial Users to restrict their discharge during peak flow periods, designate that certain wastewater be discharged only into specific sewers, relocate and/or consolidate points of discharge, separate sewage wastestreams from industrial wastestreams, and such other conditions as may be necessary to protect the POTW and determine the Industrial User's compliance with the requirements of this ordinance.

- b. A Significant Industrial User may be required to install and maintain, on its property and at its expense, a suitable storage and flow control facility to ensure equalization of flow over a period determined by the Director. The facility shall have a reasonable capacity for the daily discharge volume and shall be equipped with alarms and a rate of discharge controller, the regulation of which shall be directed by the Director. A wastewater discharge permit or a general permit may be issued solely for flow equalization.
- c. Grease interceptors, oil separators and grit interceptors shall be provided when, in the opinion of the Director they are necessary for the proper handling of wastewater containing excessive amounts of grease and oil, or sand; except that such devices shall not be required for residential users. All devices shall be of type and capacity approved by the Director and shall be so located to be easily accessible for cleaning and inspection. Such devices shall be inspected, cleaned and repaired regularly, as needed, by the owner at his expense.
- d. Industrial Users with the potential to discharge flammable substances may be required to install and maintain an approved combustible gas detection meter.

Section 4.11 - Bypass, Affirmative Defense

Any User which bypasses treatment facilities as defined in 40 CFR 403.17 and SC R61-9 Section 403.17 shall comply with the requirements of that section and applicable State and Federal regulations. An Industrial User may allow a bypass to occur only when it does not cause pretreatment standards or requirements to be violated, but only if it also is for essential maintenance to assure efficient operation. If an Industrial User knows in advance of the need for a bypass, it shall submit prior notice to the Director, if possible at least ten days before the date of the bypass. An Industrial User shall submit oral notice of an unanticipated bypass that exceeds applicable pretreatment standards to the Director within 24 hours from the time the Industrial User becomes aware of the bypass. A written submission shall also be provided within five days of the time the Industrial User becomes aware of the bypass. The written submission shall contain a description of the bypass and its cause; the duration of the bypass, including exact dates and times, if the bypass has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the bypass. The Director may waive the written report on a case-by-case basis if the oral report has been received within 24 hours.

The Director may take enforcement action against an Industrial User for a bypass, except where the User establishes an affirmative defense of bypass. For this affirmative defense the User must show the following:

- 1. Bypass was unavoidable to prevent loss of life, personal injury or severe property damage;
- 2. There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastewater, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass

which occurred during normal periods of equipment downtime or preventative maintenance;
and;

3. The Industrial User submitted notices as required in this section.

The Director may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the conditions listed in this section.

Section 4.12 - Recovery of Preventative Expenses

When any discharge, in the opinion of the Director, appears to be in violation of Section 4, Prohibitions and Limitations on Wastewater Discharges, to the extent that the discharge may cause an interference with, or have an adverse impact upon, the operation of facilities, ReWa may act to take preventative action. All costs and expenses, losses and damages, including the reasonable value or cost of the use of ReWa personnel and equipment caused or incurred by the implementation of preventative measures shall be charged to and paid by the discharger.

SECTION 5 - REVENUE SYSTEM

Section 5.1 - Fees and Charges

Fees shall be assessed to Users for discharges to the POTW and for executing or enforcing the provisions of this Regulation. These charges shall be reviewed by ReWa no less frequently than biennially in accordance with the User Charge System and other ordinances and policies of ReWa and applicable statutes of the State. Charges may be developed for the following purposes:

1. Industrial monitoring, inspections, and surveillance procedures;
2. Reviewing accidental discharge procedures and construction;
3. Reviewing permit applications;
4. Reviewing appeals;
5. Special industrial discharges;
6. Recovering capital related expenditures;
7. Other charges, including User charges based on billable flow and excessive pollutant discharges to the POTW, necessary to recover the operation and maintenance costs of the wastewater disposal system;
8. Availability, impact, and connection fees or similar fees to recover, or to provide for, capital costs expended for the system and/or its expansion.

Current fees and charges are shown in Attachment B. Future charges and fees will be developed and approved for inclusion in Attachment B.

SECTION 6 - DISCHARGE PERMITS AND REPORTING

Section 6.1 - Wastewater Discharge permit or a general permits

1. Application Requirements

Any person desiring to discharge industrial wastewater shall complete an official application and file it with ReWa. Approval shall be evidenced by written notice from the Director. The person shall provide all data required by the current official application, copies of which shall be obtained from the Director. The Director shall evaluate the data and may require additional information. After evaluation and acceptance of the data provided, the Director may grant permission to discharge subject to the terms and conditions provided herein. The Director may issue a permit with specific limitations different from those listed in this Regulation if he determines that the discharge will otherwise comply with the remaining provisions in this Regulation. All Significant Industrial Users shall obtain a permit to discharge to the POTW. Authorized representatives of Users shall sign the permit application.

Users which, through changes in the use of the premises or water usage, cause a substantive change in wastewater volume, strength, or characteristic shall notify ReWa of anticipated changes and may be required to submit a new application prior to making the change or alterations.

Applicable persons and Users shall complete and submit an application, accompanied by any application fee in the amount prescribed, including the following information:

- a. Name, address, and location (if different from the address) of the facility, name of the operator and owner;
- b. Applicable SIC/NAICS number(s) and a list of any environmental control permits held by or for the facility;
- c. Analytical data on wastewater constituents and characteristics including but not limited to those mentioned in this Regulation;
- d. Time and duration of discharges;
- e. Average daily wastewater discharge rates, including daily maximum, monthly average and any seasonal variations in gallons per day;
- f. Schematic site, floor, mechanical, and plumbing plans, with details to show all drains, sewers, sewer connections, and appurtenances by the size, location and (if available) elevations including location for monitoring all discharges (these must show point of discharge to the POTW);

- g. Description of activities, facilities and plant processes on the premises unless subject to the confidentiality provisions of Section 6.4;
- h. The nature and concentration of any pollutants in the wastewater which are limited by any Local Limitations, or National Categorical Pretreatment Standards, a statement regarding whether or not the person is complying or will comply with National Categorical Pretreatment Standards on a consistent basis and, if not, whether additional pretreatment or operational modifications are required to comply with applicable limitations or National Categorical Pretreatment Standards, or Local Limitations;
- i. If additional pretreatment or operational modifications will be required to comply with limitations or National Categorical Pretreatment Standards or Local Limitations, the shortest schedule by which the person will comply;
- j. Where required to develop pretreatment standards, a brief description of each product produced by type, amount, process or processes and rate of production;
- k. Where required to develop pretreatment standards, type and amount of raw materials processed (average and maximum per day);
- l. Number and type of employees, hours of operation of plant, and proposed or actual hours of operation of pretreatment facilities;
- m. Any other information as may be deemed by the Director to be necessary to evaluate the permit application; and
- n. All wastewater discharge permit applications and Industrial User reports must contain the certification statement in Section 6.3 and be signed by an authorized representative of the User.

The Director shall review the application, conduct an on-site inspection of the plant and any pretreatment facilities, and shall prepare a written evaluation and tentative determination to issue or deny the permit. If the tentative determination is to issue the permit, the Director shall draft the permit in accordance with the Regulation and State regulations. A synopsis of the application shall be prepared by the Director for submission to the applicant, the SCDHEC, and to the public upon request. The contents of such shall include a sketch or detailed description of the process, if not in violation of Section 6.5 on confidentiality, and pretreatment facilities including the location of all points of discharge to the POTW and all compliance monitoring points. This shall also include the rate or frequency of the proposed discharge, average daily flow, average daily discharge in pounds of any limited pollutant and any pollutant identified in the application as known or suspected present, and the basis for the pretreatment limitations including the documentation of any calculations in applying National Categorical Pretreatment Standards or Local Limitations, and all other information required by the State. The User shall have 30 days from the receipt of the draft permit to review and

comment on the draft permit. The Director shall issue the final permit at the end of the comment period.

At the discretion of the Director, the Director may use general permits to control SIU discharges to the POTW if the following conditions are met. All facilities to be covered by a general permit must:

1. Involve the same or substantially similar types of operations;
2. Discharge the same types of wastes;
3. Require the same effluent limitations;
4. Require the same or similar monitoring; and
5. In the opinion of the Director, are more appropriately controlled under a general permit than under individual wastewater discharge permits.

To be covered by the general permit, the SIU must file a written request for coverage that identifies its contact information, production processes, the types of wastes generated, the location for monitoring all wastes covered by the general permit, any requests in accordance with Section 6.2 for a monitoring waiver for a pollutant neither present nor expected to be present in the Discharge, and any other information the POTW deems appropriate. A monitoring waiver for a pollutant neither present nor expected to be present in the discharge is not effective in the general permit until after the Director has provided written notice to the SIU that such a waiver request has been granted.

The Director will retain a copy of the general permit, documentation to support the POTW's determination that a specific SIU meets the criteria listed above and applicable State regulations, and a copy of the User's written request for coverage for three (3) years after the expiration of the general permit.

An SIU subject to production-based categorical Pretreatment Standards or categorical Pretreatment Standards expressed as mass of pollutant discharged per day or an IU whose limits are based on the Combined Wastestream Formula as allowed in 40 CFR 403.6 and SC R61-9 Section 403.6(f) shall not be allowed to be covered by a general permit.

2. Hearings

Any person whose permit is denied, or is granted subject to conditions he deems unacceptable, shall have the right to request an Adjudicatory Hearing under the procedures provided in Section 8 and the ReWa Enforcement Management Strategy, Attachment C mutatis mutandis, except insofar as that procedure relates to appeals from the decision of the hearing examiner. After a determination is made by the hearing examiner in any case other than an enforcement proceeding, any party may apply to ReWa for a review of the determination of the hearing examiner prior to a final decision in the matter by ReWa. However, application must be submitted in writing within 15 days of receipt of the determination stating specifically the grounds of objection to such determination. ReWa may, on its own motion, take up the review of the determination of the hearing examiner at a regularly scheduled ReWa meeting. On the basis of the complete record of proceedings and testimony and evidence presented before the hearing

examiner, his or her determination shall be affirmed, modified, or set aside by ReWa in a final decision on the matter.

ReWa will review the determination of the hearing examiner in the following manner:

- a. Briefs may be submitted to ReWa by the parties but are not required unless specially requested by ReWa.
- b. All briefs shall be submitted to ReWa at least 15 days prior to the scheduled meeting with 10 separate copies. Briefs shall state specifically the grounds for affirmation, modification, or denial of the determination of the hearing examiner. Reply briefs may be filed five days before the ReWa meeting.
- c. Oral arguments shall be limited in duration to not more than one hour, or as otherwise provided by ReWa, from each party in the hearing, including intervening parties.
- d. A full and complete record shall be kept of all proceedings and reported and transcribed by a qualified reporter furnished by ReWa. A copy of the transcript may be requested by any interested party, who shall pay the cost of preparing such transcript.
- e. ReWa, at its discretion, may require a reopening of the adjudicatory hearing before the hearing examiner for the taking of additional testimony upon all issues or particular issues prior to its final decision on the determination of the hearing examiner.
- f. ReWa will make its decision upon the record presented by the hearing examiner alone, unless ReWa determines it needs additional evidence during its consideration. In such event, a proper opportunity for rebuttal by the party will be granted.

Any party aggrieved by a final decision of ReWa, other than in an enforcement case, may appeal such decision to the Court of Common Pleas in the county in which ReWa is located under the same guidelines applied to State agencies which are set forth in S.C. Code Ann. §1-23-380.

3. Permit Modifications

Within nine months of the promulgation of a National Categorical Pretreatment Standard, or adoption of a Local Limitation, the permit of Users subject to such standards shall be revised to require compliance with such standard within the time frame prescribed by such standard. Where a User, subject to a National Categorical Pretreatment Standard, or Local Limitation, has not previously submitted an application for a permit, the User shall apply for a permit within 180 days after the promulgation of the National Categorical Pretreatment Standard. In addition, the User with an existing permit shall submit to ReWa within 180 days after the promulgation of an applicable standard, information regarding the nature and concentration of the regulated pollutant and a schedule for providing additional pretreatment, if necessary.

Other modifications of permits, including general permits, shall be subject to the same procedural requirements as the issuance of permits except the following changes may be made upon 30 days notice:

- a. modifications of the monitoring program contained in the permit;
- b. changes in the ownership of the discharge when no other change in the permit is indicated;
- c. a single modification of any compliance schedule not in excess of four months; or
- d. modification of compliance schedules in permits for new sources where the new source will not discharge until process or pretreatment facilities are operational; or
- e. modifications incorporating new or revised Federal, State or Local pretreatment standards or regulations; or
- f. other modifications determined necessary by the Director under the Regulations.

4. Permit Conditions

The Director shall have the authority to grant a permit with such conditions attached as he believes necessary to achieve the purpose of this Regulation, State and Federal regulations. Such conditions shall include but are not limited to the following:

- a. a statement of duration (in no case more than five years);
- b. a statement of non-transferability;
- c. applicable effluent limits, including Best Management Practices, based on National Categorical Pretreatment Standards or Local Limitations;
- d. self monitoring, sampling, reporting, notification, and record-keeping requirements, identification of the pollutants to be monitored (including the process for seeking a waiver for a pollutant neither present nor expected to be present in the discharge in accordance with Section 6.2, or a specific waived pollutant), sampling location, sampling frequency, and sample type based on Federal, State, and local law;
- e. Any grant of the monitoring waiver by the Director;
- f. notification requirements for slug discharges as defined by 40 CFR 403.5(b) and SC R61-9 Section 403.5 (b) ;
- g. a statement of applicable penalties for violation of permit conditions;
- h. a compliance schedule that outlines dates and actions for obtaining compliance with final limitations or other pretreatment requirements; and

- i. Slug Control requirements in accordance with Section 4.7.

5. Permit Duration

Permits may be issued for a specified time period, not to exceed five years. A permit may be issued for a period less than a year or may be stated to expire on a specific date. The User shall apply for a permit reissuance a minimum of 180 days prior to the expiration of the permit.

6. Permit Transfer

Wastewater discharge permits or a general permit are issued to a specific User for a specific operation. A wastewater discharge permit or a general permit shall not be reassigned or transferred or sold to a new owner, new User, different premises, or a new or changed operation. In such event a new application shall be submitted with full information. This application will be expedited if the new owner or operator certifies (1) that there is not immediate intent to change the facility's operation and process, (2) the date the new owner or operator shall take over, and (3) acknowledgment is made that the new owner or operator has full responsibility for complying with the existing wastewater discharge permit or a general permit.

Section 6.2 - Reporting Requirements for Permittee

1. Within 180 days after the effective date of a National Categorical Pretreatment Standard, or 180 days after the final administrative decision is made upon a category determination submission under 40 CFR 403.6 and SC R61-9 Section 403.6 (b), whichever is later, existing Categorical Industrial Users subject to such National Categorical Pretreatment Standards shall be required to submit to the Director a report which contains the information required in 40 CFR 403.12 and SC R61-9 Section 403.12 (b) and applicable State and Federal regulations. At least 90 days prior to commencement of discharge, new sources and sources that become Categorical Industrial Users subsequent to the promulgation of an applicable National Categorical Pretreatment Standard, shall be required to submit to the Director a report which contains the information required in 40 CFR 403.12 and SC R61-9 Section 403.12 (b). The Director shall require appropriate reporting from those Significant Industrial Users not subject to National Categorical Pretreatment Standards. Reports required by this Regulation shall be signed by an authorized representative of the Significant Industrial User.
2. Within 90 days following the date for final compliance with applicable National Categorical Pretreatment Standards or, in the case of a New Source, following commencement of the discharge of wastewater into the POTW, any User subject to National Categorical Pretreatment Standards and Requirements shall submit to the Director a report containing the information required in 40 CFR 403.12 and SC R61-9 Section 403.12 (b).
3. Any User subject to a National Categorical Pretreatment Standard, after the compliance date of such National Categorical Pretreatment Standard, or, in the case of New Source, after commencement of the discharge into the POTW, shall submit to the Director, no less than

twice per year, unless required more frequently in the National Categorical Pretreatment Standard or by the Director, a report indicating the nature and concentration of pollutants in the effluent which are limited by such National Categorical Pretreatment Standards. In addition, this report shall include a record of all measured or estimated average and maximum daily flows during the reporting period. In cases where the Pretreatment Standard requires compliance with a Best Management Practice or pollution prevention alternative, the User shall submit documentation as required by the Director or the applicable Pretreatment Standard to determine compliance with the standard. At the discretion of the Director and in consideration of such factors as local high or low flow rate, holidays, budget cycles, etc., the Director may agree to alter the months during which the above reports are to be submitted. The Director may impose mass limitations on Users which are using dilution to meet applicable National Categorical Pretreatment Standards or Requirements, or in other cases where the imposition of mass limitations are appropriate. In such cases, the required periodic reports shall indicate the mass of pollutants regulated by National Categorical Pretreatment Standards in the discharge of the User. These reports shall contain the results of sampling and analysis of the discharge, including the flow and the nature and concentrations, or production and mass where requested by the Director, of pollutants contained therein which are limited by the permit or applicable National Categorical Pretreatment Standard.

4. The Director may authorize an Industrial User subject to a Categorical Pretreatment Standard to forego sampling of a pollutant regulated by a categorical Pretreatment Standard if the Industrial User has demonstrated through sampling and other technical factors that the pollutant is neither present nor expected to be present in the Discharge, or is present only at background levels from intake water and without any increase in the pollutant due to activities of the Industrial User. This authorization is subject to the following conditions:
 - a. The waiver may be authorized where a pollutant is determined to be present solely due to sanitary wastewater discharged from the facility provided that the sanitary wastewater is not regulated by an applicable categorical Standard and otherwise includes no process wastewater.
 - b. The monitoring waiver is valid only for the duration of the effective period of the individual wastewater discharge permit, but in no case longer than 5 years. The User must submit a new request for the waiver before the waiver can be granted for each subsequent individual wastewater discharge permit.
 - c. In making a demonstration that a pollutant is not present, the Industrial User must provide data from at least one sampling of the facility's process wastewater prior to any treatment present at the facility that is representative of all wastewater from all processes.
 - d. The request for a monitoring waiver must be signed by a duly authorized representative and include the certification statement in Section 6.3 below.
 - e. Non-detectable sample results may be used only as a demonstration that a pollutant is not present if the EPA approved method from 40 CFR Part 136 with the lowest minimum detection level for that pollutant was used in the analysis.

- f. Any grant of the monitoring waiver by the Director must be included as a condition in the User's permit. The reasons supporting the waiver and any information submitted by the User in its request for the waiver must be maintained by the Director for 3 years after expiration of the waiver.
 - g. Upon approval of the monitoring waiver and revision of the User's permit by the Director, the Industrial User must certify on each report with the statement in Section 6.3 below, that there has been no increase in the pollutant in its wastestream due to activities of the Industrial User.
 - h. In the event that a waived pollutant is found to be present or is expected to be present because of changes that occur in the User's operations, the User must immediately: Comply with the monitoring requirements of paragraph 3 above, or other more frequent monitoring requirements imposed by the Director, and notify the Director.
 - i. This provision does not supersede certification processes and requirements established in categorical Pretreatment Standards such as baseline monitoring reports and 90-day report of final compliance with the Pretreatment Standard, except as otherwise specified in the categorical Pretreatment Standard. The waiver is not available when the combined wastestream formula is applied except where a single categorical wastestream is combined only with sanitary wastewater.
5. All Users shall notify the Director immediately of any changes at the User's facility affecting the potential for a slug discharge, including any slug discharges as defined in Section 1.2 of this Regulation.
 6. Sampling and analysis may be performed by ReWa in lieu of the User. If done by ReWa, the User shall be charged such fees or charges as are established by ReWa. Where ReWa performs the required sampling and analysis in lieu of the User, the User shall not be required to submit the compliance certification required under 40 CFR 403.12(b)(6) and 403.12(d) and SC R61-9 Sections 403.12(b) and 403.12(d). In addition, where ReWa itself collects all the information required for the report, including flow data, the User shall not be required to submit the report.
 7. If sampling performed by a User indicates a violation, the User shall notify the Director within 24 hours of becoming aware of the violation. The User shall also repeat the sampling and analysis and submit the results of the repeat analysis to ReWa within 30 days after becoming aware of the violation, except the User may not be required to resample if ReWa performs sampling of the discharge at a frequency of at least once per month, or ReWa performs sampling between the time when the User performs its initial sampling and the time when the User receives the results of this sampling.

Where ReWa has performed the sampling and analysis in lieu of the User, ReWa will repeat sampling and analysis unless it notifies the User of the violation and requires the User to perform the repeat analysis. Resampling is not required if ReWa performs sampling at the

User at a frequency of at least once per month, or ReWa performs sampling at the User between the time when the initial sampling was conducted and the time when the User or ReWa receives the results of this sampling.

8. If a User subject to these reporting requirements monitors any regulated pollutant at the location(s) designated in the discharge permit or a general permit more frequently than required by the Director, the results of this monitoring shall be included in the report.
9. The Director shall require appropriate reporting from those Users with discharges that are not subject to National Categorical Pretreatment Standards. Significant Industrial Users shall submit to the Director at least once every six months (on dates specified by the Director) a description of the nature, concentration, and flow of the pollutants required to be reported by the Director. This sampling and analysis may be performed by ReWa in lieu of the non-categorical Significant Industrial User. Where ReWa itself collects all the information required for the report, the Significant Industrial User shall not be required to submit the report. In cases where the Pretreatment Standard requires compliance with a Best Management Practice or pollution prevention alternative, the User shall submit documentation as required by the Director or the applicable Pretreatment Standard to determine compliance with the standard.
10. Significant Industrial Users shall promptly notify the Director in advance of any substantial change in the volume or character of pollutants in their discharge in excess of the amounts allowed in the discharge described in the application or the permit, including the listed or characteristic hazardous wastes for which the Significant Industrial User has submitted initial notification under 40 CFR 403.12 and SC R61-9 Section 403.12. Significant Industrial Users shall notify the Director, the EPA Regional Waste Management Division Director, and State hazardous waste authorities in writing of any discharge of a substance, which, if otherwise disposed of, would be a hazardous waste under 40 CFR 261. Such notification must include the name of the hazardous waste as set forth in 40 CFR 261, the EPA hazardous waste number, and the type of discharge (continuous, batch, or other). If the Significant Industrial User discharges more than 100 kilograms of such waste per calendar month to the POTW, the notification shall also contain the following information to the extent such information is known and readily available to the Significant Industrial User: (1) an identification of the hazardous constituents contained in the wastes; (2) an estimation of the mass and concentration of such constituents in the wastewater discharged during that calendar month; and (3) an estimation of the mass of constituents in the wastewater expected to be discharged during the following 12 months. Significant Industrial Users shall provide the notification no later than 180 days after the discharge of the listed or characteristic hazardous waste. Notification need be submitted only once for each hazardous waste discharge. However, notifications of changed discharges must be submitted under 40 CFR 403.12(j) and SC R61-9 Section 403.12(j). The notification requirement does not apply to pollutants already reported under the self-monitoring requirements of 40 CFR 403.12(b), (d), and (e) and SC R61-9 Section 403 (b), (d) and (e). Users are exempt from the requirements during a calendar month in which they discharge no more than 15 kilograms of hazardous wastes, unless the wastes are acute hazardous wastes as specified in 40 CFR 261.30(d) and 261.33(e). Discharge of more than 15 kilograms of non-acute hazardous wastes in a calendar month, or any quantity of acute hazardous wastes as specified in 40 CFR 261.30(d) and

261.33(e), requires a one-time notification. Subsequent months during which the Significant Industrial User discharges more than such quantities of any hazardous waste do not require additional notification.

11. In the case of any regulations under section 3001 of RCRA identifying additional characteristics of hazardous waste or listing any additional substance as a hazardous waste, the Significant Industrial User shall notify the Director, the EPA Regional Waste Management Division Director, and State hazardous waste authorities of the discharge of such substance within 90 days of the effective date of such regulations.
12. In the case of any notification, the Significant Industrial User shall certify that it has a program in place to reduce the volume and toxicity of hazardous wastes generated to the degree it has determined to be economically practical.

Notice:

The reports and other documents required to be submitted or maintained under this section may be subject to the provisions of 18 USC section 1001 relating to fraud and false statements; the provisions of section 309(c)(4) of the Act, as amended, governing false statements, representation or certification; and the provisions of section 309(c) regarding responsible officers.

6.3 Certification Statements

1. Certification of Permit Applications, User Reports and Initial Monitoring Waiver

The following certification statement is required to be signed and submitted by Users submitting permit applications, baseline monitoring reports, reports on compliance with the Categorical Pretreatment Standard deadlines, periodic compliance reports, and Users submitting an initial request to forego sampling of a pollutant. The following certification statement must be signed by an Authorized Representative as defined in Section 1.2:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

2. Annual Certification for Non-Significant Categorical Industrial Users

A facility determined to be a Non-Significant Categorical Industrial User by the Director pursuant to Section 1.2 must annually submit the following certification statement signed in accordance with the signatory requirements in Section 1.2. This certification must accompany an alternative report required by the Director:

Based on my inquiry of the person or persons directly responsible for managing compliance with the categorical Pretreatment Standards under 40 CFR _____, I certify that, to the best of my knowledge and belief that during the period from _____, to _____ [months, days, year]:

- a. The facility described as _____ [facility name] met the definition of a Non-Significant Categorical Industrial User as described in Section 1.2.
- b. The facility complied with all applicable Pretreatment Standards and requirements during this reporting period; and (c) the facility never discharged more than 100 gallons of total categorical wastewater on any given day during this reporting period.

This compliance certification is based on the following information.

3. Certification of Pollutants Not Present --

Users that have an approved monitoring waiver must certify on each report with the following statement that there has been no increase in the pollutant in its wastestream due to activities of the User.

Based on my inquiry of the person or persons directly responsible for managing compliance with the Pretreatment Standard for 40 CFR [specify applicable National Pretreatment Standard part(s)], I certify that, to the best of my knowledge and belief, there has been no increase in the level of [list pollutant(s)] in the wastewaters due to the activities at the facility since filing of the last periodic report.

Section 6.4 -- User Records

Users shall maintain and retain for three years all records as specified by the Director and afford ReWa access thereto. These records include but are not limited to wastewater self-monitoring records, records associated with Best Management Practices and records related to compliance with National Categorical Pretreatment Standards, Local Limitations and other State and EPA required records.

Section 6.5 - Confidentiality

Information and data on a User obtained from reports, questionnaires, discharge applications and monitoring programs and from inspections shall be available to the public or other governmental agency without restriction unless the User specifically requests and is able to demonstrate to the satisfaction of the Director that the release of such information would divulge information, processes or methods of production entitled to protection as trade secrets of the User. When requested by the person furnishing the report, the portions of a report which might disclose trade

secrets or secret processes shall not be made available for inspection by the public. It shall, however, be made available upon written request to governmental agencies for uses related to this Regulation, the NPDES Permit, or other uses determined appropriate by the Director. The information shall be available for use by the State in judicial review or enforcement proceedings involving the person furnishing the information. Wastewater constituents and characteristics shall not be recognized as confidential information.

SECTION 7 - SAMPLING AND MONITORING

Section 7.1 - Right of Entry

Whenever it shall be necessary for the purposes of this Regulation and upon presentation of proper credentials and identification, ReWa, State, and EPA personnel shall be permitted to enter upon any property of Users for the purpose of inspecting and copying records, facility inspection, observation, measurement, sampling, or testing in the area of the control structure. Any User completing and filing an application to discharge wastewater shall thereby grant ReWa permission to enter his premises for said purposes. Where a User has security measures in force which would require proper identification and clearance before entry into its premises, the User shall make necessary arrangements with its security guards so that upon presentation of suitable identification, ReWa personnel shall be permitted to enter, without delay, for the purposes of performing their specific responsibilities.

Section 7.2 - Compliance Determination/Sample Collection

Samples collected by Users to satisfy reporting requirements must be based on data obtained through appropriate sampling and analysis performed during the period covered by the report, based on data that is representative of conditions occurring during the reporting period.

1. Except as indicated in 2. and 3. below, the User must collect wastewater samples using 24-hour flow-proportional composite sampling techniques, unless time-proportional composite sampling or grab sampling is authorized by ReWa. The samples must be representative of the discharge. Using protocols (including appropriate preservation) specified in 40 CFR Part 136 and appropriate EPA guidance, multiple grab samples collected during a 24-hour period may be composited prior to the analysis as follows: for cyanide, total phenols, and sulfides the samples may be composited in the laboratory or in the field; for volatile organics and oil and grease, the samples may be composited in the laboratory. Composite samples for other parameters unaffected by the compositing procedures as documented in approved EPA methodologies may be authorized by ReWa, as appropriate.
2. Samples for oil and grease, temperature, pH, cyanide, total phenols, sulfides, and volatile organic compounds must be obtained using grab collection techniques.
3. For sampling required in support of baseline monitoring and 90-day compliance reports [40 CFR 403.12(b) and (d) and SC R61-9 403.12. (b) and (d)], a minimum of four (4) grab samples must be used for pH, cyanide, total phenols, oil and grease, sulfide and volatile organic compounds for facilities for which historical sampling data does not exist; for

facilities for which historical sampling data is available, the Director may authorize a lower minimum. For the periodic compliance reports [40 CFR 403.12(e) and (h) and SC R61-9 403.12 (e) and (h)], the Industrial User is required to collect the number of grab samples necessary to assess and assure compliance with applicable Pretreatment Standards and Requirements.

Section 7.3 - Analysis of Industrial Wastewaters

All measurements, tests and analyses of the characteristics or properties of wastewater to which reference is made in this Regulation shall be made in accordance with 40 CFR 136 and shall be performed by a Qualified Laboratory. In the event that there is no approved method in CFR 136 for a particular parameter, testing shall be performed in accordance with Standard Methods, herein defined, or a method approved by the Director.

Section 7.4 - Sampling Frequency

Sampling of industrial wastewater for the purpose of compliance determination with respect to prohibitions and limitations shall be done at such intervals as the Director may designate. However, it is the intention of ReWa to conduct compliance sampling or to cause such sampling to be conducted for all Significant Industrial Users and other Industrial Users at least twice in every one year period and more frequently as required in Attachment E.

Section 7.5 - Control Structure

When determined by the Director to be feasible, the Owner of any property served by a building sewer carrying industrial wastewater, shall build a control structure in the building sewer from his premises just prior to the entrance of the building sewer into the public sewer suitable for sampling and measuring his wastewater. Plans for this structure shall be approved by the Director. There shall be ample room in or near such sampling facility to allow accurate flow measurement, sampling, and preparation of samples for analysis. The facility, sampling and measuring equipment shall be maintained at all times in a safe and proper operating condition at the expense of the Owner.

SECTION 8 - ENFORCEMENT

Section 8.1 - Enforcement Management Strategy

The Director shall enforce the provisions of this regulation in accordance with the current ReWa Enforcement Management Strategy, Attachment C.

Section 8.2 - Administrative Remedies

1. Notification of Violation

Whenever the Director finds that any User has violated or is violating this Regulation, any provision of this Regulation, an individual discharge permit or general permit, or order issued hereunder, or any other Pretreatment Standard or Requirement, the Director may serve upon such a User an appropriate written notice stating the nature of the violation. An oral notice shall be sufficient in emergency circumstances. The Director may require a response to the notice of violation. When required in the notice and within 15 days from the date of the notice, an explanation of the violation and a plan for the satisfactory correction thereof shall be submitted to the Director. Submission of this plan shall not relieve the User of liability for any violations occurring before or after receipt of the notice of violation. The classification of violations under these regulations and permit are as follows: Warning of Minor Violation (WOMV), Notice of Violation (NOV), Notice of Significant Noncompliance (NOSN), and Notice of Revocation (NOR). Reference is made to Attachment C as to these procedures.

2. Administrative Consent Order

The Director is empowered to enter into Administrative Consent Orders, assuring of voluntary compliance, or other similar documents establishing an agreement with the User responsible for the violation. Such orders may be negotiated in an Informal Conference. Such agreements shall include specific action to be taken by the person to correct the violation within a time period also specified by the Administrative Consent Order and contain other terms and conditions. Reference is made to Attachment C. A violation of an Administrative Consent Order shall constitute a violation or violations under this Regulation.

3. Notice to Show Cause at Adjudicatory Hearing

The Director may order any User who causes or is responsible for an unauthorized discharge or other violation to show cause at an Adjudicatory Hearing why a proposed enforcement action should not be taken. A notice shall be served on the User specifying the time and place for the hearing, the proposed enforcement action, and the reasons for such action, and a request that the User show cause why this proposed enforcement action should not be taken.

4. Service

The notice of the hearing to the User shall be served personally or by registered or certified mail (return receipt requested) at least 10 days before the hearing. Service may be made on any agent or officer of the User.

5. Request by User for an Adjudicatory Hearing or for an Informal Conference prior to Show Cause Hearing

- a. Requests for an Adjudicatory Hearing must be served on ReWa within 15 days following any final administrative action or decision by ReWa on any violation, application, permit, certificate or other licensing matter;
- b. A request for an Informal Conference prior to the Show Cause Hearing may be made by a User but not to delay the hearing date. If the request is granted, an Informal Conference may be held by the Director or his designee to explore ways and means to obtain compliance by consent without the necessity of a formal Adjudicatory Hearing.

6. Record

At any hearing held pursuant to this Regulation, testimony shall be taken under oath and recorded stenographically. The transcript, so recorded, shall be made available to any member of the public or any party of the hearing upon payment of the usual charges thereof.

7. Hearing Officer

A hearing officer or officers may be appointed by the Director to preside over the Adjudicatory Hearing. The hearing officer may be an employee of ReWa or be specially appointed for such purpose. He shall have no connection with the preparation or presentation of the evidence at the hearing.

8. Procedure

The procedure for an Adjudicatory Hearing and other enforcement procedures are set forth in Attachment C, the Enforcement Management Strategy for ReWa.

9. Enforcement Orders

When the hearing officer finds that a User has violated or is violating the provisions, prohibitions or limitations of this Regulation, or those contained in any permit issued hereunder, he may issue an order to cease and desist, and may direct those persons in violation to:

- a. comply forthwith;
- b. comply in accordance with a compliance time schedule set forth in the Order; or

- c. take appropriate remedial or preventive action in the event of a continuing or threatened violation;
- d. prohibit or reduce the discharge;
- e. provide wastewater storage or flow equalization;
- f. make payment by the User to cover added costs of handling and treatment costs and the administrative costs of the enforcement action;
- g. post performance bonds;
- h. act to take other steps to achieve compliance;
- i. pay fines and penalties;
- j. pay reasonable attorney's fees, hearing costs, reporting costs, and other expenses incurred by ReWa for the hearing or enforcement procedure.

10. Administrative Penalties

A User may be fined up to two thousand dollars (\$2,000.00) for each violation. The Director may hold all or part of a fine in abeyance while evaluating the performance of a User to achieve compliance with a control mechanism and/or this Regulation. Each day on which a violation shall occur or continue shall be deemed a separate and distinct violation. In case of monthly or long-term discharge limits, fines may be assessed for each day during the period of violation. ReWa shall have such remedies for the collection of such assessments as it has for collection of other service charges.

11. Payment of Costs

Payment of costs or fines shall not relieve the User from the requirement to pretreat wastewater or discharges in excess of the limitations required under its permits or the Regulations of ReWa.

12. Emergency Suspensions

The Director may suspend or revoke a User's permission to discharge when such action is necessary in order to stop an actual or threatened discharge which presents or may present an imminent or substantial endangerment to the health or welfare of persons or the environment, or causes interference. Any User notified of revocation of permission to discharge shall immediately stop or eliminate its discharge. A hearing shall be held within 15 days of the notice of revocation to determine whether the suspension may be lifted or the User's permit terminated. The User shall submit a detailed written statement describing the causes of the violations and the measures taken to prevent any future violations to the Director prior to the date of the hearing. In the event of a failure of the

person to comply voluntarily with the order, the Director shall take such steps as deemed necessary including immediate severance of the sewer connection. The Director may reinstate the permission to discharge upon proof of the elimination of the violations.

13. Termination or Revocation of Permit

Any User who violates the conditions of this Regulation, or applicable State and Federal regulations, is subject to having his permission to discharge revoked. The Director may revoke a permit for the following reasons:

- a. failure to factually report the wastewater constituents and characteristics of his discharge;
- b. failure to report significant changes in operations, or wastewater constituents and characteristics;
- c. refusal of reasonable access to the User's premises for the purpose of inspection and monitoring;
- d. failure to meet effluent limits;
- e. tampering with or deliberately altering monitoring equipment;
- f. falsifying self-monitoring reports;
- g. changes in the POTW's NPDES permit, receiving stream water quality standards, POTW treatment plant process, sludge disposal practices or requirements, or other modifications of a similar nature that impact ReWa's ability to accept industrial wastewater; or
- h. for causes necessitating an emergency suspension;
- i. discharge of wastewater prohibited by this Regulation;
- j. significant noncompliance with schedules, pretreatment standards or requirements, or with any terms of the wastewater discharge permit, a general permit or the Regulation;
- k. non-payment of sewer User charge or other charges, fines, costs and expenses.

A User whose permission to discharge has been revoked may apply for new permission to discharge and shall pay all delinquent fees, charges, penalties, and such other sums as may be due to ReWa.

Section 8.3 - Judicial Remedies

Notwithstanding the administration procedure provided herein, when any person discharges wastewater into the wastewater disposal system contrary to the law of this State or the provisions of this Regulation, or any order or permit issued hereunder, or otherwise violates applicable law or the provisions of this Regulation or any order or permit issued hereunder, the Director may commence an action for appropriate legal or equitable relief in the Court of Common Pleas. The remedies provided by this Regulation are not exclusive.

Section 8.4 - Injunctive Relief

The Director may, in the name of ReWa, file in Common Pleas Court, a suit seeking the issuance of an injunction, damages, or other appropriate relief to enforce the provisions of this Regulation or other applicable law or regulation and the determination of the hearing examiner. Suit may be brought on behalf of ReWa, at the same time or separately, to recover any and all damages suffered by ReWa as a result of any action or inaction of any User or other person who causes or suffers damage to occur to the POTW or for any other expense, loss or damage of any kind or nature suffered by ReWa. Such damages shall include, but not be limited to, claims for damages, takings, losses, expenses, costs, fines, penalties and attorneys' fees for which ReWa may become liable or responsible and which arise out of or result from the User's noncompliance with its permit or the User's violation of State or Federal Pollution Control laws, rules or regulations.

Section 8.5 - Criminal Violations

Facts or circumstances which tend to indicate a criminal activity or action by any person may be reported to the proper State and Federal law enforcement agencies for prosecution.

Section 8.6 - Performance Bonds

The Director may refuse to reissue a permit or a general permit to any User which has failed to comply with the provisions of this Regulation or any order, previous individual discharge permit or a general permit issued hereunder, or any other Pretreatment standard or Requirement, unless such User first files with it a satisfactory bond, payable to ReWa, in a sum not to exceed a value determined by the Director to be necessary to meet the cost of any scheduled improvements and to achieve consistent compliance.

Section 8.7 - Liability Insurance and Letters of Credit

The Director may decline to issue or reissue an individual wastewater discharge permit or a general permit to any User who has failed to comply with any provision of this Regulation, a previous individual wastewater discharge permit, or a previous general permit or order issued hereunder, or any other Pretreatment Standard or Requirement, unless the User first submits proof that it has obtained financial assurances sufficient to restore or repair damage to the POTW caused by its discharge and to pay the balance of any enforcement penalties and fees.

Section 8.8- Discontinuance of Sewer Service for Non-Payment

The Director shall have the right to discontinue sewer service to the property of a User of such service within ReWa's or within any of the Subdistricts in the event of non-payment of sewer charges; provided that no discontinuation shall be made until the User shall have been given notice of his right to be heard in person or by counsel on the question of discontinuation before ReWa or any person designated by ReWa after not less than five days written notice specifying the basis of the discontinuation. ReWa or its agents shall have the right of entry in and upon the premises and the right of ingress and egress to determine the location of the service line or to dig it up or to uncover it for the purpose of disconnecting the service line from the property, or sealing, or plugging such line, or any collection line, upon the notice as provided under ReWa's regulations.

Section 8.9- Tenant Responsibility

Where an Industrial User of property leases the premises to a subsidiary or affiliate or other entity in which the Industrial User has a direct or indirect interest, the tenant or Industrial User or both may be held responsible for compliance with the provisions of this Ordinance.

Section 8.10 - Vandalism

No person shall maliciously, willfully or negligently break, damage, destroy, uncover, deface, tamper with or prevent access to any structure, appurtenance or equipment, or other part of the POTW. Any person found in violation of this requirement shall be subject to the sanctions set out in Section 8 above.

Section 8.11- Publication of Industrial Users in Significant Noncompliance

ReWa shall publish annually, in a newspaper of general circulation that provides meaningful public notice within the jurisdictions served by ReWa, a list of the Industrial Users which, during the previous 12 months, were in significant noncompliance with applicable pretreatment standards and requirements. The term significant noncompliance shall mean violations which meet one or more of the following criteria:

1. Violations of wastewater discharge limits
 - a. Chronic violations. 66% or more of the measurements in a six-month period exceed (by any magnitude) a numeric Pretreatment Standard or Requirement, including same Daily Maximum Limit, Daily Average Limit, or Instantaneous Limit.
 - b. Technical Review Criteria (TRC) violations. 33% or more of the measurements taken for the same pollutant parameter during a six-month period equal or exceed the product of the numeric Pretreatment Standard or Requirement including Daily Maximum Limit, the same Daily Average Limit, or Instantaneous Limit multiplied by the applicable TRC (TRC=1.4 for BOD, TSS, fats, oil and grease and 1.2 for all other pollutants except pH).

- c. Any other violation of a Pretreatment Standard or Requirement including Daily Maximum Limit, Daily Average Limit, Instantaneous Limit, or narrative standard that ReWa believes has caused, alone or in combination with other discharges, interference or pass-through including endangering the health of the ReWa personnel or the general public.
 - d. Any discharge of a pollutant that has caused imminent endangerment to human health, welfare or to the environment or has resulted in the ReWa's exercise of its emergency authority to halt or prevent such a discharge.
- 2. Failure to meet within 90 days after the schedule date, a compliance schedule milestone contained in a local control mechanism or enforcement order, for starting construction, completing construction, or attaining final compliance.
 - 3. Failure to provide within 45 days after the due date, standards required reports such as self-monitoring reports and reports on compliance schedules.
 - 4. Failure to accurately report noncompliance.
 - 5. Any other violation or group of violations, which may include a violation of Best-Management Practices, ReWa determines will adversely affect the operation or implementation of the local pretreatment program.

SECTION 9 - SEVERABILITY

If any provision, paragraph, word, section or article of this Regulation is invalidated by any court of competent jurisdiction, the remaining provisions, paragraphs, words, sections, and articles shall not be affected and shall continue in full force and effect.

SECTION 10 - CONFLICT

All regulations and parts of regulations inconsistent or conflicting with any part of this Regulation are hereby repealed to the extent of such inconsistency or conflict.

SECTION 11 – EFFECTIVE DATE

This Regulation shall be in full force and effect from and after passage, approval and publication, as provided by law.

Effective Date:	June 6, 1984
REVISED:	April 15, 1993
AS AMENDED:	
	March 20, 1995, May 6, 1996, November 29, 1999, June 4, 2001,
	May 6, 2002, February 2, 2004, October 3, 2005, June 5, 2006,
	December 4, 2006, February 5, 2007, May 5, 2008, January 5, 2009,
	March 1, 2009, October 5, 2009, September 13, 2010

ATTACHMENT A

RENEWABLE WATER RESOURCES PROCEDURE FOR ACCEPTANCE OF HAULED WASTE

In accordance with Section 3.2, Tank Truck Transporter, Attachment F – Grease Control Strategy and Attachment B, Fees and Charges of Renewable Water Resources (ReWa), of the Sewer Use Regulation, outlined below is the procedure for the acceptance of hauled waste and will be considered policy in this matter.

PART I REQUEST TO HAVE ReWa AS RECEIVING SITE

- A) Upon written request by Transporter of septic tank, grease trap or interceptor waste, a review and determination to allow the Transporter to designate ReWa as a receiving site will be made by the Director or authorized representative.
- B) The Transporter must receive an acceptance letter from the Director or an authorized representative. The letter will serve as notification that the Mauldin Road Wastewater Treatment Plant will be a receiving site for the septage. All discharges at the Mauldin Road Plant must be in compliance with the current SCDHEC Regulation 61-56.1, and with the ReWa Sewer Use Regulation; especially, Section 4.0, Prohibitions and Limitations on Wastewater Discharges, Section 3.2, Tank Truck Transporter of the Regulation and Attachment F – Grease Control Strategy. The Transporter shall provide the following:
 - A copy of any required SCDHEC License shall be submitted to the Mauldin Road Plant Operations Department.
 - The log book of cleaning activities as required by SCDHEC shall remain accessible to the Mauldin Road Operations Department (maintained with truck upon delivery of waste).
- C) Discharging to any site (manhole, POTW, etc.) not approved by the Director to be a designated receiving site is prohibited. Currently, the Mauldin Road Plant is the only designated receiving site.

PART II ACCEPTANCE OF COMMERCIAL/INDUSTRIAL WASTEWATER

- A) Commercial Users desiring to have septic tank, grease trap or interceptor waste discharged at a receiving site at ReWa shall request in writing for approval by ReWa to accept the hauled waste. An acceptance letter must be obtained from ReWa. The letter will stipulate the conditions/limitations of acceptance. A copy of the acceptance letter must accompany each load to the ReWa receiving site.

A request for a Commercial User shall include the following information:

- 1. Description of the business
- 2. Address
- 3. Contact Name
- 4. Nature of the Wastewater (Sanitary waste must be noted as such).

ATTACHMENT A - PROCEDURE FOR THE ACCEPTANCE OF HAULED WASTE
PAGE 2

- B) The acceptance letter is the approval from Renewable Water Resources to accept waste from the septic tank/grease trap or interceptor and shall include the following:
- This waste must be delivered to the Mauldin Road Treatment Plant (to be established).
 - A copy of this letter must accompany each load.
 - The waste must comply with all standard trucked waste requirements.
 - The cost of each load will be based on the number of gallons discharged as measured by ReWa tank volume, meter or permitted truck tank volume times the current Hauled Waste Charge.
 - This approval will be in effect until (*assigned date*). If this agreement needs to be extended beyond this date, please reapply for approval 30 days prior to expiration.

PART III HAULED WASTE DISPOSAL FORM

- A) All waste to be discharged shall be accompanied by a Tank Truck Content Disposal Form which shall include the following information:

- 1) Transporter Company Name: _____
Transporter Permit No: _____ Truck Tag No: _____
- 2) Origin of this load and description of contents (If more than two sources, provide same information for other sources on back of page)

Origin & Contents #1

Description of Contents: _____ Gallons: _____
Name of Residence or Business: _____
Address: _____
City: _____
County: _____ Telephone No.: _____

Origin & Contents #2

Description of Contents: _____ Gallons: _____
Name of Residence or Business: _____
Address: _____
City: _____
County: _____ Telephone No.: _____

ATTACHMENT A - PROCEDURE FOR THE ACCEPTANCE OF HAULED WASTE
PAGE 3

I certify that the above information is correct and that the wastewater to be discharged is from a septic tank, grease trap or interceptor, originated in Greenville County or within the ReWa service area, and to the best of my knowledge contains no toxic material. Furthermore, the wastewater contains no solid or hazardous waste as defined under the Federal Resource Conservation and Recovery Act (PL 94-580 as amended) and the SC Hazardous Waste Regulation as amended June 1997 and promulgated pursuant to Sections 48-1-10 *et. seq.* and 44-56-10 *et. seq.* of the 1976 South Carolina Code of Laws as amended.

Signature of Driver: _____

(TO BE COMPLETED BY ReWa)

Date: _____ Time: _____ AM/ PM pH of Waste: _____

If rejected, give reason: _____

B) This form must be turned in at the designated site before discharge of the tank contents.

Comments: _____

PART IV COST OF HAULED WASTE

The cost of hauled waste is referenced in Attachment B -- Fees and Charges. The cost escalates per gallon of hauled waste discharged as measured by ReWa tank volume, meter or permitted truck tank volume.

PART V SAMPLING

- A) All hauled waste must be within a compatible pH range
- B) All hauled waste may be sampled by a ReWa representative and randomly tested for compliance with the Sewer Use Regulation. The analyses will be performed by the ReWa Laboratory Section or a SCDHEC certified laboratory as determined by ReWa.

ATTACHMENT B

**FEES AND CHARGES OF
RENEWABLE WATER RESOURCES (ReWa)
(Effective March 1, 2010)**

RESIDENTIAL⁽¹⁾⁽⁷⁾⁽¹⁰⁾

Volume Charge	\$4.61 per 1,000 gallons of metered water
Base Charge	\$9.00 per month
Disconnect Charge	\$ 300.00 ⁽²⁾

INDUSTRIAL AND COMMERCIAL⁽³⁾⁽⁵⁾⁽⁷⁾⁽¹⁰⁾

Volume Charge	\$4.38 per 1,000 gallons of metered water \$4.61 per 1,000 gallons of metered wastewater
Unused Capacity Allotment Charge	\$1.56 per 1,000 gallons of unused capacity of the permitted flow
Base Charge	\$9.00 per month

SURCHARGES⁽⁴⁾

Biochemical Oxygen Demand:	
BOD 0-250 mg/l	\$ -0-
BOD above 250 mg/l	\$ 0.275 per pound of excess BOD
Total Suspended Solids:	
TSS 0-250 mg/l	\$ -0-
TSS above 250 mg/l	\$ 0.275 per pound of excess Total Suspended Solids
Disconnect Charge	\$ 300.00 ⁽²⁾

HAULED WASTE⁽⁶⁾

Basic Charge (all hauled waste)	\$ 0.067 per gallon

ATTACHMENT B FEES AND CHARGES (Continued)

Page 2

PRETREATMENT PROGRAM FEES**Permit Application Processing and Renewal Fees:**

Low Volume Discharger	\$ 550.00
Significant Industrial Users	\$1,360.00
Food Service Establishment ⁽⁹⁾	\$ 75.00
Septic Tank Hauler (Transporter)	\$ 75.00

Requested Permit Addendum Fee:

Low Volume Discharger	\$ 150.00
Significant Industrial Users	\$ 300.00

Engineering Plans and Specifications Review and Approval Fees:

Monitoring Facility	\$ 210.00
Pretreatment Facility	Consultant Cost
Food Service Establishment	\$ 110.00

Annual Administrative and Inspection Fees:

Low Volume Discharger	\$ 810.00
Significant Industrial User	
Without Pretreatment	\$1,440.00
Significant Industrial User	
With Pretreatment	\$2,080.00
Food Service Establishment ⁽⁹⁾	\$ 130.00

Late Reporting Fee

Low Volume Dischargers and	\$ 100.00 1st Day Late
Significant Industrial Users	\$ 50.00 Every day thereafter until report is received

ADMINISTRATIVE AND FINANCE FEES

Research and validation fee will be billed at the current fiscal year's overhead allocation rate

ENGINEERING PROGRAM FEES

Engineering Plans and Specifications Review and Approval Fees: \$220.00

LABORATORY ANALYSES FEES

Random testing by the ReWa laboratory will be conducted during the year. The frequency of testing will be dependent upon the industry's permitted daily average flow and compliance status. The minimum frequency of testing (with the exception of organics) will be as follows:

- Flow greater than 500,000 gallons/day = 12 times a year
- Flow greater than 100,000 gallons/day but less than 500,000 gallons/day = 6 times a year
- Flow less than 100,000 gallons/day = 4 times a year

Attachment B - 54

ATTACHMENT B FEES AND CHARGES (Continued)

Page 3

Organics will be performed once a year unless specified otherwise.

The total cost for any monitoring will include a sampling fee of \$50 per site visit and the associated analytical fee(s). Total cost is permit parameter specific.

LABORATORY ANALYSIS FEES: (Per test per sample)

pH	\$10.00	METALS:	
TSS	13.00	ALUMINUM	\$ 20.00
BOD (5-day)	31.00	ANTIMONY	20.00
COD	24.00	ARSENIC	29.00
AMMONIA	20.00	BORON	20.00
PHOSPHORUS	20.00	CADMIUM	20.00
CYANIDE	36.00	CHROMIUM	20.00
OIL & GREASE	46.75	COPPER	20.00
HYDROCARBON	43.00	LEAD	20.00
MBAS	34.00	MERCURY	34.00
CTAS	85.00	NICKEL	20.00
PHENOL	34.00	SELENIUM	28.00
COLOR (ADMI)	36.00	SILVER	20.00
FLUORIDE	20.00	TIN	15.00
TDS	11.75	TITANIUM	15.00
		VANADIUM	15.00
		ZINC	20.00

ORGANICS:

ACID/BASE NEUTRALS	\$580.00
VOLATILE ORGANICS	223.00
BETX	161.00
PHTHALATES	161.00
TTO (469) (ABN, VOA, PCBs)	964.00
TPH	107.00
TTO (ABN, VOA)	803.00
VOCs by GC/FID EPA Method 1671A	445.00
VOCs by Isotope Dilution (GC/MS) EPA Method 1666A	745.00

TOXICITY TESTING COST is \$1,100.00 a year per industrial permit SIUs and LVDs.

ATTACHMENT B FEES AND CHARGES (Continued)

Page 4

NEW-ACCOUNT FEE⁽⁸⁾

	WATER METER SIZE (INCHES)	FEE
RESIDENTIAL	5/8, 3/4	\$2,500.00
	1	\$5,000.00
	1-1/2	\$15,000.00
COMMERCIAL AND INDUSTRIAL	5/8	\$2,500.00
	3/4	\$5,000.00
	1	\$7,500.00
	1-1/2	\$15,000.00
	2	\$22,500.00
	3	\$50,000.00
	4	\$100,000.00
	6	\$300,000.00
	8	\$400,000.00

Notes:

- (1) The residential schedule applies to all Residential Users within the ReWa service area and classified by ReWa as discharging wastewater with normal pollutant concentrations.
- (2) There is a cost to ReWa for discontinuing service by physically disconnecting or blocking the service line of a User at the point of connection to the public sewer after excavation by backhoe or other equipment, or by blocking the service line of a User by utilizing a remote control TV camera and grouting equipment. The \$300.00 disconnect charge must be paid by the User whose service is discontinued by physical disconnection or blocking to recover the cost incurred by ReWa. The reconnection or renewed service of a disconnected service line to the public sewer system will be the responsibility of the User and subject to all appropriate use regulations and fees.

ATTACHMENT B FEES AND CHARGES (Continued)

Page 5

- (3) Users that have been classified by ReWa as Commercial Users, Industrial Users or Significant Industrial Users may be billed directly by ReWa according to the above charges. Volume Charges will be based on metered water, or metered wastewater. An Unused Capacity Allotment Charge for unused capacity of the permitted flow will be applied to the difference in the daily average metered flow and an established threshold. The threshold will be established at ninety-five percent of the requested flow or the peak daily average flow. This charge is calculated using the sum of debt service, fixed charge, and capital improvements contribution. These Users will be charged a late fee of 1% per month of any unpaid balance.
- (4) All Users discharging waste to the POTW in excess of 250 mg/l of BOD, or 250 mg/l of TSS shall be assessed a surcharge set by ReWa. Surcharges shall be computed with information determined from ReWa and User self-monitoring data. The following requirements shall apply to self-monitoring data:
- a. The sample must have been collected by a person who has completed a wastewater sample collection course approved by the Director.
 - b. The sample must have been analyzed by a laboratory operating under a current SCDHEC certification number.
 - c. The data must be received by the date required by the Director.

The total surcharge will be the combined total of charges for Biochemical Oxygen Demand (BOD) and Total Suspended Solids (TSS). Surcharges will be based on metered water consumption, unless the User, at the User's expense, elects to meter the wastewater to the sewer. All measuring devices must be approved and maintained in an appropriate manner as determined by the Director. The total surcharges will be based on pounds of BOD or TSS in excess of the concentrations stated above. A User discharging waste in excess of the stated concentrations shall be subject to periodic inspection and shall be required to monitor for the above stated constituents at an approved frequency.

Surcharge calculated using metered water includes a 5% discount for water not discharged to the sewer.

ReWa in its discretion may base its charges on COD in lieu of BOD

- (5) The monthly base charge applies to industrial customers which are billed manually.
- (6) Hauled Waste Discharges shall be measured by ReWa tank volume, meter or permitted truck tank volume.
- (7) Any User may, upon application, request permission to have installed an additional and separate water meter, which shall be dedicated to measurement of the water used but not discharged into the sewer upon the following conditions:

ATTACHMENT B FEES AND CHARGES (Continued)

Page 6

a. The User shall file an application under oath to make the request and shall state the following:

- 1) Name, address and telephone number of the User;
- 2) Location and block book designation of the property;
- 3) The use made of water not discharged to the sewer;
- 4) The User's estimate of the volume of such use.

b. If the installation of such a meter is economically feasible for the User, the Director, after a review of prior usage and other economic factors, will approve the application.

c. The application shall contain the following representations and agreements by the User and be signed under oath by the User:

Representations:

- 1) That water, or a portion of water currently consumed by the User is not discharged either directly or indirectly into the sewer system;
- 2) That the discharge or disposal of such water by the User does not violate any city, county, state, or federal water or groundwater pollution laws or regulations.

Agreements:

- 1) That the water which shall flow through this additional and separate meter shall be used solely for uses and purposes which shall not cause a discharge directly or indirectly into the sewer system;
- 2) That the Director or his agents shall have the right of entry to inspect the premises to verify such usage so long as such a meter is in use. In the event of misuse of the meter to wrongfully avoid payment of any portion of the sewer service charge, all further and future water measured by such meter shall be subject to the full sewer service charge. Further, all credits earned subsequent to its installation shall be forfeited and reinstated to the User's bill. The User shall pay the reinstated charges in not less than thirty (30) days, and if not paid, User hereby consents for his water service to be terminated without further notice.

d. All cost of the meter and its installation shall be borne by the User.

- (8) New Residential, Commercial and Industrial Users making new connections or upgrading the size of the water meter will be charged a fee for connection to the ReWa system. This fee will be charged for new construction and will be based on the water meter size required to serve each property. For any existing user, such fee will also be assessed when a larger meter(s) is required due to redevelopment or expansion. In cases where such redevelopment or expansion occurs, the user will be assessed such fee based on the incremental increase in the water meter size. No credit will be provided in cases where a water meter is eliminated or reduced in size. Water meters installed for outdoor irrigation or other purposes and classified as "water only" accounts shall be exempt from such fee.

ATTACHMENT B FEES AND CHARGES (Continued)

Page 7

- (9) A Food Service Establishment shall be charged the Annual Administrative and Inspection Fee and a Permit Application Processing and Renewal Fees following an inspection of the facility due to adverse impact of the public sewer, non-compliance with the conditions of Attachment F – Grease Control Strategy or when in the opinion of the Pretreatment Manager an inspection and/or permit is necessary to assure compliance with the Sewer Use Regulation.
- (10) Customer usage will be based on volume, if consistently available. If unavailable, SCDHEC Unit Contributory Loadings to All Domestic Wastewater Treatment Facilities will be used. For direct bill customers, ReWa shall have the right of entry, ingress and egress onto the user's property and shall have the further option of requiring a water meter and discontinuing sewer service by securing the water serving the User's property.

ADJUSTMENTS FOR RESIDENTIAL ACCOUNTS

ReWa has an agreement with the Greenville Water System for billing and collection of wastewater treatment charges. The Greenville Water System, as agent for ReWa, will adjust residential wastewater charges on the same basis as the Greenville Water System adjustments for water use. Similar billing and collection agreements are in effect with other water suppliers in ReWa's service area.

An adjustment policy (Maximum Consumption Program) for water used but not returned to the sewer during the summer months has been adopted by ReWa for residential customers. Under this policy, each residential customer will automatically have his wastewater bill volume limited during the two summer quarters to an average of the water consumption of the two most recent winter quarters.

**ATTACHMENT C
RENEWABLE WATER RESOURCES
ENFORCEMENT MANAGEMENT STRATEGY**

This Enforcement Management Strategy has been developed by Renewable Water Resources (ReWa) as a comprehensive and effective enforcement response plan in coordination with the Federal and State requirements and with ReWa Sewer Use Regulation. The intent is to give guidance to the staff regarding the methods and manner of enforcement and to provide information to Users who may become subject to enforcement proceedings.

1. Purpose of the Plan

ReWa desires to make its staff and the public aware of its enforcement response plan by 1) describing how instances of non-compliance will be investigated; 2) stating the type of escalated enforcement actions for violation and the time period for action; and 3) reflecting its primary responsibility to enforce applicable pretreatment standards and other requirements of its Sewer Use and Pretreatment Regulation. The plan will also contain guidelines or requirements for inspections, sampling, monitoring, other reports, hearings, permitting, suspensions, revocations, sanctions, fines and penalties.

This plan will strengthen internal management, enhance ReWa's reputation as a responsible public agency, remove the subjective element from enforcement and involve other public and regulatory agencies in coordinated efforts in health, sanitation and environmental concerns.

2. Duties

The Director has been empowered to enforce compliance with permits and regulations. Acting under the Director is the Pretreatment Manager. The Pretreatment Manager shall be responsible for implementing the Pretreatment Program. The Laboratory Department Manager shall be responsible for the sampling and analysis required in wastewater discharge permits to be performed by ReWa. Analyses not performed by the laboratory staff shall be performed by a qualified laboratory. The Pretreatment Manager shall inform the Director of any violations of discharge limitations. The Pretreatment Manager shall be responsible for assuring that the Industrial Users comply with reporting requirements, and for enforcement actions. The Pretreatment Manager shall be responsible for all administrative actions such as the submissions of reports, industrial inspections, periodic survey update, and issuing permits. The Pretreatment Manager shall annually evaluate the Enforcement Program to assure it is effective and reasonable. A report on the findings of the evaluation shall be given to the Director.

3. Enforcement Procedures

Once non-compliance is identified, the Director shall be advised of the nature of the violation. The Pretreatment Manager may demand monitoring in the event the violation was of a discharge limitation or which resulted in interference. The Pretreatment Manager shall notify the User of any violations and of any intended enforcement regarding the violation.

- A. The Warning of Minor Violation (WOMV) shall be in the form of a written Summary of Violations labeled Warning of Minor Violation. A WOMV shall be sent to the User and retained for record by the User. A WOMV does not require a response to ReWa but should prompt the User to take corrective action.
- B. The Notice of Violation (NOV) shall be in the form of a letter sent to the User within fifteen days after the violation is noted. The User shall respond, if required, within fifteen days of receipt to the NOV and state (1) the cause of the violation; and (2) what corrective action will be taken to prevent future violations. If the Pretreatment Manager does not receive a response, or receives an inadequate response to an NOV for which a response was required, a Notice of Significant Noncompliance shall then be issued.
- C. A Notice of Significant Noncompliance (NOSN) shall be sent to the User by certified mail within ten days of the determination of its need. The User shall respond within fifteen days of receipt of the NOSN and state (1) the cause of the violation; and (2) what corrective action will be taken to prevent future violations. The Pretreatment Manager may also require the User to propose and submit a schedule of compliance. If the User indicates that corrective action will take longer than 90 days, the Pretreatment Manager may ask the User to enter into a Consent Agreement.
- D. If a User fails to respond to a Notice of Significant Noncompliance, the Pretreatment Manager shall issue a Rule to Show Cause for an Adjudicatory Hearing and give notice of the relief, civil penalties, expenses, costs and fees to be sought at the Adjudicatory Hearing.
- E. If the violation is caused by a discharge that is of imminent danger to public health, or has resulted in observed damage to the wastewater system or receiving stream then a Notice of Revocation (NOR) shall be sent immediately and may include a requirement to immediately cease the discharge. A hearing shall be held within fifteen days after the User is directed to cease the discharge.

4. **Classification of Violations**

The classification of violations under these regulations and permit are as follows:

- A. A Warning of Minor Violation (WOMV) shall be given when there is any violation less than that under the criteria for requiring a Notice of Violation.
- B. A Notice of Violation (NOV) shall be given when there is any violation less than that under the criteria for a Notice of Significant Noncompliance (NOSN) and more than that under the criteria for a Warning of Minor Violation (WOMV).
- C. A Notice of Significant Noncompliance (NOSN) indicates a greater violation, including but not limited to, those violations set out in paragraph 11.1.

- D. A Notice of Revocation (NOR) shall be given orally if time does not permit written notice. However, such oral notice shall be subsequently documented as time is available. When practical, written notice shall be given. A NOR shall be given when a violation of a permit condition or limitation, or a violation of these regulations threatens to cause an interference with, or have an adverse impact upon, the operation of the facilities; or danger to human health, welfare, or the environment is imminent. A NOR shall result in the revocation of a User's permission to discharge. Any User notified of revocation of permission to discharge shall immediately stop or eliminate its discharge. A hearing shall be held within fifteen days of the NOR to determine whether the suspension may be lifted or the User's permit terminated. Prior to the date of the hearing the User shall submit to the Director a detailed written statement describing the causes of the violations and the measures taken to prevent any future violations. In the event the User fails to comply voluntarily with the Order, the Director shall take such steps as deemed necessary including immediate severance of the sewer connection. The Director may reinstate permission to discharge upon proof of elimination of the violations.

5. **Revocation or Termination of Permit**

- A. Any User who violates the conditions of this Regulation, per applicable State and Federal regulations, is subject to having his permission to discharge terminated. The Director may terminate a permit for the following reasons:
1. Failure to factually report the wastewater constituents and characteristics of the discharge.
 2. Failure to report significant change in operations, or wastewater constituents and characteristics;
 3. Refusal of reasonable access to the User's premises for the purpose of inspection and monitoring;
 4. Violation of conditions of an individual discharge permit or general permit;
 5. Tampering with, or deliberately altering, monitoring equipment;
 6. Falsifying self-monitoring reports;
 7. Changes in POTW NPDES permit, receiving stream water quality standards, POTW treatment plant process, sludge disposal practices or requirements, or other modifications of a similar nature that impact ReWa's ability to accept industrial wastewater;
 8. Causes necessitating an emergency suspension;
 9. Discharge of wastewater prohibited by this Regulation;
 10. Significant noncompliance with schedules, Pretreatment Standards or Requirements, or with any terms of the individual wastewater discharge permit or general permit or regulation; or
 11. Non-payment of sewer User charge or other charges, fines, costs and expenses.

A User whose permission to discharge has been revoked may re-apply for permission to discharge and shall pay all delinquent fees, charges, penalties, any impact fees which may be established by ReWa and be effective at the date of the reapplication, and such other sums as may be due to ReWa.

6. **Informal Conference Prior to Hearing Date**

Upon request, the Pretreatment Manager will schedule an information conference with the User and attempt to negotiate an enforceable Compliance Schedule by way of a Consent Agreement. The Consent Agreement may contain such other terms and conditions, including but not limited to, provisions for additional monitoring, full or partial cessation of discharge, interim limits, submittal of technical reports, addition of or modification of pretreatment facilities, payment of all administrative costs, expenses, attorney's fees and civil penalties.

7. **Failure to Comply with Consent Agreement**

If a User fails to comply with a Consent Agreement, this failure shall constitute a separate and new violation and give rise to additional costs, fines and penalties, as well as grounds to seek other and different relief than that consented to in the original Consent Agreement.

8. **Publication of List of Significant Violators**

Pretreatment Regulations require ReWa to publish, at least annually, in a newspaper of general circulation that provides meaningful public notice within the jurisdictions served by ReWa, a list of Users which were in Significant Noncompliance with applicable pretreatment standards and requirements during the previous twelve months. The procedure for compiling the list of such Users is as follows:

- A. The Pretreatment Manager shall prepare a compliance history from ReWa records for each individual Significant Industrial User (SIU), or other User.
- B. The compliance history so obtained for each SIU or other User shall be reviewed to determine if a pattern of noncompliance exists or if the industry has been, or continues to be, in SNC. To the extent that an industry meets these criteria, it will be placed on the list for publication.

9. **Adjudicatory Hearings**

Adjudicatory Hearing shall mean a hearing that is held pursuant to this regulation. Adjudicatory Hearings are trial-type proceedings where there is to be a determination made in a contested case pursuant to the power of ReWa

Requests for an Adjudicatory Hearing shall be served on ReWa within fifteen days following any final administrative decision by ReWa on an application, permit, certificate or other licensing matter, or on a violation. Requests for Adjudicatory Hearings shall include the name of the requestor, his interest and the names of parties which he represents, the reasons for the request, the major issues which are purposed to be contested at the hearing, and a statement by the requestor agreeing to be subject to examination and cross-examination and to make any employee or consultant of such requestor, or other person represented by the requestor, available for examination and cross-examination at the expense of the requestor. The Director may grant or deny a request for an Adjudicatory

Hearing on the basis of a consideration of whether the person making such a request has standing to seek a determination under the law and whether such request is a matter subject to an Adjudicatory Hearing under these regulations.

An initial pleading as used herein shall refer to the document by which an Adjudicatory Hearing may be commenced. A request may be considered an initial pleading. Every initial pleading shall, at a minimum, contain the following:

- A. A title which indicates the nature of the proceeding and the parties involved therein;
- B. The complete name and address of the party filing the pleadings and, if applicable, the organization or interest whom he represents;
- C. The legal authority and the jurisdictional basis for the hearing;
- D. A clear and concise statement of the issues upon which the pleading is maintained and identification of the particular regulation, standard, guideline, or provision of law which is the subject of the hearing. If the party is unable to state the matters in detail at the time of the initial pleading or other notice is served, such initial pleading or other notice may be limited to a simple statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished to all parties;
- E. A prayer setting forth the relief sought;
- F. If the party filing the pleading is represented by counsel, the name and address of the attorney;
- G. A statement by the requestor agreeing to be subject to examination and cross-examination and to make any employee or consultant of such requestor available for examination and cross-examination at the expense of such requestor, or such person upon the request of the hearing examiner on his own motion, or on the motion of any party.

An answer to the initial pleading shall be served on the requestor within ten days after service of the document to which the answer is directed unless additional time is required pursuant to provisions of this section. Allegations contained in said initial pleading which are not specifically admitted by the party filing an answer are deemed denied. The answer shall contain, but not be limited to, the following:

- A. A clear and concise statement identifying the party filing the answer and the matter to which the answer relates;
- B. A clear and concise statement of all matters upon which the party filing the answer relies. There shall be no replies other than an answer.

Leave to file amendments to any pleading may be allowed or denied provided, however, leave to amend shall be freely given when justice requires it.

A party desiring to withdraw a pleading filed with ReWa or the hearing examiner shall file a motion for withdrawal. If any party has an objection thereto, he shall, within ten days after the receipt of the motion, serve a statement on the hearing examiner setting forth the reasons for his objection and serve a copy of the same on each part. In the absence of objections or a request for a hearing, a motion of withdrawal shall, within ten days after filing thereof, be deemed allowed. The hearing examiner shall then file an order of dismissal, with or without prejudice.

Service by ReWa of initial pleadings, complaints, orders, decisions, pleadings, motions, processes, and other documents shall be by personal delivery or by first-class mail. Service on ReWa shall be by servicing and filing two copies of the paper with the Renewable Water Resources, 561 Mauldin Road, Greenville, SC 29607, by personal service or by first-class mail upon all parties to the proceedings. A certificate of service shall accompany all papers when filed by any party and shall be filed within ten days after service is made.

The hearing examiner may, on motion, at any time during the course of any proceeding, permit such substitutions or additions of parties as justice may require. Third party intervenors should meet the same standards as required of those intervening in matters before the Court of Common Pleas.

The hearing examiner shall observe the rules of evidence observed by the Court of Common Pleas, with the exception that hearsay evidence may be admissible provided that it is deemed necessary to ascertain facts not reasonably susceptible of proof without such evidence and the hearsay evidence is properly identified as such and is given appropriate consideration in reaching a determination. The hearing examiner shall exclude hearsay evidence when such testimony would violate fundamental fairness.

All testimony shall be taken under oath and all parties shall have the right to cross-examination of the witness.

The hearing examiner and all other parties, through the hearing examiner, shall have the right to issue subpoenas requiring the attendance and testimony of witnesses and the production of any documents in question in the proceeding; provided, however, that where the issuance of such a subpoena is resisted or contested, the hearing examiner shall rule on the availability of the subpoena in that particular case.

A party may file a motion for the production or view of any object which relates to the subject matter of any proceeding then pending before the hearing examiner. The motion shall be granted where justice requires.

Anytime during the course of the proceeding, the hearing examiner may order that testimony of a witness be taken by deposition. Application to take testimony by deposition shall be made by motion directed to the hearing examiner. Such motion shall set forth the reasons for desiring the deposition, the time when, the place where, the name and address of each witness, and the subject matter concerning which each witness is expected to testify. The hearing examiner shall allow the motion only upon showing that circumstances are such that the witness to be deposed cannot appear before the hearing examiner without substantial hardship being caused. If such hardship is financial in nature, any party may agree to

reimburse the witness for expenses, including loss of wages incurred by appearing. In such cases, the motion to allow taking of a deposition shall therefore be denied. Motions for the taking of depositions shall not be allowed if the depositions result in any undue burden to another party or in any undue delay of the proceeding. If the motion is allowed, the hearing examiner shall give at least five days notice of the taking of the depositions to all parties. Depositions shall be taken orally before a person having power to administer oaths. Each witness testifying upon deposition shall be duly sworn, and the adverse party shall have the right to cross-examine.

Objections to questions shall be in short form stating the grounds of objections relied upon. The questions asked, the answers thereto, and all objections shall be reduced to writing certified by the officer before whom the deposition is taken. Said officer shall forward the deposition to the hearing examiner. Subject to appropriate rulings on evidence, the testimony taken as deposition shall be included in the record of the Hearing as if the testimony contained therein had been given by the witness in the presence of the hearing examiner. After notice is served for taking a deposition, upon motion of the party to be examined, made prior to the date set, the hearing examiner may, for good cause shown, order that the deposition shall not be taken; that certain matters shall not be inquired into; or that the scope of the examination shall be limited to certain matters. The hearing examiner may make any other order necessary to protect the party or witness from harassment or oppression.

The parties may file a written stipulation with the hearing examiner at any stage of the proceeding. At the hearing a stipulation may be orally read into the record. Contested cases may be resolved by informal disposition through means of stipulation, agreed settlement, consent order (with or without a financial penalty), or default.

On the basis of the evidence presented, the hearing examiner shall issue the determination. The hearing examiner shall deliver by certified mail to the parties a copy of the decision.

Any appeal from the determination of the hearing examiner in any enforcement proceeding shall be submitted to the Court of Common Pleas in which ReWa is located pursuant to S.C. Code Ann. §6-11-285 (F).

When the time prescribed in these rules for doing any act expires on a Saturday, Sunday or a legal holiday, such time shall extend to and include the next succeeding day that is not a Saturday, Sunday or legal holiday. ReWa or the hearing examiner may grant reasonable extensions of time to meet the filing deadlines specified herein.

10. Administrative Penalties

In addition to other penalties, charges, sanctions or restrictions, revocations or limitations as may be provided in the Sewer Use Regulation, a User may be fined up to two thousand dollars (\$2,000.00) for each offense. Each day on which a violation occurs or continues shall be deemed a separate and distinct offense. In case of a monthly or long-term average discharge limits, the administrative penalty may be assessed for each day during the period of violation. ReWa shall have such remedies for the collection of such assessments as it has for collection of other service charges.

11. Ranges of Enforcement Response

ReWa will choose the response appropriate to the violation and in the context of the user's prior violations.

ReWa will consider the following criteria when determining a proper response:

1. Magnitude of the violation;
2. Duration of the violation;
3. Effect of the violation on the receiving water;
4. Effect of the violation on the POTW;
5. Compliance history of the industrial users;
6. Good faith of the industrial user.

11.1 Magnitude of the Violation

Generally, an isolated instance of noncompliance can be met with an information response or a NOV. However, since even an isolated violation could threaten public health and the environment, damage public and private property, or threaten the integrity of ReWa's program (e.g., falsifying a self-monitoring report), EPA recommends that ReWa respond to any "significant noncompliance" with an enforceable order that requires a return to compliance by a specific deadline. EPA has defined significant noncompliance as violations which meet one or more of the following criteria:

1. Violations of wastewater discharge limits
 - a. Chronic violations. 66% or more of all the measurements taken for the same pollutant parameter in a six-month period exceed (by any magnitude) a numeric Pretreatment Standard or Requirement, including Daily Maximum Limit, same Daily Average Limit, or Instantaneous Limit.
 - b. Technical Review Criteria (TRC) violations. 33% or more of the measurements taken for the same pollutant parameter during a six-month period equal or exceed the product of the numeric Pretreatment Standard or Requirement including Daily Maximum Limit, Daily Average Limit, or Instantaneous Limit multiplied by the applicable TRC (TRC=1.4 for BOD, TSS, fats, oil and grease and 1.2 for all other pollutants except pH).
 - c. Any other violation of a Pretreatment Standard or Requirement including Daily Maximum Limit, Daily Average Limit, Instantaneous Limit, or narrative standard that ReWa believes has caused, alone or in combination with other discharges, interference or pass-through including endangering the health of ReWa personnel or the general public.
 - d. Any discharge of a pollutant that has caused imminent endangerment to human health, welfare or to the environment or has resulted in the ReWa's exercise of its emergency authority to halt or prevent such a discharge.

2. Failure to meet within 90 days after the schedule date, a compliance schedule milestone contained in a local control mechanism or enforcement order, for starting construction, completing construction, or attaining final compliance.
3. Failure to provide within 45 days after the due date, standards required reports such as self-monitoring reports and reports on compliance schedules.
4. Failure to accurately report noncompliance.
5. Any other violation or group of violations, which may include a violation of Best Management Practices, ReWa determines will adversely affect the operation or implementation of the local pretreatment program.

11.2 Duration of the Violation

Violations (regardless of severity) which continue over prolonged periods of time should subject the industrial user to escalated enforcement actions. For example, an effluent violation which occurs in two out of three samples over a six-month period or a report which is more than 45 days overdue is considered significant, while a report which is two days late would not be deemed significant.

ReWa's response to these situations must prevent extended periods of noncompliance from recurring. EPA recommends issuance of administrative orders for chronic violations. If the industrial user fails to comply with the administrative order, ReWa may assess administrative penalties or initiate judicial action. If the prolonged violation results in serious harm to the POTW, ReWa may also consider terminating service or obtaining a court order to halt further violations as well as to recover the costs of repairing the damage.

11.3 Effect on the Receiving Water

One of the primary objectives of the National Pretreatment Program is to prevent a "pass through" of pollutants which enter the receiving stream. Consequently, any violation which results in environmental harm should be met with a severe response. Environmental harm should be presumed whenever an industry discharges a pollutant into the sewerage system which:

- Causes a "pass through"
- Causes a violation of the POTW's NPDES permit (including water quality standards)
- Has a toxic effect on the receiving waters (i.e., fish kill)

At a minimum, responses to these circumstances may include an administrative order and an administrative fine. In addition, the response may ensure the recovery from the noncompliant user of any NPDES fines and penalties paid by ReWa. Where authorized, ReWa may also pursue damages for the destruction or harm to local natural resources. If a user's discharge causes repeated harmful effects, ReWa may seriously consider terminating service to the user.

11.4 Effect on the POTW

Some of the violations may have negative impacts on the POTW itself. For example, they may result in significant increases in treatment costs, interfere or harm POTW personnel, equipment, processes, operations, or cause sludge contamination resulting in increased disposal costs. These violations may be met with an administrative fine or civil penalty and an order to correct the violation in addition to recovery of additional costs and expenses to repair the POTW. For example, when the industrial user's discharge upsets the treatment plant, damages the collection system through pipe corrosion, causes an obstruction or explosion, or causes additional expenses (e.g. to trace a spill back to its source), the POTW's response may include cost recovery, civil penalties, and a requirement to correct the condition causing the violation.

11.5 Compliance History of the User

A pattern of recurring violations (even of different program requirements) may indicate either that the user's treatment system is inadequate or that the user has taken a casual approach to operating and maintaining its treatment system. These indications will alert ReWa to the likelihood of future significant violations. Accordingly, users exhibiting recurring compliance problems may be strongly dealt with to ensure that consistent compliance is achieved. Compliance history is an important factor for deciding which of the two or three designated appropriate remedies to apply to a particular violator. For example, if the violator has a good compliance history, ReWa may decide to use the less severe option.

11.6 Good Faith of the User

The user's "good faith" in correcting its noncompliance is a factor in determining which enforcement response to invoke. "Good faith" may be defined as the user's honest intention to remedy its noncompliance coupled with actions which give support to this intention. Generally, a user's demonstrated willingness to comply may predispose ReWa to select less stringent enforcement responses. However, good faith does not eliminate the necessity of an enforcement action. For example, if the POTW experiences a treatment upset, it will recover its costs regardless of prior good faith. Good faith is typically demonstrated by cooperation and completion of corrective measures in a timely manner (although compliance with previous enforcement orders is not necessarily good faith).

ENFORCEMENT RESPONSE GUIDE

[This guide is essentially for use by the staff and is not an absolute requirement. ReWa reserves its right to vary or make exceptions for its general responses as in its discretion may serve the best interest of ReWa.]

A. UNAUTHORIZED DISCHARGES (NO PERMIT)

<u>Noncompliance</u>	<u>Circumstances</u>	<u>Range of Response</u>	<u>Significant Non-Compliance</u>	<u>Personnel</u>
1. Discharge without a permit, or approval.	One time when discharger is unaware of permit requirement, no known POTW damage.	NOV	No.	Inspector, Pretreatment Manager
2. Non-permitted discharge (expired permit).	Failure to apply for permit <u>renewal</u> within ten (10) days of due date.	NOV	No	Inspector, Pretreatment Manager
3. Discharge without a permit or approval.	Which results in interference or pass through of POTW or continuing violation of categorical or local limitations.	NOSN, Show Cause Hearing (Administrative Order, Cease and Desist Order, and/or seek injunctive relief and damages).	Yes	Director or authorized representative
4. Dilution in lieu of treatment.	Deliberately increase the use of process or other water to dilute a discharge as a partial or complete substitute for treatment.	NOSN, Show Cause Hearing, (Administrative Order).	Yes	Director or authorized representative
5. Recurring dilution in lieu of treatment.	Continue to deliberately increase the use of process water or other water to dilute a discharge as a partial or complete substitute for treatment.	NOSN, NOR Show Cause Hearing (Administrative Order).	Yes	Director or authorized representative

B. APPLICABLE PRETREATMENT LIMITATIONS

<u>Noncompliance</u>	<u>Circumstances</u>	<u>Range of Response</u>	<u>Significant Non-Compliance</u>	<u>Personnel</u>
1. Exceeding final limitations (categorical or local).	Infrequent or isolated violation greater than applicable pretreatment standards or less than TRC.	WOMV, NOV	No	Inspector, Pretreatment Manager
2. Exceeding final limitations (categorical or local).	Violation(s) which place an Industrial User in SNC.	NOSN, Show Cause Hearing (Administrative Order).	Yes	Pretreatment Manager, Director
3. Exceeding interim limitations.	Without known interference or pass through but which places Industrial User in SNC with limit.	NOSN, Show Cause Hearing (Administrative Order).	Yes	Pretreatment Manager, Director
4. Exceeding interim limitations.	With interference or pass through.	NOSN, NOR, Show Cause Hearing (Administrative Order, Cease and Desist Order, and/or seek injunctive relief and damages).	Yes	Director or authorized representative

C. SAMPLING, MONITORING AND REPORTING

<u>Noncompliance</u>	<u>Circumstances</u>	<u>Range of Reponse</u>	<u>Significant Non- Compliance</u>	<u>Personnel</u>
1. Failure to sample, monitor or report (routine reports, BMRs).	Isolated or infrequent.	WOMV, NOV	No	Inspector, Pretreatment Manager
2. Failure to provide reports for compliance schedules, self-monitoring data or categorical standards or to resubmit incomplete, inaccurate or improper reports returned to User by the Authority within 45 days from the due date or the date the report was returned to the User for resubmission.	Reports not submitted or properly resubmitted for 30 days or more after their due date.	NOSN, Show Cause Hearing (Administrative Order).	Yes	Pretreatment Manager, Director
3. Failure to sample, monitor, report, or notify.	User does not respond to letters, does not follow through on verbal or written agreement.	NOSN, Show Cause Hearing (Administrative Order).	Yes	Pretreatment Manager, Director

C. SAMPLING, MONITORING AND REPORTING (CONTINUED)

<u>Noncompliance</u>	<u>Circumstances</u>	<u>Range of Response</u>	<u>Significant Non-Compliance</u>	<u>Personnel</u>
4. Failure to notify of applicable pretreatment standard violation as a result of self-monitoring.	Isolated or infrequent. No interference or pass through.	WOMV, NOV requiring report within 10 days.	No	Pretreatment Manager, Director
5. Minor sampling, monitoring or reporting deficiencies (computations or typographical errors).	Isolated or infrequent.	WOMV, NOV	No	Inspector, Pretreatment Manager
6. Major or gross sampling, monitoring or reporting deficiencies (missing information, late reports).	Isolated or infrequent.	NOV	No	Pretreatment Manager
7. Major or gross reporting deficiencies.	Continued. Remains uncorrected for 30 days or more.	NOSN, Show Cause Hearing (Administrative Order).	Yes	Pretreatment Manager, Director
8. Failure to notify of slug discharge.	Isolated or infrequent. No interference or pass through.	NOV	No	Pretreatment Manager
9. Failure to notify of slug discharge.	Known interference or pass through or threat to human safety.	NOSN, NOR, Show Cause Hearing, (Administrative Order, Cease and Desist Order, and/or seek injunctive relief and damages).	Yes	Director or authorized representative

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C. SAMPLING, MONITORING AND REPORTING (CONTINUED)

<u>Noncompliance</u>	<u>Circumstances</u>	<u>Range of Response</u>	<u>Significant Non-Compliance</u>	<u>Personnel</u>
10. Reported slug load.	Isolated or infrequent without known interference or pass through.	NOV	No	Pretreatment Manager
11. Reported slug load.	Isolated or infrequent with known interference, or pass through with threat to human safety.	NOSN, Show Cause Hearing (Administrative Order).	Yes	Pretreatment Manager, Director
12. Reported slug load.	Recurring with known interference or pass through or threat to human safety.	NOSN, NOR, Show Cause Hearing (Administrative Order, Cease and Desist Order, and/or seek injunctive relief and damages).	Yes	Director or authorized representative
13. Failure to report changed discharge.	Isolated or infrequent with no interference or pass through.	NOV	No	Inspector, Pretreatment Manager
14. Failure to report changed discharge.	With known interference and/or pass through or threat to human safety.	NOSN, Show Cause Hearing (Administrative Order, Cease and Desist Order, and/or seek injunctive relief and damages).	Yes	Director or authorized representative
15. Reporting false information.	Any instance.	NOSN, NOR, Show Cause Hearing (Termination of Service).	Yes	Director or authorized representative

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D. COMPLIANCE SCHEDULES AND INTERIM LIMITS FOUND IN PERMITS

<u>Noncompliance</u>	<u>Circumstances</u>	<u>Range of Response</u>	<u>Significant Non-Compliance</u>	<u>Personnel</u>
1. Missed Interim Date.	Will not cause late final or other interim dates.	NOV, WOMV	No	Inspector, Pretreatment Manager
2. Missed Interim Date.	Will result in other missed interim dates. Violation for good and valid cause.	NOV	No	Pretreatment Manager
3. Missed Interim Date.	Will result in other missed interim dates. No good or valid cause.	NOSN, Show Cause Hearing (Administrative Order).	Yes	Pretreatment Manager, Director
4. Missed Final Date.	Violation due to <u>force majeure</u> (beyond control of User).	Letter	No	Pretreatment Manager
5. Missed Final Date.	30 days or more outstanding. Failure or refusal to comply without good or valid cause.	NOSN, NOR, Show Cause Hearing (Administrative Order).	Yes	Pretreatment Manager, Director
6. Failure to install monitoring facilities.	Failure to or refusal to comply with requirements of Regulation.	NOSN, NOR, Show Cause Hearing (Administrative Order).	Yes	Pretreatment Manager, Director

E. NONCOMPLIANCE DETECTED THROUGH SAMPLING AND/OR FIELD INSPECTIONS AND INVESTIGATIONS.

<u>Noncompliance</u>	<u>Circumstances</u>	<u>Range of Response</u>	<u>Significant Non-Compliance</u>	<u>Personnel</u>
1. Minor violation of permit condition.	No evidence of negligence or intent.	WOMV	No	Inspector, Pretreatment Manager
2. Minor violation of permit condition.	Evidence of negligence or intent.	NOSN, Show Cause Hearing (Administrative Order).	Yes	Pretreatment Manager
3. Major violation of permit condition.	Evidence of negligence or intent.	NOSN, Show Cause Hearing (Administrative Order, Cease and Desist Order, and/or suit for injunction for relief and damages).	Yes	Director or authorized representative
4. Entry Denial.	Failure or refusal to comply with requirements of Regulation.	NOSN, obtain search warrant, Show Cause Hearing (Administrative Order).	Yes	Director or authorized representative

RESPONSE REQUIREMENTS**A. ReWa [reserving its right to make exceptions] will respond to violations of the Regulation in accordance with the following:**

1. All violations should be identified and documented within 10 days of receiving compliance information.
2. Initial enforcement responses involving contact with the Industrial User, and requesting information on corrective or preventative action(s), should occur within 30 days of violation detection.
3. Follow up action for continuing or reoccurring violation should be taken within 60 days of the initial enforcement response. For all continuing violations the response will include a compliance schedule.
4. Violations which threaten health, property, or environmental quality are considered emergencies and will receive immediate responses such as halting the discharge or terminating service.
5. All violations meeting the criteria for Significant Noncompliance should be addressed with an enforceable Order within 30 to 60 days of the identification of Significant Noncompliance.

B. Industrial User response to noncompliance:

1. Any instance of Industrial User noncompliance must be reported within 24 hours of knowledge of the noncompliance to the Director or his authorized representative followed by a written report, when required, within five working days.

The report of noncompliance shall include:

- a. A description of the characteristics of the noncompliance.
- b. A statement of the cause of noncompliance.
- c. An account of the time and duration of noncompliance including dates and times; or if not corrected, the anticipated time the noncompliance is expected to continue, and activities being taken to reduce, eliminate, and prevent recurrence of the noncompliance.
- d. For noncompliance of permit limitations repeat sampling event and submit test results to ReWa within 30 days. Such notification shall not relieve the User of any expense, loss, damage, or other liability which may be incurred as a result of damage to the POTW, fish kills, or any other damage to person or property; nor shall such notification relieve the User of any fines, civil penalties, or other liability which may be imposed by this article or other applicable law.

2. Industrial dischargers requiring a permit, but found to be unpermitted, shall submit a completed industrial application within 15 days of receipt.
3. All Administrative Orders shall be implemented upon receipt by the industry.
4. All schedules of compliance shall be implemented upon receipt of the final schedule by the industry.
5. Notice of Violation (NOV) and Notice of Significant Noncompliance (NOSN) shall be responded to within 15 days of the receipt of the Notice.
6. All other activities required of the Industrial User in accordance with the Regulation shall be implemented as specified.

ATTACHMENT D
RENEWABLE WATER RESOURCES ALLOCATION METHODOLOGY

PURPOSE: To allocate technically determined Pollutants of Concern capacity to Users while complying with the NPDES Permit issued to Renewable Water Resources (ReWa).

OBJECTIVE: To control the introduction of pollutants which can cause an adverse impact on the operation of a POTW, which may cause: a violation of the NPDES Permit; worker health problems; inhibition of process; pass through to the receiving stream; and/or interference with the disposal or use of sludge.

DEFINITIONS AND TERMS:

Current Methodology: Shall mean the determination of limitations in accordance with this policy.

Daily Average Permit Limitation: shall mean the average concentration (mg/l), mass (lbs/day) or flow (gpd) for permitting determined from an allocation of the POC or flow capacity.

Daily Maximum Permit Limitation: shall mean the maximum concentration (mg/l) of a POC or flow (gpd) for permitting obtained by applying a factor to the allowable Daily Average Permit Limitation.

Daily Maximum Mass Limitation: shall mean the maximum mass (lbs/day) of a POC determined by multiplying the Daily Maximum Permit Limitation concentration (mg/l) x 8.34 (lbs/gal) x the Daily Average Permit Limitation Flow (MGD).

Average Daily Industrial Flow: shall mean the average daily flow from all Industrial Users determined by dividing the total flow from the Industrial Users over a period of days by the number of days in the period.

Average Treatment Plant Flow: shall mean the average daily flow into the influent of the treatment plant determined by dividing the total flow into the plant over a period of days by the number of days in the period.

Conventional Pollutants: shall include BOD, TSS, and COD for the purpose of this methodology.

Non-Industrial User: shall mean a residential or commercial User discharging sanitary in nature wastewater to the treatment plant.

Non-Permitted Flow: shall mean the flow by POC of the Users without the POC in a permit (including residential, commercial, and Industrial Users).

Non-Permitted Loading: shall mean the mass (lbs/day) of a POC in the wastewater discharged by Users not permitted for the POC. This should only include background amounts of the POC.

RENEWABLE WATER RESOURCES ALLOCATION METHODOLOGY

(Continued)

Page 2

DEFINITIONS AND TERMS CONTINUED:

Pollutant of Concern (POC): shall mean the pollutants identified present from a review of POTW influent, effluent, and sludge monitoring data and which are in amounts that can cause an adverse impact on the POTW if not controlled. Additionally, those pollutants identified by EPA to necessitate inclusion in the headworks analyses; normally BOD, TSS, antimony, arsenic, cadmium, chromium, copper, cyanide, lead, mercury, molybdenum, nickel, selenium, silver, zinc.

PROCEDURES:

Determination of Capacity:

- Step 1 The Headworks Analyses will be performed on a site specific basis for each wastewater treatment plant receiving industrial wastewater, or as required by the NPDES Permit. A daily average mass (lbs/day) allowable into the influent of the treatment plant will be calculated using the design flow of the plant.
- Step 2 Before determining the capacity which can be allocated to Industrial Users for permitting purposes, the non-permitted loading of each POC has to be calculated. The non-permitted flow (MGD) will be calculated for each POC by subtracting the Average Daily Industrial Flow of industries with the POC in their permit from the average allocated treatment plant influent flow.
- Step 3 The available capacity of each POC that can be allocated to Industrial Users for permitting purposes will be determined by subtracting the determined non-permitted loading from the total allowable loading of a POC to the influent of the treatment plant minus any safety factor. The safety factor will be determined, and approved by the Director, after reviewing the performance of the wastewater treatment plant and the current percentage of hydraulic capacity being utilized.

Determination of Permit Limitations:

- Option 1 Daily Average Permit Limitation (mg/l) for conventional and non-conventional POC's will be determined by dividing the allowable lbs/day to be permitted to Industrial Users by the Daily Average Permitted Flow (MGD) x 8.34 (lbs/gal), which is a contributory flow approach. Alternatively, the Director may approve using the Average Daily Industrial Flow which is a uniform concentration approach. Unless approved by the Director, the allowable concentration will not exceed the 1988 Sewer Use Regulation limitations. This will appear in the allocation worksheet as the Daily Average Permit Limitation By Current Methodology (mg/l). When the Daily Average Permit Limitation (mg/l) is determined to be less than the ReWa detection limitation, then the Daily Average Permit Limitation (mg/l) will become the detection number.

RENEWABLE WATER RESOURCES ALLOCATION METHODOLOGY

(Continued)

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PROCEDURES, Determination of Permit Limitations Continued:

Option 2 When capacity is available and at the Director's discretion, ReWa reserves the right to exercise a mass (lbs/day) only option for a local limitation or applicable categorical pretreatment standard. The following conditions shall apply:

1. The I.U. shall submit a request for mass (lbs/day) only limitations.
2. A Waste Minimization and/or Water Conservation Plan shall be submitted and ReWa approval of the plan obtained.
3. A Slug Control Plan and/or, as required by the Director, Spill Prevention Control Plan must be submitted and ReWa approval of the plan obtained.

When the mass (lbs/day) only option is applied, then the Daily Average Permit Limitation (lbs/day) to be permitted will be determined by multiplying the average permitted flow (MGD) x the Daily Average Permit Limitation By Current Methodology (mg/l) x 8.34 (lbs/gal). However, when greater than eighty percent of the POTW capacity is needed for allocation, a more stringent mass (lbs/day) limitation may be determined based on performance.

Option 3 On a case-by-case situation, and at the Director's discretion, it may be advantageous to ReWa and the Industrial User to allow for a mass (lbs/day) only limitation for BOD, COD and TSS which is higher than that determined as stated above. The following conditions shall apply:

1. Capacity must be available.
2. Items 1, 2 and 3 as outlined in Option 2 for a mass (lbs/day) only option shall be completed.
3. A treatability study, which demonstrates that the wastewater is readily biodegradable, shall be performed and approved by ReWa.

Option 4 When capacity is available and at the Director's discretion, an Industrial User subject to an enforcement action such as a Compliance Schedule in a permit or Administrative Order may have a mass (lbs/day) only limitation higher than the mass (lbs/day) limitation determined by applying the above options. This mass (lbs/day) limitation will be called an interim limitation which will be effective in accordance with the Compliance Schedule deadline.

Option 5 For Industrial Users with a Daily Average Permit Limitation (gpd) of 10,000 (gpd) or less, the Daily Average Permit Limitation (lbs/day) to be permitted will be determined by multiplying the Daily Average Permit Limitation By Current Methodology (mg/l) x 8.34 (lbs/gal) x .01 MGD.

RENEWABLE WATER RESOURCES ALLOCATION METHODOLOGY

(Continued)

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PROCEDURES, Determination of Permit Limitations Continued:

Applies to All Options:

- A. The Daily Maximum Permit Limitation (mg/l) for conventional and non-conventional POC's will be determined by multiplying the Daily Average Permit Limitation by Current Methodology (mg/l) times one of the following factors.
 - 1) A factor of one and a half (1.5) or less will be applied when in the opinion of the Director a more stringent limitation is needed to protect the treatment system. Capacity must be available.
 - 2) A maximum factor of two (2) will be applied when capacity is available. A request and demonstration of need must be submitted.
- B. The Daily Average Permit Limitations (lbs/day) and Daily Maximum Permit Limitations (lbs/day) for conventional and non-conventional POC's will be determined by multiplying the Daily Average Permit Flow (MGD) by the respective determined limitations (mg/l) by current methodology x 8.34 (lbs/gal).
- C. The Daily Maximum Permit Flow (gpd) will be limited to not exceed 1.3 times the Daily Average Permit Limitation (gpd) for the month permitted flow for Industrial Users discharging greater than or equal to 25,000 (gpd). For Industrial Users discharging less than 25,000 (gpd), the Daily Maximum Permit Flow (gpd) will be limited to not exceed 1.5 times the Daily Average Permit Limitation (gpd) for the month permitted flow. This will better assure a consistent flow from the Industrial User.
- D. On a case-by-case basis, and at the Director's discretion, the Daily Maximum Permit Flow Limitation (gpd) may be waived. The following conditions shall apply:
 - 1. The I.U. shall submit a request for waiver of the Daily Maximum Flow Limitation (gpd).
 - 2. A Slug Control Plan and/or, as required by the Director, Spill Prevention Control Plan must be submitted and ReWa approval of the plan obtained.
 - 3. The Daily Average Permit Flow Limitation (gpd) shall not exceed five (5) percent of the POTW design hydraulic capacity.
 - 4. A Waste Minimization and/or Water Conservation Plan shall be submitted and ReWa approval of the plan obtained.

RENEWABLE WATER RESOURCES ALLOCATION METHODOLOGY

(Continued)

Page 5

- E. The COD limitations will be calculated by multiplying the determined BOD limitation by a factor of three (3) which has been an accepted ratio in the wastewater profession for sanitary wastewater.

NOTE: The peak Daily Average Flow (gpd) during a review period plus five percent will become the Daily Average Permit Flow Limitation (gpd). The review period will be the most current calendar year or ReWa Fiscal Year. For new Industrial Users, and for those Industrial Users wanting higher permitted flows, the requested flow from the Industrial User Permit Application plus five percent will become the Daily Average Permit Limitation (gpd).

The more stringent of the categorical limitation or the local limitation will be applied for Categorical Users.

Monitoring and analysis will be performed in accordance with the latest EPA approved methodology. The Director will determine the appropriate methodology in the absence of EPA approved methodology.

SUPPLEMENT TO ATTACHMENT D (ALLOCATION METHODOLOGY)

Amended as of September 13, 2010

RENEWABLE WATER RESOURCES

LOCAL LIMITATIONS

Purpose:

Local limitations have been determined in accordance with Section 4.3 - National Categorical Pretreatment Standards or Local Limitations and Attachment D - Allocation Methodology. The specific limitations for the POTW's requiring Local Limitations are as follows:

POTW:	DURBIN CREEK SC0040002	GILDER CREEK SC0040525	GROVE CREEK SC0024317	LOWER REEDY SC0024261	MAULDIN ROAD SC0041211
NPDES NO.	DAILY AVG.	DAILY AVG.	DAILY AVG.	DAILY AVG.	DAILY AVG.
POLLUTANT OF CONCERN	<u>LIMIT (mg/l)</u>	<u>LIMIT (mg/l)</u>	<u>LIMIT (mg/l)</u>	<u>LIMIT (mg/l)</u>	<u>LIMIT (mg/l)</u>
BOD5	800	800	800	800	800
TSS	700	700	700	700	700
ANTIMONY	0.5	1.5	*	1.0	2.0
ARSENIC	*	1.5	*	0.2	0.2
CADMIUM	0.5	0.1	0.5	0.5	0.4
T. CHROMIUM	1.5	1.5	1.5	1.5	3.0
COPPER	1.2	1.5	1.5	1.5	2.0
CYANIDE	0.4	0.5	0.2	0.2	0.4
LEAD	0.5	0.5	0.04	0.2	0.5
MERCURY	0.0017	0.002	*	0.0053	0.012
NICKEL	1.0	3.0	1.5	1.5	4.0
SILVER	0.1	0.1	0.2	0.2	0.08
ZINC	1.5	3	1.5	1.5	4.0
1,2,4-TRICHLOROBENZENE	*	*	*	*	*
BIS (2-ETHYLHEXYL)					
PHTHALATE	*	*	0.2	*	*

POTW:	GEORGES CREEK SC0037451	FELHAM ROAD SC0033804	PIEDMONT SC0023906	SLATER- MARIETTA SC0026883
NPDES NO.	DAILY AVG.	DAILY AVG.	DAILY AVG.	DAILY AVG.
POLLUTANT OF CONCERN	<u>LIMIT (mg/l)</u>	<u>LIMIT (mg/l)</u>	<u>LIMIT (mg/l)</u>	<u>LIMIT (mg/l)</u>
BOD5	*	800	800	*
TSS	700	700	700	*
ANTIMONY	*	0.5	*	*
ARSENIC	*	*	*	*
CADMIUM	0.5	0.5	0.5	*
T. CHROMIUM	1.5	1.5	1.5	*
COPPER	*	1.5	1.5	*
CYANIDE	0.4	0.4	0.4	*
LEAD	0.5	0.4	0.5	*
MERCURY	*	0.0008	0.025	*
NICKEL	1.5	1.5	1.5	*
SILVER	*	0.5	0.5	*
ZINC	1.5	1.5	1.5	*
1,2,4-TRICHLOROBENZENE	*	*	*	*
BIS (2-ETHYLHEXYL)				
PHTHALATE	*	*	*	*

* To be determined pending modifications to Headworks Analysis and SCDHEC approval. 1988 approved limitations remain in effect during interim period.

NOTE: Limitations for all facilities:

Grease Polar Material - 200 mg/l
And Oil Non-polar Material - 100 mg/l
pH: 6.0-10.0 su
COD: 3 X BOD

ATTACHMENT E

RENEWABLE WATER RESOURCES

SELF MONITORING INTERVAL

All Industrial Users subject to monitoring requirements shall sample at a minimum as indicated in the following monitoring schedule. A different sampling interval may be required of an industrial discharger as a result of a more frequent sampling scheduling, a categorical standard or if the Director requires different sampling because of the impact of the discharger on the receiving wastewater treatment plant. The Director may also reduce the sampling scheduling, at his discretion, after taking into consideration such factors as the Industrial Users compliance status and pollution prevention activities.

Total Process Flow Gallons/Day

0 - 1,000
1,001 - 10,000
10,001 - 50,000
50,001 - 100,000
100,001 - 500,000
Over 500,000

Frequency of Monitoring

Semi annually
Quarterly
Twice/Quarter
Monthly
Twice/Monthly
Weekly

The permitted flow will be the indicator of the frequency of monitoring. When applicable and where feasible, flow proportioned composite samples shall be utilized to document and evaluate compliance with this Regulation.

ATTACHMENT F
RENEWABLE WATER RESOURCES
GREASE CONTROL STRATEGY
FOR
FOOD SERVICE ESTABLISHMENTS

This Grease Control Strategy has been developed in accordance with Section 2.12, Special Pretreatment Devices of the Sewer Regulation as a comprehensive and effective means of regulating the collection and transportation of fats, oils and grease (referred to as grease) of mineral or vegetable origin. The intent is to provide a policy for the ReWa staff, supplementary to the Regulation, regarding the appropriate means of collection, transportation, and disposal; and to provide information to persons who are subject to this policy.

1. Purpose of the Policy

ReWa desires to protect the public health, safety, and welfare of the citizens in the service area and to eliminate the deleterious impact of grease discharges on the wastewater collection and treatment facilities. The purpose of this document is to provide for the regulation of the collection and transportation of non-hazardous fats, oils, and grease of mineral or vegetable origin retained in commercial grease interceptors. The policy also contains guidelines on the sizing and maintenance of grease interceptors, permitting, inspections, monitoring, reporting, and recordkeeping.

2. Duties

The Executive Director has been empowered to enforce compliance with permits and regulations. Acting under the Executive Director is the Pretreatment Manager, who shall be responsible for implementing these grease control requirements. The Laboratory Manager shall be responsible for managing the sampling and analyses required in assuring compliance with any limitations imposed under these requirements. Analyses not performed by the ReWa laboratory staff shall be performed by a qualified laboratory. The Pretreatment Manager shall be responsible for all administrative actions such as inspections, plan review, and records maintenance. The Pretreatment Manager shall annually review the requirements contained herein to assure that it is effective and reasonable. Duties regarding the enforcement of these requirements are outlined in Attachment C - Enforcement Management Strategy.

3. Applicability

Users including but not limited to cafeterias, hospitals, hotels, motels, restaurants, churches, and school kitchen operations involved in the preparation of food for commercial purposes shall provide approved grease interceptors as required by the Pretreatment Manager for the removal of grease. As of the effective date of this Attachment, all Food Service Establishments which are proposed, constructed, expanded, renovated, reconstructed, or change ownership shall meet the requirements included herein prior to opening, expanding, or reopening the Food Service Establishment.

Existing Food Service Establishments requiring a grease interceptor greater than 1,500 gallons in capacity shall complete installation of said interceptor within ninety days of the effective date of

Effective January 3, 2000

Attachment F - 86

this Attachment, Existing Food Service Establishments requiring a grease interceptor less than 1,500 gallons in capacity shall complete installation of said interceptor within one hundred and eighty days of the effective date of this Attachment. Accelerated compliance shall be required for users which are found to be discharging grease in sufficient quantities to cause blockages or necessitate maintenance on the wastewater collection system to prevent blockages. The Food Service Establishment will be notified in writing of any compliance date determined by the Pretreatment Manager.

Any requests for extensions must be made in writing to the Pretreatment Manager at least sixty days in advance of the compliance date. The request must include the reasons for failure to comply, additional time required for compliance, and steps taken to avoid further delays.

On a case by case basis, a request in writing for a waiver of ReWa's requirement to install a grease interceptor may be made by a Food Service Establishment under the following conditions:

1. The Food Service Establishment shall submit and obtain approval by the Pretreatment Manager of a Best Management Plan for the control and disposal of grease.
2. The Food Service Establishment shall implement an appropriate source reclaim and/or recycling program to avoid excessive discharges of grease to the public sewer.
3. The Food Service Establishment must have a record of no adverse impact on the public sewer within twelve months of seeking the waiver. Any waiver granted will be considered void should the Food Service Establishment cause adverse impact on the public sewer due to grease. Additionally, the Pretreatment Manager reserves the right to rescind any waiver and require the installation of a grease interceptor as needed and in accordance with this strategy.

This attachment does not apply to grease waste removed from pumping stations owned and maintained by the ReWa or subdistricts or from public sewers. This attachment is a supplement to the Sewer Use Regulation and is not intended to supersede or modify the provisions contained in the Regulation regarding holding tank wastes or control of grease.

4. Definitions

The following are supplemental to the definitions given in Section 1.2 of the Sewer Use Regulation:

Bakery shall mean a facility which produces baked goods for retail, wholesale or resale. Included in the term bakery shall be such enterprises as donut and pastry shops.

Chemical Additive shall mean liquids, gases or solids composed of non-living substances introduced into the grease interceptor for the purpose of changing the chemical nature or physical properties of the fats, oils and grease retained in the interceptor.

Common Grease Interceptor shall mean an interceptor to which wastewater containing fats, oils and grease is directed from more than one food related facility having different operators or types of operations, such as a food court.

Disposal shall mean the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid or semi-solid grease trap or interceptor waste into or on any land or water so that such

waste or any constituent thereof may enter the environment, including emission to air or discharge to surface or groundwaters.

Disposer shall mean a person who operates a facility at which grease waste is intentionally placed for final disposition.

Food Courts shall mean areas predominantly found in shopping centers or amusement parks and festivals where several food preparation establishments having different owners may share seating space or plumbing facilities.

Food Service Establishment shall mean any restaurant, eatery, food caterer, cafeteria, or other institution processing or serving food such as motels, hotels, prisons, schools, hospitals, churches or butcher shops. A Food Service Establishment can include any facility which cuts, prepares, cooks, fries, bakes, or services food; or which disposes of food related wastes. Excluded from this definition are such facilities which do not prepare or service food in a manner similar to those described above. These facilities may include dairies and espresso bars.

Garbage Grinder shall mean a device which shreds or grinds up solid or semisolid garbage into smaller portions for discharge into the sanitary sewer.

Generator shall mean any Food Service Establishment which produces grease waste.

Grease Interceptor shall mean a device so constructed as to separate and hold fats, oils and grease from the wastewater in order to reduce the fats, oils and grease entering the sanitary sewer. Grease interceptors are often called "grease traps". Under-the-sink grease traps shall not be construed as meeting this definition.

Grease trap shall mean a device primarily used by Food Service Establishments for removal of food solids from a waste stream and placed in the building drain immediately following a sink or wash basin. A grease trap is often referred to as a "grease interceptor" but should not be confused with a grease interceptor as defined above. Grease traps are generally smaller than 100 gallons in capacity.

Grease Waste shall mean any liquid, semi-liquid, or solid fats, oils and grease that is removed from commercial operations through the use of a grease trap or interceptor.

Grease Waste Handling shall mean the collection, transportation, storage, transfer, processing, disposal, or other handling of grease waste. This term shall not apply to the generator of grease waste or to the storage of grease waste in a grease interceptor.

Hauled Waste shall mean transported Holding Tank Waste including waste from vessels, chemical toilets, campers, trailers, septic tanks, grease traps, grease interceptors, and vacuum pump tank trucks.

Hauled Waste Disposal Form shall mean a multi-part reporting form used to document the point of generation, transportation, and disposal of grease waste as outlined in Attachment A – Procedure for Acceptance of Hauled Waste.

Hauler shall mean transporter.

Hazardous Material shall mean a substance or combination of substances which, because of its quantity, concentration, or characteristics, may (1) due to human exposure, cause or significantly contribute to mortality, illness, or incapacitation; (2) pose a substantial hazard to human health or the environment if improperly handled; or (3) be defined to be a hazardous waste under the Resource Conservation and Recovery Act, under regulations promulgated pursuant to said Act, or under any other Local, State or Federal law.

Transporter shall mean a person who owns or operates a vehicle for the purpose of transporting liquid waste.

5. Maintenance Log

Persons engaged in grease waste handling shall document by written log the collection, transportation, and disposal of grease waste. The Generator must maintain copies of the log. It is the responsibility of the generator to assure that the information in a log is accurate and that copies of the log are maintained and submitted as required to the Pretreatment Manager. The log form shall be approved by the Pretreatment Manager, and duplicates may be made as necessary. A log may include multiple entries but must include the information for each time a grease trap or interceptor is maintained. Information in the log should include the following:

Generator Information

- Name and physical address of establishment
- Name of owner or authorized representative
- Date and time of maintenance
- Volume of grease waste
- Signature of generator

Transporter Information

- Name and physical address of company
- Name of owner or authorized representative
- DHEC authorization/license number
- Vehicle description and capacity
- Date and time of maintenance
- Volume transported to disposal
- Signature of vehicle operator

Receiving Facility (Disposer Information)

- Name and physical address of facility (or location if land application)
- Name of owner or authorized representative
- DHEC authorization/permit number (if applicable)

6. Inspections

Provisions in the Sewer Use Regulation regarding monitoring, inspection, and right of entry to the Generator's facility and the Transporter's vehicle are incorporated fully herein and shall be implemented to assure that maintenance is being completed as indicated on the maintenance log and that the information provided is accurate and complete. Generators shall provide access to ReWa staff or its agents to inspect records, grease traps and interceptors, obtain representative

samples and perform other duties as necessary to assure compliance with the Regulation. It is the intention of ReWa to perform an as needed inspection of the Generator's facility. Transporters shall provide ReWa staff or its agents access to inspect records, obtain representative samples and perform other duties as necessary to assure compliance with the Regulation. It is the intention of ReWa to perform an inspection of each load of grease delivered to the disposal site designated by ReWa.

7. Generator Requirements

Persons required to install grease interceptors shall complete the Survey at the end of this document and submit it with a plan of the proposed grease interceptor indicating the location of the building drain to ReWa. Additionally, the survey will be considered a request to discharge to the ReWa system. Approval to discharge shall be obtained by the Pretreatment Manager and will be limited to a three year period.

Grease interceptors for Food Service Establishments such as restaurants, cafeterias, and food courts shall be sized based on a minimum capacity of 20 gallons per seat (or bed, in the case of hospitals, rest homes, or other care facilities, if more applicable), except that no grease interceptor shall be smaller than 1,000 gallons unless approved by the Pretreatment Manager. Common grease interceptors shall be sized using the same criteria and taking into account all seats in the food court or similar establishment. No single-chamber of a grease interceptor shall exceed 3,000 gallons in capacity, and Food Service Establishments requiring interceptors exceeding 3,000 gallons shall install multiple units in parallel to comply with these requirements. Upon obtaining prior approval from the Pretreatment Manager, the Generator may use approved EPA or SCDHEC methodology for sizing grease traps or interceptors in lieu of the above criteria.

Grease interceptors for bakeries, establishments with meat cutting facilities, and other related establishments shall be sized based on a capacity as determined using minimum and maximum hydraulic detention times (based on the approximate discharge over eight hours) of ten minutes and thirty minutes, respectively, except that no grease interceptor shall be smaller than 1,000 gallons unless approved by the Pretreatment Manager. As indicated above, establishments requiring interceptors exceeding 3,000 gallons shall install multiple units. Users that meet the definition of Significant Industrial User shall comply with the applicable provisions of the Sewer Use Regulation.

Upon request by ReWa, details of the grease interceptor showing sample port and piping configurations shall be submitted to the Pretreatment Manager and prior to installation. The details and installation shall comply with the requirements of local building inspection or health department codes. The Pretreatment Manager shall review the requested submittal within sixty days and shall recommend changes as appropriate. Approval shall be evidenced by a letter signed by the Pretreatment Manager or his authorized representative. Prior to commencement of construction or installation, the user shall secure applicable local building, plumbing, and other permits. The user shall notify the Pretreatment Manager or his authorized representative at least 48 hours prior to backfilling the grease interceptor and piping to request a final inspection of the installation. The Executive Director or his authorized representative may halt the completion of the installation or notify the local building inspector if the installation does not meet the requirements of this regulation.

Refrigerator drain lines, beverage dispenser drain lines, hand sinks, and similar drains not ordinarily receiving significant quantities of grease shall not be connected to nor discharge

through a grease interceptor unless otherwise approved by the Pretreatment Manager. Infrequently used floor drains whose interceptors may have a tendency to "dry out" and produce odor shall not be connected to a grease interceptor. Showers, toilets, washing machines, baths, or sinks used only for vegetable washing shall not be connected to nor discharge through a grease interceptor. Holding tank waste shall not be discharged to a grease interceptors. Grease interceptors shall not be installed in any part of the building where food is handled and shall be located to be easily accessible for cleaning and inspection. The vent line from the sample port riser on the interceptor outlet line shall be connected to the building waste vent piping.

The use of any biological or chemical additives as a substitute for grease interceptors or the proper maintenance of grease interceptors is prohibited. Chemical additives, such as solvents, are strictly prohibited from use in all cases. However, the use of biological additives as a supplement to maintenance may be authorized by the Pretreatment Manager. Proper documentation of approval shall be obtained by the user in writing from the Pretreatment Manager. All grease traps and grease interceptors shall be purchased and maintained by the user at the user's expense. Maintenance shall include the sufficient removal of all contents including floating materials, wastewater, slugs, and solids at a frequency of once per calendar quarter or more frequently to assure proper operation of the grease interceptor. Upon written request from the Generator, the Pretreatment Manager may allow a less frequent schedule of maintenance when assurance of proper operation of the grease interceptor can be demonstrated. Decanting or discharging any of the contents removed from a grease interceptor back into that grease interceptor or into any other grease interceptor is prohibited unless approved by the Pretreatment Manager.

The Generator shall apply and obtain prior written approval from the Pretreatment Manager for the disposal of grease interceptor contents at ReWa's designated receiving sites.

8. Transporter Requirements

Transporters shall maintain a current license from the Department of Health and Environmental Control Division of Onsite Wastewater Systems to maintain grease interceptors and haul grease waste. Transporters shall use only disposal sites or methods approved in the license. Transporters shall request and obtain approval from the Pretreatment Manager to discharge hauled waste at disposal sites designated by ReWa. Approvals will be limited to a three year period after which a written request for a renewal may be submitted to the Pretreatment Manager. Hazardous materials shall not be transported, and the transporter shall not mix septic tank contents or other holding tank waste with grease waste. The Transporter shall determine the nature of the waste, and complete the Hauled Waste Form before transport.

9. Fees

Provisions in the Sewer Use Regulation regarding fees and charges are applicable and shall be assessed to Generators and Transporters for services rendered by ReWa. Generators shall pay the Engineering Plans and Specifications Review and Approval Fee. Generators shall pay an Annual Administrative and Inspection Fee as needed to address non-compliance with the Sewer Use Regulation. Generators shall also pay for any Laboratory Analyses Fees associated with the discharge from the Generator's facility. Additionally, Generators shall pay a Permit Application Processing and Renewal Fee as needed to assure compliance with or in response to non-compliance with the Sewer Use Regulation. Transporters shall pay the Permit Application Processing and Renewal Fee for the approval to discharge grease at ReWa's designated receiving site. Transporters shall also pay all Laboratory Analyses Fees associated with the

Transporter's discharge to ReWa's designated receiving site. Additionally the Transporter shall pay the applicable hauled waste charge. Such fees and charges shall be as established from time to time and included in Attachment B Fees and Charges of the Sewer Use Regulation.

10. Violations, Fines and Recovery of Preventive Expenses

Violations of these provisions may be subject to the enforcement provisions contained in the Sewer Use Regulation including fines of up to \$2000.00 for each offense. Violations may also be reported, as appropriate, to the SCDHEC and local codes office for further enforcement action. In addition, fines assessed for violations involving blockages, cleanup, or other occurrences requiring increased operations and/or maintenance expenses shall include the cost incurred by the ReWa or subdistricts for the cleanup or blockage removal. In accordance with the recovery of preventative expenses provisions contained in the Regulation, costs and expenses incurred by the ReWa for preventing interference or adverse impact on the public sewer, may be charged to and paid by the discharger upon written notice.

**RENEWABLE WATER RESOURCES
FOOD SERVICE ESTABLISHMENT INFORMATION SURVEY**

Please provide all information requested and attach plans for building sewer or drain and grease interceptor or trap to this form for review.

Name of Facility: _____

Physical Address: _____

Mailing Address: _____

Name of Owner: _____

Mailing Address: _____

Daytime Phone: Owner _____ Facility _____

Facility Type: Bakery _____ Restaurant _____ Cafeteria _____

Caterer _____ Hospital _____ Nursing Home _____

Deli _____ Butcher Shop _____ Other _____

Seating Capacity _____ Beds _____ (if applicable)

Approximate Water Usage: Daily _____ (gpd) Monthly _____ (gpd)

Tenant Yes _____ No _____

New Facility Yes _____ No _____

Existing Facility Yes _____ No _____

Renovation/Expansion Yes _____ No _____

Cooking Facilities Yes _____ No _____

Existing Grease Interceptor or Trap Yes _____ No _____

Capacity of Grease Interceptor or Trap _____ gallons (if applicable)

(For existing facilities, please indicate whether or not there is an existing grease interceptor or grease trap, provide the capacities, and indicate whether they will remain in use or be abandoned or removed.)

Does or will this facility generate grease waste? Yes _____ No _____

Comments: _____

Submit this form and attachments to:

RENEWABLE WATER RESOURCES

Pretreatment Program Manager
561 Mauldin Road
Greenville, South Carolina 29607

Telephone Number (864) 299-4000 Fax Number (864) 299-8958

Attachment F - 93

In Re:)
Renewable Water Resources, Inc.)
Administrative Proceeding)
Concerning Harrison Partners, LLC)
_____)

**DETERMINATION BY
HEARING OFFICER**

This matter came before me as an administrative or adjudicatory hearing pursuant to the Renewable Water Resources Sewer Use Regulation and a Circuit Court Order of The Honorable Edward W. Miller dated March 16, 2010. The petitioner, Harrison Partners, LLC (Harrison Partners), claims that it was improperly denied wastewater treatment service by Renewable Water Resources, Inc. (ReWa). Both parties appeared and participated in the hearing without motion or objection to the proceedings. Accordingly, I find that this matter was properly before me as hearing officer and that these proceedings and findings are proper and binding under the Renewable Water Resources Sewer Use Regulation and the South Carolina Administrative Procedures Act.

A full hearing was held on March 22 and 23, 2001 at the ReWa administrative offices. In addition, a subsequent deposition of John V. Boyette, Jr., held on April 21, 2011, was submitted as part of the hearing record. At the hearing, testimony was taken and exhibits were presented. Based upon my review and evaluation of the testimony and evidence, I hereby make the following findings of fact and conclusions of law:

ReWa is a special purpose district, created under South Carolina state law to control the treatment of all wastewater in the Greenville, South Carolina area. All entities desiring to develop a wastewater system must do so in connection with and under the approval of ReWa. There are several special purpose sewer sub-districts operating within ReWa's area. One of

these sub-districts is Metropolitan Sewer Sub-District (Metro). Metro operates and controls some of the sewer systems which transport wastewater to ReWa's facilities for treatment.

In 2006, Harrison Partners undertook to develop a residential subdivision, River Trace, in the Greenville area. This was within ReWa's wastewater service area. Harrison Partners planned to use a private company, Condor Environmental, LLC (Condor) to build and operate the wastewater pump station at the subdivision. In the course of planning the development, representatives of Harrison Partners approached ReWa and were told that they should annex their property into Metro's sub-district for sewer service from the subdivision. ReWa also instructed Harrison Partners to begin the approval process through Greenville County.

It is important to note here, and testimony was presented therefor, that for many years, it has been a usual and accepted practice in ReWa's service area for a private provider, such as Condor, to operate a pump station, and then a sub-district, such as Metro, to provide the sewer service to ReWa's wastewater treatment facility. This was a usual and accepted practice and, importantly, allowed under ReWa's regulations. Scott Bolo, of Harrison Partners, testified that Harrison Partners had built their entire business plan for River Trace upon this usual practice. The evidence and testimony clearly showed that ReWa was fully aware that Harrison Partners made all of its plans and relied upon its ability to set up its wastewater system in this manner.

On March 16, 2006, Harrison partners received from Brian Bishop, the engineering supervisor at ReWa, an e-mail confirming that ReWa had sufficient capacity to handle their subdivision's wastewater. The e-mail also confirmed that Harrison Partners should enter into contracts with Metro and Condor, and should meet all Metro and Condor specifications.

Harrison Partners then undertook to make all submissions and seek approval for their project from Greenville County. In May of 2006, Greenville County approved Harrison

Partners' plans for River Trace, requiring sewer service through Metro and providing that the pump station be maintained by a publicly regulated entity, such as Condor. (Condor was approved by the South Carolina Public Service Commission for such services.)

After ReWa's March 16, 2006 e-mail and after the Greenville County approval, Harrison Partners purchased the property for River Trace and undertook an enormous financial obligation for its development. Scott Bolo testified that Harrison Partners undertook such obligations and made such plans, relying upon ReWa's representations and relying upon their ability to structure their wastewater system as described above. ReWa's March 16th e-mail clearly identified and anticipated Harrison Partners' use of Condor and Metro. This was an important component of the financial model used by Harrison Partners. Mr. Bolo testified that Harrison Partners had entered into a contract with a builder who had agreed to purchase the lots and develop the project. Harrison Partners also entered into a contract with Condor.

In October of 2006, Harrison Partners sent its application, with the required fee and documentation, including a connection point map, to ReWa to begin the approval process for wastewater treatment services. ReWa cashed their check and accepted their application.

At this time, there were several other applications, from other entities for other developments, pending with ReWa. All of the applications were submitted during a time when ReWa's regulations allowed a private provider to operate a pump station, and a sewer sub-district to handle the sewer service to ReWa.

The testimony revealed that, from the fall of 2006 through the summer of 2007, Harrison Partners, at ReWa's instructions, explored and developed plans for running their sewer line through at least three different possible routes from the subdivision to the ReWa facility. This was testified to by Scott Bolo and admitted by ReWa employees, including ReWa's executive director, Ray Orvin. This included engineering and surveying work, all

done by, and at the expense of, Harrison Partners. Brian Bishop, of ReWa, admitted that all of the changes came from ReWa. First one route would be explored by Harrison Partners, then ReWa would reject that route and demand that Harrison Partners explore another. This was occurring for months, during which time Harrison Partners was continuing to bear the expense of the development but could not move forward. There was testimony from more than one witness that the process usually only took from three to six months.

Even with all of these changes required by ReWa, however, Harrison Partners continued to cooperate and to perform and submit the required studies and surveys. Scott Bolo testified that the engineering and survey work for the application were complete. At first, Brian Bishop testified that Harrison Partners had failed to submit the needed documents. After Mr. Bishop's complete file was entered into evidence and examined, however, it was clear that Harrison partners had submitted the necessary engineering and survey documents. Mr. Bishop then admitted that he had reviewed the plans and other materials. Documents were also submitted to Metro for approval, as was required under the process. Mr. Bishop admitted that he had seen such documents and the comments made thereon. Also, e-mails were produced which confirmed this. It was admitted by Stephen Graef, an engineer working with ReWa, that Harrison Partners acted in good faith in their efforts. Mr. Graef also admitted that Mr. Bolo and Harrison Partners did a lot of engineering work.

During the fall of 2007, however, ReWa's intentions changed. The testimony was undisputed that, during that time, ReWa decided to change its policy and not allow a private provider to be a part of the same wastewater system with ReWa or a sewer sub-district such as Metro. This is in contravention to their prior policy and goes against years of usual custom and policy. There was testimony that this new thinking arose because ReWa decided that it could make money by running the pump stations, and that ReWa wanted to get rid of the

private operators. Regardless of ReWa's true motivation, however, under ReWa's new thinking, the business plan undertaken by Harrison Partners, and other entities awaiting approval, would not work. Under the new policy, Harrison partners could not contract with Condor to build and operate the pump station and then with Metro to operate the sewer lines. Under this new thinking, ReWa would have to own and operate the entire system or Condor could own the entire system, but only, if Metro was willing to guarantee the entire system. Gene McCall, from Condor, testified that Metro was not willing to do so.

Mr. Orvin, ReWa's executive director, admitted that, in November of 2007, all ReWa employees, including Brian Bishop, were told to "hold up" on all of the applications for pump stations which were pending. In December of 2007, the new policy was made public. At several public ReWa meetings and hearings, many people testified and asked ReWa not to change their policy. There was testimony from Mr. Bolo, of Harrison Partners and Mr. McCall, of Condor, that many individuals and entities came before ReWa or communicated with ReWa, explaining how the change in policy was unfair and how it would ruin their projects. In addition, there was testimony from Mr. Ernie Willis, the developer of another project that was awaiting approval, that the change in policy was disastrous for his project.

Significantly, it was requested of ReWa that, even if they planned to change their policy, those with applications already pending be "grandfathered" in under the old policy and be allowed to build their systems as planned. It was explained that, after so much time had gone by, and so much effort and expense had been put into the pending developments, the change would literally kill the projects and bankrupt the developers. ReWa, however, refused to "grandfather" the pending applicants. ReWa's on representative, Mr. Graef, admitted that such a decision was "not 100% fair." Mr. John Boyette, a chairman of the board for ReWa, admitted that ReWa did not consider "grandfathering" applicants at the time of the change.

He also testified that ReWa did not even consider the effect upon those applicants, including Harrison Partners, when making their decision to change. Mr. Boyette also admitted that the change was "unforeseen and unforeseeable" to those applicants. This would include Harrison Partners.

In May of 2008, the policy change was officially put into effect and ReWa officially changed its regulations to reflect the change. It is important to note that, even though the official change was not enacted by ReWa until May of 2008, as discussed above, it was followed and "enacted" by ReWa personnel, in reality, in November of 2007, some six months before official enactment. As discussed above, both Mr. Orvin and Mr. Bishop of ReWa admitted that they were instructed to "hold off" on all pump station applications in November of 2007.

ReWa then submitted a proposal to Harrison Partners for the River Trace wastewater system to be run entirely by ReWa. The testimony was unanimous, however, that the costs were much higher than Harrison Partners had planned and budgeted. Even ReWa's employees admitted this. There was testimony that the proposed new costs were at least twice as much or more than Harrison Partners' original expected costs under its plan to use Condor and Metro. Mr. Willis, another developer awaiting approval on a separate subdivision, testified that ReWa's costs were "significantly higher" than those upon which the developers were planning. Under ReWa's proposed cost schedule, the developments were unworkable. The testimony was undisputed: none of them went forward; Harrison Partners had their property foreclosed upon, causing great financial hardship to the partners; the change, and ReWa's refusal to "grandfather" killed the projects.

ReWa's own regulation states that one of its objectives is "to promote economic growth including residential and industrial development..." ReWa Sewer Use Regulation, Section 1.1.

ReWa and its employees are, therefore, bound to carry out this objective in good faith. As discussed above, there is ample testimony and evidence that ReWa failed to properly follow its own regulations in three (3) ways: First, ReWa employees failed to properly and promptly process Harrison Partners' application. Second, ReWa improperly enforced the new regulation before it was enacted. Third, ReWa improperly and unfairly refused to "grandfather" the waiting applicants under the old regulation.

First, as seen in the testimony and evidence described above, ReWa unreasonably delayed Harrison Partners' application and efforts to obtain service. As discussed above, after the initial application and submission, ReWa kept changing its route requirements for Harrison Partners. In a process which usually takes three to six months, ReWa asked Harrison Partners to fully explore, survey, and make engineering drawings for one proposed route after another, only to refuse each route. Whether this was done out of negligence or with a hidden purpose in view of the upcoming change in policy was not made clear. Regardless of the real purpose, however, this unreasonable delay caused Harrison Partners months of extra time and much extra work and expense. Without the delay, the project could have been approved, as first submitted, well before the policy change.

Second, as discussed above, ReWa effectively enacted its new policy before its official enactment. The new regulation was not officially enacted until May of 2008. However, as discussed above, and as admitted by ReWa employees, as early as November of 2007, they were told to "hold off" on all pump station applications, thus effectively enforcing a regulation before it was in effect. This was improper and caused the collapse Harrison Partners' project.

Third, ReWa should have "grandfathered" Harrison Partners and all of the waiting applicants and allowed them to build their projects under the regulation in effect at the time of their filing. The United States Constitution, in Article I, Sections 9 and 10 prohibits the passing

of *ex post facto* laws. That is exactly what happened in this case. These applicants, including Harrison Partners, justifiably relied upon the regulations and customs in place when they applied for service. As discussed above, they made all of their business plans and substantial investments relying upon their ability to follow the regulations and customs then in place. To change the requirements in the middle of the process under those circumstances is both unfair and improper under the law. Even if ReWa has the right to amend its regulations in conformance with its policies, there should be consideration given to those, like Harrison Partners, who applied under the old regulation. ReWa's failure to do so was improper.

For the reasons stated above, I find that ReWa acted improperly in the handling of Harrison Partners' application for service and that ReWa improperly and unfairly denied service to Harrison Partners for the River Trace development.

Determined this _____ day of _____, 2011.

Michael D. Glenn, Hearing Officer

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE)

THIRTEENTH JUDICIAL CIRCUIT

Harrison Partners, L.L.C.,)

Civil Action No. 2011-CP-23-6482

Plaintiff,)

vs.)

Renewable Water Resources.)

Defendants.)

CERTIFICATE OF COUNSEL

This Record for Administrative Appeal contains the entire record of the Administrative Proceeding conducted by Renewable Water Resources in the matter of Harrison Partners, LLC.

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10/31, 2011

CERTIFICATE OF SERVICE

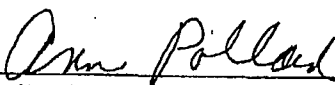
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Renewable Water Resources, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Record for Administrative Appeal

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Ann Pollard
Administrative Assistant

Oct. 31, 2011

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Harrison Partners, L.L.C.,
Appellant

v.

Renewable Water Resources,
Respondent.

) IN THE COURT OF COMMON PLEAS
) THIRTEENTH JUDICIAL CIRCUIT
)
)
)

C.A. No.: 2011-CP-23-6482

BRIEF OF APPELLANT

TO: THE HONORABLE ALEXANDER S. MACCAULAY, PRESIDING JUDGE; AND
RIVERS STILWELL AND LANE W. DAVIS ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

1. Did the hearing officer err in numerous findings of facts in its "Factual Background" that are unsupported by evidence?
2. Did the hearing officer err in not finding, pursuant to Finding Number 2, that there were many delays in the project caused by Respondent ("ReWa") during the two year period and did hearing officer thus err in finding that the evidence clearly shows that "HP ("Appellant") had never complied with the requirements by submitting the required information."
3. Did the hearing officer err in Finding Number 3 in failing to find that the Appellant had a vested right that was taken by Respondent and that the retroactive application of the regulations to the Appellant were unlawful?
4. Did the hearing officer err in failing to consider and rule on the issue of the Contract Clause of the United States and South Carolina Constitutions?

SUMMARY OF FACTS

Appellant is a residential subdivision developer with interests in Greenville County, South Carolina. The Respondent Renewable Water Resources ("ReWa") is the former Western Carolina Regional Sewer Authority which is a pre-home rule special purpose district managed and controlled by a nine member commission appointed through the Greenville County Legislative delegation and vested with the authority to operate trunk lines and treatment plants for the disposal of sewage for Greenville County and portions of Spartanburg, Laurens, and Anderson counties.

In 2006, Appellant undertook to develop a residential subdivision, River Trace, in the Greenville area. (R.p.98, 1.1-11). This was within Respondent's wastewater treatment service area. Appellant planned to use a private company, Condor Environmental, LLC ("Condor") to build and operate the wastewater pump station at the subdivision. In the course of planning the development, representatives of Appellant approached Respondent and were told that they would have to annex their property into the Metropolitan Sewer Sub-district ("Metro") for sewer service from the subdivision. (R.p.103, 1.2-8).

River Trace required a pump station to connect its subdivision to the trunk lines. (R.p.102, 1.1-10). It had been a usual and accepted practice in Respondent's service area for a private sewer company ("PSC"), such as Condor, to operate a pump station, and then a sub-district, such as the Metro, to be responsible for the collection lines up to the pump station and from the pump station to the main trunk lines of the Respondent then to Respondent's wastewater treatment facility. (R.p.88, 1.4-25). The private pump station is licensed as a PSC through the public service commission. Construction and operation of the pump station are first paid by the developer and then through homeowner fees. This was a usual and accepted practice and, importantly, was allowed under Respondent's regulations. (R.p.103, 1.9-24).

After inquiry by Appellant to determine sewer availability with Respondent, on March 16, 2006, Appellant received from Brian Bishop, the engineering supervisor at Respondent, an e-mail confirming that Respondent had sufficient capacity to handle their subdivision's wastewater. The e-mailed also confirmed that Appellant should enter into contracts with Metro and Condor, and should meet all Metro and Condor specifications.

Appellant then undertook to make all submissions and seek approval for their project from Greenville County. In May of 2006, Greenville County approved Appellant's plans for River Trace, requiring sewer service through Metro and providing that the pump station be maintained by a publicly regulated entity, such as Condor (Condor was approved by the South Carolina Public Service Commission for such services.).

After Respondent's March 16, 2006 e-mail and after the Greenville County approval, Appellant purchased the property for River Trace on June 22, 2006 for \$1,022,500.00 and undertook an enormous financial obligation for its development. Appellant was annexed into Metro. Appellant then entered into legally binding and valid contracts with Condor for the PSC and contracted with Eastwood Homes to sell all the lots. They cleared the property, engineered and surveyed the facilities.

Five months after the e-mail in October of 2006, Appellant sent its application, with the required fee and documentation, including a connection point map, to Respondent to begin the approval process for the wastewater treatment services. Respondent cashed their check and accepted their application.

Nevertheless, processing of Appellant's application encountered delay and stretched into 2007. During the summer or early fall of 2007 the Respondent placed "a hold" on the Development. During the fall of 2007, Respondent considered a change to its policy that would

not allow a PSC to connect the Respondent's trunk lines to be a part of the same wastewater system with Respondent or a sewer sub-district such as Metro. This was passed by the Respondent Board in May of 2008 but Appellant continued to request exemption from the new regulation and grandfather status.

Under this new thinking, Respondent would have to own and operate the entire system or Condor could own the entire system, but only, if Metro was willing to guarantee the entire system. Metro was not willing to do so. Appellant continued to contend that their application would be grandfathered since they applied before the effective date for the change in policy and that the policy really didn't apply to them since it applied to "out-of-district" developments and they were in Metro.

By August of 2009 it became obvious that no permit from the Respondent would be forthcoming. On September 9, 2009 Appellant filed an action against the Respondent that the Respondent wrongfully denied the Appellant to ability to establish a private collector sewer system ("PCS"). (2009-CP-23-7710). Appellant asserted claims for breach of contract, breach of contract accompanied by a fraudulent act, unjust enrichment, negligence, negligent misrepresentation, interference with contractual rights, civil conspiracy, declaratory judgment, writ of mandamus, and a violation of the South Carolina Unfair Trade Practices Act. The Respondent's answer raised no issues of there being administrative remedies or a failure to exhaust administrative hearings. (R.p.39-55). On October 30, 2009 the Respondent filed a motion to dismiss. The Circuit Court conducted a hearing on January 19, 2010. On March 16, 2010 the Circuit Court issued its Order. (R.p.2-8).

In its March 16, 2010 Order the Court stated "During the hearing on this matter, ReWa provided evidence of a process by which an aggrieved person may appeal the denial of a PCS

permit. Specifically, the ReWa Sewer Regulations provide a hearing and reexamination process for aggrieved individuals.” (R.p.3). (Emphasis added) The Court further stated “Once a final decision is rendered, the Regulations provide any party aggrieved by a final decision of ReWa may appeal such decision to the Court of Common Pleas.” (Id.) The Court also provided “The Regulations provided under Section 2: Any person whose permit is denied, or is granted subject to conditions deems unacceptable shall have the right to request an Adjudicatory Hearing.” (R.p.4) The Circuit Court therefore, dismissed the 2009 suit without prejudice pending the administrative review process. (R.p.6).

On March 21, 2011 the Appellant filed a new lawsuit against Respondent and others raising the same allegations from the lawsuit filed in 2009. (2011-CP-23-1957) The Administrative hearing was finally held on March 23, 2011. On September 1, 2011 the hearing officer finally adjudicated the matter and issued the “Administrative Decision”. This appeal followed.

SUMMARY OF ADMINISTRATIVE HEARING FACTS

The testimony at the hearing indicates that on March 16, 2006 the Respondent notified the Appellant that they had sufficient sewer capacity to serve the property that the Appellant planned to develop (“River Trace”). (R.Ex.13; p.805). Attorney and Ph.D. in Environmental Engineering, Eugene C. McCall, Jr., was the Appellant’s first witness and testified that this notification is the first step in the process of connecting a development to a sewer system in Greenville County. (R.p.1-23). McCall had formed Condor Environmental, L.L.C. because of the Respondent’s previous decision to no longer accept into their systems pump stations constructed by developers. This provided a niche for Condor as an approved private wastewater utility to provide pump station ownership and operation for various subdivisions in Greenville County.

(R.p.88, 1.2-23). They owned and operated 12 pump stations in Greenville County. (R.p.89, 1.1-3). They also managed another 30 stations in the State. (R.p.89-23-25).

In early 2006 Mr. McCall received a call from the Appellant about owning and operating a pump station for River Trace that culminated in a contract dated April 23, 2007. (R.p.96-25; R.Ex.1, p.725-731). The process to acceptance of the PSC with the Respondent is usually four to six months. (R.p.91, 1.10-17). A year into process to acceptance was the longest possible time McCall had ever experienced. (R.93, 1.21-25). River Trace submitted and had approved their subdivision plat by Greenville County that indicated its sewer system was approved provided that the PSC be approved by the public service commission which had already been done. Greenville County confirms that all the service and utility providers that are willing to service the project prior to the County's approval. (R.p.125, 1.1-5). According to McCall, "so if it has plat approval then ReWa said 'Yes, fine'." (R.p. 125, 1.5-6). Then Appellant commenced work on the property. (R.p.98, 1.1-4). They obtained encroachment permits for sewer and utilities. (R.p.98, 1.6-11).

Mr. McCall testified that in November 2007, some one year and eight months following the issuance of the capacity letter, approval of the subdivision plat, purchase of the property, design of the components and numerous surveys the Respondent started mentioning the idea of prohibiting PSC pumping station connections and replacing it with themselves since the Respondent "ought to be making money on the pump stations." (R.p.104, 1.10-105, 1.9, p.105, 1.24-p.106, 1.4). At this point Respondent had committed to the traditional pump station all the way up to the treatment plant according to standard practice. (R.p.103, 1.15-24).

According to Mr. McCall, while the River Trace application was still being considered, in early 2008, now nearly two years into the process that should have lasted a year, the Respondent

officially began consideration of the enactment of regulations ending the PSC pumping station connections to their system. (R.p.117, 1.7-21). The regulations essentially prohibited split ownership of the system between a private and public utility. (R.p.108, 1.18-25). Although retroactive application of the proposed regulation had not been determined by the Board “every time something would be finalized by the developer, the Respondent would come up with a new wrinkle, no we can’t have that. The last wrinkle “was that Rivers Stillwell basically told us that they weren’t going to allow the force main owned by a private utility coming onto ReWa property.” This despite the fact that it was standard practice to do so.

Then on May 5, 2008 the Respondent passed a resolution effectively abolishing the PSC pump stations. (R.Ex.3, p.772). The Respondent then proposed that the Respondent would own and operate the station at twice the price of that proposed by McCall’s group. (R.p.120, 1.1-13).

McCall questioned whether the new regulations were retroactive to River Trace and the six other pending PSC projects. He testified “And in talking with Mr. Stillwell, I said ‘Well, the reg’s not fair, but even if we live with the reg going forward, it shouldn’t apply to these seven projects.’ And he said, ‘Well if you want to come to the Board and make your presentation, do it.’” (R.p.121, 1.21-p.122, 1.1).

Mr. McCall got this issue of the new regulations application to River Trace and six other projects on the Board’s agenda. (R.p.122, 1.1-7). After a presentation and a few questions the Board reached no decision. (R.p.122, 1.11-16). Mr. McCall stated “And I should say today, I have never gotten the decision from the Board on that —those—that request. So they never decided, but effectively they’ve killed the projects by dragging them out so long.” (R.p.123, 1.12-16). Nevertheless despite the failure of the Board to determine the applicability of the new regulation to existing projects the Respondent continued to retroactively apply it to the

Appellant. This practice continues to today, despite Respondents concession at the administrative hearing that that Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 536 S.E.2d 892 (S.C.App. 2000) was controlling the legal issues in this case. (R.p.127, 1.21-p.128, 1.2).

Scott Bolo an engineer and an officer and owner, of Appellant, testified that Appellant had built their entire business plan for River Trace premised upon this usual practice by Respondent of using the PSC for the pumping station. (R.p.190, 1.7-17). Bolo stated that when they received the March 16, 2006 e-mail from the Respondent the Respondent knew that Condor was going to own and operate the force main. (R.p. 258, 1.11-22; Ex.13, p.805). Early on in the process Respondent's chief engineer Brian Bishop told the Appellant that they had met the engineering requirements for connection to the Respondent's trunk line. (R.p. 267, 1.19-24). What they didn't tell the Appellant's representatives is that two years later they were going to retroactively put in place a new regulation that completely changed "the way that the force main people, the collector system and treatment people interact". (R.p.267, 1.24-268, 1.10).

Bolo testified they were completely vested in the project by the time they had their engineering drawings complete. (R.p.197, 1.18-25). Although, they had never had a project that took more than eight months for final sewer approval (R.p.210, 1.11-20) the project seemed to progress smoothly and there was no indication that Respondent would interfere with their plans even through the enactment of the new policy. (R.p.205, 1.11-19). The Appellant purchased the property and executed mortgages, contracted with Condor, obtained encroachment permits, cleared, surveyed, lined up builders, contracted with Eastwood Home to sell all the lots and negotiated completely with Metro all by the end of March of 2007. (R.Ex.8, p.783-792; p.409,

1.2-10; p.210 1.21-p.211, 1.8). The Appellant complied with every request by the Respondent for information, design and data throughout the process. (R.p.231, 1.11-p.233, 1.25).

On February 9, 2007 the Respondent confirmed that the encroachments for connection, PCS ownership of the force main, final plans and profiles could be submitted. (R.p.806, Ex.14). All that remained was the permit to construct from the South Carolina Department of Health and Environmental Control ("SCDHEC"). (Id.) The Appellant finalized the ownership of the force, the final plans, profiles and requested a "willingness to serve" letter from Respondent for SCHEC on February 17, 2007. (R.p.807, Ex.15; p.290, 1.16-p.235, 1.3).

Despite the submissions by Appellant, the Respondent needlessly drew out the process. (R.p.309, 1.8-13). As of March 21, 2007 the project was 100% design complete and Metro was satisfied at that point. (R, p.409, 1.2-10).

However, by August of 2007 the Respondent was still unwilling to finalize the route of the connector and allegedly imposed new security measures for the their property that prevented Condor from owning the forced main on the Respondent's property. (R.Ex. 20, p.813). In November of 2007 Respondent began discussions with area sewer service providers concerning prohibiting PCS connections to their system. (R.p.105, 1.24-p.106, 1.4). Unbeknownst to the Appellant, the Respondent had "flagged" their application in August of 2007 and put a "hold" on processing of Appellant's pump station and encroachment had been ordered by the Executive Director of Respondent Ray Orvin ("Orvin"). (R.p.453, 1.1-12).

After numerous proposals and counter-proposals and continuing engineering requests and survey demands the Appellant forwarded the finalized connector route to the Respondent on January 9, 2008. (R.p.356, 1.15-p.357, 1.23; Ex.23, p.818). All these demands by Respondent were "straw dogs" intended to delay the project. (R.p.358, 1.9-22). The Respondent continued to

refuse granting of the easement up to and through May 5, 2008 when the new regulations were imposed. (R.p.390, 1.12-21).

Even the applicability of the new regulation to the Appellant was far from clear. Bolo testified "And I specifically asked them, and I held up the regulation and said, 'This doesn't apply to us because we're not outside the sewer district.' And Mr. Orvin (director of Respondent) said, and I quote, in front of 20 people, 'Well we think you are.' " (R.p.214, 1.18-23). Then the Appellant requested an Adjudicatory Hearing before the Board concerning whether or not the new regulation was retroactive and they appeared before the Respondent Board concerning that question in November of 2008. (R.p.242, 1.9-20). However, no decision was ever made by the Board. (R.p.244, 1.1-4).

Orvin testified on behalf of the Respondent. (R.p.418, 1.18-23). Orvin was approached by staff about the Appellant's submission in August of 2007. (R.p.453, 1.1-12). Orvin testified that the Respondent became concerned about the proliferation of PSC force main stations in late October of 2007. (R.p.459, 1.10-18). Orvin decided to "chat with the Board" about the situation. (R.p.459, 1.19-23). According to his testimony Orvin gave developers "a window of opportunity" between August of 2007 and November or December of 2007 to get everything in and approved concerning PSC force main stations before the regulation change. (R.p.457, 1.21-p.458, 1.6). The matter was discussed with the Board in November of 2007 but the board had no idea about how it was ultimately going to address the issue through amended regulations. (R.p.465, 1.21-p.466, 1.12). The Board never even considered formal adoption of the regulation change until May of 2008. (R.Ex.3, p.772).

Although Orvin created a window of opportunity for developers to get everything in and approved before the end of December of 2007, some five months before the regulations were

enacted he contended at the hearing that he had no authority to determine “grandfather” status following passage of the regulation. (R.p.457, 1.21-p.458, 1.6; p.487, 1.23-25). Orvin contended that he was told by the Board in November of 2007 to hold up on approving any pump stations pending review of the proposed regulation which occurred six or seven month later in May of 2008. (R.p.492, 1.9-1.25). He testified:

Q. (Appellant’s counsel) So even before it was enacted, you were told, and you did, hold up on any approvals?

A. (Orvin) On the pump station.

Q. On the pump station. And the pump station was clearly a part of the River Trace application approval, wasn’t it?

A. There were several of them that had pump stations that’s correct.

Q. And you were told to hold up on all of them?

A. On the pump station section of it.

Q. That stack that Brian brought to you were the people that were what we’ve been calling in the pipeline at the time?

(R.p.492, 1.18-p.493, 1.13).

The record is quite clear that the Board never directed Orvin to hold up approval. (See R. Ex.1, p.947-948). Furthermore, the granting of an easement or encroachment permit is was also a Board function according to Orvin’s testimony. (R.p.461, 1.16-462, 1.2). According to Orvin the staff could reject an easement or encroachment request but the Board must approve them. (R.p.462, 1.2-5). Appellant needed and requested an easement or encroachment permit to connect the Condor pump station to Respondent’s trunk line. That request was not rejected by staff but Orvin never submitted any of the Respondent’s multiple requests for the permit to the Board. (R., inter alia).

Orvin further testified that public hearings were held on the proposed PSC connection regulations in January and April of 2008. The proposed regulations went through several different drafts most particularly definitions and provisions concerning “in district” and “out-of-district” service and provisions for the private and public sector. (R.p.470, 1.4-15). All the while

Orvin had told the staff to hold final approval of Appellant's project since they were most concerned about being left as the "bag holder" related to the contract between the Appellant and Condor. (R.p.475, 1.2-23).

Orvin also testified that although he had the authority to open and close the "opportunity window" he allegedly opened in late 2007 for developers who were "in-the-pipeline" he stated that he lacked the authority to "grandfather" (meaning to exempt the project from the new regulations due to their pre-existing status) the pending projects. Orvin, nevertheless, "held up" the Respondent's pump station portion of their application without telling them and closed the "opportunity window" sometime in December of 2007 again without telling the Appellant. (R.p.492, 1.9-14; p499, 1.12-21). Orvin didn't even know if his "small window" was enough time for developers to comply. (R.p.458, 1.16-18).

Although, Metro was responsible for most of the technical review of the pumping station and although, the Respondent had no reason to believe that the Appellant had not submitted every scrap of paper necessary for Metro to complete their responsible portion, the Respondent "held-up" their approval forever. (R.p.500, 1.17-p.501, 1.3).

Mr. Joe E. Willis testified at the administrative hearing on behalf of the Appellant. Mr. Willis was also a developer and testified about the Appellant's companion development known as Grant Estates ("Grant"). (R.p.524, 1.12-25). Grant also received a capacity letter from the Respondent about the same time as the Appellant. (R.p.526, 1.22-25). Grant proceeded to grade their site and started installing utilities. (R.p.527, 1.2-9). They also were working on plans to submit to Respondent and retained Condor for their project as well. (R.p.527, 1.2-21).

Just like the Appellant, Mr. Willis testified that Grant submitted their plans and their check to Respondent before any discussion of new regulations only to find out later that their

plans would not be reviewed until the Respondent's Board decided how to handle PSC pump station connections. (R.p.530, l.17-24). Grant conducted meetings with the Respondent's representatives concerning Respondent's refusal to review their plans. (R.p.533, l.9-25).

Mr. Willis also testified that the Respondent's representatives stated,

And during this time, you know, my phone – my conversations with Brian was that – you know, 'Listen, guys, the Board's going to meet. They're going to figure out what they're going to do with pump stations in the future. And I feel confident – I feel sure you guys – you're not the only ones out there. You'll be grandfathered in and be allowed to proceed with your project.' (R.p.533, l.16-24).

As a result of those conversations Grant proceeded "full steam ahead". (R.p, 533, l.24-25). Grant bought the \$600,000.00 to \$700,000.00 property (Appellant paid over \$1,000,000.00 for their property), mass graded the property and installed all their storm drains. (R.p.534, l.2-5). Because Grant had already cut and filled their property like the Appellant had done the standard septic tank systems would never be permitted by the South Carolina Department of Health and Environmental Control ("DHEC"). (R.p.534, l.1-11).

Willis further testified that, "Ray Orvin said it was his decision personally to stop any project with a pump station, and he did that against advice of his counsel, who's in this room now." (R.p.535, l.1-4). Willis further stated:

But this letter I received stated that it was at their – that if a piece of property – if a project was in their service area but outside of one of their subdistricts, then at their sole discretion, that's how this would be handled. But per their request, I was annexed into one of their subdistricts, so this new policy still did not apply to my project and it still did not get reviewed. And till this day, I don't think my project's been reviewed. Has it?" (R.p.535, l.11-22).

Mr. Willis summarized the dilemma of the Appellant and the six other developers as by addressing the initial capacity letter as follows:

Well, you know, here's the thing. Short answer, yes, but there's a longer answer which goes back to all these continued delays which just killed my fucking project. They gave me a letter that – stating that, you know, 'Here –

we've got capacity for your project and here's what you need to do to tie into our system.' Nowhere in that letter did it state that I needed to make sure Metropolitan's Subdistrict would own and operate my pump station. That was never brought up to me." Stillwell asked, "That was a change?" Mr. Willis continues to state, "That was a change. Okay, so they took eight months after they decided they were going to change to come up with a change. So then I said 'Fine. If you're going to own and operate my pump stations, what's going to be the cost?' The initial response was, 'We don't know.'" So I'm their customer and the way they're going to treat - they're supposed to be in this county for - to help grow - do planned controlled growth which would be beneficial to everybody in the county. And I'm their customer and they tell me they're going to provide this service to me. Then they say, 'No, were not. Here's the new service.' And I said, 'Well, what does the new service cost?' And they don't know, so they spent eight months coming up with a new plan, but they still didn't have a complete plan. They don't have the price. (R.p.541, 1.16-p.542, 1.19).

Willis lost over a \$1,000,000.00 as a result of the "held-up" application, new regulation and the failure to "grandfather" his project. (R.p.542, 1.20-p.543, 1.8).

Respondent's Engineering Supervisor Brian Bishop also testified at the administrative hearing. Bishop testified that the Respondent had knowledge of the proposed route for Appellant's connection to their system prior to March 16, 2006. (R.p.575, 1.1-24). Bishop also reiterated the knowledge for the need for the Respondent's Board approval for the Appellant to cross Respondent's property as early March 16, 2006. (R.p.579, 1.20-24). However, Bishop also confirmed that the Respondent actually approved the general route of the connection across Respondent's property without Board approval in January of 2008. (R.p.623, 1.10-19; p.626, 1.19-627, 1.4).

Bishop admitted that three of the four connection route changes proposed by the parties during the course of the project were proposed by Respondent. (R.p.644, 1.17-22). Bishop confirmed that the Appellant as of October 10, 2006 had tendered the monies and materials required to commence the approval by the Respondent of the project. (R.p.647, 1.5-11). Bishop also admitted in his testimony that he testified at his deposition that he saw plans that were

almost complete and he never gave his input to the Appellant as to whether or not those submissions were acceptable to the Respondent. (R.p.654, 1.5-25).

Bishop also testified that he was informed in November of 2007 to not give any final approvals on Appellant's project. (R.p.659, 1.2-24). He confirmed that documentation was first submitted to Metro then from Metro to the Respondent. (R.p.661, 1.5-17). Lastly, Bishop admitted that prior to his direction to "hold-up" his approval process he had received the final submission of the "river route" connection to their facilities and that the Respondent had agreed to the "river route" (R.p.664.1.4-13; p.662, 1.17-23).

The second in command for the Respondent Dr. Stephen B. Graef testified at the hearing as well. (R.p.676, 1.18-677-1.7). Graef became familiar with the project in the fall of 2007. (R.p.677, 1.23-25). Graef asked to meet with the developers. (R.p.679, 1.20-24). Graef confirmed that the "river route" connection had been offered by the Respondent and the parties were in agreement on the concept. (R.p.682, 1.10-23). Graef also testified about the Respondent's \$318,000.00 one time cost and \$35,000.00 a year annual cost of their offer to own and operate the entire sewer system of the project if the project de-annexed from Metro and the developer paid those amounts. (R.p.690, 1.18-p.692, 1.7; Ex.37, p.861). The April 23, 2007 contract of the Appellant with Condor provided for payment of the up front amount of only \$10,250.00 with monthly payment of \$25.00 per lot connected to the system and an initial \$1,500.00 per month after the pump station startup. (R.Ex.1, p.725-731).

Graef also admitted that it wasn't fair to apply the new regulations to projects already in progress and that the Appellant acted in good faith and cooperation during the project. (R.p.711, 1.15-p.712, 1.13; p.712, 1.14-p.714, 1.23).

The deposition of William J. Alexander IV was introduced at the hearing. Mr. Alexander testified that they put the Appellant's property under contract in February of 2006 when they requested and received the capacity letter from Respondent. (R.p.875, p.9, l.12-15). They closed on the contract in September of 2008. (R.p.875, p.9, l.22-23). The Appellant was advised initially that they had to be annexed into the Metropolitan Sewer Sub-District to proceed with their project and that was done. (R.p.881, p.35, l.15-23).

John Boyette testified as a Commissioner on the Respondent's Board. (R.p.892, l.12-20). Mr. Boyette testified that Mr. Orvin informed the Board about the Appellant's project plans to run a sewer line through their treatment plant site. (R.895, l.2-10). Orvin submitted the Appellant's request for the easement or right-of-way to the Board with no details at all about the route. (R.p.897, l.6-18).

On November 5, 2007 the Operations and Planning Committee of Respondent's Board recommended to the Full Board for the staff to define a policy for ownership of pump stations and force mains to bring it back in December. (R.p.903, l.6-10). The Board understood that it was not customary to enforce regulations that haven't gone into effect. (R.p.917, l.7-14). It is unclear whether or not the Board even knew of the "hold" against the developers. Although, the same time the committee recommended to the Board that Mr. Orvin be directed to enter into negotiations with Appellant's representatives. (R.Ex.1, p.947). Neither of these two recommendations were adopted by Respondent's Full Board and neither the Committee or the Full Board directed that pending projects with PSC connections be suspended from review. (R.Ex.1, p. 947-948). The staff while purportedly acting upon the November 2007 committee recommendation concerning negotiations with Appellant waited a year or more before making any offers to the Appellant. (R.p.920, l.1-9).

The Respondent had no policy prohibiting private pump station connections either before or during their consideration of the new regulation. (R.p.9-3, 1.12-15). In its May 2008 decision the Full Board did not even consider the impact of the new regulations on the economic viability of the six or seven projects "in the pipeline" Mr. Boyette stated that the disastrous impact of the new regulation on those projects "didn't enter -- it certainly did not enter into our decision making process as to what we did or did not do. (R.p.926, 1.17-25).

Commissioner Boyette testified that in November of 2008 after passage of the May 2008 regulations the Commission was descended upon by people asking to be "grandfathered" from the regulations. (R.p.913, 1.11-22). The Board never decided whether or not the existing PSC connection projects would be "grandfathered" or if the new regulations applied to them at all. (R.p.914, 1.13-18; p.942, 1.22-24).

Nevertheless, the Respondent enforced the regulation retroactively against the Appellant. The Respondent knew that the enforcement of the regulations against "in the pipeline" projects interfered with the existing contract between the Appellant and Condor. (R.p.934, 1.19-935, 1.20).

Mr. Bolo epitomized the situation as follows:

No. The reason it was important to ReWa was because you were delaying the process to implement a retroactive law, violating the Constitution of the United State of America. That's why it was important. It was a subterfuge designed to draw out the process. Look, you had 20 other -- seven other developments that didn't have any technical challenge, and you wouldn't let them connect either, right? They didn't connect. No one did. Mr. Davis asks, this email is from March 21, 2077, right? Mr. Bolo replies, it is. Mr. Davis states, March 21, 2007 reflects that you hadn't sent in the easement application yet. Mr. Bolo replies, Well, maybe because you all hadn't approved the route. You -- see it's a catch-22. How can we submit a permit for a route you won't approve. We kept designing the route, engineering it, engineering completing it, and then we go to submit it and you say, "Oh, wait, we got an ownership issue," or "Oh, wait, we have a location issue." You know, you just put a bag over our heads, punch us in the face, and then sent us off to do another bidding and it was endless tasks like that time and time and time again. But no, you never allowed us -- we were there. Mr. Stilwell could have just signed the encroachment permits, given them to

Condor. We were done. That was it, but you didn't allow that to happen. (R.p.309, 1.6-310, 1.9).

ANALYSIS
ISSUE 1

The hearing officer erred in numerous findings of facts in its "Factual Background" that are unsupported by evidence as follows:

- A. The hearing officer found that the Appellant bought the property in question although it knew no public sewer service was available. (R.p.8). In fact, Appellant purchased the subject property on June 21st, 2006 for \$1,022,500.00 (Greenville County Deed Book 2212, p.192-193). This was only after they received the March 16, 2006 e-mail from the Respondent that the Respondent had the capacity to accept the sewer system for the subdivision which Condor was going to own and operate the force main. (R.p.258, 1.11-22). (R. Ex.13, p.805). The purchase was also after Respondent's chief engineer Brian Bishop told the Appellant that they had met the engineering requirements for connection to the Respondent's trunk line. (R.p.267, 1.19-24).
- B. The hearing officer found that population densities in the basin to which the Appellant was to connect with did not yet justify studying how to sewer the area for basin-wide planning purposes. (R.p.9). In fact, there was no testimony or evidence presented to support that factual finding. Actually the evidence was quite to the contrary. There was the Roger and Callcott study (R.p.685, 1.2-7) and the pump station study (R.p.439, 1.19-25)
- C. The hearing officer found concerning Appellant (referred to as "HP") that "While HP's land would be annexed into the Metropolitan Sewer Sub-District's ("Metro") service area; Metro declined to own and maintain the force main and pump station. (R.p.9). In

fact, the issue of Metro ever owning or maintaining the force main and pump station arose only after the Appellant executed a contract with Condor on April 23, 2007 to provide the force main and pump station, the Respondent “held-up” Appellant’s application for two and one-half years and a new May 8, 2008 regulation of the Appellant requiring sole ownership of the collection system and the force main and pump station was retroactively applied to the Appellant before Metro considered owning and maintaining the force main and pump station. (R.Ex.1, p.725; Ex.3, p.772; p.492, .118-p.493, l.13; R.p.492, .118-p.493, l.13).

- D. The hearing officer found, referring to the companion Grant Estates development, that “The separate projects meant compounding the difficulties: two sets of engineers, two sets of plans, twice the routing problems, twice as many engineering issues, different sets of right of ways, twice the likelihood of delays and negotiating two sets of agreements between the public and private parties participating in the sewer service. In fact, there was no evidence that these separate projects compounded the difficulties relative to the approval of Appellants’ project such as having twice the routing problems, twice the likelihood of delays and negotiating separate PCS agreements. The testimony was clear that the delays in the project were from Appellant being “held-up” by the Respondent, retroactively applying a regulation to Respondent in addition to Respondent’s proposal of numerous routes to connect to their system. (R.p.659, l.2-24) (R.p.664, l.4-13; p.662, l.17-23).
- E. The hearing officer found “The peculiarities of the project led to HP pursuing various routes and options over a several year period. The evidence in the record reflected three primary routes: one referred to as the ‘Flag Lot Route’; a second called the ‘Bishop

proposal'; and a third dubbed as the 'River Route'." In fact, the evidence was that the Respondent proposed three of the four routes discussed during the course of the project and that the Appellant didn't "pursue" various routes and options over a several year period but it was required to consider other routes and options after the Respondent "held up" their application and retroactively applied the new regulation to the Appellant. (R.p.644, 1.17-22).

ISSUE TWO

The hearing court erred in not finding pursuant to Finding Number 2 that there were many delays in the project caused by Respondent ("ReWa") during the two year period and erred in finding that the evidence clearly shows that HP (the Appellant) "had never complied with the requirements by submitting the required information."

The hearing court totally disregarded the only evidence presented, which was that Mr. Orvin ordered his staff to "hold" approval of all PSC connections as early as August 2007. It is an admitted fact by the Respondent that their executive director intentionally caused at least a six month delay by putting the "hold" on the Appellant's processing until after the regulation was amended in May of 2008. Furthermore, the Appellants were placed on "hold" secretly for a period of time with no notice to them. A "hold" order by the executive director clearly, plainly and obviously stopped everything in its track. There would be no reason for the Appellant to supply additional documentary requirements from the date of placement of the "hold" in August of 2007 until the present time. It would not be possible to process other aspects of the project since the PSC connection to the Respondent was the only issue they were dealing with and that processing was now on hold. If you can't connect to the sewer you can't proceed with the project. The remaining contact with Appellant after November of 2007 were more in the form

negotiation information, not processing information although it took the Respondent up to early 2009 to even come up with a proposal. (R.p.694, 1.2-7).

The findings under Finding Number 2 that Bishop notified Bolo of the requirement for sewer service in his March 16, 2006 capacity letter and the requirements were never met by Appellant are irrelevant and contrary to the evidence. Clearly, Metro agreed to handle the collection line for the subdivision and the only reason it could not connect was the Respondent's "hold" and retroactively applied regulation.

In another finding the hearing officer cites a litany of e-mails from February and March of 2007 for the proposition that the Appellant failed to comply with requirements. In fact, the e-mails indicate that from March of 2006 the Respondent requested no additional information and only responded to Appellant's inquires in February of 2007. (R.Ex.13, p.805; Ex.14, p.806). Furthermore, the evidence showed that the July 3, 2007 e-mail of of Ashley Hornung was never responded to by Respondent. (R.Ex.19, p.812).

Furthermore, the finding implies a survey had been requested for sixteen months when in fact a "survey map" was requested only in February of 2007. (R.Ex.14, p.806).

The hearing officer goes on to state that by e-mail of March 21, 2007 (Exhibit 18) Bolo acknowledged Appellants failure to comply with requirements. The e-mail actually said:

"Thanks for your correspondence. Appreciate your taking the time to look over the plans. The Metro comments were integrated into the engineering drawings you are reviewing. So as far as comments from Metro and design we have been through this process. Hopefully the Metro review has the drawings where they are ready for your comments and corrections. We are collecting the DOT encroachment permit and finalizing the WCRSA easement forms forwarded. These last two items should be complete soon. It has been a long process and we appreciate your help in working out the details. Please do not hesitate to contact me if you need anything else from us in the interim." (R.Ex.18, p.811).

The hearing officer also places some weight on the January 8, 2008 e-mail from Hornung when this e-mail took place during the “hold” period imposed by Respondent and was in response to negotiations. (R.Ex.23, p.818)

The hearing officer also placed some weight on the April 14, 2008 letter of Mr. Fogleman when that letter was issued concerning Riversway Subdivision during the “hold” and it actually confirms that Respondent was already requiring sole ownership of gravity line, pump stations and force mains even before the regulation was passed in May of 2008. (R.Ex.26, p.822). What the hearing officer also overlooked is the virtual lack of any responsiveness to Appellants requests as shown by the record. (R.Ex.13-26, p.805-822).

It is also an admitted fact that the Respondent submitted at least three different routes to connect to their property requiring surveys for each and every one. It is an admitted fact that although the Committee directed Respondent to negotiate with the Appellant in November of 2007 the Respondent waited a year before doing so. The Respondents own witness Dr. Graef when asked about when the river route was even offered as an alternative by Respondent said “Eventually” (R.p.681, 1.20-22). Their own staff testified the passing of the regulation “shut some doors for – a door for the developer.” (R.p.683, 1.16-20). Likewise, there is no evidence whatsoever that any document or submission that the Respondent requested to finish their approval of connection under the existing regulations before the August 2007, “hold” was not submitted to them. (R. inter alia).

The hearing officer’s erroneous reliance on e-mails after the August of 2007 “hold”, this disregard of any evidence of the “hold” from August 2007 to present and erroneous the statements about the evidence content are clear error.

ISSUE THREE

The hearing court erred in Finding Number 3 in failing to find that the Appellant had a vested right that was taken by Respondent and that the retroactive application of the regulations to the Appellant were unlawful.

The hearing officer somehow finds that “HP has offered no evidence to contest the validity of the amended Sewer Use Regulation.” Those issues were clearly and squarely presented. It is slightly mystifying that the Hearing Officer relied upon the zoning of Friarsgate vs. Town of Irmo, 290 SC 266, 349 SE2d 891 (Ct. App. 1986) to decide the Appellant had no vest rights. Especially when it was admitted by the Respondent at the hearing that Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 536 S.E.2d 892 (S.C.App. 2000) was controlling the legal issues in this case. (R.p.127, 1.21-p.128, 1.2).

The hearing officer stated in his order that Friarsgate held that “a developer did not acquire a vested right to all its buildings because it had not obtained permits for all the buildings before the enactment of the ordinance. The developer’s failure to obtain building permits for the entire project foreclosed the vesting of rights to build the entire project even though one building had been completed.”

Actually the Court of Appeals in Friarsgate stated;

Friarsgate also argues in its brief and at trial that its claim to a vested right to complete the project rested principally upon a lack of zoning in the area at the time it began planning and expending funds on the project. [290 S.C. 273] It argues it had a right to expect that zoning would not be imposed on its property to preclude construction of the condominiums. The record does not reveal that this argument was made before the trial court. It is a much quoted rule of law that we cannot grant relief on an issue argued for the first time on appeal. American Hardware Supply Co. v. Whitmire, 278 S.C. 607, 300 S.E.2d 289 (1983).

Therefore, the hearing officers own citation of Friarsgate for the finding that “I find that HP failed to complete and submit the required documents to obtain a Flow Acceptance Permit before May 5, 2008. Without a complete application and finalized plan, Respondent’s

Commission had nothing before it to confer grandfathered status and HP had no vested rights” was a clear error of law.

However, the latter expression by our Supreme Court in Vulcan, supra, would have given the hearing officer the correct law to apply to this case and gives this court some guidance when the Supreme Court stated:

A landowner acquires a vested right to continue a nonconforming use already in existence at the time his property is zoned in the absence of a showing that the continuance of the use would constitute a detriment to the public health, safety or welfare." F.B.R. at 527, 402 S.E.2d at 191. Vulcan expended nearly \$2 million to find granite on the 585 acre Princeton site, arranged for the removal of fifteen acres of overburden to expose the granite for extraction, and was merely awaiting a mine operating permit from DHEC when the restrictive zoning stopped the development. "Acts of a landowner in development of his land, in order to require a finding that he has acquired a vested right to continue development as a nonconforming use, should rise beyond mere contemplated use or preparation.... "101A C.J.S. Zoning & Land Planning § 161 at 495 (1979) (emphasis added). Accordingly, Vulcan's pre-zoning development of the site established a nonconforming use. See also 101A C.J.S. Zoning and Land Planning § 64 at n. 80 (1979) ("Right to utilize one's property to conduct a lawful business becomes entitled to constitutional protection against otherwise valid legislative restrictions as to locality by city's zoning ordinance, or becomes 'vested' within the full meaning of that term, when, prior to enactment of such restrictions, owner has in good faith substantially entered on performance of a series of acts necessary to accomplishment of end intended....").

Clearly, Appellant expended a similar sum as Vulcan did in the development of the land in question and the submission of the requested materials, execution of contracts and was “awaiting a...permit” as in Vulcan at 901 and had substantially entered on performance of a series of acts to develop the subdivision when the new regulations were passed.

The evidence and testimony clearly showed that Respondent was fully aware that Appellant made all of its plans and relied upon its ability to set up its wastewater system in this manner. Respondent's March 16th e-mail clearly identified and anticipated Appellant's use of Condor and Metro. This was an important component of the financial model used by Appellant.

Mr. Bolo testified that Appellant had entered into a contract with a builder and also entered into a contract with Condor. At this time, there were several other applications, from other entities for other developments, pending with Respondent. All of the applications were submitted during a time when Respondent's regulations allowed a private provider to operate a pump station, and a sewer sub-district to handle the sewer service to Respondent.

The testimony revealed that, from the fall of 2006 through the summer of 2007, Appellant, at Respondent's instructions, explored and developed plans for running their sewer line through at least three different possible routes from the subdivision to the Respondent's facility. This was testified to by Scott Bolo and admitted by Respondent employees, including Respondent's executive director, Ray Orvin. This included engineering and surveying work, all done by, and at the expense of, Appellant. Brian Bishop, of Respondent, admitted that all of the changes came from Respondent. First one route would be explored by Appellant, and then Respondent would reject that route and demand that Appellant explore another. This was occurring for months, during which time Appellant was continuing to bear the expense of the development but could not move forward.

There was testimony from more than one witness that the process usually only took from three to six months.

Under the new policy, Appellant could not fulfill its contract with Condor to build and operate the pump station and then with Metro to operate the sewer lines. Mr. Orvin, Respondent's executive director, admitted that, in November of 2007, all Respondent employees, including Brian Bishop, were told to "hold up" on all the applications for pump stations which were pending. In January of 2008, the new policy was made public. At several public Respondent meetings and hearings, many people testified and asked Respondent not to change

their policy. There was testimony from Mr. Bolo, of Appellant and Mr. McCall, of Condor, that many individuals and entities came before Respondent or communicated with Respondent, explaining how the change in policy was unfair and how it would ruin their projects. In addition, there was testimony from Mr. Ernie Willis, the developer of another project that was awaiting approval, that the change in policy was disastrous for his project.

Significantly, it was requested of Respondent that, even if they planned to change their policy, those applications already pending be "grandfathered" in under the old policy and be allowed to build their systems as planned. It was explained that, after so much time had gone by, and so much effort and expense had been put into the pending developments, the change would literally kill the projects and bankrupt the developers. Respondent, however, refused to decide if "grandfather" applied to the pending applicants. Respondent's own representative, Mr. Gracif, admitted that such a decision was "not 100% fair." Mr. John Boyette, a chairman of the Board for Respondent, admitted that Respondent did not consider "grandfathering" applicants at the time of the change. He also testified that Respondent did not even consider the effect upon those applicants, including Appellant, when making their decision to change. Mr. Boyette also admitted that the change was "unforeseen and unforeseeable" to those applicants. This would include Appellant.

In May of 2008, the policy change was officially put into effect and Respondent officially changed its regulations to reflect the change. It is important to note that, even though the official change was not enacted by Respondent until May of 2008, as discussed above, it was followed and "enacted" by Respondent personnel, in reality, in August of 2007, more than nine months before official enactment. As discussed above, both Mr. Orvin and Mr. Bishop of Respondent admitted that they were instructed to "hold off" on all pump station applications in 2007.

During the “hold” Respondent then submitted a proposal to Appellant for the River Trace wastewater system to be run entirely by Respondent. The testimony was unanimous, however, that the costs were much higher than Appellant had planned and budgeted. Even Respondent’s employees admitted this. There was testimony that the proposed new costs were at least twice as much or more than Appellant’s original expected costs under its plan to use Condor and Metro. Mr. Willis, another developer awaiting approval on a separate subdivision, testified that Respondent’s costs were “significantly higher” than those upon which the developers were planning. Under Respondent’s proposed cost schedule, the developments were unworkable. The testimony was undisputed: none of them went forward; Appellant had their property foreclosed upon, causing great financial hardship to the partners; the change, and Respondent’s refusal to “grandfather” killed the projects.

Mr. Willis’ observations at the hearing were correct. He stated,

“You can go by the rules, but when you got an individual personally changing the rules, there are no rules. So in – sometimes in ’08, about eight month after I submitted my plans for review, I received a letter of the policy change of ReWa stating that – you know, that basically it was their sole discretion what to do with pump stations. But this letter I received stat that it was at their – that if a piece of property – if a project was in their service area but outside of one of their subdistricts, then at their sole discretion, that’s how this would be handled. But per their request, I was annexed into one of their subdistricts, so this new policy still did not apply to my project and it still did not get reviewed. And till this day, I don’t think my project’s been reviewed. Has it?” (R.p.535, 1.4 – 1.21).

The testimony and evidence was clear that all the “in the pipeline” projects were “vested” in their rights to continue under the regulations existing at the time of their applications. The Appellant didn’t fail to adequately proceed with their project along with all six other. All were prevented from proceeding.

Furthermore, the new regulations did not even state their effective date nor that they would be retroactive. S.C. Code Ann. § 6-11-1230(3) addresses the power of sewer commissions as follows:

(3) To prescribe and enforce regulations (a) requiring all persons to whom it shall be available to make use of any sewer system which the district shall from time to time operate; and (b) generally with respect to the discharge of sewage and the use of privies, septic tanks and any other type of sewage facilities within the district. Any such regulations shall, however, become effective only after they have been adopted by resolution of the commission, a certified copy thereof has been recorded in the office of the register of deeds, or, if none, in the office of the clerk of court of common pleas for each county in which such sewer system lies, a copy posted in the courthouse of each such county, and notice of the adoption of such resolution has been published at least once a week for three successive weeks in a newspaper having general circulation in the district. The published notice shall specify in brief the scope of the regulations and shall state the date on which the same shall become effective. (Emphasis added)

In the present case the resolution states no effective date whatsoever and thus can't possibly be retroactively applied. Based upon this statutory requirement it is questionable if those regulations are even effective now. Certainly a clear reading of the regulation implies that since the Appellant was already within Metro's district the new regulation didn't apply to them at all.

Since the Appellant had a vested right to connect to the Respondent's system pursuant to the old regulations under Vulcan, that right was taken in violation of the takings clauses of the United States and South Carolina Constitutions when the regulations that prohibited the project were passed. In determining whether governmental regulation violates the takings clause, the Court will consider the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action. Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed.2d 451 (The Takings Clause provides that private property shall not be taken for public use without just compensation. Rick's Amusement, Inc. v. State, 351 S.C. 352, 357, 570 S.E.2d 155, 157 (2001). Similarly, to prove a

denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. Worsley Co. v. Town of Mount Pleasant, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000).

Certainly, Appellants entitlement to connect their development under the old regulations is undisputed. Obviously anyone within the service area that qualifies under the new regulations would be entitled to a connection. There would be no reason to "hold" the Appellant's application if they weren't entitled to connect under the old regulation. Although the Respondent raises multiple issues about "routes" and crossing of treatment plant property the Respondent cannot point to one statute, rule or regulation that would disqualify a particular route or prohibit the customary joint use of rights of way that are enjoyed by a multitude of private as well as public utilities such as phone, cable, electric, water, sewer, gas and cellular companies.

Therefore, the hearing officer erred in not finding that the Appellant had a vested property right that was taken in violation of the takings clauses of the United States and South Carolina Constitutions and that the retroactive application of the new regulations to Appellant were unlawful.

ISSUE FOUR

The hearing officer erred in failing to consider and rule on the issue of the Contract Clause of the United States and South Carolina Constitutions.

As pointed out many times in the testimony there existed two contracts with the Appellant and third parties prior to the enactment of the new regulation. The testimony was clear that this enactment impaired those contracts.

Both the South Carolina Constitution and the United States Constitution bar states and their municipalities and quasi-municipal corporations from passing laws that impair the

obligations of contracts. Section 4 of Article 1 of the South Carolina Constitution states: "No ... law impairing the obligation of contracts ... shall be passed...." In interpreting the Contract Clause of the South Carolina Constitution, the South Carolina Supreme Court has followed federal precedent construing the federal Contract Clause. G-H Ins. Agency v. Continental Ins. Co., 278 S.C. 241, 246, 294 S.E.2d 336, 339 (1982) ("The mandate of the state and federal constitutions relating to impairment of contracts is basically the same."). Alston v. City of Camden, 322 S.C. 38, 471 S.E.2d 174 (S.C. 1996).

Article 1, section 10 of the United States Constitution provides:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters or Marque and Reprisal; coin Money, emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility. U.S. Const. art. I, § 10, cl. 1 (emphasis added). See S.C. Const. art. I, § 4.

Appellant argued at the hearing that the enactment of the new regulations impaired its contract with Condor and Eastwood, thus violating the Contract Clause of the United States Constitution and South Carolina Constitution. To establish a contract clause violation, Appellant must show To establish a contract clause violation, Appellant must show: (1) the existence of a contract; (2) the law changed actually impaired the contract and the impairment was substantial; and (3) the law was not reasonable and necessary to carry out a legitimate government purpose. Hodges v. Rainey, 341 S.C. 79, 93, 533 S.E.2d 578, 585 (2000). See also generally U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) (in considering contract clause claim, court must ascertain, among others, whether the State law has in fact operated as a substantial impairment of a contractual relationship); Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) (same); Seaboard Air Line Ry. v. United States, 261 U.S. 299, 304, 43 S.Ct. 354, 67 L.Ed. 664 (1923) ("The compensation to which the owner is entitled is the

full and perfect equivalent of the property taken."); South Carolina Dep't of Transp. v. Faulkenberry, 337 S.C. 140, 522 S.E.2d 822 (Ct.App.1999).

A law is viewed as substantially impairing a contract, for Contract Clause analysis, where it alters the reasonable expectations of the contracting parties. Hodges, 341 S.C. at 94, 533 S.E.2d at 585-86.

There was no factual dispute that Appellant had two valid contracts. There was no factual dispute the law, or as in this case the regulation actually impaired both contracts and completely abrogated the Condor contract. Therefore, the only issue remaining would be the reasonableness and necessity of the new regulation applying to the Appellant.

Again, by its own language the new regulation may not apply to the Appellant since there is no effective date nor does it state that it applies to existing applications. The only justification to apply this new regulation to the Appellant is to avoid "holding the bag" for the Appellant when the Respondent is allegedly holding the bag for twelve pump stations none of which have failed. The only justification that one can believe about the regulation was McCall's testimony that the Respondent wanted the money. That is not justification for the reasonableness and necessity of a new regulation. The other arguments raised at the hearing are theoretical scenarios that are not based in any fact other than some man running his own sewer collection and treatment facility unconnected to the Respondent on some mountain called the "Altamont" case. The relevancy of the Altamont case is obscure at best since it involved the Respondent agreeing to be a trustee over a defunct private residential sewer system for the EPA and DHEC when they weren't legally obligated to do so. (R.p.449, 1.3-7).

For a law to survive scrutiny under the Contract Clause when the law substantially impairs a contract, it must be "reasonable and necessary to accomplish a legitimate public

purpose." Citizens for Lee County v. Lee County, 308 S.C. 23, 30, 416 S.E.2d 641; accord Baltimore Teachers Union, 6 F.3d at 1018. When a governmental agency acts to impair a purely private contract, "courts properly defer to legislative judgments as to the necessity and reasonableness of a particular measure." United States Trust Co. v. New Jersey, 431 U.S. 1, 17, 97 S.Ct. 1505, 1515, 52 L.Ed.2d 92, 106 (1977). However, when the agency impairs a contract to which it is a party, less deference is due the legislative judgment Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727, 736 (1978). Since this new regulation affected a transaction that the Respondent was going to be a party to when finalized less deference should be given to their judgment. Therefore, the Court should pay little deference to any legislative judgments of necessity and reasonableness in this case, because the Respondent's self-interest is implicated, even though the contract at issue is purely a private contract.

The United States Supreme Court has said that heightened scrutiny is appropriate when a governmental agency's self-interest is at stake. United States Trust Company, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92. Traditional analysis of reasonableness and necessity focuses on such issues as (1) whether an emergency exists justifying the impairment; (2) whether the law was enacted to protect a basic societal interest, rather than a favored group; (3) whether the law is narrowly tailored to the emergency at hand; (4) whether the imposed conditions are reasonable; and (5) whether the law is limited to the duration of the emergency. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727, 736 (1978); G-I Ins. Agency, 278 S.C. 241, 294 S.E.2d 336. Of course, there need not be an emergency situation before a state may pass a law impairing a private contract. See Spannaus, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727.

There is no indication in the Record that an emergency situation existed, so factors (1), (3), and (5), listed above, do not apply. Furthermore factors (2) and (4) have not been satisfied. Likewise nothing about this new regulation affects the public health or environment since it was a purely economic interest in not "holding the bag" for a defunct PSC. Furthermore, this alleged problem with PSC connections, is one created by Respondents own regulations.

Therefore, the trial officer clearly erred in failing to rule on the contract clause claims and finding there is no constitutional infirmity relative to this regulation. It clearly violated the Contract Clause of our Constitutions.

CONCLUSION

Mr. Bolo summarized the principals of this case as follows:

You know, I just wanted to impress upon the Court and just beg for mercy because, sire, we've obviously been in this process since 2006. You know, I'm not going to contend that I'm a perfect person. I got a lot of shortcomings. There's a lot of people on this project that got hurt really bad, especially Mr. Clark, and I just don't think its right, what happened. I mean how can you go through three or four years of working your heart out and doing everything right and then at the end of the day have these people just laugh in your face and turn their back on you. And now I don't even know if my children are going to have a house to live in. How's that fair to us when we did all we could and were honest and we worked so hard and this is that we get? I got to live with this. I got to try and make a living while I come and get deposed for two days and go to countless hearings and why? Why am I here? Because no one else can do it. They're all bankrupt or they're all too scared to come to Court. You heard Mr. Condor – Mr. Gene. So this isn't about -- it's a human thing. Imposing a regulation on someone three years or whatever it happened, that's why it's in our U.S. Constitution, because as citizens we have a right to be protected from retroactive laws. (R.p.410, 1.7 – 411, 1.7).

The trial officer erred in his findings of fact unsupported by the evidence. He clearly erred in relying upon Friarsgate, supra. The trial officer had to find that the Appellant had a vested right to continue under the old regulation since it was taken, prior to enactment of such regulation, the Appellant in good faith substantially entered on performance of a series of acts

necessary to accomplishment of the end intended, that being to connect their subdivision to the sewer system. The trial officer failed to ascertain that the new regulation could and should not apply to the Appellant and that the application of the regulation to the Appellant violated the Contract Clause of the United State and South Carolina Constitutions and was a taking of its vested property rights based upon reasonable investment backed expectations.

The decision of the hearing officer should be reversed since there is no question about the vested rights of the Appellant, the purposeful delay by the Respondent and the Contract Clause violation by the application of the new regulation to the Appellant. Alternatively, this court should reverse and remand this matter for a new hearing on the issues presented.



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Greenville, South Carolina
Date: 4/19/12

STATE OF SOUTH CAROLINA)
)
)
COUNTY OF GREENVILLE)
)
)
Harrison Partners, LLC)
)
Petitioner,)
vs.)
)
Renewable Water Resources,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

BRIEF OF RESPONDENT

Renewable Water Resources ("ReWa")¹ respectfully submits the Brief of Respondent in the above-captioned case:

I. QUESTIONS PRESENTED

- 1. Can Appellant Harrison Partners, LLC ("Appellant") Raise Issues on Appeal Never Presented to the Hearing Officer or ReWa's Board?**
- 2. Did the Hearing Officer Clearly Err When Reciting the Factual Background in His Order?**
- 3. Did the Hearing Officer Clearly Err When He Found Appellant Never Provided ReWa With a Finalized Permit Application?**
- 4. Did the Hearing Officer Err When He Concluded Appellant's Incomplete Flow Acceptance Application Failed to Vest in Appellant a Right to Build a Sewer Main Crossing ReWa's Treatment Plant Property?**
- 5. Did the Hearing Officer Err When He Failed to Find ReWa's Amended Sewer Regulation Did Not—Clearly and Beyond A Reasonable Doubt—Violate the State and Federal Constitutions?**

¹ The Legislature created ReWa, formally known as the Greater Greenville Sewer District, the Greenville County Sewer Authority, and the Western Carolina Regional Sewer Authority, in 1925 via act 362. Act No. 102 was passed in 2009 and changed the name of the Western Carolina Regional Sewer Authority to Renewable Water Resources.

II. INTRODUCTION

Appellant Harrison Partners, LLC ("Appellant") disavows responsibility for its many mistakes.² "It is [indeed] a painful thing to look at your own trouble and know that you yourself and no one else has made it."³ Sophocles' quote sums up this dispute's evidence and underlying psychology—a need by Appellant to foist blame upon everyone else for its engineer's mistakes. Unfortunately Appellant's unfounded blame-casting has ensnared ReWa in this dispute.

Beginning in the Spring/Summer of 2006, Appellant purchased land in southern Greenville County below ReWa's Lower Reedy Wastewater Treatment Plant. Appellant bought the property, although it knew no public sewer service was available in the basin embracing the land and although it knew no public sewer service could be offered until public providers had reviewed and approved finalized engineering plans and issued a flow acceptance letter (treated interchangeably as "Flow Acceptance Permit"). Appellant planned to build a residential neighborhood on the property which it later dubbed Rivertrace.

Appellant hired the Insite Group, LLC from Columbia, South Carolina to provide engineering services on the project. Specifically, Appellant hired Scott Bolo, P.E. ("Bolo") as Rivertrace's head engineer. Bolo was simultaneously one of Appellant's shareholders. Although Bolo testified he had significant experience in sewer related engineering projects, the evidence suggests he had very limited experience with the permitting of Upstate South Carolina sewer projects. Bolo proposed to pump sewer "uphill" with a pump station, force main, and

² Appellant's Brief is rife with misstatements of Record. As a consequence, it is not practical for ReWa to address each and every inaccuracy in this Brief. As a consequence, ReWa annotated Appellant's Brief with footnotes in order to point out the inaccuracies. A copy of that annotation is attached hereto as Exhibit A and incorporated herein by reference.

³ Sophocles, *Ajax*, c. 450.

through ReWa's Lower Reedy Wastewater Treatment Plant. According to Appellant, the replacement of the uphill system by a permanent gravity system in future years would be ReWa and the affected homeowners' problem. The developers of the individual neighborhoods with the uphill systems would be long gone by that point.

III. RECITATION OF TESTIMONY AND EXHIBITS

Sewering the Rivertrace project presented a slew of obstacles.⁴ First, Appellant bought the land knowing no public sewer service was available. No engineering study had previously been performed of the basin embracing Appellant's land. And, population densities in the basin did not yet justify studying how to sewer the area for basin-wide planning purposes. Appellant was essentially trying to extend the sewer system out of order in order to reap the benefits of cheaper unsewered land. The costs of later installing the permanent gravity systems in the area were something Appellant refused to acknowledge as a legitimate concern of the public entities left to provide the collection, trunkline, and treatment services in the basin.

Second, Appellant's project required a force main and pump station since it was located below the Lower Reedy Plant. While Appellant's land was located in Metro's subdistrict, Metro declined to own and maintain the required force main and pump station. As a result, Appellant proposed that a private utility named Condor Environmental, LLC ("Condor") would own and maintain the force main and pump station while Metro would own the collector

⁴ Interestingly, Appellant was not the first developer who approached ReWa about developing the land where Rivertrace was proposed to be located. Prior to Appellant's purchasing the Rivertrace property, approximately five different prospective purchasers contacted Bishop about sewer service on the subject property. (R. pp. 572-571.) After analyzing the difficulty of sewerage the project, all such developers decided not to purchase the land. (R. p. 572, lines 20-23)("Q. After they spoke with you about the difficulty in obtaining sewer service, you never heard from them again? A. No. That's correct.")

lines. Metro's and Condor's lines would then discharge into ReWa trunk lines and travel to ReWa's Lower Reedy Treatment Plant.

Third, Appellant collaborated on the sewer line project with another entity named the Windsor Aughttry Company on its proposed development nearby dubbed Riversway. Essentially, the two developers sought to build their own collector systems and then, at some point, interconnect their lines. The developers' plans differed over time but, at one point, they sought to have two privately owned pump stations and force mains which would "manifold into one line." (R. p. 596, lines 4-7) (Never approved a site involving two pump stations wanting to manifold into one line.); (R. p. 515, lines 13-22) (Questions existed about the manifold.); (R. p. 95, lines 1-8) (Manifolds atypical in Upstate South Carolina.) In his ten years at ReWa, Bishop had never approved a project with comparable engineering, even though he has processed thousands of projects. (R. p. 96, lines 4-7; p. 229, lines 13-17)

Moreover, 2 projects meant twice the headache on an already difficult project: 2 developers, 2 sets of engineers, 2 sets of plans, twice the routing problems, twice as many engineering issues, different sets of right of ways, twice the likelihood of delays, and negotiating two sets of agreements between the public and private parties participating in the sewer service. To make matters worse, Windsor Aughttry was no less than a year behind Appellant in relation to the timing of its project. (R. p. 596, line 23-p. 597, line 2)⁵

⁵ While Scott Bolo ("Bolo"), Appellant's chief engineer, testified that Appellant's project was not complicated, it appears that Insite Group actively advertises the project as "technically challenging." (*Compare* R. p. 295, lines 20-21 ("Q. Was this a technically challenging project? A. No, it wasn't") *with* R. p. 809, Ex. 16) ("The extended off-site routing and tie-ins made this project technically challenging."); *see also* R. p. 993 (Unanswered Request for Admission, #8 stating: "The Rivers Trace project was technically challenging.") Discussed more fully *infra*, this is yet another example of Bolo's lack of credibility as a witness.

Fourth, unlike any other project, Appellant proposed to build its force main across ReWa's property. (R. p. 596, lines 14-16; p. 895, lines 10-12)("And that's highly unusual for us to, to—and—in fact, I don't know that we've ever done that before.") Addressing the mechanics of obtaining easements across ReWa's treatment plant posed a set of obstacles never encountered before. Historically, ReWa had never before allowed a party to have an easement across treatment plant property. (R. p. 596, lines 14-16; p. 895, lines 21-24.) Notwithstanding the same, ReWa told ReWa that it would consider the request, depending on where the line crossed its land and subject to meeting project requirements for obtaining sewer service.

The peculiarities of the project led to Appellant pursuing various (yet never finalized) routes and options over a several year period. The facts surrounding each route/option are as follows:

A. The Routes:

- **Route 1—The Flag Lot Route: 3/16/06 to 8/29/07 (18 Month Delay):**

Appellant first met with ReWa staff sometime in early 2006. (*Compare*, R. p. 805, Ex. 13 (First E-mail from Bolo dated 3/16/06) *with* R. p. 577, lines 1-4 (Unaware of any prior e-mails)) It was during this timeframe that the first route was proposed. In highly unusual fashion, and as noted *supra*, Appellant's proposed route crossed through ReWa's Lower Reedy Wastewater Treatment Plant.⁶ While Appellant had no right to cross ReWa land, and while ReWa had an absolute right to deny the route outright, ReWa informed Appellant it would

⁶ Bishop testified the idea was first proposed in a joint meeting with Appellant's members. (R. p. 579, lines 9-13)

consider allowing Appellant to cross ReWa land with a force main.⁷ Prior to this time, no party had ever requested to cross ReWa plant property. (R. p. 579, line 20–p. 580, line 2) (Board approval required in part "because we've never had a request like that before" and because a formal right of way would be required.) (R. p. 444, lines 4–6) ("Q. Have you ever had a private pump force main go across your plant property? A. No. This was very unique to us.")

In e-mail correspondence dated March 16, 2006, entered into evidence as Exhibit 13 (see R. p. 805), Brian Bishop ("Bishop"), ReWa's Engineering Supervisor, cautioned: "Please keep in mind Western Carolina has not made a determination regarding right of way access [for the Flag Lot Route] through our treatment plant property. I would recommend that you provide us with a potential force main route for our review before you finalize your design." (R. p. 805, Ex. 13, ¶2 (emphasis added)); (R. p. 264, lines 8–16) According to Bishop's testimony, his purpose in requesting the proposed route early in the process was "two-fold": (1) Bishop "needed to see exactly where the route was going to be"; and (2) "I was really trying to help them out in a way to say, "Look, don't spend a lot of money on this until we determine whether this is really the route that's going to be approved." (R. p. 578, lines 2–12) As discussed *infra*, Bolo ignored Bishop's advice. Bolo, in fact, failed to identify the potential force main route until seventeen months later and proceeded with substantial engineering work in the interim.

In the same correspondence, Bishop confirmed capacity in ReWa's Lower Reedy Sewer Treatment Plant. (R. p. 805, Ex. 13) Confirmation of plant capacity is the first step in

⁷ Appellant's initial route has become known as the "Flag Lot" route referring to various properties adjacent to the ReWa property. (R. p. 576, lines 4–5) (As of March 16, 2006, "[w]e are talking about—I think it's been referred to as the flag lot route.")

pursuing a Flow Acceptance Permit since if no capacity exists in the treatment plant, all other conditions to service prove irrelevant. (R. p. 573, lines 20-24) (Confirming as first step in the process.)⁸ Bishop then generally outlined the preliminary steps Bolo would need to complete before ReWa would consider issuing a Flow Acceptance Permit. (R. p. 805, Ex. 13) Such steps included:

- Obtaining a right of way from ReWa;
- Designing the sewer lines and pump station to meet both the specifications of ReWa and the Metropolitan Sewer Subdistrict ("Metro");
- Reaching "an agreement between all parties...[defining] ownership/operation of the pump station and force main."⁹

(*Id.* at ¶3; *see also* R. p. 267, lines 1-20 (agreeing that Bishop informed him of additional requirements for Flow Acceptance Permit on 3/16/06)) Finally, Bishop noted ReWa's "willingness to serve this project is contingent upon the property owner complying with all requirements/standards of Western Carolina, Metropolitan Sewer and the Greenville County Planning Commission." (R. p. 805, Ex. 13)¹⁰

A lull of activity on the project then apparently ensued for approximately 11 months. E-mail correspondence from Bishop dated February 9, 2007, and entered into evidence as Exhibit 14, reflects Bishop again informing Appellant: "As part of the permit application, we

⁸ During the administrative hearing, ReWa introduced a sample Flow Acceptance Letter, which is the last step in the process. (*Compare* R. p. 805, Ex. 13 *with* R. p. 839, Ex. 32)

⁹ Bishop testified that such an agreement could be called a "sustainability agreement." (R. p. 581, lines 3-9) It would be, at this stage, that a gravity surcharge would be discussed. (R. p. 581, lines 10-13)

¹⁰ Bishop testified that requirements for ReWa, Metropolitan, and Greenville County were distinct. (R. p. 581, line 24-p. 582, line 5) All filings required by each agency must be made to "each one of these agencies." (R. p. 582, lines 15-16); *see also* (R. p. 430, lines 1-12) (Metro reviews for Metro, ReWa reviews for ReWa.)

need the survey map and description for the portion of the force main which will be located on our property." (R. p. 806, Ex. 14, ¶2 (emphasis added)); (R. p. 586, lines 8-17) (Sent e-mail because ReWa still had not received any of the requested materials and "needed the plans to be able to look at to see whether we could approve [Flag Lot Route] or not.") Bishop's testimony emphasized the extreme importance of the force main's route on ReWa's property. (R. p. 591, lines 2-16; p. 592, line 1-p. 181, line 1) The proposed line could impact service to a huge number of ReWa customers served by the sixty million dollar, Lower Reedy Treatment Plant. (R. p. 591, lines 2-16)

By this point in time (February 9, 2007), Appellant had decided to construct the proposed sewer infrastructure with Windsor Aughtry (for the Riversway development) causing Bishop to note again: "[W]e will need the final plans and profiles for both subdivisions and the force main route along with the flow request in order to provide you with the flow acceptance letter. This also needs to be submitted to Metro Sewer for their approval and O&M letter." (R. p. 806, Ex. 14 at ¶3 (emphasis added)) Bishop testified he thereafter never received the final Flag Lot Route, nor did he ever receive fully designed force main plans. (R. p. 586, line 18-p. 587, line 1)

Knowing full well that Appellant had submitted none of the information required by ReWa for a flow acceptance letter, a mere three days after receiving Bishop's February 9, 2007 e-mail correspondence, Bolo wrote (in Exhibit 15) to Bishop and asked, "Could you please send me a willingness to serve letter for this project as it is a requirement for the DHEC permits?" Surprised by the question, on February 14, 2007, Bishop predictably responded yet again: "I cannot send the flow acceptance letter until we have the final plans for both subdivisions and the force main route along with working out the easement agreement." (R.

pp. 807-808, Ex. 15); (R. p. 593, lines 15-22)¹¹ Contrary to Bolo's testimony, Bishop confirmed he asked for the materials because Appellant had not sent them. (R. p. 586, lines 8-17) Bolo answered, "Ok thanks. Edward is putting the easements together. We can finalize our subdivision and forward to your attention." (R. p. 807-808, Ex. 15) Unsurprisingly, this never occurred. (R. p. 586, line 18-p. 587, line 1); see also (R. p. 130, lines 8-10) (Never saw final plans for Appellant); (R. p. 78, lines 1-4) (Never saw a survey)¹²

Later the same day (on February 14, 2007), Bishop again wrote to Bolo noting the remainder of what Appellant needed to submit to ReWa for review. (See R. p. 595) (Discussing correspondence and its intent). Those items included:

1. \$220 review fee for each subdivision
2. Request for flow—not to exceed 2-year build out

¹¹ With respect to the issue relating to the Flag Lot Route plans, Bolo lacks all credibility. Bolo testified that he submitted surveyed plans for the Flag Lot Route to ReWa, although no such survey was ever received. (R. pp. 262-264). When asked to produce the fully surveyed line at his deposition, Bolo produced a blank CD. Despite months of requests from ReWa, three days before the hearing, Bolo electronically produced a simple line drawing which even Gene McCall from Condor (Appellant's consultant) testified did not constitute a surveyed line. (R. p. 139, lines 11-16) ("Well that's not a survey, no.") McCall testified that he never saw a survey for any route. (R. p. 134, lines 1-4) Of note, Appellant had never supplied ReWa with the simple line drawing during the application process. Bolo then testified under oath contained imbedded data. (R. p. 320, lines 1-4) When after the hearing ReWa's engineers examined the electronic submission for the imbedded data testified to by Bolo, no electronic data was found on the same. (See also R. p. 992, ¶3 (Unanswered Request for Admission #3 (Stating: "Scott Bolo produced a blank CD at his deposition (Depo. Ex. 26) which he testified contained surveys of the Flag Lot Route.") In accompaniment to its Closing Brief, ReWa submitted the electronic file sent to ReWa by Bolo to the hearing officer for further examination. (See R. p. 960, FN 9.)

¹² Notwithstanding multiple pieces of correspondence from Bishop asking for the proposed force main route, in dizzying circularity, Bolo testified at the hearing that he did not submit the requested proposed route because he was waiting for Bishop to approve the route even before Bolo identified the route. (R. p. 309, lines 17-20) ("Q. March 21, 2007 reflects that you hadn't sent in the easement application yet. A. Well, maybe because you all hadn't approved the route..."; (R. p. 327, lines 2-4) ("Well, why would you complete an encroachment permit application for a route that was not approved?") In this regard, Bolo's testimony is reminiscent of Abbott and Costello's "Who's on First" skit.

3. Stamped plans
4. I will also need a statement that the pump stations are designed to meet WCRSA's minimum requirements.

(R. p. 810, Ex. 17) Bishop then noted, "Please be patient with the approval process since these projects are not typical." (R. p. 810, Ex. 17) Notwithstanding Bishop's instructions to Bolo to submit the required information to ReWa, over and over again, in ever-shifting testimony, Bolo would now have the Court believe Appellant satisfied all of the requirements by submitting the information to Metro, materials he notably cannot actually provide and has not put into evidence. (*Compare* R. p. 275, lines 4-6) ("the entire time we were submitting to Metropolitan, and then ReWa would be copied on what we were submitting to Metropolitan *with* (R. p. 288, lines 12-19) ("ReWa doesn't have any finalized plans, sir. Do you realize that? A. But Metro does.") In truth, ReWa never received finalized plans and Appellant has never produced what it claims to have sent to Metro.

On March 21, 2007, in an e-mail, Bolo wrote to Bishop and noted Appellant was still "finalizing the WCRSA easement forms forwarded." (R. p. 811, Ex. 18) Yet, Bolo still had not provided ReWa with "a final survey engineered route" and still had not supplied ReWa with the engineering plans for the force main across ReWa's property. (R. p. 598, lines 18-22) *see also* R. p. 130, lines 8-10 (Never saw final plans for pump station or force main.) Over a year after Bishop first told Appellant not to proceed until he received final approval of the proposed route, Bolo still had not done so and continued to proceed with the project without supplying the information required by ReWa to proceed. (R. p. 599, lines 10-11; *see also* R. p. 992 (Unanswered Requests for Admissions #6 stating: "[Appellant] never completed surveys of the Flag Lot Route."))

On July 3, 2007, Bolo's assistant, Ashley Hornung, once again wrote to Bishop about obtaining approval to cross ReWa's property. (See R. p. 812, Ex. 19) Hornung's e-mail reflects that, as of this date, Appellant still had not surveyed the proposed route and supplied the same to ReWa. In fact, Hornung asks Bishop whether she can send un-surveyed copies of the proposed route as appearing on Appellant's "engineering sheets." (R. p. 812, Ex. 19) At this point, ReWa still does not have the basic information requested from Appellant concerning the Flag Lot route. (R. p. 599, lines 22-24)("Q. Had you received the proposed route as of this date? A. No.") Bishop told Hornung the surveys were required to approve the route and specify a recordable legal description in the easement, if approved. (R. p. 603, lines 9-20)

Appellant, in fact, never identified the proposed route across ReWa's property until August of 2007, nearly eighteen months after the first meeting on the project. (R. p. 189, ll. 20-25); (R. p. 453, lines 5-8) (Route identified to Bishop in August 2007 timeframe because, "he'd come to me in August about that.") Even then, Appellant never submitted an easement application or the required surveys. (R. p. 589, lines 4-18; R. p. 130, lines 20-24 (No application for ReWa encroachment since no final plans.) Appellant similarly failed to submit engineering plans for the force main proposed to cross ReWa's land, let alone finalized plans for the Flag Lot Route. (R. p. 586, line 18-p. 587, line 1; R. p. 130, lines 8-10) (Does not recall final plans for pump or force main.)

On August 29, 2007, Mike Deaton (a conspicuously absent corroborating witness if Bolo's testimony had been true), an Insite Group employee, finally walked the proposed route with Bishop. (R. p. 813, Ex. 20)¹³ According to Bishop, it became immediately apparent to

¹³ Notably, Bishop set the meeting within only a few days of when he was contacted by Deaton about assisting Appellant in completing a survey. (R. p. 604, lines 14-23.) In bizarre testimony, Bolo testified that Bishop met Deaton to clear the property. (R. p. 323, lines 2-25)

both Bishop and Deaton the route was not viable. (R. p. 813, Ex. 20; R. p. 608) Bishop immediately informed Bolo of the problems. (R. p. 609, lines 2-7 (sent e-mail to Bolo about problems either the same day or following morning.) The problems included:

- 2/3 of the route was "heavily forested";
- One particular section dropped 20+ feet and then rose 30+ feet;
- There was no room to re-route "the force main to decrease the elevation";
- Construction would be "very expensive";
- "An access road would have to be built";
- "The force main would be laid very deep";
- "A significant number of trees would have to be removed";
- "A high potential for rock" existed";
- The route would interfere with new security measures and a new fiber optic cable;
- Condor's ownership of the force main would interfere with the new security measures; and
- ReWa was not receptive to "having trees removed or having the potential for rock blasting at the site."

(R. p. 813, Ex. 20; R. p. 608); *see also* (R. pp. 434-435) (discussing operational problems facing ReWa relative to proposed flag lot route once eventually disclosed by Appellant.)¹⁴

Within five (5) hours of receiving Bishop's e-mail, Bolo responded: "I read your notes and can

("He was going out to the site on August 29, 2007 to construct a line, to clear the right-of-way and go in.") Bolo was not at the meeting. The testimony also does not make a lot of sense since the vast majority of the flag lot route, outside of ReWa's fenced plant property, runs through a shared driveway and would require no clearing whatsoever. (R. p. 605 lines 24-25; R. p. 605, lines 1-4.) At this time (or ever), no easement application had been received from ReWa and, thus, not approved by ReWa's Board. (R. p. 586, lines 4-18.) Bishop testified he would never have allowed land to be cleared in the absence of route approval and executed easement. (R. p. 605, lines 2-9) ("Q. That never happened, did it? A. No, it did not happen."); (*See also* R. p. 606, lines 5-10.)

¹⁴ Interestingly, during the deposition of Jay Alexander, an employee of Windsor Aughtry, Alexander testified that Bolo never informed him of Bishop's concerns with the Flag Lot route until ReWa communicated them directly. (R. 878 (p.21-22) lines 24-25 & 1-2) This could very well explain why Bolo now attempts to blame ReWa for the delay. That is to say, Bolo knows ReWa informed him, at the project's start, to confirm the proposed route before completing substantial engineering work. Bolo's failure to do so created the problems Appellant and Windsor Aughtry encountered in August of 2007.

understand what you are saying about the route." (R. p. 813, Ex. 20) Now, Bolo contends he did not really mean what he wrote—he was just being "diplomatic." (R. p. 328, lines 9–18)

Tellingly, Bolo would not answer even the most basic questions about the Flag Lot. He transparently deflected his responses to some other point of time occurring months and years later. But Bolo was not confused. He intentionally confused his responses and purposefully conflated what occurred on different routes. To answer the questions candidly would mean Bolo had to admit the entire delay for the first 18 months of Appellant's project occurred exclusively at his own hand.

The Flag Lot Route can be summarized as follows:

- In March of 2006, Bishop informed Bolo to shore up the forced main route on ReWa's property before he begins engineering design. (R. p. 609, lines 8–11)
- Bolo ignores Bishop and Appellant does not contact him about the route for eighteen months. (R. p. 609, lines 12–15)
- Once Appellant actually contacts Bishop about the route, Bishop walks the route within only a few days. (R. p. 609, lines 12–15)
- After Bishop walks the route with Deaton, he communicates problems with the route to Bolo within 24 hours. (R. p. 609, lines 16–19)
- The problems with the route could have been detected as early as March of 2006, had Bolo followed Bishop's advice and supplied the requested information. (R. p. 609, lines 22–25)
- Bolo's unwillingness to supply the proposed route to Bishop caused a delay in the project for the first 18 months.¹⁵

¹⁵ Gene McCall testified the average length of the project would be three to six months. (R. p. 91, lines 10–17) While ReWa believes such an estimate is too short for a project of this complexity, if taken as true, by McCall's own testimony, Bolo delayed Appellant's project somewhere in the range of 3 to 6 times as long as it should have lasted by failing to supply the route information, survey, and design plans requested by ReWa beginning in March of 2006.

Notwithstanding all of the evidence, and unwilling to accept any personal responsibility, Bolo blames ReWa for his own self-inflicted delays.

- **Route 2—The Bishop Proposal: 8/27/07 to 11/26/07 (3 Month Delay):**

Bishop did not leave Appellant without recourse. In the same e-mail dated August 27th, 2007, Bishop informed Bolo of an alternate solution.¹⁶ (R. p. 813, Ex. 20) Bishop wrote:

With that said, I would propose the following:

1. Have the Riversway subdivision pump to your site using the right of way you recently purchased.
2. Install a pump station sufficient to pump your site flow along with the Riversway flows.
3. Run your force main up Harrison Bridge road to Metropolitan's gravity sewer.
4. All that would be needed to install the force main is a DOT encroachment which would not cost. Additionally there is sufficient room to install the force main and would be much easier, quicker and less expensive even if you had to upgrade Metro's existing gravity line.

(R. p. 813, Ex. 20) Bolo testified he loved the proposed route. *See* R. p. 332, lines 14–18.

But, in his correspondence to another Insite Group employee, he wrote: "Here is the connection point they are proposing...It is a total cluster f*ck!" (R. p. 842, Ex. 35) Bolo never articulated such concerns to Bishop.

Bolo, by contrast, testified the Bishop Proposal constituted a viable engineering solution. (R. p. 332, lines 19–21) ("Engineering wise, it was [viable]") Indeed, Bolo pursued the Bishop Proposal and even sent ReWa a proposed sketch of the new route. (R. pp. 781–782, Ex. 7) But, according to Bolo, Metro queered the route. (R. p. 332, lines 17–18) ("Metropolitan wouldn't allow us to use their easement."); *see also* R. 993 (Unanswered Requests for Admissions, #9 stating, "The Bishop Proposal would have worked if [Appellant]

¹⁶ This has become known in the litigation as the "Bishop Proposal."

could have had access to existing right of ways owned by the Metropolitan Sewer Subdistrict.") Bolo also implausibly testified, at this point in time, Mike Dickson, the Executive Director at Metro, informed him about his discussions with ReWa about amending the Sewer Use Regulation. (R. p. 336, lines 1-12) Unfortunate to Bolo's credibility, however, ReWa's Board did not even begin considering the Sewer Use Regulation's amendment until late November or early December 2007, roughly sixty to ninety days *after* this point in time. (See R. p. 465, lines 21-24) By then, the parties had already begun evaluating the River Route, discussed below.

After impeachment with his deposition testimony, Bolo eventually admitted Appellant's project collaborator, Windsor Aughtry, objected to the Bishop Proposal because of increased costs. (R. p. 348, lines 2-6); *see also* R. p. 993 (Unanswered Request for Admission, #7 stating, "The owners of the Riversway development objected to the Bishop Proposal due to cost reasons.") Windsor Aughtry's representative, Jay Alexander, testified both parties objected to the costs of the Bishop Proposal. (R. p. 878, Alexander Depo., p. 24, lines 5-10) Yet, neither party could actually testify what the costs of the Bishop Proposal actually were. (R. p. 878, Alexander Depo., p. 23, lines 24-25) Appellant, in the end, abandoned the Bishop Proposal for reasons not altogether clear. What is clear is ReWa presented a viable alternative and Appellant abandoned the proposal for reasons unrelated to ReWa.

- **Route 3—The River Route: 11/26/07 to date (Indefinite Delay--Never Finalized):**

After abandoning the Bishop proposal, during early October of 2007, Appellant once again approached ReWa about how to obtain sewer service. *See, e.g.*, (R. p. 816, Ex. 21) (September 30, 2007 e-mail, "I talked to my partners at Windsor Aughtry and was told they were not willing to accept the longer route...be back in touch soon.") ReWa again sat down

with Appellant and, over the next few weeks, mapped out another alternative route. The new route allowed Appellant to cross ReWa's Lower Reedy Plant property. This particular route followed the river on ReWa's property.¹⁷ (R. p. 817, Ex. 22) ("As I understand it we are coming up the river now.") And, as with the Flag Lot Route, the issuance of a Flow Acceptance Permit was: subject to both Metro's and ReWa's final approval of the engineering plans, subject to Appellant filing an application to obtain right of ways, subject to Appellant obtaining an executed agreement by all parties for the ownership of the force mains and pump station, and subject to Appellant otherwise obtaining a Flow Acceptance Permit.

Even though ReWa told Appellant that it could cross its property along the river, just like the Flag Lot Route, Appellant never filed an application for a right of way over ReWa's land. The documentary evidence wholly contradicts Bolo's testimony regarding the River Route. According to Bolo, Appellant never submitted easement applications because ReWa would not approve the route. (R. p. 327, lines 2-4; R. p. 130, lines 20-24 (No application for encroachment because plans were not finalized.)) However, e-mail correspondence from Ashley Hornung, Bolo's assistant, dated January 9, 2008 states:

I have attached the proposed route through your properties...Please let me know if this layout is ok so I can get an easement document wrote up and signed by you all. I will then also have to get an encroachment application signed by you to go through the property I suppose.

(R. p. 818, Ex. 23 (emphasis added)) Two days later, on January 11, 2008, Bishop responded, "The route in general looks to be ok." (R. pp. 819-820, Ex. 24.) Yet, Appellant never submitted easement applications to ReWa, even after Bishop's confirmation of the layout.

¹⁷ This route has become known in the litigation as the "River Route."

Appellant likewise never submitted final engineering plans for the River Route. (R. pp. 635-637) Appellant never obtained an agreement from all parties involved concerning the ownership and maintenance of the pump station and force main. (R. pp. 635-637) Appellant consequently never obtained a Flow Acceptance Permit for the River Route.¹⁸

Significant delays hampered the River Route for two reasons. First, in January of 2008, Riversway and Rivertrace revealed for the first time that they intended to build two force mains across ReWa's property instead of one. Bishop replied: "No one has indicated to me that there would be two force mains. This has never been discussed." (R. p. 821, Ex. 25) According to Gene McCall, Appellant's engineering consultant, the possible need for the second force main resulted because delays placed Windsor Aughtry substantially behind Appellant from an overall engineering standpoint. (R. p. 91, 10-17; *see also* R. p. 596, lines 23-25) (Windsor Aughtry up to a year behind) And, as discussed below, this design issue was never resolved by Appellant and Windsor Aughtry, which was the *real* reason Bolo never applied for an easement from ReWa. (*See* R. p. 822, Ex. 26) ("[W]e are not sure at this time if we will be using a combined force main from Harrison Bridge Road to the Western Carolina site or 2 separate force mains in the same right of way."); (R. p. 634, lines 12-25) (recalling the project never resolved the joint or single force main issue and never re-approached ReWa seeking approval one way or another.) Importantly, ReWa could not issue a Flow Acceptance Permit, even if it were so inclined, until final plans were submitted and a right of way across ReWa land had been executed, neither of which could occur until the issue of force main design resolved.

¹⁸ The importance of these facts, as discussed below, relates to the incompleteness of Appellant's application throughout the process.

Second, the River Route was delayed because Metro (not ReWa) raised concerns about Bolo's engineering calculations. (R. p. 631, line 22-p. 632, line 7; *see also* R. p. 993 (Unanswered Request for Admission, #10 stating: "Metro expressed concerns about the engineering calculations completed by the InSite Group in relation to the River Route.") Metro (perhaps rightfully so) objected to Bolo's engineering proposal citing concerns that the river basin was too flat and could not be served by a small diameter pipe. Metro's objections caused delays in the Spring of 2008, having nothing to do with ReWa. At one point, Metro even instructed Appellant to stop working until they heard back from Metro.

Appellant never finalized its plans for the River Route and correspondingly never submitted final plans for the route to ReWa's Lower Reedy Treatment Plant. In fact, as noted above, the correspondence dated April 14, 2008 reflects that Appellant and Windsor Aughttry still had not even decided basic plans regarding the design of the force main Appellant sought to build on ReWa's property. (R. p. 822, Ex. 26) The April 14, 2008 correspondence further confirms the incomplete nature of the plans by noting, "We will review this design and make this final determination as soon as we begin finalizing our design." (*Id.*) On May 5, 2008, ReWa amended its Sewer Use Regulation in relation to privately-owned pump stations. (R. pp. 772-775, Ex. 3) At this time, and at no time thereafter, did Appellant submit finalized engineering plans for the River Route (or any route).¹⁹

¹⁹ During the hearing Bolo jumped up during the cross-examination of Bishop claiming that certain file materials in the ReWa file constituted a missing engineering profile from the proposed River Route force main. When Bishop reviewed the profile, however, it was dated July of 2006. (R. p. 673, lines 7-13) As discussed above, the River Route was not even discussed until November of 2007. It appears the engineering profile is from the subdivision's force mains, not the force main sought on ReWa property, but again, ReWa is not entirely sure what it is because it is unlabeled and has no point of reference to anything allowing ReWa to evaluate it. (R. p. 675, lines 2-11.) Thus, it appears this is yet attempt by Bolo to bootstrap documents to where they have no apparent application. Even if the materials were what Bolo

At the time of the regulatory amendment in May of 2008 (the point of time for which Appellant claims it possessed vested rights), Appellant had not: obtained executed right of ways, had not finalized an agreement for the ownership of the force mains and pump station, had not submitted finalized plans, and had not obtained a Flow Acceptance Permit. (See R. pp. 635-637; *see also* R. p. 993 (Unanswered Requests for Admissions ##14, 15, and 18 stating Appellant never received a flow acceptance letter and never obtained an executed right of way from ReWa.) Indeed, Appellant never submitted any of these materials, even though Bishop informed Bolo all were required as early as March of 2006.

- Routes/Options 4 & 5:

The amendment to the Sewer Use Regulation did not prohibit Condor from owning the pump station and force main as long as Condor owned the collector system as well. (See R. pp. 772-775, Ex. 3; R. p. 160, lines 7-10 (Condor could have owned whole system inside of Metro but Metro would not let it happen); *see also* R. p. 993 (Unanswered Request for Admission #11 stating: "Condor Environmental, LLC could own both the pump station and collector system under the May 5, 2008 amendment to the Sewer Use Regulation.") In such scenario, Condor would have to reach a final agreement with Metro wherein it secured Metro's agreement that Metro would backstop the project if Condor could no longer own and maintain the infrastructure (i.e., death, receivership, insolvency, bankruptcy). (R. pp. 772-775, Ex. 3) According to Bolo, Condor agreed to own the pump station, force main, and collector system. (R. p. 993 (Unanswered Request for Admission #12 stating, "Condor agreed to own both the pump station and collector system to satisfy the May 5, 2008 amendment to the Sewer Use

said they were, which they are not, it stretches any notion of credibility that a head engineer would testify under oath that such materials constitute the final plans and drawings a public service provider would need to provide a Flow Acceptance Permit.

Regulation.") Metro, however, would not consent to Condor's ownership of the collector system. (R. p. 993 (Unanswered Request for Admission #13 stating, "Metro objected to Condor's ownership of Appellant's collector system."); *see also* R. p. 160, lines 7-13 (Metro would not let it happen)) For this reason, Option 4 was never seriously pursued by Appellant through no fault of ReWa.

Option 5 mirrors Option 4, except that it addresses the possibility that Condor could own the collector system, force main, and pump station, if Appellant deannexed from Metro's subdistrict. If Appellant were outside of the Metro subdistrict, Metro would no longer have to "backstop" the Condor system under the ReWa amended regulation. Condor, under this scenario, would have to reach an agreement with ReWa, but ReWa would have worked to reach such an agreement. Appellant never pursued Option 5 whatsoever. (R. p. 993 (Unanswered Request for Admission #17 stating, "[Appellant] and Condor never pursued the option of Condor's ownership of the pump station and collector system outside of Metro's Subdistrict."))

- **Options 6 and 7:**

After enacting the amendment to the Sewer Use Regulation, Appellant contended it could no longer complete its project. ReWa then did something it had never done before. ReWa informed Appellant that if it deannexed from Metro's Subdistrict, it would agree to own the pump station, force main and collector system. (R. p. 478, line 14-24); (R. p. 479, lines 1-13) (Offered to be the backstop if they de-annexed and Metro agreed.)

While ReWa had no desire to accept this responsibility, it once again tried to accommodate Appellant's project.²⁰ But to be clear, ReWa explained to Appellant that it had no experience calculating maintenance and operations costs and would need to work with Appellant to calculate the same in a fair manner. Appellant never deannexed from Metro because, according to Bolo, ReWa never explained why it could not provide services within Metro's subdistrict. (R. p. 993 (Unanswered Request for Admission #16 stating, "[Appellant] never deannexed from Metro.") The evidence from this time period demonstrates Bolo's contention, in this regard, as simply untrue.

- **Option 8:**

One final option presented by Appellant, but abandoned, related to the use of a package plant on the Rivertrace property. Appellant inquired whether ReWa would agree to a package plant. ReWa agreed. Indeed, ReWa even offered to own the package plant, if it proved cost-effective as an alternative. Appellant never pursued this alternative.

B. Scott Bolo's Testimony Lacked Credibility.

As the sole owner for Appellant who appeared to testify, Bolo's testimony suffered from serious credibility deficits. To ReWa, it appears relatively obvious why the documentary evidence coincides with and confirms the testimony of ReWa's witnesses while contradicting almost all of Bolo's sworn testimony. Some of the many examples are set out below:

- **Bolo denied ever receiving an encroachment permit application form from Bishop.** (R. p. 274, lines 12-14 ("I deny that I received it."))

²⁰ In relation to these issues, it is important to note ReWa's role in providing sewer service. ReWa is a regional sewer authority. As such, it is very rare for ReWa to agree to own collector systems, force mains, and pump stations intended to accommodate a developer. ReWa owns no collector systems. Owning such assets detracts from ReWa's primary role as a treatment provider and creates administrative and operational headaches. ReWa's offer, in this regard, reflects ReWa's genuine efforts to aid Appellant in obtaining sewer service.

But see, R. p. 590, lines 10–11 ("Q. Did you send it to him? A. I did.")
See also, R. p. 811, Ex. 18 (E-mail from Bolo to Bishop, "We are...finalizing the WCRSA easement forms forwarded.")

- **Bolo testified he was design complete in mid 2007. (R. 274, lines 15-16)**

But see, R. p. 130, lines 8–10, p. 134, lines 1–4 (Never saw final plans for Appellant or survey.)

See also, R. p. 635–637 (No finalized plans, easement applications, governmental agreement ever submitted to ReWa).

Appellant similarly has not introduced into evidence the finalized application materials required by ReWa.

- **Bolo testified he prepared final engineering plans for all collector systems and all force mains. (R. p. 186, lines 9-16.)**

But see, R. p. 130, lines 8–10, p. 134, lines 1–4 (Never saw final plans for Appellant or survey.)

See also, R. p. 635–637 (No finalized plans, easement applications, governmental agreement ever submitted to ReWa).

Appellant similarly has not introduced into evidence the finalized application materials required by ReWa.

- **Condor environmental filed the encroachment permits with ReWa. (R. p. 281, lines 19-22)("Q. Condor environmental filed the encroachment permits? A. They signed and filed them as we were directed by Brian Bishop.")**

But see (R. p. 130, lines 20–24) (No application for encroachments filed by Condor with ReWa because no final plans for pump station or force main.)

See also (R. p. 283, lines 21–24) (When asked by the hearing officer, Bolo then testified ReWa wouldn't let Condor file the encroachment permit application.)

See also, (R. p. 635–637) (No finalized plans, easement applications, governmental agreement ever submitted to ReWa.)

- **Bolo testified he spoke to Attorney Stilwell about encroachment applications in February of 2007 concerning the River Route (discussed above). (R. p. 272, lines 14-25.)**

But see R. p. 817, Ex. 22 (Reflecting the River Route not pursued until late November 2007—Bolo noting, "As I understand it, we are coming up the river now.")

See also, (R. 276, lines 12–13) (Recanting when he realized documents undermined testimony, "I don't really remember when we met with Mr. Stilwell.")

- **Bolo testified he had submitted final plans for both subdivisions and a force main route to ReWa as of February 14, 2007. (R. p. 291 lines 10-18)**

But see R. pp. 807–808, Ex. 15 (Bishop continue to ask for final plans and force main route in February 14, 2007.)

See also, (R. p. 130, lines 20–24) (No application for encroachments filed by Condor with ReWa because no final plans for pump station or force main.)

See also, (R. p. 635–637) (No finalized plans, easement applications, governmental agreement ever submitted to ReWa).

Bolo's testimony is replete with factually inaccurate testimony regarding Appellant's project. Indeed, Bolo's cross-examination and Bishop's direct examination intentionally track the exact same chronology and substantially the same exhibits. ReWa invites the Court to compare and contrast the consistency of the witnesses' respective testimony. Bolo's testimony lacks all credibility.

IV. ADMINISTRATIVE PROCEDURE & JURISDICTION

Appellant argues ReWa should have granted it a Flow Acceptance Permit but did not, or alternatively, should have grandfathered Appellant's permit application. Two classes of prospective sewer customers require approval directly from ReWa in order to discharge into ReWa's sewer infrastructure. Pursuant to ReWa Sewer Use Regulation §2.2, entitled "Permits Required," any entity "planning to discharge wastewater in excess of 1,000 gallons per day, or planning a direct connection to ReWa sewer...must be [] approved by ReWa." (R. p. 1012, ReWa Sewer Use Reg. §2.2)²¹ Appellant's proposed system would both discharge in excess of 1,000 gallons per day and, under most iterations, directly connect to ReWa's system.

Section 6.1(2) of ReWa's Sewer Use Regulation establishes an administrative process, which must be exhausted in relation to challenged actions concerning permits. (R. p. 1030,

²¹ Industrial Users also require permits. The general permitting process and challenges thereto are generally treated the same under ReWa's Sewer Use Regulation.

ReWa Sewer Use Reg. §6.1(2)) Pursuant to §6.1(2), entitled "Wastewater Discharge Permit or a General Permit," "Any person whose permit is denied, or is granted subject to conditions he deems unacceptable, shall have the right to request an Adjudicatory Hearing..." (R. p. 1030, ReWa Reg. §6.1(2).) "Requests for an Adjudicatory Hearing" must be served "on ReWa within fifteen days following any final administrative decision by ReWa on an application, permit...or licensing matter..." (R. p. 1062, ReWa Sewer Use Reg. §8, Attachment C, ¶9.)

"After a determination is made by the hearing examiner in any case other than an enforcement proceeding, any party may apply to ReWa for a review of the determination of the hearing examiner prior to a final decision in the matter by ReWa." (R. p. 1031, ReWa Reg. §6.1(2)) Such application must thereafter be submitted within "15 days of receipt of the determination stating specifically the grounds of objection to such a determination." (R. p. 1031, ReWa Reg. §6.1(2)) "Any party aggrieved by a final decision of ReWa, other than in an enforcement case, may appeal such decision to the Court of Common Pleas...under the same guidelines applied to State agencies which are set forth in S.C. Code §1-23-380." (R. p. 1031, ReWa Reg. §6.1(2)) Accordingly, this Court possesses appellate jurisdiction to hear appeals from final decisions of ReWa's Board of Commissioners in disputes where parties contend they should have been issued a Flow Acceptance Permit but did not receive one, or alternatively, should have had different standards applied to its Flow Acceptance Permit application.

V. LAW/ANALYSIS

This Court should affirm the hearing officer for the following reasons:

A. Never Before Has Appellant Raised Any of the Issues It Now Argues on Appeal.

Having never previously argued any of the issues now raised to the hearing officer or ReWa Board, Appellant cannot raise *any* of the issues argued in its brief on appeal. "Issues and arguments are preserved for appellate review only when they are raised to and ruled upon by the lower court." *Elam v. S.C. DOT*, 361 S.C. 9, 23 (2004). Thus, it is axiomatic: an Appellant cannot raise any of the issues it now argues for the first time on appeal. *See Wilder Corp v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1988) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.")

Not only did Appellant not raise the arguments it now advances with the hearing officer, it similarly never obtained a final determination from ReWa's Board of Commissioners as required by applicable regulation. The controlling provision of ReWa's Sewer Use Regulation states as follows:

After a determination is made by a hearing examiner in any case other than an enforcement proceeding, any party may apply to ReWa for a review of the determination of the hearing examiner prior to the final decision in the matter by ReWa. However, application must be submitted in writing within 15 days of receipt of the determination stating specifically the grounds of objection to such determination of the hearing officer.

(R. p. 1030, Sewer Use Reg. p. 32, § 6.1, ¶ 2.) Instead of pursuing a final decision in the matter from ReWa's Board, Appellant improperly noticed an appeal directly to this Court on September 29, 2011.

The regulation prescribes a full review process including: the submission of written briefs, oral arguments before the Commission, the completion of a qualified record. (R. p. 1031, Sewer Use Reg. §6.1(2)) During the proceedings, the Commission may affirm, reverse, or modify the hearing officer's findings (R. p. 1031, Sewer Use Reg., §6.1(2)) Or, the Commission may re-open the adjudicatory hearing to gather additional evidence as related to the issues challenged. (R. p. 1031, Sewer Use Reg., §6.1(2)) Or, the Commission may also supplement the record through the presentation of rebuttal evidence. (R. p. 1031, Sewer Use Reg., §6.1(2))

No dispute exists in this case: Appellant never asked ReWa's Commission to review the hearing officer's order within the time prescribed by law. No dispute exists that Appellant failed to state any objection to the Order below. And Appellant never participated in a hearing before ReWa's Commission whose final decisions this Court may actually review from a jurisdictional standpoint. (R. p. 1031, Sewer Use Reg., §6.1(2) ("Any party aggrieved by a final decision of ReWa...may appeal such decisions to the Court of Common Pleas."); *see also Adamson v. Richland County School Dist. One*, 332 S.C. 121, 503 S.E.2d 752 (Ct. App. 1998) (Holding that Circuit Court lacked jurisdiction to review termination by Superintendent which was not appealed to School Board because the Teacher Employment Dismissal Act limited appellate review to final School Board decisions); *Nucor Steel v. S.C. Pub. Serv. Comm'n*, 439 S.E.2d 270, 272 (1994) (Reversing Circuit Court decision regarding industrial gas prices because Public Service Commission had not issued final decision))

Appellant consciously elected not to pursue review of the hearing officer's decision by ReWa's Commission in the time allotted by regulation thereby ripening the hearing officer's order to finality. Importantly, Appellant knew exactly how the Administrative process was

required to unfold. In his unappealed March 19, 2010 Order, Judge Miller specifically stated: "As further set forth in the ReWa Regulations a person may appeal a denial of a permit to: (1) first, a hearing examiner, (2) secondly, to the Board of Commissioners of ReWa, and (3) upon a final decision, to the Court of Common Pleas. Plaintiffs, having failed to engage in this review process, have not exhausted their administrative remedies as required by law." (R. p. 5.)

During the administrative hearing, the hearing officer specifically noted "there's one more administrative step . . . before any appeal would go to the Circuit Court." (R., p. 61, l. 15-20.) Similarly, ReWa's written closing (served on Appellant) specifically outlined the process and specified all applicable dates. (R. p. 974 (Stating the hearing examiner's determination may be reviewed upon application submitted within "15 days of receipt of the determination stating specifically the grounds of objection to such a determination" and thereafter outlining the appeal process to the Circuit Court.) Moreover, in his written order, the hearing officer again noted:

The Circuit Court noted this process as follows: "As further set forth in the ReWa Regulations a person may appeal a denial of a permit to (1) first, a hearing examiner, (2) secondly, to the Board of Commissioners of ReWa, and (3) upon a final decision to the Court of Common Pleas.

(R. p. 8, Fn. 1.)

Appellant, like it has throughout this proceeding, and like it did throughout the underlying permitting process, simply ignored the regulatory process required to obtain appellate review by this Court. Prior to five days ago, ReWa had no understanding of the grounds for this appeal. Appellant instead hoped this Court would allow it to disregard the process mandated by law and submit, at the 11th hour, a thirty-five (35) page brief, which

raises brand new issues, which habitually misstates the record, and which intentionally confuses the issues before the Court. The Court should affirm the ruling of the hearing officer as a now unreviewable final order. *See, e.g., Lominick v. City of Aiken*, 135 S.E.2d 305 (1964) (After Plaintiff failed to follow correct administrative process and exhaust her remedies, the South Carolina Supreme Court held: "It was incumbent upon the respondent Schwerin and, for that matter, the City Council of Aiken to appeal to the Zoning Board of Adjustment from the decision of the Building Inspector if they, or either of them, considered his decision erroneous. Not having done so, she cannot now attack the validity of his decision."); *Meredith v. Elliott*, 147 S.E.2d 244, 249 (1966) (Superseded by statute on unrelated grounds) (Holding: "Having failed to follow the administrative remedy created by the statute for the correction of errors in the valuation of their property, they are precluded from resorting to the courts for relief.")

B. Appellant's "New Arguments" Altogether Lack Merit.

Not only does Appellant raise all new issues on appeal, but all of the issues raised by Appellant wholly lack merit. Respondent addresses the "Issues" raised by Appellant as they appear in Appellant's Brief.

Issue 1: As Raised by Appellant: Alleged Factual Errors in Administrative Order's Factual Background Section (Appellant's Brief, pp. 18-20)

Appellant initially challenges the hearing officer's factual recitation set forth in the Factual Background of the Order. ReWa would note that Appellant fails to explain why any of the stray facts it now challenges as unsupported would materially change the outcome of the adjudicatory hearing. For example, Appellant somehow challenges (App. Brief, p. 18, ¶A) that it knew public sewer service was not available in the area where it purchased property

(which it did thereby prompting Appellant to consult with Condor, LLC in the first place *see infra*). Appellant challenges (App. Brief, p. 18, ¶B) whether studies had been conducted for basin-wide planning prior to Appellant's purchase of the subject property (which they had not and were only completed much later *see infra*). Appellant challenges (App. Brief, p. 18, ¶C) whether Metro declined to own the force main and pump station (which it did which is why consultation with Condor, LLC occurred *see infra*). Appellant challenges (App. Brief, p. 19, ¶D) whether collaborating with "Grant Estates" caused delay (which it did not because Appellant did not collaborate with Grant Estates but with Riversway, as found by the hearing officer (R. p. 10) but collaborating with Riversway did complicate the process *see infra*). And Appellant challenges (App. Brief, p. 19, ¶E) whether the peculiarities of the project led to different routes.

While ample evidence supported the hearing officer's findings in the above regards (*see infra*), none of the issues raised under Appellant's Issue 1 prove material to any outcome determinative fact. Tellingly, Appellant has not, and cannot, tell the Court how such factual findings, if they were in error, would change the hearing officer's findings. Indeed, they would not.

To the extent such factual findings matter, however, the South Carolina Administrative Procedures Act ("APA") provides the correct standard review for factual determinations on appeal, since ReWa's Sewer Use Regulation incorporates the hearing procedures and guidelines set forth in the South Carolina Administrative Procedures Act ("APA"). (*See* R. p. 1031, ReWa Sewer Use Reg. § 6.1, ¶ 2 ("[U]nder same guidelines applied to State agencies which are set forth in S.C. Code §1-23-380.") South Carolina Code §1-23-380(e) constrains a reviewing Court from upsetting an agencies factual determinations, unless they are "(e) clearly

erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code §1-23-380(e).

Moreover, "Under the APA, [the appellate court cannot] substitute its judgment for that of [ReWa or ReWa's hearing officer] as to the weight of the evidence on questions of fact." *Leventis v. South Carolina Dep't of Health & Envtl. Control*, 340 S.C. 118, 130, 530 S.E.2d 643, 649-50 (Ct. App. 2000) (quoting *Ballenger v. S.C. Dep't of Health and Envtl. Control*, 331 S.C. 247, 251, 500 S.E.2d 183, 185 (Ct. App. 1998); S.C. Code §1-23-380(e). As to issues of fact, the hearing officer's decision should be affirmed unless clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. *Id.* "The possibility of drawing two inconsistent conclusions from the evidence" will not mean the agency's conclusion was unsupported or improper. *Waters v. South Carolina Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996) (quoting *Palmetto Alliance, Inc. v. South Carolina Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)). Finally, "the burden is on appellants to prove convincingly that the agency's decision is unsupported by the evidence." *Id.*; see also *Tennis v. S.C. Dep't Soc. Servs.*, 355 S.C. 551, 558 (Ct.App. 2003).

a. Substantial Evidence Supports the Hearing Officer's Findings Relating to Period Before Appellant's Land Purchase (App. Brief, p. 18, ¶A).

As to Category A (see App. Brief, p. 18, ¶A), substantial evidence supports every finding made by the hearing officer. No public sewer existed in the basin where Appellant's property was located. (R. p. 632, l. 8-25; 633, l-8) (Bishop: Discussing basin-wide planning in subject basin as typical especially, when as here, no public sewer is in the basin.) In fact, the lack of public sewer underlies the entire case. Because no public sewer existed, Appellant

proposed to use a private utility (Condor, LLC) to pump sewer uphill and across ReWa's treatment plant. Appellant's questioning of this fact is bizarre and highlights its lack of understanding of basic facts.

Appellant's willingness to misstate the evidence of record is alarming. Appellant inexplicably cites Exhibit 13. While Exhibit 13 does confirm ReWa's Lower Reedy Wastewater Treatment plant had capacity (i.e., room to accept) to serve the proposed volume of flow from Appellant's project. (R. p. 805, Ex. 13) Such confirmation of capacity constitutes only the very first step in the permitting process. (R. p. 567, l. 16-25) It does not mean public sewer is available in the basin, as no gravity mains exist in the subject basin to date, which is an undisputed and undisputable *fact*.

Appellant next miscites page 267 of the Record for the proposition that Bishop "told the Appellate that they had met the engineering requirements for connection to Respondent's trunk lines." This is flatly untrue. Bishop never told Appellant it satisfied the engineering requirements for a Flow Acceptance Permit. (R. p. 921, l. 11-14; R. p. 660, l. 1-4 (Bishop: "I did not have enough information to approve" Appellant's plans.)

Moreover, the passage cited by Appellant (yet again) does not say what Appellant contends. The passage states that, Referring to Exhibit 13, Bolo testified: "Mr. Bishop did tell us that we'd have to meet these requirements. . . ." (R. p. 267, l. 19-25.) The passage does not state, contrary to Appellant's misrepresentation, that Bishop told Appellant the engineering requirements were satisfied. Accordingly, as to Category A, Appellant has not "convincingly" proved the hearing officer's factual findings are "unsupported by the evidence." *Waters v. South Carolina Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917. (1996).

b. Substantial Evidence Supports the Hearing Officer's Finding About Basin-Wide Studies.

As to Category B (*see* App. Brief, p. 18, ¶B), substantial evidence supports every finding made by the hearing officer. The hearing officer noted that "no engineering study had previously" (as in before Appellant purchased the property in June of 2006) been performed of the "basin embracing" Appellant's land. Ignored by Appellant, the testimony of ReWa's Executive Director, Ray Orvin squarely supports the finding. (R. 441, l. 4-8) (Indicating when "when the developments came on the table, there wasn't a plan for how that whole area would be handled.")

Appellant is correct that ReWa *later* paid for the engineering firm of Rogers and Calcott to complete a study but that was significantly *after* Appellant and Riversway purchased their respective properties and began pursuing the subdivisions. (R. p. 685, l. 13-19) (Study occurred in 2008.) As the hearing officer found, at the time Appellant purchased the property, no study had been completed because growth (i.e., population densities) in the subject basin had not yet warranted it. (*See also* R. 438, l. 15-18) ("I think a lot will depend on how development occurs in the basin and how it works out, you know, with growth.") Accordingly, as to Category B, Appellant has not "convincingly" proved the hearing officer's factual findings are "unsupported by the evidence." *Waters v. South Carolina Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996).

c. Substantial Evidence Supports the Hearing Officer's Findings Regarding Metro.

As to Category C (*see* App. Brief, p. 18, ¶C), substantial evidence supports every finding made by the hearing officer. Appellant enigmatically questions the hearing officer's reference to Metro's refusal to own and maintain the force main and pump station—an

undisputable fact. Appellant's own witness, Gene McCall, testified his company, Condor, LLC created a niche business because subdistricts like Metro will no longer own pump stations. (R. p. 88, l. 4-25) ("[T]he sewer subdistricts said they weren't taking [pump stations] anymore."); (R. p. 109, l. 7-10) (Condor planned to own the pump station and force main because Metro did not want to own them.)

Appellant's property is located in Metro's service area. If Metro had agreed to own the pump station and force main, there would have never been any need to involve Condor.²² Moreover, Appellant sued both ReWa and Metro. (R. pp. 21-38) Accordingly, as to Category C, Appellant has not "convincingly" proved the hearing officer's factual findings are "unsupported by the evidence." *Waters v. South Carolina Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996).

d. Facts Concerning Complications Arising from Two Projects.

As to Category D (*see* App. Brief, p. 19, ¶D), substantial evidence supports every finding made by the hearing officer. As an initial matter, Appellant's joint venture was not Grant Estates, but Riversway.²³ (*See* App. Brief, p. 19, ¶D ("[R]eferring to the companion Grant Estates development...") The hearing officer correctly identified the companion project as Riversway. (R. p. 10.) It is telling, and it should give the Court pause, that Appellant questions the hearing officer factual findings but cannot even properly identify the entity with which it collaborated.

²² Appellant once again suggests ReWa "held-up" Appellant's project. The facts of how the project unfolded are set forth in detail *supra* and incorporated by reference in response. Needless to say, Appellant's allegations have no basis in fact, as the hearing officer so found.

²³ Interestingly, although Riversway collaborated on the project with Appellant, it never joined Appellant in its lawsuit against ReWa. While Grant Estates did join Appellant, it subsequently abandoned the lawsuit presumably as legally unfounded.

Contrary to Appellant's representations, significant evidence exists demonstrating the collaboration of the separate projects compounded project difficulties. To accommodate flows from each project, Appellant and Riversway proposed to utilize a "manifold main."²⁴ As Gene McCall admitted, ["T]hat truly was kind of a unique issue here." (R. p. 95, l. 12.) McCall acknowledged the manifold main presented, "An engineering coordination problem" and "question[s] for the two design engineers for the Windsor/Aughtry Group [Riversway] and [Appellant]." (R. p. 95, l. 1-16.) Moreover, Bishop testified:

Yes, because – you know, I said here for each subdivision, meaning there's two separate submittals, meaning that the way we had described it, they were looking at having a pump station at each one, coming up and manifolding in it. So, I needed to know what each site was doing and what the flow – and what they're asking for, so I needed that information.

(R. p. 595, l. 1-7); *see also* (R. p. 806, Ex. 14) (Bishop: "In addition, we will need the final plans and profiles for both subdivisions and the force main route along with the flow request in order to provide you with the flow acceptance letter."); (R. p. 807, Ex. 15) (Bishop: "I cannot send the flow acceptance letter until we have the final plans for both subdivisions and the force main route along with working out the easement agreement."). Bishop later testified:

Well, first of all, we've never approved – or at least since I've been here for sure, I've never approved a site where you had two pump stations wanting to manifold into one line. And so there's some issues of making sure that each one of them were working properly, that they can serve each subdivision when one's running and the other's not running. When both of them are running, there's pressures, there's issues that need to be worked out that. So that's the main nontypical thing about this, not to mention the fact that they're wanting to go through our treatment plant.

²⁴ Technically speaking the manifold would be the two pressure pipes from River Trace and Rivers Way that would connect into ReWa's force main line.

(R. p. 596, l. 4-16.) And, Bishop confirmed as the hearing officer found: "Q. Was Riversway on pace with Rivers Trace? A. No. Q. How far behind were they? A. I'd say probably a year to even get me plans." (R. p. 596, l. 21-25;) *see also* (R. 442-443) (Orvin: Discussing different engineering plans discussed between parties and noting Riversway's lag.).

Contrary to Appellant's assertions (App. Brief, p. 19, ¶D), the evidence of record reflects Appellant delayed the project's progress, not ReWa. Although ReWa instructed Appellant in its very first communication to identify the specific route across ReWa's plant property (*See* R. p. 805, Ex. 13), Appellant failed to identify the route, despite several additional requests, for eighteen months. (R. p. 609, l. 6-23; R. p. 610.) Within days of disclosing the route, it was discovered the route was not viable. (R. p. 813, Ex. 20.) Scott Bolo, Appellant's engineer, acknowledged Bishop was correct. (R. p. 813, Ex. 20) ("I read your notes and can understand what you are saying about the route.") Thus, the entire first eighteen months of delay could have been avoided had Appellant provided the information requested by ReWa.

Appellant's joint venturer, and not ReWa, refused the next proposed route causing additional delay. (*See* R. p. 816, Ex. 21; R. p. 878 (p. 23) lines 2-22; *see also* (R. p. 993) (Unanswered Request for Admission #7 stating: "The owners of the Riversway development objected to the Bishop Proposal due to cost reasons.") Of course, Appellant nonetheless blames ReWa. The documentary evidence proves the opposite.

The collaboration efforts with Riversway also delayed the River Route. The River Route came into play in late November of 2007. (*See* R. p. 817, Ex. 22 ("As I understand it we are coming up the river now.") By January 11 of 2008, Bishop confirmed, "The route in general looks to be OK." (R. p. 819, Ex. 24.) Bishop testified his express instructions were

to continue helping Appellant finalize its project file and he, in fact, continued to work on it. (R. p. 668, l. 9-25.)

Nonetheless, Appellant still did not submit the necessary engineering plans and applications to permit ReWa's Board to review the application. (R., p. 668, l. 14-21) ReWa's Board had to approve the project regardless because it required an easement on plant property, which only the board could grant. (R. p. 897, l. 3-5) (Boyette: "Yes. The Board would have to approve any easement or any right of way across any of our property. . . ")

In full support of the hearing officer's finding (R. p. 10), the evidence suggests Appellant and RiverTrace were struggling in their decision as how to design the force main across ReWa's property. (R. p. 822, Ex. 26) (As of 4/14/08: "We are not sure at this time if we will be using a combined force main from Harrison Bridge Road to the Western Carolina site or 2 separate force mains in the same right-of-way. We will review this design and make this final determination as soon as we begin finalizing our design) (emphasis added.) As a consequence, substantial evidence supported the hearing officer's findings as to Category D. Accordingly, as to Category D, Appellant has not "convincingly" proved the hearing officer's factual findings are "unsupported by the evidence." *Waters v. South Carolina Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996).

Issue 2: As Raised by Appellant: The Hearing Officer Allegedly Erred by Not Finding ReWa Caused Many Delays and Erred Finding Appellant Never Submitted A Complete Filing (Appellant's Brief, pp. 20-22)

As to Issue 2, and as with all factual findings, Appellant must convincingly prove the hearing officer's findings are "unsupported by the evidence." *Waters v. South Carolina Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). As noted *supra*, the clearly erroneous standard of review applies, *see* S.C. Code §1-23-380(e), and "[the

appellate court cannot] substitute its judgment for that of [ReWa or ReWa's hearing officer] as to the weight of the evidence on questions of fact." *Leventis v. South Carolina Dep't of Health & Envtl. Control*, 340 S.C. 118, 130, 530 S.E.2d 643, 649-50 (Ct. App. 2000).

As to Issue 2, substantial evidence supports every finding made by the hearing officer. The evidence fully supports Appellant's Project had a variety of peculiarities. Bishop testified in his ten years at ReWa, he had never approved a project with comparable engineering, even though he has processed thousands of projects. (R. p. 96, lines 4-7; R. p. 229, lines 13-17) The Project sought to have two privately owned pump stations and force mains which would "manifold into one line." (R. p. 596, lines 4-7) (Never approved a site involving two pump stations wanting to manifold into one line); (R. p. 515, lines 13-22) (Questions existed about manifold); (R. p. 95, lines 1-8) (Manifolds atypical in Upstate South Carolina.)

The Project was also peculiar for several other reasons. Unlike any other project, Appellant proposed to build a force sewer main across ReWa's treatment plant property. (R. p. 596, lines 14-16; p. 895, lines 10-12) ("And that's highly unusual for us to, to—and—in fact, I don't know that we've ever done that before."); R. p. 596, lines 14-16; R. p. 895, lines 21-24.) To make matters worse, Appellant's collaborator, Riversway, was also no less than year behind Appellant in relation to the timing of its project. (R. p. 596, line 23-p. 597, line 2.) Thus, ample evidence supports the hearing officer's determination that Appellant's project presented peculiar circumstances.

As discussed *supra* and incorporated herein, of the "two year" delay cited by Appellant (*see* App. Brief, p. 20), the first eighteen months of delay resulted because Appellant failed to provide ReWa with its proposed Flag Lot Route. (*See supra* pp. 5-14) Bishop instructed Appellant to provide the route before completing substantial engineering work. (*See* R. p.

805, Ex. 13) Bishop testified he was trying to help Appellant avoid spending a lot of time and money until the route was approved. (R. p. 578, lines 2-12) Correspondence during the eighteen month period reflects Bishop repeatedly requesting information about the location of the Flag Lot Route. (See e.g., R. p. 806, Ex. 14; R. p. 807-808, Ex. 15)

Despite Bishop's requests, Appellant failed to specify the route location until August of 2007, nearly eighteen months after Bishop first requested the route. (R. p. 189, ll. 20-25); (R. p. 453, lines 5-8) (Route identified to Bishop in August 2007 timeframe because, "he'd come to me in August about that.") Even then, Appellant never submitted an easement application or the require surveys. (R. p. 589, lines 4-18; R. p. 130, lines 20-24 (No application for ReWa encroachment since no final plans.) Appellant similarly failed to submit engineering plans for the Flag Lot Route. (R. p. 586, line 18-p. 587, line 1; R. p. 130, lines 8-10)

When Appellant finally disclosed the proposed route to Bishop, he walked the route within only a few days with Appellant's surveyor, Mike Deaton. (R. p. 604, lines 14-23) While walking the route, it became obvious to both Bishop and Deaton the route was not viable. (R. p. 813, Ex. 20; R. p. 608) Bishop notified Appellant of the problems either the same day or next morning. (R. p. 609, lines 2-7; R. p. 813, Ex. 20; R. p. 608) Importantly, the problems with the Flag Lot Route could have been detected as early as March of 2006, had Bolo followed Bishop's instruction and supplied the requested information. (R. p. 609, lines 22-25)

As noted *supra* at pp. 14-15, after the problems with the Flag Lot were learned, ReWa immediately began working with Appellant to identify solutions. The next proposed route was the Bishop Proposal, which resulted in an additional three month delay. Appellant concedes the Bishop Proposal constituted a viable engineering solution. (R. p. 332, lines 19-21)

("Engineering wise, it was [viable]".) Bolo "loved" this proposed route. (R. p. 332, lines 14-18) But, according to Bolo, Metro, not ReWa, queered the route. (R. p. 332, lines 17-18) ("Metropolitan wouldn't allow us to use their easement."); *see also* R. p. 993 (Unanswered Request for Admission #9 stating, "The Bishop Proposal would have worked if [Appellant] could have had access to existing right of ways owned by the Metropolitan Sewer District.")

Finally, in late November of 2007, the Parties began entertaining the River Route. By January 9, 2008, Appellant specified a specific path for the River Route. (R. p. 818, Ex. 23) Within only two days, Bishop responded, "The route in general looks to be ok." (R. pp. 819-820, Ex. 24) Of course, ReWa's Board would still have to approve the granting of an easement. But, ReWa preliminarily approved the River Route in January of 2008.

The evidence of Record demonstrates the River Route was delayed for three reasons. First, Metro (not ReWa) raised concerns about Bolo's engineering calculations. (R. p. 631, line 22 through p. 632, line 7; *see also* R. p. 993 (Unanswered Request for Admission #10 stating: "Metro expressed concerns about the engineering calculations completed by the Insite Group in relation to the River Route."))

Second, Appellant began entertaining plans to build two force mains on ReWa's property, not one. This was never disclosed to ReWa, until mid January of 2008. (*See* R. p. 821, Ex. 25) Third, the evidence of Record demonstrates that River Trace and Riversway never concluded how to design the force main across ReWa's property and, therefore, never completed finalized plans for the same. (*See* R. p. 822, Ex. 26) While Orvin did testify the Board instructed staff not to approve private pump stations without further Board input, the testimony uniformly showed ReWa's personnel were instructed to continue working with Appellant to finalize its permit application at all times prior to the Sewer Use Regulation's

amendment. (R. p. 639, lines 12-16) (Never instructed to stop work); (R. p. 492, lines 1-8) (Instructed to continue working with Appellant "to get all of their paperwork in" and let Board evaluate.)

At the time of the regulatory amendment in May of 2008, Appellant had not: finalized its engineering plans for the force main, submitted an application for an easement across ReWa's land, had not finalized an agreement for the ownership of force mains and pump station with the public entities, and had not obtained a Flow Acceptance Permit. (See R. pp. 635-637; *see also* R. p. 993 (Unanswered Requests for Admissions ##14, 15, and 18 stating Appellant never received a flow acceptance permit and never obtained an executed right of way from ReWa.) Simply no evidence supports Appellant's position that ReWa delayed Appellant's Project as contended.

Appellant argues ReWa placed a "secret" hold on their Project, which is inaccurate, while simultaneously arguing it did not complete its application because of the "secret" hold. (See App. Brief, p. 20) This makes no sense. By contrast, the documentary evidence of Record demonstrates Appellant did not finalize its filings because it had not completed its engineering plans. (See R. 822, Ex. 26.) Moreover, no testimony indicates ReWa would not approve a private pump station between January and May of 2008. The testimony indicates staff were required to bring such projects to the Board, who remained free to approve the projects and for which no evidence indicates the Board would not. There is nothing wrong with ReWa's Board taking an active role in processing permits for projects where policy changes are being considered.

Many of the remaining arguments Appellant makes under Issue 2 of its Brief simply make no sense. (App. Brief, pp. 20-22) The hearing officer cited Exhibits 13, 14, 15, 17, 18,

23, and 26 as documentary evidence that Appellant failed to provide the information needed to obtain a Flow Acceptance Permit as specified by Bishop in Exhibit 13 from March of 2006. As noted above, the testimony from Bishop confirms ReWa never received the required information and as of May of 2008, Appellant's project file remained "substantially incomplete." (R. p. 637, ll. 1-4) According to Appellant, however, the fact that ReWa's "requirements were never met by Appellant" is "irrelevant." (App. Brief, p. 21)²⁵

Appellant next argues that Exhibits 13 through 26 reflect "a lack of any responsiveness to Appellants." (App. Brief, p. 22) ReWa asks the Court to review Exhibits 13 through 26, as none of the exhibits reflect a lack of responsiveness on ReWa's part. What they do show is ReWa consistently asking Appellant for the same information. What they further show is Appellant repeatedly promising to send information and then never following through.²⁶ As a consequence, substantial evidence supported the hearing officer's findings as to Issue 2. Accordingly, as to Issue 2, Appellant has not "convincingly" proved the hearing officer's factual findings are "unsupported by the evidence." *Waters v. South Carolina Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996).²⁷

²⁵ Appellant discusses Exhibit 18 and contends that it does not reflect Bolo acknowledged Appellant's failure to comply with ReWa's required filings. Contrary to Appellant's suggestions, however, the March 21, 2007 e-mail reflects Appellant still had not finalized "WCRSA easement forms" as requested. (R. p. 811, Ex. 18) Thereafter Appellant still never completed easement forms on *any* route and never submitted finalized engineering plans.

²⁶ Appellant's Brief, on one hand, contends Exhibit 23 from January 8, 2008 was "in response to negotiations," while, on the other hand, contends ReWa waited a year after November 2007 to negotiate with Appellant. (App. Brief, p. 22) Appellant's Brief manages to contradict itself completely within only two paragraphs.

²⁷ Appellant's Brief references when ReWa offered the River Route to Appellant. The evidence of Record demonstrates the River Route was offered to Appellant in November of 2007, the same month the Committee instructed staff to negotiate a solution with Appellant. (See R. p. 817, Ex. 22 (E-mail from Bolo dated November 26, 2007 stating: "As I understand it, we are

Issue 3: As Raised by Appellant: The Hearing Officer Allegedly Erred by Not Finding Appellant Had a Vested Right and That ReWa Retroactively Applied Its Regulation (Appellant's Brief, pp. 22-28)

Appellant's claims both hinge *and* fail upon a previously unstated theory of vested rights. According to Appellant's prior position, for which it never offered any legal authority, ReWa should have grandfathered its project under the Amendment to the Sewer Use Regulation, altogether allowing Appellant to escape the effect of the Sewer Use Regulation's May 5, 2008 Amendment. (R. p. 67, lines 7-12)("[T]hose of us who have proceeded under one set of rules should be allowed to proceed under those rules and be, if nothing else, grandfathered in to the old policy which would allow us to proceed under our plan...") Stated differently, Appellant contends it had a legal right to be grandfathered under ReWa's Sewer Use Regulation before its amendment. Yet, no legal basis exists for such a request since an incomplete permit application, as a matter of law, fails to vest the rights of a would-be permittee.

Consistent with the hearing officer's ruling, it is axiomatic that without a complete permit application, a putative permittee's rights do not vest, since it would be impossible to determine *what* rights vested.²⁸ (See R. p. 17; *see also* R. p. 637, line 5-p. 638, line 1)(ReWa

coming up the river now.") Moreover, Appellant's Brief references an August of 2007 "hold." There is no evidence demonstrating that any sort of hold existed in August of 2007. The Board did not even begin considering a change of the Regulation, until late November of 2007 or early December.

²⁸ The point is driven home by the facts of this case. Subsequent to the enactment of the Amended Sewer Regulation, ReWa held a meeting to address "grandfathering" requests. Requests came "out of the woodwork." People and projects ReWa never even heard of were requesting grandfathering status. (R. p. 487, lines 14-16) (Requests were made in relation to projects "I'd never heard of before.") For this reason, applications would have to be, at the very least, complete so the contours of the rights "vested" could be determined.

had insufficient information from Appellant to know what it was grandfathering.) As the leading local government law treatise notes:

[A]n application for a permit made before a zoning ordinance becomes effective gives in itself no right to a use excluded by the ordinance. Indeed, generally speaking, no preliminary proceedings to the obtaining of a permit give rise to any vested right to pursue a use in a zoned district.

8 *McQuillin Mun. Corp.* § 25:179.24 (3d ed.). This analysis applies here thereby foreclosing Appellant's vesting claims.

Appellant never submitted a finalized permit application and, therefore, had no vested rights prior to ReWa's May 5, 2008 amendment to the Sewer Use Regulation. As discussed *supra* at length, the hearing evidence shows Appellant:

- Never submitted a finalized set of engineering plans for any proposed route;
- Never even applied for the necessary right of ways across ReWa's Plant property;
- Never executed an agreement with public utilities about the ownership of the proposed private pump station and force mains.

(R. p. 635, line 14–p. 636, line 25)(Appellant never submitted: finalized engineering plans for any proposed route, applications for right of way from ReWa, and never executed final agreement among service providers.) Dating back to March of 2006, ReWa informed Appellant of these prerequisites to obtaining a Flow Acceptance Permit at the onset of the process. (See R. pp. 805–808; R. p. 810, Ex. 13, 14, 15, & 17; R. p. 636, lines 15–19). As a consequence, Appellant's failure to submit a complete application, as a matter of law, fails to vest any rights to obtain a Flow Acceptance Permit prior to the Sewer Use Regulation's amendment.

Cited by the hearing officer, the decision of *In re Ross* substantially mirrors the facts of the instant case and confirms both the ruling below and ReWa's analysis. *See In re Ross*, 151 Vt. 54, 557 A.2d 490 (1989). In *Ross*, Raymond Ross ("Ross"), a land developer, filed a permit application with the environmental commission ("Commission") for the town of Dover, Vermont. Simultaneously, Dover was considering amendments to its "town plan."²⁹ The Commission deemed Ross's application as incomplete requiring its deferral. Ross appealed the deferral to the state environmental board. During the appeal, the town amended its plan.

Like Appellant, Ross contended, unsuccessfully, he had a vested right to have his application considered under the town plan in effect when he first submitted his application, rather than under the amended town plan. The state board found Ross had not completed his application and the amended town plan would govern further review. On appeal, the Supreme Court of Vermont found Ross did not have a vested right to review under the former plan as he failed to present a complete application. *Id.* at 57-58.

Also cited by the hearing officer, in *City of Aspen v. Marshall*, 912 P.2d 56 (Colo. 1996), Ronnie Marshall ("Marshall"), a landowner in the City of Aspen, initially sought review in the trial court of the city planning and zoning commission's denial of her building permit for a hot tub and deck built before Marshall received appropriate construction approvals. Marshall thereafter did not complete the permit application process before Aspen adopted a new environmental ordinance restricting development in Marshall's neighborhood. The Colorado Supreme Court ruled Marshall failed to obtain vested rights subjecting her project to Aspen's new ordinance because her permit application was incomplete before the

²⁹ The town of Dover did not have a zoning plan but had an overall "town plan" governing development densities.

ordinance's enactment. *Id.* at 60-61 (Citing McQuillin, *The Law of Municipal Corporations* § 25:155 (3d ed. 1991).)

The South Carolina Court of Appeals in *Friarsgate, Inc. v. Town of Irmo* likewise accords with the hearing officer's analysis. *Friarsgate, Inc. v. Town of Irmo*, 290 S.C. 266, 349 S.E.2d 891 (Ct. App. 1986). In *Friarsgate*, a real estate developer sought to enjoin Irmo from enforcing a new zoning ordinance relating to its property. In 1978 or 1979, the real estate developer (Friarsgate) began preparations to build a condominium project on a tract of land in the Town of Irmo. The proposed development consisted of fourteen buildings and one hundred eight units. Preparation consisted of completing market research, conducting financial studies, developing drainage, grading, landscaping, sewer and water distribution plans, and platting the tract. Friarsgate also obtained building permits for one building containing five units on March 21, 1980 and thereafter began constructing the foundation of the building. *Id.* at 268.

Less than a month after construction began, on April 15, 1980, Irmo enacted a comprehensive zoning ordinance prohibiting use Friarsgate's tract for condominiums. The *Friarsgate* Court examined whether the developer had acquired a vested right to build the entire condominium project although building permits only existed for five of the units before the zoning change. *Id.* at 268-269. The *Friarsgate* Court ruled the developer had not acquired vested rights for all fourteen buildings because it had not obtained permits for all fourteen buildings before Irmo's enactment of the ordinance. *Id.* at 272. The developer's failure to obtain building permits for the entire project foreclosed the vesting of rights to build the entire project.

The *Friarsgate* Court further held, "a landowner has no right to insist that his property not be restricted by a zoning regulation absent a showing that he has, prior to the effective date of the regulation, established a nonconforming use." *Id.* at 273. In the instant case, with regard to Appellant's Flow Acceptance Permit, Appellant cannot prove an "established nonconforming use." This is true for several reasons.

First, until Appellant received a Flow Acceptance Permit, and also a DHEC permit, no prior "use" could exist because sewer flow would not be accepted. Second, until Appellant received an executed easement from ReWa, no Flow Acceptance Permit could issue. Regardless of what route Appellant relied upon, the (incomplete) permit applications pursued by Appellant necessitated the construction of a force main across ReWa's treatment plant. (R. p. 261, lines 1-4) ("You're kidding, right? Well, we have to go through the plant to get to the tie-in-point, so we'd have to have an easement no matter which way we went.") Thus, Appellant attempts to argue it obtained vested rights by operation of prior non-conforming use, when Appellant previously never obtained a legal right to discharge into ReWa's system and no use commenced. To hold otherwise would be tantamount to saying Appellant obtained a vested legal right to an easement on ReWa's property, which by statute, can only be granted by ReWa's Board. (*See also infra* at pp. 54-56)

Here, Appellant failed to complete its Flow Acceptance Permit application before ReWa amended its Sewer Use Regulation on May 5, 2008. Notably, the testimony uniformly showed ReWa's personnel were instructed to continue working with Appellant to finalize its permit application through the date of the Regulation's amendment. (R. p. 639, lines 12-16) (Never instructed to stop work); (R. p. 492, lines 1-8) (Instructed to continue working with Appellant "to get all of their paperwork in" and then let Board decide how to handle pump

station.) Notwithstanding the same, Appellant failed to complete any of the required tasks to obtain a Flow Acceptance Permit before May 5, 2008. Without a complete application and finalized plans, ReWa had nothing before it to confer grandfathered status and Appellant failed to obtain any vested rights to demand the same.

Appellant questions the hearing officer's reliance upon *Friarsgate* and instead insists the opinion of *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000) controls. First, Appellant contends ReWa conceded *Vulcan's* analysis controls the case *sub judice*. This never occurred. In fact, the Record, cited by Appellant to support this contention, reflects ReWa objected when a witness began discussing *Vulcan*. (See R. p. 127)

Second, *Vulcan* is wholly distinguishable from the instant facts in a variety of ways. In *Vulcan*, Greenville County sought to impose *post facto* prohibitive zoning *after Vulcan* already commenced a nonconforming use it could pursue as a matter of right. *Id.* at 498. Here, the alleged nonconforming use (i.e., the incomplete plans submitted in Appellant's Flow Acceptance Permit Application) *were* the nonconforming use Appellant sought to commence, but could not, because a Flow Acceptance Permit never issued. In *Vulcan*, the Respondent did not need to obtain a grant of a real property interest (i.e., easement) before it could commence its nonconforming use. Here, Appellant concedes all of its plans for use required ReWa's Board to convey an easement before it could obtain a Flow Acceptance Permit and a DHEC permit to commence its nonconforming use in the first instance.³⁰ Notably, ReWa had no legal obligation (ever) to grant an easement to Appellant.

³⁰ Appellant spends considerable time discussing the lack of an effective date in the ReWa's Amended Sewer Use Regulation. Apparently, Appellant has not actually analyzed the Regulation, as it clearly contains an effective date. (See R. p. 1048)

In *Vulcan*, the Respondent only needed an operating permit from DHEC before it could commence mining granite on its property. *Id.* at 498. Unlike Appellant, the *Vulcan* Respondent had fully completed its DHEC application for an operating permit over a year before the County enacted the prohibitive zoning. *Id.* at 484 & 486. Here, Appellant's project file remained substantially incomplete when ReWa amended its Regulation and remains so, to date. (R. p. 637, lines 2-4) Moreover, even the *Vulcan* Court acknowledged the nonconforming use only vests if "already in existence at the time his property is zoned..." *Id.* at 498. In the instant case, the nonconforming use could not exist in advance of the issuance of an easement and Flow Acceptance Permit. In short, ReWa did not apply its Amended Sewer Use Regulation retroactively. Accordingly, the hearing officer should be affirmed.

Issue 4: As Raised by Appellant: The Hearing Officer Allegedly Erred by Not Finding ReWa's Amended Sewer Use Regulation Violated the Contracts Clause of the State and Federal Constitutions (Appellant's Brief, pp. 29-34)

As an initial matter, Appellant's statements concerning an alleged Contract Clause violation prove starkly disingenuous. According to Appellant, "Appellant argued at the hearing that the enactment of the new regulations impaired its contract with Condor and Eastwood, thus violating the Contract Clause of the United States Constitution and South Carolina Constitution." (Appellant's Brief, p. 30) This is categorically untrue. Appellant has never argued a Contract Clause violation before. Appellant never raised the issue with the hearing officer. And Appellant's original Complaint never alleged such violation. (See R. pp. 19-38) Appellant impermissibly raises the issue for the first time on appeal. *Elam v. S.C. DOT*, 361 S.C. 9, 23 (2004). The Court should require Appellant to identify in the Record below where the term "Contract Clause" appears.

Second, because South Carolina Courts are reluctant to find legislative acts unconstitutional, "every presumption is made in favor of...constitutionality." *Knotts v. S.C. Dep't of Nat. Resour.*, 348 S.C. 1, 558 S.E.2d 511 (2002). Indeed, a "legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." *Joytime Distribs. & Amusement Co., Inc. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999); *see also Beaufort County v. State*, 353 S.C. 240, 242 (2003). Thus, in raising this issue for the first time, to the extent allowed, Appellant must, but cannot, demonstrate to the Court "beyond a reasonable doubt" how ReWa's Sewer Use Regulation runs afoul of the State and Federal Contract Clauses.

Third, Appellant argues, without basis, that the Court should show ReWa less deference because the Amended Sewer Use Regulation impairs a contract to which it is a party. (See Appellant's Brief, p. 32) This makes no sense. The Amended Sewer Use Regulation impairs no contract to which ReWa is a party. No evidence of Record supports such contention, nor could it because it is untrue.

The Amended Sewer Use Regulation *does* require proposed projects with private pump stations to reach an agreement with applicable public entities before discharge into ReWa's sewer infrastructure can occur. But those contracts could be with one of eighteen entities. Moreover, the Amended Sewer Use Regulation could not *impair* those contracts, as they do not even exist yet. To the extent Appellant references ReWa's offer to help Appellant, nothing obligates Appellant to do so. And, in fact, the Parties did not consummate such an arrangement, which suited ReWa fine. In short, no reason exists for the Court not to defer to ReWa's legislative judgment.

So long as ReWa's Sewer Use Amendment aims to accomplish a "reasonable and necessary...public purpose," then, no constitutional infraction exists, even if everything else Appellant proved true. *Hodges v. Rainey*, 341 S.C. 79, 93, 533 S.E.2d 578, 585 (2000). Moreover, because the contracts Appellant alleges were impaired existed between two private parties, this Court should "properly defer to [ReWa's] legislative judgments as the necessity and reasonability" of the Amended Sewer Use Regulation. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17, 97 S.Ct. 1505, 1515 (1977). When the Court filters the evidence of Record through the beyond a reasonable doubt burden of proof, and the properly accords deference to ReWa's legislative authority, the unsupportability of Appellant's Contract Clause contentions becomes manifest.

The testimony introduced by ReWa evidences the Amended Sewer Use Regulation as reasonable and necessary and accomplishing legitimate purposes.³¹ ReWa presented the testimony (via deposition by agreement) of Commission member, John Boyette ("Boyette"). Boyette testified the Commission became aware of problems associated with the private ownership of pump stations in November of 2007, when such pump stations began to proliferate. (R. at 901, lines 21-25; R. at 902, lines 1-16.)

According to Boyette, after analyzing the issue, ReWa's Board viewed unchecked private ownership of pump stations as presenting: long-term viability risks, environmental risks, and, ultimately, a risk to orderly development. (R. p. 900-901.) Specific concerns also

³¹ Although testimony was elicited purporting to quote Boyette as stating that ReWa should make money off of private pump stations, Boyette emphatically denied ever saying the same. (R. p. 922, lines 15-16) ("I absolutely never made that statement." Q. "You're denying having said that?" A. "Absolutely.") Boyette further testified, "We don't want to get into the retail business. We don't want to get into the pump station business. We want to be in the treatment business, the trunk line business, and we will operate our pump stations that are in our systems because that's what we're here to do." (R. p. 940, lines 10-15) Indeed, Orvin confirmed ReWa makes no money off of pump station ownership. (R. p. 450, lines 2-3.)

related to the fact that private entities do not last forever meaning that they become undercapitalized or go defunct and then become a threat to the environment and constituents. (R. p. 900-902; *see also* R. p. 447 lines 13-25; R. p. 448, lines 1-25 (Orvin discussing Altamonte project where private utility created huge environmental problems on Paris Mountain and abandoned site causing ReWa to become trustee for site) Boyette described the situation as "not a very stable way to do things, to protect the environment and also to protect the customer base." (R. p. 900, lines 20-23; *see also* R. p. 447, lines 5-8 (Orvin discussing problems with lawsuits from private owners when public service becomes available.) In addition, amending the Sewer Use Regulation furthered DHEC's policies as stated in their guidelines. (R. p. 898, lines 2-8; *see also* R. p. 116, lines 11-14) (McCall admitting, "And DHEC prefers that, you know, systems be owned and operated by public entities.") Thus, ReWa enacted the amendment to protect the environment, public, orderly planning, and economic development.

ReWa's Board examined the issue and held public hearings on the content of proposed amendments to the Sewer Use Regulation. Indeed, the proposed amendment went for public comment in January of 2008. (R. p. 904 line 25; R. p. 905, ll. 1-3). Executive Director, Ray Orvin, met with subdistricts. (R. p. 906, lines 2-17.) Ultimately, ReWa amended its Sewer Use Regulation in a way designed to allow the continued use of privately owned pump stations, so long as a public entity agreed to backstop such ownership in the event problems arose. (R. pp. 772-775, Ex. 3) In amending its regulation, ReWa clearly acted within the authority conferred upon it by its enabling legislation. Moreover, Appellant has never argued otherwise or, at least, specified how this is not true. Accordingly, ReWa's May 5, 2008 amendment to

its Sewer Use Regulation was reasonable and necessary and accomplished legitimate purposes.
No Contract Clause violation occurred.

B. The Court Should Affirm the Hearing Officer For Several Additional Sustaining Grounds.³²

The Circuit Court should affirm the hearing officer for the following additional reasons:

1. As a First Sustaining Ground: Appellant Failed to Follow the Administrative Procedures Under ReWa's Sewer Use Regulation For Commencing an Adjudicatory Hearing.

Appellant failed to commence the adjudicatory hearing process in the manner prescribed by ReWa's Sewer Use Regulation. Under ReWa's Sewer Use Regulation, Appellant was required, but did not, formally request an Adjudicatory Hearing within "fifteen days" following a contested decision regarding a permit. (See R. p. 1062, ReWa Sewer Use Reg., Attach. C, ¶ 9.)³³ Appellant thereafter failed to serve the initial pleading "by which an Adjudicatory Hearing may be commenced," as also required by ReWa's Sewer Use Regulation. (See R. p. 1062, ReWa Sewer Use Reg., Attach. C, ¶ 9.)³⁴ Three years after the

³² In the decision of *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), the South Carolina Supreme Court clarified the use of further sustaining grounds. The *I'On* Court noted: "Under the present rules, a respondent—the "winner" in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.")

³³ Under the Sewer Use Regulation, such request must "include the name of the requestor, his interest and the names of parties which he represents, the reasons for the request, the major issues which are proposed to be contested at the hearing, and a statement by the requestor agreeing to be subject to examination and cross-examination and to make any employee or consultant of such requestor, available for examination and cross-examination." (ReWa Sewer Use Reg., Attach. C, ¶ 9.)

³⁴ ReWa's Sewer Use Regulation outlines seven categories of information which must be contained in an initial pleading. (*Id.*) Because Appellant never filed an initial pleading, none of the information required to commence the administrative process was supplied to Appellant,

fact, Appellant still has served no initial written request and initial pleading. The hearing officer found Appellant failed to strictly follow the procedure set forth in the Sewer Use Regulation but ReWa incurred no prejudice because Appellant "initially stated its position in a Complaint filed in the Court of Common Pleas for Greenville County." (R. p. 11) According to the hearing officer, Appellant's "position was fully set forth in [its original] complaint" and as a result "lack of strict compliance did not interfere with ReWa's ability to defend the case..." (R. p. 12)

However, now unbound by a pleading, Appellant raises, on appeal, issues nowhere found in its original Complaint. (See R. p. 21-38) Thus, Appellant's failure to file the initial pleading required by ReWa's Sewer Use Regulation does prejudice ReWa by having to respond to brand new theories of liability never before pled or raised. Accordingly, the Court should affirm the hearing officer's finding, as Appellant never properly initiated the adjudicatory process in the first instance and no petition exists for the relief now sought.³⁵

The above analysis accords with South Carolina law. The South Carolina Supreme Court's decision in *Triska v. Department of Health and Environmental Control* examined the disposition of untimely administrative requests such as the one *sub judice*. *Triska v. Dep't of Health & Envtl. Control*, 292 S.C. 190, 355 S.E.2d 531 (1987) (superseded on other grounds) (Citing *Wingate v. S.C. Highway Dept.*, 276 S.C. 39, 39, 274 S.E.2d 917 (1981) (driver who allowed thirty day window to seek a hearing lapse deprived the circuit court of jurisdiction to

even though the issue arose on several occasions during the discovery phase. Notably, Appellant never even attempted to file a belated pleading.

³⁵ To the extent Appellant somehow now contends it initiated the adjudicatory hearing properly, ReWa craves reference to pages 975 through 980 of the Record, where ReWa recites the evidence of Record (including unanswered requests for admissions) demonstrating Appellant's non-compliance with the initial notice and pleading requirements set forth by regulation. (See R. pp. 975-980)

hear matter.).³⁶ Relevant here, the *Triska* Court held that even if a "contested case" existed under the facts presented, which it did not, DHEC Regulation 61-72 required a request for an adjudicatory hearing to be made within fifteen days following any administrative decision by the department on an application, permit, certificate or other licensing matter constituting a contested case. The Court held a challenge to the final decision, raised two and one-half years after the final decision was made, could not be upset by an adjudicatory hearing. *Id.* at 197-198.

Just like *Triska*, the instant case presents an administrative challenge where Appellant failed to file a timely request for an adjudicatory hearing for over two and a half years.³⁷ In fact, here, Appellant failed to file the required written request or pleading for over three years (and counting).³⁸ Just like in *Triska*, then, ReWa's decision-making cannot be reopened since

³⁶ In *Triska*, an applicant applied to the South Carolina Department of Health and Environmental Control ("DHEC") for a 401 water quality certification. DHEC subsequently revoked the certification. The Supreme Court first examined whether DHEC had the authority to review, suspend, and revoke a 401 certification after it had been granted by the agency and the appeals period expired. The *Triska* Court ruled DHEC lacked the authority to proceed in the above-noted fashion finding the certification procedure did not constitute a "contested case" requiring an adjudicatory hearing. *Id.* at 195-197.

³⁷ When the Court considers the amount of time that has lapsed, Appellant's failure to abide by the Sewer Use Regulation becomes even starker. ReWa adopted the Amendment to the Sewer Use Regulation on May 5, 2008. Further consideration of the Regulation's application to Appellant occurred at a ReWa hearing in November of 2008.³⁷ The Greenville County Court of Common Pleas ruled Appellant did not exhaust its administrative remedies in March of 2010. Even after that ruling, issued over 17 months ago, Appellant still failed to abide by the administrative procedure prescribed by ReWa's Sewer Use Regulation. (R. pp. 813-814, Ex. 20)

³⁸ Indeed, ReWa patterned its hearing procedure after the DHEC regulations noted above providing for the same fifteen day window to request an adjudicatory hearing. See ReWa Sewer Use Reg., Attach. C., ¶ 9; S.C. Ann. § 6-11-285 (E) ("The hearing procedure required under the provisions of this section [Special Purpose or Public Service Districts Generally] must be in accordance, as practicably possible, with that procedure as prescribed by Regulation 61-72 of the Department of Health and Environmental Control."). As was the case in *Triska*,

Appellant never served a written demand for an administrative hearing and never filed a pleading.

Appellant's failure to file an initial pleading forced ReWa to litigate against a moving target with ever-shifting theories of relief. And, the failure to file an initial pleading potentially prejudices ReWa's appellate rights. ReWa's Sewer Use Regulation specifically disallows such tactics. Accordingly, the Court should refuse Appellant relief that it never prayed to obtain.

Appellant's conduct has ignored ReWa's statutory authority and the administrative process on the whole. Created by statute, ReWa has the authority expressly conferred or impliedly necessary for it to perform its statutory duties. *See S.C. Coastal Conservation League v. South Carolina Dep't of Health & Env't.*, 363 S.C. 67, 74 610 S.E.2d 482 (2005). Consequently, ReWa must promulgate rules and regulations in order to carry out its functions. *Id.*; *see also* S.C. Code Ann. § 6-11-1210 (declaring that the "General Assembly has from time to time created and established special purpose or public service districts throughout the State of South Carolina for the purpose, *inter alia*, of providing for the establishing of appropriate facilities for the collection disposal or the treatment of sewage" and has vested the power to adopt, enforce, and make regulations accordingly). As authorized by the General Assembly, such regulations have the force of law. *See Goodman v. City of Columbia*, 318 S.C. 488, 490, 458 S.E.2d 531 (1995). Yet, Appellant simply disregarded the same and presently seeks to end-run ReWa administrative procedures in an effort to revive its long-abandoned opportunity to challenge ReWa's decision-making. *See Bennett v. South Carolina Dept. of Corrections*, 305 S.C. 310, 312, 408 S.E.2d 230 (1991) ("Here, the Employee did not

Appellant allowed more than three years to lapse and still failed to follow the regulatory process.

prevail before the Grievance Committee, and by not appealing their decision, abandoned his only opportunity to gain a favorable ruling on the issues involving his termination."). Accordingly, ReWa asks the Court to affirm the hearing officer on the further supporting ground that Appellant's claims for administrative relief were both untimely and improper. *See generally Burnett v. South Carolina State Highway Dept.*, 252 S.C. 568, 167 S.E.2d 571 (1969) (Court of Common Pleas did not have the authority to extend the time for landowner to appeal from a decision of the Board of condemnation after landowner failed to serve a written notice and grounds of appeal within twenty days after the receipt of the resolution as required).

2. As a Second Sustaining Ground: ReWa's Enabling Act and the Statute of Frauds Foreclose Appellant's Claims.

Appellant's claims fail for yet another glaring reason. Here's why: to find Appellant was legally entitled to build one of the proposed routes (i.e., obtained vested rights to do so), the Court also must find ReWa's Commission had a legal obligation to cast votes conveying a right of way across ReWa's Lower Reedy Treatment Plant Property. As noted above, regardless of what route Appellant relies upon, the (incomplete) permit applications pursued by Appellant necessitated the construction of a force main across ReWa's treatment plant. (R. p. 261, lines 1-4)("You're kidding, right? Well, we have to go through the plant to get to the tie-in-point, so we'd have to have an easement no matter which way we went.") However, until ReWa's Commission formally voted to convey such property rights, and until the written conveyance of the same actually occurred, no binding legal obligation could arise entitling Appellant to build a force main across its treatment plant.

a. Only ReWa's Commission Could Convey Property Rights to Appellant.

ReWa's enabling act is clear: *only its Commission* acting corporately and in public session possesses the authority to convey property rights owned by ReWa to a third-party.³⁹ (See South Carolina Act 362 (1925)(as amended in 1926 by Act 784) (ReWa's "Commission shall have power to...hold and sell such real estate and easements as they deem necessary.")(See also R. p. 461, lines 21-24)("It would have had to have gone to the Board. They're the only people who can give that easement across that property and approve it."); R. p. 11, lines 3-5) ("Board would have to approve any easement or any right-of-way across any of our property that we owned.") Appellant does not dispute ReWa's Board had the sole authority to approve the right of way to Appellant. Appellant similarly does not dispute ReWa's Board never executed such right of ways. (R. p. 993 (Unanswered Requests for Admissions #18 stating, "[Appellant] never obtained an executed right of way, easement, or encroachment permit from ReWa allowing [Appellant] to cross ReWa's property.") And [Appellant] never introduced evidence to the contrary. Moreover, Appellant concedes it never even applied for such right of ways to allow ReWa's Commission to vote on the same. As a matter of law, ReWa's Commission retained, and continues to retain, the sole legal authority as whether to convey property interests owned by the public entity. No vote ever occurred. No rights vested.

³⁹ Such statutory restriction has its underpinnings in protecting the public good. Consider, for example, the following extreme hypothetical. ReWa owns a \$60 Million Dollar Treatment Plant. Unknown to anyone else at ReWa, a staff engineer executes a contract selling the Plant for \$10 dollars. Such transaction is clearly unenforceable because only ReWa's Commission possesses the legal authority to convey property interests owned by the public entity.

b. Only Written Conveyances of Property Rights Could Bind ReWa.

Appellant's contentions similarly fail under the statute of frauds. Pursuant to S.C. Ann. § 32-3-10(4) an action to charge any person upon "any contract or sale of lands, tenements or hereditaments or any interest in or concerning them" must be in writing and signed by the party to be charged. *Id.* An easement, as a transfer of an interest in another's land, falls within the provisions of the Statute of Frauds under S.C. Ann. § 32-3-10(4) and therefore, must be in writing. *Trammell v. Trammell*, 11 Rich. 471, 45 S.C.L. 471 (S.C. App. L.), 1858 WL 3687, *2 (S.C. App. L. 1858) (regarding the right to erect a mill on the land of another and noting that a claim for an easement must be founded upon a grant by deed or writing). Thus, until Appellant obtained from ReWa's Commission a written property conveyance allowing access to its treatment plant property, Appellant cannot claim a "vested right" to build across ReWa's property.⁴⁰

3. As a Third Sustaining Ground: Appellant Cannot Invoke the Doctrine of Equitable Estoppel to Claim an Entitlement to Cross ReWa's Property.

While Appellant has yet to identify the basis of its claimed "vested" right to cross ReWa's property, ReWa anticipates Appellant will, in vain, attempt to invoke the doctrine of equitable estoppel. But South Carolina law is clear: the doctrine of estoppel requires the party invoking the doctrine to "lack knowledge of the truth as to the facts and circumstances upon which the claim of estoppel is predicated." *Berkeley Electric Co-Op., Inc. v. Town of Mount Pleasant*, 308 S.C. 205, 417 S.E.2d 579 (1992) (citing *Lewis v. City of North Myrtle Beach*, 297 S.C. 170, 375 S.E.2d 327 (Ct. App. 1988)). Here, by operation of law, Appellant knew

⁴⁰ Notably, Appellant's lack of all the easements required for the project would also make its application incomplete.

only ReWa's Board possessed the authority to authorize conveyance of a property interest owned by the public entity and could only do so in writing.

South Carolina law charges Appellant with knowledge of both ReWa's Enabling Act and the Statute of Frauds. *LaBruce v. City of North Charleston*, 268 S.C. 465, 234 S.E.2d 866 (1977) ("Citizens are charged with knowledge of existing law. Accordingly, cognizance of city ordinances is presumed."); *Horry County v. City of Myrtle Beach*, 288 S.C. 412, 414, 343 S.E.2d 36 (Ct. App. 1986) (no right to rely on leases contrary to statute as knowledge of law imputed).⁴¹ In turn, such knowledge defeats any claim of justifiable reliance on the part of Appellant—another required element of equitable estoppel. See *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 239, 692 S.E.2d 499 (2010) (relying on county staff representations unjustified because developer had the "means of knowledge" to determine the correct zoning classification and could not justifiably rely on information solely provided by staff members). In short, estoppel does not lie "where a government official or employee with limited authority erroneously provides advice beyond the scope of his authority" or in "contradiction of statute." See *Morgan v. South Carolina Budget & Control Bd.*, 377 S.C. 313, 319, 659 S.E.2d 263 (Ct. App. 2008).

The case of *Berkeley Electric Cooperative, Inc. v. Town of Mount Pleasant* supports ReWa's analysis in this regard. *Berkeley Electric Co-Op, Inc. v. Town of Mount Pleasant*, 308 S.C. 205, 219, 417 S.E.2d 579 (1992). In *Berkeley*, the Town of Mount Pleasant ("Mount

⁴¹ Throughout the trial, Bolo also attempted to claim that he did not know about administrative procedures and protocols set forth in ReWa's Sewer Use Regulation, which, at all material times, was available *in toto* online. Overlooking the peculiarity associated with the head engineer on a development project not reviewing the Sewer Use Regulation of the treatment provider from whom permits were being sought, which, if true, may have created many of the problems in the first instance, Bolo is nonetheless charged with the knowledge of the regulation as a matter of law. Thus, his many protestations of not knowing when or how to pursue administrative relief ring hollow.

Pleasant") granted the Berkeley Electric Co-Op, Inc. ("Berkeley") an electric franchise in 1982. However, Mount Pleasant only conducted one reading of the franchise ordinance, not two as required by statute. Berkeley thereafter relied on the franchise for over six years. Notwithstanding the same, the South Carolina Supreme Court held Berkeley could not rely on the doctrine of equitable estoppel to save the defective statutory grant.

"Restrictions on municipal power are created to protect citizens" and Appellant is not excused by its ignorance of such restrictions as it is charged with their knowledge. *Id.*

Pertinent here, the *Berkeley* Court confirmed:

Berkeley is not excused by its unawareness that Mount Pleasant's act was in contravention of statute. Berkeley is charged with knowledge that Mount Pleasant's power to grant franchises was limited...[t]hus Berkeley's reliance on the validity of the 1982 agreement was not reasonably justified.

Id. Accordingly, Appellant cannot invoke the doctrine of equitable estoppel to claim a grandfathered or "vested right" to build across ReWa's land, as only ReWa's Commission possessed the power to grant such rights and did not. This flaw proves fatal to all of Appellant's claims for relief.

4. As a Fourth Sustaining Ground: Even if Appellant Had Submitted a Completed Application, the Pending Ordinance Doctrine Bars Petitioner's Requested Relief.

Petitioner's claim fails for yet another reason. Even if Petitioner had submitted a completed application for a Flow Acceptance Permit, which it clearly had not, ReWa had a legal right to reject Appellant's application under South Carolina's pending ordinance doctrine. South Carolina adopted the pending ordinance doctrine in the decision of *Sherman v. Reavis*, 273 S.C. 542, 257 S.E.2d 735 (1979). The doctrine provides a basis for a municipal corporation to deny a permit affecting land use "when such use is repugnant to a pending and

later enacted zoning ordinance." *Id.* at 545, 257 S.E.2d at 737. An ordinance is considered "legally pending when the governing body has resolved to consider a particular" legislative scheme and "has advertised to the public its intention" to conduct public hearings on the same. *Id.* at 546, 257 S.E.2d at 738; *see also Stratos v. Town of Ravenel*, 297 S.C. 309, 376 S.E.2d 783 (Ct. App. 1989) ("The South Carolina Supreme Court has also approved the 'pending ordinance doctrine'" as a basis to refuse or deny a permit when permit application seeks a "proposed use...repugnant to a pending and later enacted" law.).⁴² Thus, even if Appellant could otherwise substantiate its claims, the pending ordinance doctrine bars the relief requested.

Here, the entirety of Appellant's case centers (or appears to center as it constantly changes) on what it cites as the holding-up of "approvals" on a privately-owned pump station. (*See, e.g.,* R. p. 492, lines 18-20)(*"Q. So even before it was enacted, you were told, and you did, hold up on approvals? A. On the pump station."*) Even ignoring the fact Appellant's application was otherwise incomplete, ReWa had a legal right to refuse Appellant's application using a privately-owned pump station once it resolved to change the existing Sewer Use Regulation. The testimony was undisputed that ReWa's Board learned of the problems relating to the proliferation of privately owned pump stations in late November or early December of 2007 and resolved, at that time, to address the same. (R. p. 465, lines 21-24) ReWa conducted publicly noticed hearings on the proposed changes to the Sewer Use Regulation in

⁴² The facts of the *Stratos* decision further demonstrate the unavailability of the relief sought by Appellant in this case. The developer in *Stratos* bought the property in question in order to build a mobile home park. Other mobile homes existed near the property purchased by developer. The Town of Ravenel thereafter imposed a moratorium on new mobile home parks for a period of two years while considering what new ordinances to enact. Once the ordinances were enacted, the developer could no longer use the property for a mobile home park.

January and April of 2008. ReWa thereafter adopted the Amended Sewer Use Regulation in May of 2008. Accordingly, the facts *sub judice* satisfy the pending ordinance doctrine and thereby warrant the outright denial of the relief sought by Appellant.

CONCLUSION

For the reasons set forth above, this Court should affirm the ruling of Hearing Officer Glenn.

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April 24, 2012

Stamp:  **Served**

EXHIBIT A TO RESPONDENT'S BRIEF

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
Harrison Partners, L.L.C.,)
Appellant)
v.)
Renewable Water Resources,)
Respondent.)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2011-CP-23-6482

**RESPONDENT'S ANNOTATIONS TO
BRIEF OF APPELLANT**

TO: THE HONORABLE ALEXANDER S. MCCAULAY, PRESIDING JUDGE; AND
RIVERS STILWELL AND LANE W. DAVIS ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

1. Did the hearing officer err in numerous findings of facts in its "Factual Background" that are unsupported by evidence?
2. Did the hearing officer err in not finding, pursuant to Finding Number 2, that there were many delays in the project caused by Respondent ("ReWa") during the two year period and did hearing officer thus err in finding that the evidence clearly shows that "HP ("Appellant") had never complied with the requirements by submitting the required information."
3. Did the hearing officer err in Finding Number 3 in failing to find that the Appellant had a vested right that was taken by Respondent and that the retroactive application of the regulations to the Appellant were unlawful?
4. Did the hearing officer err in failing to consider and rule on the issue of the Contract Clause of the United States and South Carolina Constitutions?

SUMMARY OF FACTS

Appellant is a residential subdivision developer with interests in Greenville County, South Carolina. The Respondent Renewable Water Resources ("ReWa") is the former Western Carolina Regional Sewer Authority which is a pre-home rule special purpose district managed and controlled by a nine member commission appointed through the Greenville County Legislative delegation and vested with the authority to operate trunk lines and treatment plants for the disposal of sewage for Greenville County and portions of Spartanburg, Laurens, and Anderson counties.

In 2006, Appellant undertook to develop a residential subdivision, River Trace, in the Greenville area. (R.p.98, 1.1-11). This was within Respondent's wastewater treatment service area. Appellant planned to use a private company, Condor Environmental, LLC ("Condor") to build and operate the wastewater pump station at the subdivision.¹ In the course of planning the development, representatives of Appellant approached Respondent and were told that they would have to annex their property into the Metropolitan Sewer Sub-district ("Metro") for sewer service from the subdivision. (R.p.103, 1.2-8).²

¹ ReWa would note that it is empathetic to the plight of Appellant's counsel in trying to digest the substantial Record in this matter. Appellant is on its fourth attorney since this matter began and opposing counsel (current) did not have the benefit of participating in the administrative proceeding. Much of the misstatement of the Record in Appellant's Brief, then, is believed by ReWa to have resulted from misunderstanding the Record or having insufficient time to analyze the same. In several instances, however, the Record's misstatement is somewhat inexcusable.

² The testimony does not support Respondent's citation to the record. Bolo actually testified that he "believe[d]" ReWa suggested River Trace's annexation but he could not "remember" because he "wasn't there." (R. p. 47, l. 4-8.)

River Trace required a pump station to connect its subdivision to the trunk lines. (R.p.102, 1.1-10).³ It had been a usual and accepted practice in Respondent's service area for a private sewer company ("PSC"), such as Condor, to operate a pump station, and then a sub-district, such as the Metro, to be responsible for the collection lines up to the pump station and from the pump station to the main trunk lines of the Respondent then to Respondent's wastewater treatment facility. (R.p.88, 1.4-25). The private pump station is licensed as a PSC through the public service commission. Construction and operation of the pump station are first paid by the developer and then through homeowner fees. This was a usual and accepted practice and, importantly, was allowed under Respondent's regulations. (R.p.103, 1.9-24).

After inquiry by Appellant to determine sewer availability with Respondent, on March 16, 2006, Appellant received from Brian Bishop, the engineering supervisor at Respondent, an e-mail confirming that Respondent had sufficient capacity to handle their subdivision's wastewater. The e-mailed also confirmed that Appellant should enter into contracts with Metro and Condor, and should meet all Metro and Condor specifications.⁴

³ The proposed pump station was necessary because no public sewer was available to serve Appellant's proposed project.

⁴ The March 16, 2006 e-mail referenced by Appellant is Exhibit 13 appearing at page 805 in the Record. Omitted by Appellant, the e-mail states: "Please keep in mind that Western Carolina [name was later changed to ReWa] has not made a determination regarding right of way access through our treatment plant property. It would recommend that you provide us with a potential force main route for our review before you finalize your design." (R. p. 805.) Thus, from the very beginning of the project, ReWa informed Appellant that it needed to know the specific route of the force main across ReWa property. The evidence of Record is clear that Appellant did not provide such information until seventeen (17) months later. Within only a few days of Appellant identifying the initial route, Bishop went on-site and walked the route. As discussed in ReWa's Brief, the proposed route, later dubbed the "Flag Route," was not feasible for a host of reasons, including rock, topography, and interference with optic cable and security protocols ReWa was implementing. The evidence of Record further reflects Bishop requested the specific route from Appellant on multiple occasions during the seventeen (17) month period but was never supplied with the same.

Appellant then undertook to make all submissions⁵ and seek approval for their project from Greenville County. In May of 2006, Greenville County approved Appellant's plans for River Trace, requiring sewer service through Metro and providing that the pump station be maintained by a publicly regulated entity, such as Condor (Condor was approved by the South Carolina Public Service Commission for such services.).

After Respondent's March 16, 2006 e-mail and after the Greenville County approval, Appellant purchased the property for River Trace on June 22, 2006 for \$1,022,500.00 and undertook an enormous financial obligation for its development.⁶ Appellant was annexed into Metro.⁷ Appellant then entered into legally binding and valid contracts with Condor for the PSC and contracted with Eastwood Homes to sell all the lots.⁸ They cleared the property, engineered and surveyed the facilities.

Moreover, Bishop's e-mail is identifying the process of what Appellant needed to do based upon the proposed plans of Appellant. Bishop informed Appellant from the beginning that an agreement about the ownership and operation of a private pump station would need to be reached by "all parties in order for the project to be approved." (R. p. 805.) No such agreement was ever reached by "all parties."

⁵ Appellant's syntax is confusing. Appellant may have submitted what was necessary to the County for County approval. However, Appellant also required approvals from DHEC, Metro, and ReWa. The Record is clear that Appellant failed to submit the required submittals to ReWa (i.e., finalized plans, surveys, easement applications).

⁶ Note that Appellant purchased the property knowing no public sewer service was available and that ReWa had "not made a determination regarding right of way access" through its treatment plant. (R. p. 805, Ex. 13.)

⁷ Appellant annexed into Metro because the subject property was located outside of any existing subdistrict that could furnish collection sewer services.

⁸ Appellant did not execute a contract with Condor until April 19, 2007. The evidence of Record, as discussed at length in ReWa's Brief, demonstrates that, at the time the Condor contract was executed, Appellant still had not identified the proposed route on ReWa's property, despite several requests. Indeed, the initial Flag Lot route was never identified until August of 2007.

Five months after the e-mail in October of 2006, Appellant sent its application, with the required fee and documentation, including a connection point map, to Respondent to begin the approval process for the wastewater treatment services. Respondent cashed their check and accepted their application.

Nevertheless, processing of Appellant's application encountered delay and stretched into 2007. During the summer or early fall of 2007 the Respondent placed "a hold" on the Development.⁹ During the fall of 2007, Respondent considered a change to its policy that would not allow a PSC to connect the Respondent's trunk lines to be a part of the same wastewater system with Respondent or a sewer sub-district such as Metro.¹⁰ This was passed by the Respondent Board in May of 2008 but Appellant continued to request exemption from the new regulation and grandfather status.¹¹

⁹ This does not accurately reflect the evidence of Record. In November of 2007, ReWa's Commissioners began evaluating how to respond to problems caused by the proliferation of projects using private pump stations and private collector systems. (R. p. 901, l. 21-25.) Bishop testified he was instructed, "to continue to work with all the developers in trying to get the information [he] needed" but refrain from approving private pump stations without presentment to the Board. (R. p. 247, l. 7-11.) In Appellant's instance, this had no practical effect, since the Board would have to approve Appellant's project regardless. This is because Appellant's project required the granting of an easement across ReWa's treatment plant property. Only the Board could grant such an easement as it involved the conveyance of an interest in real property. (R. p. 897, l. 3-5) (ReWa Commissioner John Boyette: "Yes. The Board would have to approve any easement or any right-of-way across any of our property that we owned.").

¹⁰ Appellant either misstates or misunderstands the amendment to ReWa's Sewer Use as enacted in May of 2008. The amendment still permitted a private utility such as Condor to connect to a ReWa trunk line. However, to do so, the private utility must coordinate with the applicable subdistrict (or ReWa if no subdistrict exists) on the front-end and reach an agreement with the subdistrict (or ReWa) to provide for a backstop if the private utility were to go out of business or if homeowner's fees could not adequately defray operation costs. (See R. pp. 824-25; see also R. p. 900, l. 1-23, pp. 908-910.)

¹¹ No grandfathering status was possible for Appellant because its application for sewer service was never completed (R. p. 921, l. 11-14) (Boyette testifying, "There was nothing to approve."); (R. p. 653, l. 5) (Bishop testifying, "I never saw plans that were complete, no sir.") (R. p. 657, l. 14-15) ("Did [Bolo] cooperate by providing the information I asked for, no.") (R. p. 660, l. 1-4)

Under this new thinking, Respondent would have to own and operate the entire system or Condor could own the entire system, but only, if Metro was willing to guarantee the entire system. Metro was not willing to do so. Appellant continued to contend that their application would be grandfathered since they applied before the effective date for the change in policy and that the policy really didn't apply to them since it applied to "out-of-district" developments and they were in Metro.

By August of 2009 it became obvious that no permit from the Respondent would be forthcoming. On September 9, 2009 Appellant filed an action against the Respondent that the Respondent wrongfully denied the Appellant to ability to establish a private collector sewer system ("PCS"). (2009-CP-23-7710). Appellant asserted claims for breach of contract, breach of contract accompanied by a fraudulent act, unjust enrichment, negligence, negligent misrepresentation, interference with contractual rights, civil conspiracy, declaratory judgment, writ of mandamus, and a violation of the South Carolina Unfair Trade Practices Act.¹² The Respondent's answer raised no issues of there being administrative remedies or a failure to

(Bishop testifying, "I did not have enough information to approve" Appellant's plans, even if the Commissioners instructed him to do so.).

¹² During the administrative hearing process, Appellant was required, but did not, file a written request for an administrative hearing as prescribed by ReWa's Sewer Use Regulation. (R. p. 1062) (Sewer Use Regulation, Attach. C, ¶9). Thereafter, Appellant was required, but did not, file an initial pleading setting forth the specific relief requested. (R. p. 1063.) Over ReWa's objection (see R. pp. 975-979), the hearing officer permitted Appellant to proceed under its initial pleading from the Circuit Court. (See R. pp. 11-12 & p. 61) ("The parties have furnished me their pleadings and positions in the case..."). Important for purposes of this appeal, however, Appellant now, for the first time, attempts to challenge the constitutionality of ReWa's amended Sewer Use Regulation under the Contracts Clause of Article I, §4 of the South Carolina Constitution and also the Contracts Clause of the Federal Constitution. This issue is nowhere found in Appellant's pleading and, contrary to Appellant's assertions, this issue was never raised to the hearing officer. As a result, Appellant asks this Court to grant relief on a basis it never even requested during the administrative process.

exhaust administrative hearings. (R.p.39-55).¹³ On October 30, 2009 the Respondent filed a motion to dismiss.¹⁴ The Circuit Court conducted a hearing on January 19, 2010. On March 16, 2010 the Circuit Court issued its Order. (R.p.2-8).

In its March 16, 2010 Order the Court stated "During the hearing on this matter, ReWa provided evidence of a process by which an aggrieved person may appeal the denial of a PCS permit. Specifically, the ReWa Sewer Regulations provide a hearing and reexamination process for aggrieved individuals." (R.p.3). (Emphasis added) The Court further stated "Once a final decision is rendered, the Regulations provide any party aggrieved by a final decision of ReWa may appeal such decision to the Court of Common Pleas." (Id.) The Court also provided "The Regulations provided under Section 2: Any person whose permit is denied, or is granted subject to conditions deems unacceptable shall have the right to request an Adjudicatory Hearing." (R.p.4) The Circuit Court therefore, dismissed the 2009 suit without prejudice pending the administrative review process. (R.p.6).

On March 21, 2011 the Appellant filed a new lawsuit against Respondent and others raising the same allegations from the lawsuit filed in 2009. (2011-CP-23-1957)¹⁵ The

¹³ First, Appellant has never before raised the issue of ReWa's failure to allege exhaustion of remedies. Appellant never raised the issue during the hearing on the matter. Appellant never filed a motion to reconsider on that basis. Appellant thereafter never appealed Judge Miller's Order. Second, ReWa's Sewer Use Regulation does confer jurisdiction on this Court to hear the Parties' dispute, but only appellate jurisdiction. As a result, ReWa properly interposed that objection by filing motions pursuant to Rule 12(b)(1) and Rule 12(b)(6), which the Circuit Court granted on March 19, 2010.

¹⁴ Actually, ReWa filed two motions to dismiss: one pursuant to Rule 12(b)(6) and another pursuant to Rule 12(b)(1) due to the lack of subject matter jurisdiction resulting from Appellant's failure to challenge permitting issues as required by ReWa's Sewer Use Regulation.

¹⁵ Importantly, Appellant did not even wait for the administrative hearing to occur before filing yet another lawsuit. And, to the extent Appellant means to suggest the administrative hearing did not occur in an expeditious manner, it was solely because Appellant requested the hearing be continued on multiple occasions.

Administrative hearing was finally held on March 23, 2011.¹⁶ On September 1, 2011 the hearing officer finally adjudicated the matter and issued the "Administrative Decision". This appeal followed.

SUMMARY OF ADMINISTRATIVE HEARING FACTS

The testimony at the hearing indicates that on March 16, 2006 the Respondent notified the Appellant that they had sufficient sewer capacity to serve the property that the Appellant planned to develop ("River Trace"). (R.Ex.13; p.805).¹⁷ Attorney and Ph.D. in Environmental Engineering, Eugene C. McCall, Jr., was the Appellant's first witness and testified that this notification is the first step in the process of connecting a development to a sewer system in Greenville County. (R.p.1-23). McCall had formed Condor Environmental, L.L.C. because of the Respondent's previous decision to no longer accept into their systems pump stations constructed

¹⁶ Notably, the hearing officer, former Circuit Court Judge Mike Glenn, conducted a full evidentiary hearing lasting several days. Appellant called three witnesses and introduced the testimony of a fourth witness by deposition. ReWa called three witnesses and introduced the testimony of a fourth witness by deposition. Thereafter, Hearing Officer Glenn invited the Parties to submit written closings outlining their legal positions as applied to the facts. ReWa submitted a Closing, which appears between pages 953 and 991 of the Record. Appellant elected not to submit any closing whatsoever.

¹⁷ Throughout this dispute, Appellant has been seemingly confused about the meaning of a "Capacity Letter." During his testimony at the administrative hearing, Brian Bishop, ReWa's engineering supervisor, provided a detailed step-by-step recital of the permitting process. (R. pp. 566-570.) The Capacity Letter (sometimes called a Flow Availability Letter) occurs at the "very beginning" of the process. (R. p. 567, l. 18-22.) The import of such a letter is merely to confirm ReWa's sewer treatment plant (whatever plant would receive the proposed discharge) actually has the capacity (space) to accept whatever flow is proposed. The Capacity Letter does not speak to any engineering-related issues other than to say, if the project gains a permit, the treatment plant has "space" for the proposed effluent. By contrast, the Flow Acceptance Permit (sometimes called a Flow Acceptance Letter) is issued at the very end of the project. The Flow Acceptance Permit means ReWa, DHEC, and the sewer subdistrict have reviewed and approved the finalized plans submitted on a project. The Flow Acceptance Permit allows a permitted to discharge into ReWa's trunk lines for transport to a sewer treatment plant. Here, Appellant never submitted finalized plans to ReWa and, as a consequence, no Flow Acceptance Permit ever issued.

by developers. This provided a niche for Condor as an approved private wastewater utility to provide pump station ownership and operation for various subdivisions in Greenville County. (R.p.88, 1.2-23). They owned and operated 12 pump stations in Greenville County. (R.p.89, 1.1-3). They also managed another 30 stations in the State. (R.p.89-23-25).

In early 2006 Mr. McCall received a call from the Appellant about owning and operating a pump station for River Trace that culminated in a contract dated April 23, 2007. (R.p.96-25; R.Ex.1, p.725-731). The process to acceptance of the PSC with the Respondent is usually four to six months. (R.p.91, 1.10-17). A year into process to acceptance was the longest possible time McCall had ever experienced. (R.93, 1.21-25). River Trace submitted and had approved their subdivision plat by Greenville County that indicated its sewer system was approved provided that the PSC be approved by the public service commission which had already been done. Greenville County confirms that all the service and utility providers that are willing to service the project prior to the County's approval. (R.p.125, 1.1-5). According to McCall, "so if it has plat approval then ReWa said 'Yes, fine'." (R.p. 125, 1.5-6).¹⁸ Then Appellant commenced work

¹⁸ Appellant's remarks about the County's involvement are confused. First, Appellant neglects to inform the Court that McCall never even saw the approval and was "not sure" what it said or did not say. (R. p. 124, 1. 21-25.) Second, although Appellant repeatedly cites the allegedly approved plat, a legible plat (the one provided was reduced to 8.5 by 12 and could not be read) was never offered into evidence. Third, Greenville County reviews proposed subdivisions such as Appellants for things such as "setbacks on the property," road widths, and sidewalks. (R. p. 583, 1. 12-18.) In that regard, Greenville County may confirm sewer capacity with ReWa but permitting of sewer projects at all times remains, respectively, with DHEC, ReWa and the Subdistrict involved. Omitted by Appellant, the Hearing Officer heard specific testimony regarding this issue. Specifically, Exhibit 35 is an e-mail from Skip Limbaker, the Principal Planner of the Greenville County Planning Department to Brian Bishop. In pertinent part, the e-mail states: "[Scott Bolo] wanted to know the standard operating procedures for developers to get sewer approvals etc. and we explained we are just a clearinghouse and the developers work directly with the sewer providers so he'd have to contact you about it." (R. p. 842, Ex. 35.) Bishop confirmed, "[W]hat...we're all saying is that the Planning Commission is not, quote, 'the approver of sewer.' They'd have to deal with the individual agencies." (R. p. 639, 1. 8-11.) Fourth, omitted by Appellant, McCall admitted this fact later in his testimony. (R. p. 172, 1. 3-6)

on the property. (R.p.98, 1.1-4). They obtained encroachment permits for sewer and utilities. (R.p.98, 1.6-11).¹⁹

Mr. McCall testified that in November 2007, some one year and eight months following the issuance of the capacity letter, approval of the subdivision plat, purchase of the property, design of the components and numerous surveys the Respondent started mentioning the idea of prohibiting PSC pumping station connections and replacing it with themselves since the Respondent "ought to be making money on the pump stations." (R.p.104, 1.10-105, 1.9, .p.105, 1.24-p.106, 1.4).²⁰ At this point Respondent had committed to the traditional pump station all the way up to the treatment plant according to standard practice. (R.p.103, 1.15-24)²¹.

("Q. And at that point, is what ReWa is telling the county, we have the capacity if they the system in a way that we approve? A. That's correct.").

¹⁹ This is inaccurate and taken out of context. Appellant may have obtained an encroachment permit from the *County*. But, Appellant never even submitted an encroachment/easement application to cross ReWa's treatment plant property. Contrary to Appellant's representation, McCall admitted Appellant never finalized its sewer plans and never made an application for an encroachment permit or an easement to ReWa. (R. p. 130, l. 11-25) ("Q. [T]here was never any application made for an encroachment permit or an easement to ReWa, was there? A. There was not that I know of."). McCall further admitted there had to be some way to get across ReWa's property, either by easement or encroachment permit. (R. p. 130, l. 11-14.)

²⁰ Ignored by Appellant, ReWa's Executive Director, Ray Orvin testified that ReWa generates no net revenue from pump station ownership. (R. p. 449, l. 25-p. 450, l. 30) ("[I]s a pump station a money making venture for ReWa? A. No. Our business plan and strategy is we break even. We don't make money on any of this stuff."). Moreover, the individual who Gene McCall attributed the statement, Commissioner John Boyette, categorically denied ever saying ReWa had a financial interest in owning pump stations. (R. p. 922, l. 15) ("I absolutely never made that statement."). Boyette further confirmed ReWa had no interest in owning pump stations. (R. p. 912, l. 19) ("No, absolutely no."). Indeed, as Appellant's brief pointed out, McCall was understandably disappointed in the regulation's amendment because he had developed a niche business in running private pump stations. ReWa's amendment to the regulation would require McCall to coordinate on the front-end with public agencies about their willingness to backstop his projects in the event of insolvency and the like.

²¹ Standard practice is to provide sewer service through gravity lines. (R. p. 445, l. 18-20.) What Appellant proposed was not standard practice. What Appellant proposed was to have a privately

According to Mr. McCall, while the River Trace application was still being considered, in early 2008, now nearly two years into the process that should have lasted a year, the Respondent officially began consideration of the enactment of regulations ending the PSC pumping station connections to their system. (R.p.117, 1.7-21).²² The regulations essentially prohibited split ownership of the system between a private and public utility. (R.p.108, 1.18-25).²³ Although retroactive application²⁴ of the proposed regulation had not been determined by the Board "every time something would be finalized by the developer, the Respondent would come up with a new wrinkle, no we can't have that. The last wrinkle "was that Rivers Stillwell basically told us that

owned pump station that pumped sewer from two developments across ReWa's property in force main connecting directly to a ReWa trunk line. (R. p. 116, l. 9-17) (McCall: admitting DHEC policy favors publicly owned systems); (McCall: admitting he never worked on a project where a direct connection to a ReWa trunk line was involved); (R. p. 596, l. 4-16) (Bishop: Never approved a project with the combination of issues presented by project, such as manifolding and crossing treatment plant); (R. p. 639, l. 20-25) (Bishop: "[W]e had never had this many different issues on one site...this was a very difficult project.."); (R. p. 895, l. 2-12) (Boyette: "I don't know that we've ever" allowed a private force main on ReWa Property before.); (R. p. 444, l. 3-11) (Orvin: Cannot recall any force main crossing plant property since he began with ReWa.).

²² Omitted by Appellant, McCall later admitted that he did not know any of the particular issues with any of the routes looked at by Appellant. (R. p. 77, l. 6-8) (Q. And you don't know any of the particular issues with any of the routes that were looked at, right? A. No, I don't.").

²³ This is inaccurate. See supra at FN 10.

²⁴ Throughout its brief, Appellant attempts to couch the application of the amended Sewer Use Regulation as "retroactive." This is unsupportable. The evidence throughout the Record reflects that as of May 5, 2008, when the Regulation was amended, Appellant still had not supplied a complete application to ReWa such that ReWa could issue a Flow Acceptance Permit. (R. p. 653, l. 5) (Bishop: "I never saw plans that were complete, no, sir."); (R. p. 653, l. 11) (Bishop: "[The submittals] were not even almost complete in ReWa's eyes."); (R. pp. 635-637) (Bishop: As of May 5, 2008: Appellant had not provided a final design for the force main on ReWa's property, had not submitted finalized engineering plans, had not submitted an easement/encroachment application for ReWa's property, had not executed an agreement with ReWa and Metro regarding ownership and maintenance of the force main, had a "substantially incomplete" project file.). Bishop further testified that neither he nor DHEC could have granted approvals even if instructed to do so. (R. p. 636, l. 20-25; R. p. 637, l. 1-14.) There was not even enough information to grandfather the project for ReWa's Board to know what they "could grandfather." (R. p. 637, l. 15-22.)

they weren't going to allow the force main owned by a private utility coming onto ReWa property." This despite the fact that it was standard practice to do so.²⁵

Then on May 5, 2008 the Respondent passed a resolution effectively abolishing the PSC pump stations. (R.Ex.3, p.772).²⁶ The Respondent then proposed that the Respondent would own and operate the station at twice the price of that proposed by McCall's group. (R.p.120, l.1-13).²⁷

McCall questioned whether the new regulations were retroactive to River Trace and the six other pending PSC projects. He testified "And in talking with Mr. Stillwell, I said 'Well, the reg's not fair, but even if we live with the reg going forward, it shouldn't apply to these seven projects.' And he said, 'Well if you want to come to the Board and make your presentation, do it.'." (R.p.121, l.21-p.122, l.1).

Mr. McCall got this issue of the new regulations application to River Trace and six other projects on the Board's agenda. (R.p.122, l.1-7). After a presentation and a few questions the

²⁵ See *supra* at FN 21. Nothing about Appellant's proposed project was standard practice. But, crossing ReWa plant property was unprecedented. Appellant's attempt to couch the proposal as "standard practice" highlights Appellant's how grossly it misstates the evidence of record.

²⁶ This is inaccurate. See *supra* at FN 10.

²⁷ This is inaccurate. First, it fails to take into account *ad valorem* taxes Appellant would not pay to Metro if Appellant de-annexed. Second, it fails to take into account a gravity main charge Appellant would have to pay regardless. (R. p. 696, l. 14-21.) Third, ReWa had no desire to own the private pump station or force main, but agreed to do so if Appellant could not obtain service from Metro. (See R. p. 776, Ex. 4.) Third, because the scenario was unprecedented in a variety of ways, ReWa had not previously analyzed the expense associated with owning and maintaining Appellant's pump station and force main. ReWa analyzed those expenses and compiled projections "as a point of discussion." (R. p. 694, l. 11.) ReWa actually met with the developers who gave "helpful" feedback in revising the calculations. (R. p. 694, l. 16.) In order to help Appellant with its project, however, ReWa had to recapture its costs. (R. p. 695, l. 7-11.) ReWa met with the developers at least four times looking at different approaches. (R. p. 695, l. 10.) Exhibit 9 (R. pp. 793-800) reflects preliminary numbers developed by ReWa and notes at its top, "Preliminary Draft for Discussion Only-Subject to Change." Importantly, all such meetings occurred during the timeframe when McCall testified ReWa did nothing to respond after the November 2008 meeting when he addressed ReWa's Commission.

Board reached no decision. (R.p.122, l.11-16). Mr. McCall stated "And I should say today, I have never gotten the decision from the Board on that —those—that request. So they never decided, but effectively they've killed the projects by dragging them out so long." (R.p.123, l.12-16).²⁸ Nevertheless despite the failure of the Board to determine the applicability of the new regulation to existing projects the Respondent continued to retroactively apply it to the Appellant. This practice continues to today, despite Respondents concession at the administrative hearing that that Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 536 S.E.2d 892 (S.C.App. 2000) was controlling the legal issues in this case. (R.p.127, l.21-p.128, l.2).²⁹

Scott Bolo an engineer and an officer and owner, of Appellant, testified that Appellant had built their entire business plan for River Trace premised upon this usual practice by Respondent of using the PSC for the pumping station. (R.p.190, l.7-17).³⁰ Bolo stated that when they received the March 16, 2006 e-mail from the Respondent the Respondent knew that Condor was going to own and operate the force main. (R.p. 258, l.11-22; Ex.13, p.805).³¹ Early on in the process Respondent's chief engineer Brian Bishop told the Appellant that they had met the

²⁸ This is inaccurate. ReWa's Board did respond directly to Mr. Bolo by correspondence dated December 4, 2008. See also supra at FN 27.

²⁹ Appellant wildly misstates the Record with respect to his assertion regarding the Vulcan decision. At no time did ReWa concede Vulcan applied to this case. In fact, the passage cited by Appellant is ReWa's counsel objecting to the witness discussing legal principles in his direct examination. This is yet another passage highlighting Appellant's liberties with the Record. Such liberties are in themselves telling of the strength of Appellant's position in this appeal. By contrast, ReWa's legal analysis regarding vested rights in its closing at the administrative proceeding can be found in the Record at pages 981-985 and pages 989-990. Appellant failed to submit a closing argument and never raised any opposition to the hearing officer (or anyone) why any of ReWa's analysis is incorrect.

³⁰ Appellant's project deviated from "standard practice" for sewerage a site. See supra at FN 21.

³¹ See supra at FN 4 (discussing Exhibit 13 on page 805 in the Record and Bishop making clear that ReWa had not approved the route crossing treatment plant property).

engineering requirements for connection to the Respondent's trunk line. (R.p. 267, l.19-24).³²

What they didn't tell the Appellant's representatives is that two years later they were going to retroactively put in place a new regulation that completely changed "the way that the force main people, the collector system and treatment people interact". (R.p.267, l.24-268, l.10).³³

Bolo testified they were completely vested in the project by the time they had their engineering drawings complete. (R.p.197, l.18-25). Although, they had never had a project that took more than eight months for final sewer approval (R.p.210, l.11-20) the project seemed to progress smoothly and there was no indication that Respondent would interfere with their plans even through the enactment of the new policy. (R.p.205, l.11-19). The Appellant purchased the property and executed mortgages, contracted with Condor, obtained encroachment permits, cleared, surveyed, lined up builders, contracted with Eastwood Home to sell all the lots and negotiated completely with Metro all by the end of March of 2007. (R.Ex.8, p.783-792; p.409, l.2-10; p.210 l.21-p.211, l.8). The Appellant complied with every request by the Respondent for information, design and data throughout the process. (R.p.231, l.11-p.233, l.25).

On February 9, 2007 the Respondent confirmed that the encroachments for connection, PCS ownership of the force main, final plans and profiles could be submitted. (R.p.806, Ex.14). All that remained was the permit to construct from the South Carolina Department of Health and Environmental Control ("SCDHEC"). (Id.) The Appellant finalized the ownership of the force, the final plans, profiles and requested a "willingness to serve" letter from Respondent for SCHEC on February 17, 2007. (R.p.807, Ex.15; p.290, l.16-p.235, l.3).

³² This is inaccurate. See supra at FN 24 (discussing missing submittals from Appellant).

³³ Appellant now appears to complain that ReWa did not notify it that it was going to amend its Regulation nearly two years before Appellant acknowledges ReWa even began considering the amendment.

Despite the submissions by Appellant, the Respondent needlessly drew out the process. (R.p.309, l.8-13).³⁴ As of March 21, 2007 the project was 100% design complete and Metro was satisfied at that point. (R, p.409, l.2-10).³⁵

However, by August of 2007 the Respondent was still unwilling to finalize the route of the connector and allegedly imposed new security measures for the their property that prevented Condor from owning the forced main on the Respondent's property. (R.Ex. 20, p.813).³⁶ In November of 2007 Respondent began discussions with area sewer service providers concerning prohibiting PCS connections to their system. (R.p.105, l.24-p.106, l.4).³⁷ Unbeknownst to the

³⁴ As discussed in its Brief, ReWa did not delay Appellant's project. Appellant spent the better part of thirty (30) months failing to provide the information ReWa told Appellant was required in March of 2006. (See also R. p. 805, Ex. 13.)

³⁵ Appellant again flagrantly misstates the Record. The Project was never 100% design complete. In fact, it was never even close. See *supra* at FN 24. Despite production requests to Appellant and discovery for nearly two years, Appellant has not, and indeed cannot, furnish finalized engineering plans for the River Trace project. Nonetheless, Mr. Bolo would lead the Court to believe that he submitted such plans multiple times. Should the Court need confirmation that such plans do not exist, ask Appellant to identify them in the Record. ReWa never received such plans and has asked to see them on countless occasions. To date, none have ever been supplied.

³⁶ This is likewise untrue. As discussed in ReWa's Brief, Appellant's project went through several routing changes. The first route, the Flag Lot Route, was never specified to ReWa, despite multiple requests, until August of 2007, nearly eighteen (18) months after the project began. (R. p. 609, l. 6-23; R. p. 610) (Bishop: Asked for route in 2006 before significant engineering work was completed, Appellant did not contact him about route until August of 2007. Within two days of being contacted Bishop met with Appellant's surveyor and walked the route. It was not feasible and could have been discovered in March of 2006 if Appellant had identified the proposed route. Within 24 hours of walking the route, Bishop e-mailed Bolo and informed him the Flag Route was riddled with problems.). Exhibit 20, as miscited by Appellant, is Bishop's e-mail to Bolo informing him of numerous problems with the route. Bolo responded by writing, "I read your notes and can understand what you are saying about the route." (R. p. 813, Ex. 20.)

³⁷ This is inaccurate. ReWa's Board only first learned of issues relating to the proliferation of proposed projects using privately owned pump stations in late November or early December. (R. p. 460, l. 5-13.) Meetings concerning the proposed regulation occurred in the first quarter of 2008.

Appellant, the Respondent had "flagged" their application in August of 2007 and put a "hold" on processing of Appellant's pump station and encroachment had been ordered by the Executive Director of Respondent Ray Orvin ("Orvin"). (R.p.453, l.1-12).³⁸

After numerous proposals and counter-proposals and continuing engineering requests and survey demands the Appellant forwarded the finalized connector route to the Respondent on January 9, 2008. (R.p.356, l.15-p.357, l.23; Ex.23, p.818).³⁹ All these demands by Respondent were "straw dogs" intended to delay the project. (R.p.358, l.9-22). The Respondent continued to refuse granting of the easement up to and through May 5, 2008 when the new regulations were imposed. (R.p.390, l.12-21).⁴⁰

³⁸ This is totally inaccurate. Bishop approached Orvin in August of 2007 once he learned of the proposed route across ReWa's property. (R. p. 452, l. 6-25.) Orvin expressed concern about the route and asked if anyone had even looked at the route. (R. p. 452, l. 6-25.) Shortly thereafter, Bishop walked the route with Appellant's surveyor and discovered serious topographical issues as well as rock. (R. p. 813, Ex. 20.) In addition, the proposed route interfered with construction and "operational issues in that area." (R. p. 452, l. 12-23.) Orvin then instructed Bishop and Dr. Stephen Graef to work with Appellant to identify "alternate routes," which they did in a very short timeframe. (R. p. 454, l. 10-16.) Thus, not only was Appellant's project not flagged by Orvin in August of 2007, Orvin expressly instructed ReWa's staff to help Appellant find other potential solutions.

³⁹ The next proposed route was called the "Bishop Proposal." However, although feasible, this route was rejected by Appellant's joint venturer because it required connection to a Metro Line and Metro wanted the line upgraded. Appellant's joint venturer did not want to pay to upsize the line. (R. p. 878, l. 2-22.) The Parties then pursued what has become known as the River Route, which also crossed ReWa Plant Property. Subject to Board approval, ReWa's staff generally agreed upon the River Route in January of 2008. However, when Appellant finally submitted a proposed survey for the River Route, Appellant had drawn the survey outside of ReWa's property. (See R. p. 819, Ex. 24) (Bishop: "The route in general looks to be ok..."It appears the force main route along [the northern portion of the property] is not on our property nor is the fence?"). It is the drawing of the force main off of ReWa's property that Appellant now portrays as "straw dogs" raised by ReWa to delay the project.

⁴⁰ This is equally untrue. First, Appellant and its joint venturer unilaterally decided they were going to build two force mains across ReWa's property without ever discussing the same with ReWa. (See R. p. 821, Ex. 25) (Bishop: "No one has indicated to me that there would be two force mains. This has never been discussed."). Then, Appellant never submitted finalized engineering design plans for the force main, nor did it ever submit an easement application. See

Even the applicability of the new regulation to the Appellant was far from clear. Bolo testified "And I specifically asked them, and I held up the regulation and said, 'This doesn't apply to us because we're not outside the sewer district.' And Mr. Orvin (director of Respondent) said, and I quote, in front of 20 people, 'Well we think you are.' " (R.p.214, l.18-23).⁴¹ Then the Appellant requested an Adjudicatory Hearing before the Board concerning whether or not the new regulation was retroactive and they appeared before the Respondent Board concerning that question in November of 2008. (R.p.242, l.9-20).⁴² However, no decision was ever made by the Board. (R.p.244, l.1-4).

Orvin testified on behalf of the Respondent. (R.p.418, l.18-23). Orvin was approached by staff about the Appellant's submission in August of 2007. (R.p.453, l.1-12). Orvin testified that the Respondent became concerned about the proliferation of PSC force main stations in late

supra at FN 24. Indeed, the evidence of Record reflects that Appellant never completed the final engineering plans for the force main, even though ReWa had indicated a willingness to pursue the River Route in January of 2008. Exhibit 26 is a letter dated April 14, 2008 from the engineer of Appellant's joint venturer. It reflects that those Parties had not yet even settled upon an engineering solution as "how to proceed" across ReWa's treatment plant. (R. p. 822, Ex. 26.) It states: "Also, per our conversation, we are not sure at this time if we will be using a combined force main from Harrison Bridge Road to the Western Carolina site or 2 separate force mains in the same right-of-way. We will review this design and make this final determination as soon as we begin *finalizing our design*. (R. p. 822, Ex. 26.) Yet, Appellant represents to this Court, over and over again, that it was 100% design complete. And, Appellant's joint venturer was at least a year behind Appellant "to even get [Bishop] plans." (R. p. 596, l. 21-25.) In short, ReWa had nothing to refuse Appellant as of May 5, 2008, when the regulation was amended. Appellant had never completed its submittals.

⁴¹ While denying the accuracy of what is cited, ReWa has no idea what this passage is intended to demonstrate. The amended Sewer Use Regulation applies to proposed users both inside and outside of established Subdistricts. (Compare R. p. 871 ¶2 *with* ¶3.)

⁴² Appellant never requested an "adjudicatory hearing." The process for requesting an adjudicatory hearing are outlined in § 6.1, ¶2 of ReWa's Sewer Use Regulation. It required Appellant to specify its objections to ReWa's decision in writing requesting an adjudicatory hearing. Appellant did ask to address ReWa's Board at a public meeting, but no adjudicatory hearing was ever requested. If Appellant disagrees, it should provide the Court with a citation to the Record where the written request appears. None exists.

October of 2007. (R.p.459, l.10-18).⁴³ Orvin decided to "chat with the Board" about the situation. (R.p.459, l.19-23). According to his testimony Orvin gave developers "a window of opportunity" between August of 2007 and November or December of 2007 to get everything in and approved concerning PSC force main stations before the regulation change. (R.p.457, l.21-p.458, l.6).⁴⁴ The matter was discussed with the Board in November of 2007 but the board had no idea about how it was ultimately going to address the issue through amended regulations. (R.p.465, l.21-p.466, l.12). The Board never even considered formal adoption of the regulation change until May of 2008. (R.Ex.3, p.772).

Although Orvin created a window of opportunity for developers to get everything in and approved before the end of December of 2007, some five months before the regulations were enacted he contended at the hearing that he had no authority to determine "grandfather" status following passage of the regulation. (R.p.457, l.21-p.458, l.6; p.487, l.23-25).⁴⁵ Orvin contended that he was told by the Board in November of 2007 to hold up on approving any pump stations pending review of the proposed regulation which occurred six or seven month later in May of 2008. (R.p.492, l.9-l.25). He testified:

Q. (Appellant's counsel) So even before it was enacted, you were told, and you did, hold up on any approvals?

A. (Orvin) On the pump station.

Q. On the pump station. And the pump station was clearly a part of the River Trace application approval, wasn't it?

A. There were several of them that had pump stations that's correct.

⁴³ Orvin actually testified that he did not bring the issue to the Board's attention until November or early December of 2007. (R. p. 460, l. 6.)

⁴⁴ Appellant blatantly misstates Orvin's testimony. Orvin testified that "there was a window of opportunity" where ReWa had indicated to Appellant that the River Route was workable before any discussion of the regulation ever occurred. (R. p. 457, l. 9-21.) Orvin did not testify, as Appellant represents, that he gave "developers an opportunity to get everything in and approved concerning PSC force main stations before the regulation change."

⁴⁵ Again, this is untrue. See supra at FN 44.

Q. And you were told to hold up on all of them?

A. On the pump station section of it.

Q. That stack that Brian brought to you were the people that were what we've been calling in the pipeline at the time?
(R.p.492, .118-p.493, l.13).

The record is quite clear that the Board never directed Orvin to hold up approval. (See R. Ex.1, p.947-948).⁴⁶ Furthermore, the granting of an easement or encroachment permit is was also a Board function according to Orvin's testimony. (R.p.461, l.16-462, l.2). According to Orvin the staff could reject an easement or encroachment request but the Board must approve them. (R.p.462, l.2-5). Appellant needed and requested an easement or encroachment permit to connect the Condor pump station to Respondent's trunk line. That request was not rejected by staff but Orvin never submitted any of the Respondent's multiple requests for the permit to the Board. (R., inter alia).⁴⁷

Orvin further testified that public hearings were held on the proposed PSC connection regulations in January and April of 2008. The proposed regulations went through several different drafts most particularly definitions and provisions concerning "in district" and "out-of-

⁴⁶ Appellant omitted a material passage just above what it cited to the Court. Specifically, Orvin testified that the Board instructed staff to "continue working with the developers because they needed to do planning, they needed to get right-of-ways, they needed to get all of their paperwork in..." (R. p. 492, l. 1-8.) The Board, according to Orvin, did instruct staff to hold-off approving the pump station issue without further instruction. (R. p. 492, l. 1-8.) But no Project was hindered by this instruction, as no Project had reached a point where they had filed final submittals to ReWa requiring approval or denial. Appellant's project was, perhaps, further along than all other similar projects and had a substantially incomplete project file. *See supra* at FN 24. To support its contention that Orvin somehow misstated the facts concerning these issues, Appellant cites the meeting minutes of the November 5, 2007 ReWa Board meeting, which reflect ReWa's Board instructed staff to continue negotiations with Appellant. However, this is entirely consistent with Orvin's testimony, so long as the passage omitted by Appellant is considered.

⁴⁷ Appellant's persistent contentions in this regard are telling. Again, no easement application was ever filed by Appellant. In order to approve such an easement, the Board would need finalized plans reflecting what was being built on ReWa plant property and a finalized route. Appellant never submitted such materials because Appellant never finalized the engineering of the proposed force main on ReWa Property. *See supra* at FN 24; (see also R. p. 822, Ex. 26.)

district" service and provisions for the private and public sector. (R.p.470, 1.4-15). All the while Orvin had told the staff to hold final approval of Appellant's project since they were most concerned about being left as the "bag holder" related to the contract between the Appellant and Condor. (R.p.475, 1.2-23).⁴⁸

Orvin also testified that although he had the authority to open and close the "opportunity window" he allegedly opened in late 2007 for developers who were "in-the-pipeline" he stated that he lacked the authority to "grandfather" (meaning to exempt the project from the new regulations due to their pre-existing status) the pending projects.⁴⁹ Orvin, nevertheless, "held up" the Respondent's pump station portion of their application without telling them and closed the "opportunity window" sometime in December of 2007 again without telling the Appellant. (R.p.492, 1.9-14; p499, 1.12-21).⁵⁰ Orvin didn't even know if his "small window" was enough time for developers to comply. (R.p.458, 1.16-18).⁵¹

Although, Metro was responsible for most of the technical review of the pumping station and although, the Respondent had no reason to believe that the Appellant had not submitted

⁴⁸ Appellant again misstates the Record. The passage cited discusses ReWa's general concerns that when private utilities go defunct the public utility ends-up "holding the bag." (R. p. 475, 1. 2-23.) Appellant twists the passage to make it appear as if such general concerns prompted decision-making specific to Appellant's project. That was not Orvin's testimony.

⁴⁹ Orvin never gave any such testimony. It is noteworthy that Appellant fails to provide any citation to the Record for its gross misrepresentation of Orvin's testimony.

⁵⁰ This is inaccurate. See supra at FN 46.

⁵¹ Appellant's misstatement of the Record in this regard is quite stark. Orvin never stated "he" created a window of opportunity. He testified a window of opportunity existed for Appellant's Project pre-dating when the Regulation was even in play. See supra at FN 46.

every scrap of paper necessary for Metro to complete their responsible portion, the Respondent "held-up" their approval forever. (R.p.500, l.17-p.501, l.3).⁵²

Mr. Joe E. Willis testified at the administrative hearing on behalf of the Appellant. Mr. Willis was also a developer and testified about the Appellant's companion development known as Grant Estates ("Grant"). (R.p.524, l.12-25).⁵³ Grant also received a capacity letter from the Respondent about the same time as the Appellant. (R.p.526, l.22-25). Grant proceeded to grade their site and started installing utilities. (R.p.527, l.2-9). They also were working on plans to submit to Respondent and retained Condor for their project as well. (R.p.527, l.2-21).⁵⁴

⁵² Appellant's comments either intentionally misstate the permitting process or evidence a genuine lack of understanding of the process. Bishop was questioned about these issues:

Q. And are Metropolitan Sewer's requirements the same as Western Carolina?

A. No, they're not.

Q. Now, the stuff that Harrison Partners needs to file in the flow acceptance process, do they get to just send it to Metro and say, "Oh, yeah, Metro, forward it on to ReWa?"

A. No. It's not Metro's responsibility.

Q. That's not how it works, is it?

A. No.

Q. Those filings have to be made directly to you, don't they?

A. They have to be made to each one of these agencies.

(R. p. 582, l. 3-16.) And, Appellants never submitted the required materials to ReWa, despite numerous requests. *See supra* at FN 24. And, to the extent they actually exist, which appears highly doubtful, Appellant never produced them. And, to the extent they actually exist, Appellant never presented them into evidence.

⁵³ Riversway, not Grant Estates, was Appellant's companion project. Appellant is just factually wrong.

⁵⁴ Contrary to what Appellant represented to the Court, Grant Estates never finalized a contract retaining Condor. (R. p. 549, l. 15-17) ("Q. You never had a signed contract with Condor, did you? No, I did not."). Once finalized, such contract still needed to be approved by the Public Service Commission. So, just like Appellant, Grant Estates' project file remained substantially incomplete as of May 5, 2008. Omitted by Appellant, Grant Estates initially sued ReWa with Appellant's sharing Appellant's second and third lawyers. Unlike Appellant, however, Grant Estates ultimately abandoned its lawsuit recognizing the weakness of its case.

Just like the Appellant, Mr. Willis testified that Grant submitted their plans and their check to Respondent before any discussion of new regulations only to find out later that their plans would not be reviewed until the Respondent's Board decided how to handle PSC pump station connections. (R.p.530, 1.17-24). Grant conducted meetings with the Respondent's representatives concerning Respondent's refusal to review their plans. (R.p.533, 1.9-25).⁵⁵

Mr. Willis also testified that the Respondent's representatives stated,

And during this time, you know, my phone – my conversations with Brian was that – you know, 'Listen, guys, the Board's going to meet. They're going to figure out what they're going to do with pump stations in the future. And I feel confident – I feel sure you guys – you're not the only ones out there. You'll be grandfathered in and be allowed to proceed with your project.' (R.p.533, 1.16-24).

As a result of those conversations Grant proceeded "full steam ahead". (R.p, 533, 1.24-25). Grant bought the \$600,000.00 to \$700,000.00 property (Appellant paid over \$1,000,000.00 for their property), mass graded the property and installed all their storm drains. (R.p.534, 1.2-5). Because Grant had already cut and filled their property like the Appellant had done the standard septic tank systems would never be permitted by the South Carolina Department of Health and Environmental Control ("DHEC"). (R.p.534, 1.1-11).

Willis further testified that, "Ray Orvin said it was his decision personally to stop any project with a pump station, and he did that against advice of his counsel, who's in this room now." (R.p.535, 1.1-4).⁵⁶ Willis further stated:

⁵⁵ Actually, Willis later admitted that ReWa's staff was working with an engineer in his office in late February of 2008—after when Appellant contends ReWa halted work. (R. 554, l. 1-10.) Willis also conceded that correspondence in March of 2008 reflected that the project was "waiting on United Utilities [another private utility] and Metro to them direction." (R. p. 555, l. 3-7.) Willis further conceded he did not know what work Bishop had completed with his project engineer. (R. p. 556, l. 1-4.)

⁵⁶ Orvin's testimony conflicts with Willis' allegations. *See supra* at FN 46. Notably, none of the facts relating to Grant Estates have any bearing on the instant lawsuit.

But this letter I received stated that it was at their – that if a piece of property – if a project was in their service area but outside of one of their subdistricts, then at their sole discretion, that's how this would be handled. But per their request, I was annexed into one of their subdistricts, so this new policy still did not apply to my project and it still did not get reviewed. And till this day, I don't think my project's been reviewed. Has it?" (R.p.535, l.11-22).

Mr. Willis summarized the dilemma of the Appellant and the six other developers as by addressing the initial capacity letter as follows:

Well, you know, here's the thing. Short answer, yes, but there's a longer answer which goes back to all these continued delays which just killed my fricking project. They gave me a letter that – stating that, you know, 'Here – we've got capacity for your project and here's what you need to do to tie into our system.' Nowhere in that letter did it state that I needed to make sure Metropolitan's Subdistrict would own and operate my pump station. That was never brought up to me." Stillwell asked, "That was a change?" Mr. Willis continues to state, "That was a change. Okay, so they took eight months after they decided they were going to change to come up with a change. So then I said 'Fine. If you're going to own and operate my pump stations, what's going to be the cost?' The initial response was, 'We don't know.' So I'm their customer and the way they're going to treat – they're supposed to be in this county for – to help grow – do planned controlled growth which would be beneficial to everybody in the county. And I'm their customer and they tell me they're going to provide this service to me. Then they say, 'No, were not. Here's the new service.' And I said, 'Well, what does the new service cost?' And they don't know, so they spent eight months coming up with a new plan, but thy still didn't have a complete plan. They don't have the price. (R.p.541, l.16-p.542, l.19).⁵⁷

Willis lost over a \$1,000,000.00 as a result of the "held-up" application, new regulation and the failure to "grandfather" his project. (R.p.542, l.20-p.543, l.8).

Respondent's Engineering Supervisor Brian Bishop also testified at the administrative hearing. Bishop testified that the Respondent had knowledge of the proposed route for Appellant's connection to their system prior to March 16, 2006. (R.p.575, l.1-24).⁵⁸ Bishop also

⁵⁷ See *supra* at FN 27.

⁵⁸ Appellant simply misrepresents Bishop's testimony. Page 575, beginning with line 20 through line 25 and continuing on page 576, is quoting Exhibit 13 found on page 805 of the Record. As noted above, Exhibit 13 states: "[ReWa] would recommend that you provide us with a potential

reiterated the knowledge for the need for the Respondent's Board approval for the Appellant to cross Respondent's property as early March 16, 2006. (R.p.579, l.20-24). However, Bishop also confirmed that the Respondent actually approved the general route of the connection across Respondent's property without Board approval in January of 2008. (R.p.623, l.10-19; p.626, l.19-627, l.4).⁵⁹

Bishop admitted that three of the four connection route changes proposed by the parties during the course of the project were proposed by Respondent. (R.p.644, l.17-22).⁶⁰ Bishop confirmed that the Appellant as of October 10, 2006 had tendered the monies and materials

force main route for our review before you finalize your design." (R. p. 805.) Thus, not only does page 575 not show that Bishop had knowledge of the proposed route before March 16, 2006, it proves the exact opposite. Moreover, Exhibit 14 (R. p. 806), an e-mail from February 9, 2007 demonstrates Appellant still had not provided ReWa with a survey, final plans or force main route. (R. p. 806, Ex. 14) ("We need the survey map and description for the force main which will be located on our property."); Exhibit 15, an e-mail from February 14, 2007 evidences Appellant still had not provided the information. (R. p. 807, Ex. 14) ("I cannot send the flow acceptance letter until we have the final plans for...the force main route."); Exhibits 18 and 19, e-mails dated March 21, 2007 and July 3, 2007, both reflect that Appellant still had not provided the easement applications, submitted a proposed survey, or identified the proposed route. (R. pp. 811-812, Ex. 18 & 19.) Indeed, Bishop testified that he was never even supplied with the route until August of 2007. (R. p. 609, l. 6-15.)

⁵⁹ Actually, the passage recites Exhibit 6 which is an e-mail from Bishop stating, "The route in general looks to be okay." (R. p. 623, l. 10-19.) But, Bishop is actually writing to note the survey supplied draws the proposed sewer line on a third-party's property. That having been said, ReWa was generally okay with the proposed route, subject to Appellant submitting finalized engineering plans for the force main, and subject to Appellant submitting an easement application, and subject to the Board formally voting on approving the easement. Obviously, none of the later conditions ever occurred. Interestingly, Exhibit 6 squarely refutes Appellant's argument that ReWa would never "okay" a proposed route so Appellant could submit finalized engineering submittals and easements.

⁶⁰ Bishop testified that ReWa made suggestions to Appellant about alternative routes that could work. However, Appellant did not have to follow ReWa's suggestions. (R. p. 614, l. 19-25.) Appellant could pursue any viable route. (R. p. 615, l. 1-2.) ReWa was simply trying to help Appellant find engineering solutions to a very difficult project to sewer. (R. p. 615, l. 1-4.)

required to commence the approval by the Respondent of the project. (R.p.647, l.5-11).⁶¹ Bishop also admitted in his testimony that he testified at his deposition that he saw plans that were almost complete and he never gave his input to the Appellant as to whether or not those submissions were acceptable to the Respondent. (R.p.654, l.5-25).⁶²

Bishop also testified that he was informed in November of 2007 to not give any final approvals on Appellant's project. (R.p.659, l.2-24).⁶³ He confirmed that documentation was first submitted to Metro then from Metro to the Respondent. (R.p.661, l.5-17).⁶⁴ Lastly, Bishop admitted that prior to his direction to "hold-up" his approval process he had received the final submission of the "river route" connection to their facilities and that the Respondent had agreed to the "river route" (R.p.664.l.4-13; p.662, l.17-23).⁶⁵

⁶¹ This is misleading. Bishop testified that Appellant submitted "some materials." But, Appellant omits to note that Bishop also testified Appellant failed to submit a survey or a route on the design of where the route was going, which he "asked for in—at the very beginning." (R. p. 647, l. 4-19.)

⁶² Actually, Bishop did not testify to what is stated. Appellant's counsel was attempting to cite the answer to a compound question to Bishop. Bishop explained: "I never gave a final full acceptance. That is a true statement. I answered your question. These plans here are not complete. I answered that question. What else do you want me to answer? (R. p. 655, l. 5-8.)

⁶³ Like Orvin, Bishop testified that he was instructed to continue helping the developers complete their applications for flow acceptance pending further instruction from the Board. (R. p. 659, l. 8-11.) Presumably, had a developer actually completed the application process, Bishop would have returned to the Board or Orvin for further instruction. (R. p. 668, l. 14-25; R. p. 669, l. 1. 1-6.) However, this never happened. And, in the instance of Appellant, Bishop noted, "Even if I was told to approve [Appellant's] plans, I did not have enough information to approve them at that time. (R. p. 660, l. 2-4.)

⁶⁴ Actually, Bishop testified that he "needed to see a final set of plans" and it was not Metro's responsibility to submit the final plans to ReWa. (R. p. 661, l. 21- p. 662, l. 2.)

⁶⁵ Bishop testified that he received the revised survey correcting the line drawn off of ReWa's property. Bishop did not testify that the revised survey constituted final plans. Bishop noted the submittal failed to define the plan and profile needed "in order to know exactly how this is going to work." (R. p. 667, l. 12-22.)

The second in command for the Respondent Dr. Stephen B. Graef testified at the hearing as well. (R.p.676, l.18-677-1.7). Graef became familiar with the project in the fall of 2007. (R.p.677, l.23-25). Graef asked to meet with the developers. (R.p.679, l.20-24). Graef confirmed that the 'river route' connection had been offered by the Respondent and the parties were in agreement on the concept. (R.p.682, l.10-23).⁶⁶ Graef also testified about the Respondent's \$318,000.00 one time cost and \$35,000.00 a year annual cost of their offer to own and operate the entire sewer system of the project if the project de-annexed from Metro and the developer paid those amounts. (R.p.690, l.18-p.692, l.7; Ex.37, p.861). The April 23, 2007 contract of the Appellant with Condor provided for payment of the up front amount of only \$10,250.00 with monthly payment of \$25.00 per lot connected to the system and an initial \$1,500.00 per month after the pump station startup. (R.Ex.1, p.725-731).

Graef also admitted that it wasn't fair to apply the new regulations to projects already in progress and that the Appellant acted in good faith and cooperation during the project. (R.p.711, l.15-p.712, l.13; p.712, l.14-p.714, l.23).⁶⁷

The deposition of William J. Alexander IV was introduced at the hearing. Mr. Alexander testified that they put the Appellant's property under contract in February of 2006 when they requested and received the capacity letter from Respondent. (R.p.875, p.9, l.12-15).⁶⁸ They

⁶⁶ See *supra* at FN 58.

⁶⁷ While Graef felt a little uncomfortable about developers being delayed by the amended regulation, he also testified that the regulation was a good thing. (R. p. 711, l. 19.) And, whenever you have an area as large as ReWa's service area, there will be people in various stages of completion of whatever they were doing. (R. p. 711, l. 11-14.) As a result, Graef testified that he believed the decision was 80 percent fair. (R. p. 712, l. 5.)

⁶⁸ This is factually wrong. Mr. Alexander works for Windsor Autry, the developer who pursued Riversway, the actual companion project to River Trace. The passage cited above relates to when Windsor Autry executed the Riversway contract. It has nothing to do with River Trace. (R. p. 875, l. 1-4.)

closed on the contract in September of 2008. (R.p.875, p.9, l.22-23). The Appellant was advised initially that they had to be annexed into the Metropolitan Sewer Sub-District to proceed with their project and that was done. (R.p.881, p.35, l.15-23).⁶⁹

John Boyette testified as a Commissioner on the Respondent's Board. (R.p.892, l.12-20). Mr. Boyette testified that Mr. Orvin informed the Board about the Appellant's project plans to run a sewer line through their treatment plant site. (R.895, l.2-10). Orvin submitted the Appellant's request for the easement or right-of-way to the Board with no details at all about the route. (R.p.897, l.6-18).⁷⁰

On November 5, 2007 the Operations and Planning Committee of Respondent's Board recommended to the Full Board for the staff to define a policy for ownership of pump stations and force mains to bring it back in December. (R.p.903, l.6-10). The Board understood that it was not customary to enforce regulations that haven't gone into effect. (R.p.917, l.7-14). It is unclear whether or not the Board even knew of the "hold" against the developers. Although, the same time the committee recommended to the Board that Mr. Orvin be directed to enter into negotiations with Appellant's representatives. (R.Ex.1, p.947). Neither of these two recommendations were adopted by Respondent's Full Board and neither the Committee or the

⁶⁹ Again, this passage has nothing to do with Appellant. It refers to an entity other than Appellant.

⁷⁰ Appellant again misstates the Record. First, the testimony does not reflect what Orvin told the Board with any specificity. The witness testified he was not sure (R. p. 895, l. 6.) and he could not remember any project details. (R. p. 896, l. 9.) Second, Orvin could never provide the Board with full details, because Appellant never furnished a final easement application and finalized engineering drawings. (R. p. 597, l. 20-21) (Bishop: Q. "[D]id you ever receive finalized engineering plans? A. I did not."); (R. p. 653, l. 5) (Bishop: "I never saw plans that were complete, no sir....They were not even almost complete in ReWa's eyes."); (R. p. 657, l. 15 ("Did [Bolo] cooperate by providing the information I asked for, no...No. Again, I kept asking for certain information that I was not getting provided."); (R. p. 637, l. 1-14) ("At that point in time [May 5, 2008, was [Appellant's] project file substantially incomplete? Yes."); (R. p. 637, l. 10-14) ("Well, I couldn't approve it, which means they couldn't have taken it to DHEC to get a permit to even construct it.").

Full Board directed that pending projects with PSC connections be suspended from review. (R.Ex.1, p. 947-948). The staff while purportedly acting upon the November 2007 committee recommendation concerning negotiations with Appellant waited a year or more before making any offers to the Appellant. (R.p.920, l.1-9).

The Respondent had no policy prohibiting private pump station connections either before or during their consideration of the new regulation. (R.p.9-3, l.12-15). In its May 2008 decision the Full Board did not even consider the impact of the new regulations on the economic viability of the six or seven projects "in the pipeline" Mr. Boyette stated that the disastrous impact of the new regulation on those projects "didn't enter -- it certainly did not enter into our decision making process as to what we did or did not do. (R.p.926, l.17-25).

Commissioner Boyette testified that in November of 2008 after passage of the May 2008 regulations the Commission was descended upon by people asking to be "grandfathered" from the regulations. (R.p.913, l.11-22). The Board never decided whether or not the existing PSC connection projects would be "grandfathered" or if the new regulations applied to them at all. (R.p.914, l.13-18; p.942, l.22-24).

Nevertheless, the Respondent enforced the regulation retroactively against the Appellant.⁷¹ The Respondent knew that the enforcement of the regulations against "in the pipeline" projects interfered with the existing contract between the Appellant and Condor. (R.p.934, l.19-935, l.20).⁷²

⁷¹ There was no retroactive application of the Regulation. The Regulation was applied to all permit applications not finalized or approved prior to its enactment. The Regulation was applied prospectively. Appellant's argument is equivalent to saying that it had a vested right to complete a project for which it never received approval.

⁷² Appellant simply misrepresents the evidence to the Court. The transcript states the exact opposite of what Appellant cites. The witness, John Boyette, testified, "I have no idea. I have no

Mr. Bolo epitomized the situation as follows:

No. The reason it was important to ReWa was because you were delaying the process to implement a retroactive law, violating the Constitution of the United State of America. That's why it was important. It was a subterfuge designed to draw out the process. Look, you had 20 other – seven other developments that didn't have any technical challenge, and you wouldn't let them connect either, right? They didn't connect. No one did. Mr. Davis asks, this email is from March 21, 2077, right? Mr. Bolo replies, it is. Mr. Davis states, March 21, 2007 reflects that you hadn't sent in the easement application yet. Mr. Bolo replies, Well, maybe because you all hadn't approved the route. You – see it's a catch-22. How can we submit a permit for a route you won't approve. We kept designing the route, engineering it, engineering completing it, and then we go to submit it and you say, "Oh, wait, we got an ownership issue," or "Oh, wait, we have a location issue." You know, you just put a bag over our heads, punch us in the face, and then sent us off to do another bidding and it was endless tasks like that time and time and time again. But no, you never allowed us – we were there. Mr. Stilwell could have just signed the encroachment permits, given them to Condor. We were done. That was it, but you didn't allow that to happen. (R.p.309, 1.6-310, 1.9).⁷³

ANALYSIS
ISSUE 1⁷⁴

The hearing officer erred in numerous findings of facts in its "Factual Background" that are unsupported by evidence as follows:

A. The hearing officer found that the Appellant bought the property in question although it knew no public sewer service was available. (R.p.8). In fact, Appellant purchased the

idea what contractual relationships [Appellant] had. Q. You don't have any idea about what those contracts were? A. No sir."

⁷³ Appellant's arguments catches itself coming and going. Exhibit 24 (R. p. 819), as discussed *supra*, is an e-mail from Bishop confirming the general path of the route. Only ReWa's Board can grant an easement crossing plant property and to do so it needs an easement application with a finalized engineering drawing and a complete survey. Of course, it is not contested that Appellant never did this. Nor can Appellant direct the Court to an easement application with a finalized engineering drawing and survey. As with most things on this Project, Scott Bolo simply failed to complete his work. Bolo's account is sympathetic until one realizes that he is serially misrepresenting what occurred. In weighing the evidence, the hearing officer undoubtedly observed he wholly lacked credibility as a witness.

⁷⁴ As to the purported reasons "supporting" appeal, Respondent has addressed each in turn in its response brief.

subject property on June 21st, 2006 for \$1,022,500.00 (Greenville County Deed Book 2212, p.192-193). This was only after they received the March 16, 2006 e-mail from the Respondent that the Respondent had the capacity to accept the sewer system for the subdivision which Condor was going to own and operate the force main. (R.p.258, l.11-22). (R. Ex.13, p.805). The purchase was also after Respondent's chief engineer Brian Bishop told the Appellant that they had met the engineering requirements for connection to the Respondent's trunk line. (R.p.267, l.19-24).

- B. The hearing officer found that population densities in the basin to which the Appellant was to connect with did not yet justify studying how to sewer the area for basin-wide planning purposes. (R.p.9). In fact, there was no testimony or evidence presented to support that factual finding. Actually the evidence was quite to the contrary. There was the Roger and Callcott study (R.p.685, l.2-7) and the pump station study (R.p.439, l.19-25)
- C. The hearing officer found concerning Appellant (referred to as "HP") that "While HP's land would be annexed into the Metropolitan Sewer Sub-District's ("Metro") service area; Metro declined to own and maintain the force main and pump station. (R.p.9). In fact, the issue of Metro ever owning or maintaining the force main and pump station arose only after the Appellant executed a contract with Condor on April 23, 2007 to provide the force main and pump station, the Respondent "held-up" Appellant's application for two and one-half years and a new May 8, 2008 regulation of the Appellant requiring sole ownership of the collection system and the force main and pump station was retroactively applied to the Appellant before Metro considered owning and

) maintaining the force main and pump station. (R.Ex.1, p.725; Ex.3, p.772; p.492, .118-p.493, l.13; R.p.492, .118-p.493, l.13).

- D. The hearing officer found, referring to the companion Grant Estates development, that “The separate projects meant compounding the difficulties: two sets of engineers, two sets of plans, twice the routing problems, twice as many engineering issues, different sets of right of ways, twice the likelihood of delays and negotiating two sets of agreements between the public and private parties participating in the sewer service. In fact, there was no evidence that these separate projects compounded the difficulties relative to the approval of Appellants’ project such as having twice the routing problems, twice the likelihood of delays and negotiating separate PCS agreements. The testimony was clear that the delays in the project were from Appellant being “held-up” by the Respondent, retroactively applying a regulation to Respondent in addition to Respondent’s proposal of numerous routes to connect to their system. (R.p.659, l.2-24) (R.p.664, l.4-13; p.662, l.17-23).
- E. The hearing officer found “The peculiarities of the project led to HP pursuing various routes and options over a several year period. The evidence in the record reflected three primary routes: one referred to as the ‘Flag Lot Route’; a second called the ‘Bishop proposal’; and a third dubbed as the ‘River Route’.” In fact, the evidence was that the Respondent proposed three of the four routes discussed during the course of the project and that the Appellant didn’t “pursue” various routes and options over a several year period but it was required to consider other routes and options after the Respondent “held up” their application and retroactively applied the new regulation to the Appellant. (R.p.644, l.17-22).

ISSUE TWO

The hearing court erred in not finding pursuant to Finding Number 2 that there were many delays in the project caused by Respondent ("ReWa") during the two year period and erred in finding that the evidence clearly shows that HP (the Appellant) "had never complied with the requirements by submitting the required information."

The hearing court totally disregarded the only evidence presented, which was that Mr. Orvin ordered his staff to "hold" approval of all PSC connections as early as August 2007. It is an admitted fact by the Respondent that their executive director intentionally caused at least a six month delay by putting the "hold" on the Appellant's processing until after the regulation was amended in May of 2008. Furthermore, the Appellants were placed on "hold" secretly for a period of time with no notice to them. A "hold" order by the executive director clearly, plainly and obviously stopped everything in its track. There would be no reason for the Appellant to supply additional documentary requirements from the date of placement of the "hold" in August of 2007 until the present time. It would not be possible to process other aspects of the project since the PSC connection to the Respondent was the only issue they were dealing with and that processing was now on hold. If you can't connect to the sewer you can't proceed with the project. The remaining contact with Appellant after November of 2007 were more in the form negotiation information, not processing information although it took the Respondent up to early 2009 to even come up with a proposal. (R.p.694, 1.2-7).

The findings under Finding Number 2 that Bishop notified Bolo of the requirement for sewer service in his March 16, 2006 capacity letter and the requirements were never met by Appellant are irrelevant and contrary to the evidence. Clearly, Metro agreed to handle the

collection line for the subdivision and the only reason it could not connect was the Respondent's "hold" and retroactively applied regulation.

In another finding the hearing officer cites a litany of e-mails from February and March of 2007 for the proposition that the Appellant failed to comply with requirements. In fact, the e-mails indicate that from March of 2006 the Respondent requested no additional information and only responded to Appellant's inquires in February of 2007. (R.Ex.13, p.805; Ex.14, p.806). Furthermore, the evidence showed that the July 3, 2007 e-mail of of Ashley Hornung was never responded to by Respondent. (R.Ex.19, p.812).

Furthermore, the finding implies a survey had been requested for sixteen months when in fact a "survey map" was requested only in February of 2007. (R.Ex.14, p.806).

The hearing officer goes on to state that by e-mail of March 21, 2007 (Exhibit 18) Bolo acknowledged Appellants failure to comply with requirements. The e-mail actually said:

"Thanks for your correspondence. Appreciate your taking the time to look over the plans. The Metro comments were integrated into the engineering drawings you are reviewing. So as far as comments from Metro and design we have been through this process. Hopefully the Metro review has the drawings where they are ready for your comments and corrections. We are collecting the DOT encroachment permit and finalizing the WCRSA easement forms forwarded. These last two items should be complete soon. It has been a long process and we appreciate your help in working out the details. Please do not hesitate to contact me if you need anything else from us in the interim." (R.Ex.18, p.811).

The hearing officer also places some weight on the January 8, 2008 e-mail from Hornung when this e-mail took place during the "hold" period imposed by Respondent and was in response to negotiations. (R.Ex.23, p.818)

The hearing officer also placed some weight on the April 14, 2008 letter of Mr. Fogleman when that letter was issued concerning Riversway Subdivision during the "hold" and it actually confirms that Respondent was already requiring sole ownership of gravity line, pump stations

and force mains even before the regulation was passed in May of 2008. (R.Ex.26, p.822). What the hearing officer also overlooked is the virtual lack of any responsiveness to Appellants requests as shown by the record. (R.Ex.13-26, p.805-822).

It is also an admitted fact that the Respondent submitted at least three different routes to connect to their property requiring surveys for each and every one. It is an admitted fact that although the Committee directed Respondent to negotiate with the Appellant in November of 2007 the Respondent waited a year before doing so. The Respondents own witness Dr. Graef when asked about when the river route was even offered as an alternative by Respondent said "Eventually" (R.p.681, 1.20-22). Their own staff testified the passing of the regulation "shut some doors for – a door for the developer." (R.p.683, 1.16-20). Likewise, there is no evidence whatsoever that any document or submission that the Respondent-requested to finish their approval of connection under the existing regulations before the August 2007, "hold" was not submitted to them. (R. inter alia).

The hearing officer's erroneous reliance on e-mails after the August of 2007 "hold", this disregard of any evidence of the "hold" from August 2007 to present and erroneous the statements about the evidence content are clear error.

ISSUE THREE

The hearing court erred in Finding Number 3 in failing to find that the Appellant had a vested right that was taken by Respondent and that the retroactive application of the regulations to the Appellant were unlawful.

The hearing officer somehow finds that "HP has offered no evidence to contest the validity of the amended Sewer Use Regulation." Those issues were clearly and squarely presented. It is slightly mystifying that the Hearing Officer relied upon the zoning of Friarsgate

vs. Town of Irmo, 290 SC 266, 349 SE2d 891 (Ct. App. 1986) to decide the Appellant had no vest rights. Especially when it was admitted by the Respondent at the hearing that Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 536 S.E.2d 892 (S.C.App. 2000) was controlling the legal issues in this case. (R.p.127, l.21-p.128, l.2).

The hearing officer stated in his order that Friarsgate held that “a developer did not acquire a vested right to all its buildings because it had not obtained permits for all the buildings before the enactment of the ordinance. The developer’s failure to obtain building permits for the entire project foreclosed the vesting of rights to build the entire project even though one building had been completed.”

Actually the Court of Appeals in Friarsgate stated;

Friarsgate also argues in its brief and at trial that its claim to a vested right to complete the project rested principally upon a lack of zoning in the area at the time it began planning and expending funds on the project. [290 S.C. 273] It argues it had a right to expect that zoning would not be imposed on its property to preclude construction of the condominiums. The record does not reveal that this argument was made before the trial court. It is a much quoted rule of law that we cannot grant relief on an issue argued for the first time on appeal. American Hardware Supply Co. v. Whitmire, 278 S.C. 607, 300 S.E.2d 289 (1983).

Therefore, the hearing officers own citation of Friarsgate for the finding that “I find that HP failed to complete and submit the required documents to obtain a Flow Acceptance Permit before May 5, 2008. Without a complete application and finalized plan, Respondent’s Commission had nothing before it to confer grandfathered status and HP had no vested rights” was a clear error of law.

However, the latter expression by our Supreme Court in Vulcan, supra, would have given the hearing officer the correct law to apply to this case and gives this court some guidance when the Supreme Court stated:

A landowner acquires a vested right to continue a nonconforming use already in existence at the time his property is zoned in the absence of a showing that the continuance of the use would constitute a detriment to the public health, safety or welfare." F.B.R. at 527, 402 S.E.2d at 191. Vulcan expended nearly \$2 million to find granite on the 585 acre Princeton site, arranged for the removal of fifteen acres of overburden to expose the granite for extraction, and was merely awaiting a mine operating permit from DHEC when the restrictive zoning stopped the development. "Acts of a landowner in development of his land, in order to require a finding that he has acquired a vested right to continue development as a nonconforming use, should rise beyond mere contemplated use or preparation...." 101A C.J.S. Zoning & Land Planning § 161 at 495 (1979) (emphasis added). Accordingly, Vulcan's pre-zoning development of the site established a nonconforming use. See also 101A C.J.S. Zoning and Land Planning § 64 at n. 80 (1979) ("Right to utilize one's property to conduct a lawful business becomes entitled to constitutional protection against otherwise valid legislative restrictions as to locality by city's zoning ordinance, or becomes 'vested' within the full meaning of that term, when, prior to enactment of such restrictions, owner has in good faith substantially entered on performance of a series of acts necessary to accomplishment of end intended....").

Clearly, Appellant expended a similar sum as Vulcan did in the development of the land in question and the submission of the requested materials, execution of contracts and was "awaiting a...permit" as in Vulcan at 901 and had substantially entered on performance of a series of acts to develop the subdivision when the new regulations were passed.

The evidence and testimony clearly showed that Respondent was fully aware that Appellant made all of its plans and relied upon its ability to set up its wastewater system in this manner. Respondent's March 16th e-mail clearly identified and anticipated Appellant's use of Condor and Metro. This was an important component of the financial model used by Appellant.

Mr. Bolo testified that Appellant had entered into a contract with a builder and also entered into a contract with Condor. At this time, there were several other applications, from other entities for other developments, pending with Respondent. All of the applications were submitted during a time when Respondent's regulations allowed a private provider to operate a pump station, and a sewer sub-district to handle the sewer service to Respondent.

) The testimony revealed that, from the fall of 2006 through the summer of 2007, Appellant, at Respondent's instructions, explored and developed plans for running their sewer line through at least three different possible routes from the subdivision to the Respondent's facility. This was testified to by Scott Bolo and admitted by Respondent employees, including Respondent's executive director, Ray Orvin. This included engineering and surveying work, all done by, and at the expense of, Appellant. Brian Bishop, of Respondent, admitted that all of the changes came from Respondent. First one route would be explored by Appellant, and then Respondent would reject that route and demand that Appellant explore another. This was occurring for months, during which time Appellant was continuing to bear the expense of the development but could not move forward.

There was testimony from more than one witness that the process usually only took from three to six months.

) Under the new policy, Appellant could not fulfill its contract with Condor to build and operate the pump station and then with Metro to operate the sewer lines. Mr. Orvin, Respondent's executive director, admitted that, in November of 2007, all Respondent employees, including Brian Bishop, were told to "hold up" on all the applications for pump stations which were pending. In January of 2008, the new policy was made public. At several public Respondent meetings and hearings, many people testified and asked Respondent not to change their policy. There was testimony from Mr. Bolo, of Appellant and Mr. McCall, of Condor, that many individuals and entities came before Respondent or communicated with Respondent, explaining how the change in policy was unfair and how it would ruin their projects. In addition, there was testimony from Mr. Ernie Willis, the developer of another project that was awaiting approval, that the change in policy was disastrous for his project.

Significantly, it was requested of Respondent that, even if they planned to change their policy, those applications already pending be "grandfathered" in under the old policy and be allowed to build their systems as planned. It was explained that, after so much time had gone by, and so much effort and expense had been put into the pending developments, the change would literally kill the projects and bankrupt the developers. Respondent, however, refused to decide if "grandfather" applied to the pending applicants. Respondent's own representative, Mr. Graef, admitted that such a decision was "not 100% fair." Mr. John Boyette, a chairman of the Board for Respondent, admitted that Respondent did not consider "grandfathering" applicants at the time of the change. He also testified that Respondent did not even consider the effect upon those applicants, including Appellant, when making their decision to change. Mr. Boyette also admitted that the change was "unforeseen and unforeseeable" to those applicants. This would include Appellant.

In May of 2008, the policy change was officially put into effect and Respondent officially changed its regulations to reflect the change. It is important to note that, even though the official change was not enacted by Respondent until May of 2008, as discussed above, it was followed and "enacted" by Respondent personnel, in reality, in August of 2007, more than nine months before official enactment. As discussed above, both Mr. Orvin and Mr. Bishop of Respondent admitted that they were instructed to "hold off" on all pump station applications in 2007.

During the "hold" Respondent then submitted a proposal to Appellant for the River Trace wastewater system to be run entirely by Respondent. The testimony was unanimous, however, that the costs were much higher than Appellant had planned and budgeted. Even Respondent's employees admitted this. There was testimony that the proposed new costs were at least twice as much or more than Appellant's original expected costs under its plan to use Condor and Metro.

Mr. Willis, another developer awaiting approval on a separate subdivision, testified that Respondent's costs were "significantly higher" than those upon which the developers were planning. Under Respondent's proposed cost schedule, the developments were unworkable. The testimony was undisputed: none of them went forward; Appellant had their property foreclosed upon, causing great financial hardship to the partners; the change, and Respondent's refusal to "grandfather" killed the projects.

Mr. Willis' observations at the hearing were correct. He stated,

"You can go by the rules, but when you got an individual personally changing the rules, there are no rules. So in – sometimes in '08, about eight month after I submitted my plans for review, I received a letter of the policy change of ReWa stating that – you know, that basically it was their sole discretion what to do with pump stations. But this letter I received stat that it was at their – that if a piece of property – if a project was in their service area but outside of one of their subdistricts, then at their sole discretion, that's how this would be handled. But per their request, I was annexed into one of their subdistricts, so this new policy still did not apply to my project and it still did not get reviewed. And till this day, I don't think my project's been reviewed. Has it?" (R.p.535, 1.4 – 1.21).

The testimony and evidence was clear that all the "in the pipeline" projects were "vested" in their rights to continue under the regulations existing at the time of their applications. The Appellant didn't fail to adequately proceed with their project along with all six other. All were prevented from proceeding.

Furthermore, the new regulations did not even state their effective date nor that they would be retroactive. S.C. Code Ann. § 6-11-1230(3) addresses the power of sewer commissions as follows:

(3) To prescribe and enforce regulations (a) requiring all persons to whom it shall be available to make use of any sewer system which the district shall from time to time operate; and (b) generally with respect to the discharge of sewage and the use of privies, septic tanks and any other type of sewage facilities within the district. Any such regulations shall, however, become effective only after they have been adopted by resolution of the commission, a certified copy thereof has been recorded in the office of the register of deeds, or, if none, in the office of the

clerk of court of common pleas for each county in which such sewer system lies, a copy posted in the courthouse of each such county, and notice of the adoption of such resolution has been published at least once a week for three successive weeks in a newspaper having general circulation in the district. The published notice shall specify in brief the scope of the regulations and shall state the date on which the same shall become effective. (Emphasis added)

In the present case the resolution states no effective date whatsoever and thus can't possibly be retroactively applied. Based upon this statutory requirement it is questionable if those regulations are even effective now. Certainly a clear reading of the regulation implies that since the Appellant was already within Metro's district the new regulation didn't apply to them at all.

Since the Appellant had a vested right to connect to the Respondent's system pursuant to the old regulations under Vulcan, that right was taken in violation of the takings clauses of the United States and South Carolina Constitutions when the regulations that prohibited the project were passed. In determining whether governmental regulation violates the takings clause, the Court will consider the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action. Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed.2d 451 (The Takings Clause provides that private property shall not be taken for public use without just compensation. Rick's Amusement, Inc. v. State, 351 S.C. 352, 357, 570 S.E.2d 155, 157 (2001). Similarly, to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. Worsley Co. v. Town of Mount Pleasant, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000).

Certainly, Appellants entitlement to connect their development under the old regulations is undisputed. Obviously anyone within the service area that qualifies under the new regulations would be entitled to a connection. There would be no reason to "hold" the Appellant's application if they weren't entitled to connect under the old regulation. Although the Respondent

raises multiple issues about "routes" and crossing of treatment plant property the Respondent cannot point to one statute, rule or regulation that would disqualify a particular route or prohibit the customary joint use of rights of way that are enjoyed by a multitude of private as well as public utilities such as phone, cable, electric, water, sewer, gas and cellular companies.

Therefore, the hearing officer erred in not finding that the Appellant had a vested property right that was taken in violation of the takings clauses of the United States and South Carolina Constitutions and that the retroactive application of the new regulations to Appellant were unlawful.

ISSUE FOUR

The hearing officer erred in failing to consider and rule on the issue of the Contract Clause of the United States and South Carolina Constitutions.

As pointed out many times in the testimony there existed two contracts with the Appellant and third parties prior to the enactment of the new regulation. The testimony was clear that this enactment impaired those contracts.

Both the South Carolina Constitution and the United States Constitution bar states and their municipalities and quasi-municipal corporations from passing laws that impair the obligations of contracts. Section 4 of Article 1 of the South Carolina Constitution states: "No ... law impairing the obligation of contracts ... shall be passed...." In interpreting the Contract Clause of the South Carolina Constitution, the South Carolina Supreme Court has followed federal precedent construing the federal Contract Clause. G-H Ins. Agency v. Continental Ins. Co., 278 S.C. 241, 246, 294 S.E.2d 336, 339 (1982) ("The mandate of the state and federal constitutions relating to impairment of contracts is basically the same."). Alston v. City of Camden, 322 S.C. 38, 471 S.E.2d 174 (S.C. 1996).

Article I, section 10 of the United States Constitution provides:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters or Marque and Reprisal; coin Money, emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility. U.S. Const. art. I, § 10, cl. 1 (emphasis added). See S.C. Const. art. I, § 4.

Appellant argued at the hearing that the enactment of the new regulations impaired its contract with Condor and Eastwood, thus violating the Contract Clause of the United States Constitution and South Carolina Constitution. To establish a contract clause violation, Appellant must show To establish a contract clause violation, Appellant must show: (1) the existence of a contract; (2) the law changed actually impaired the contract and the impairment was substantial; and (3) the law was not reasonable and necessary to carry out a legitimate government purpose. Hodges v. Rainey, 341 S.C. 79, 93, 533 S.E.2d 578, 585 (2000). See also generally U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) (in considering contract clause claim, court must ascertain, among others, whether the State law has in fact operated as a substantial impairment of a contractual relationship); Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) (same); Seaboard Air Line Ry. v. United States, 261 U.S. 299, 304, 43 S.Ct. 354, 67 L.Ed. 664 (1923) ("The compensation to which the owner is entitled is the full and perfect equivalent of the property taken."); South Carolina Dep't of Transp. v. Faulkenberry, 337 S.C. 140, 522 S.E.2d 822 (Ct.App.1999).

A law is viewed as substantially impairing a contract, for Contract Clause analysis, where it alters the reasonable expectations of the contracting parties. Hodges, 341 S.C. at 94, 533 S.E.2d at 585-86.

There was no factual dispute that Appellant had two valid contracts. There was no factual dispute the law, or as in this case the regulation actually impaired both contracts and completely

abrogated the Condor contract. Therefore, the only issue remaining would be the reasonableness and necessity of the new regulation applying to the Appellant.

Again, by its own language the new regulation may not apply to the Appellant since there is no effective date nor does it state that it applies to existing applications. The only justification to apply this new regulation to the Appellant is to avoid "holding the bag" for the Appellant when the Respondent is allegedly holding the bag for twelve pump stations none of which have failed. The only justification that one can believe about the regulation was McCall's testimony that the Respondent wanted the money. That is not justification for the reasonableness and necessity of a new regulation. The other arguments raised at the hearing are theoretical scenarios that are not based in any fact other than some man running his own sewer collection and treatment facility unconnected to the Respondent on some mountain called the "Altamont" case. The relevancy of the Altamont case is obscure at best since it involved the Respondent agreeing to be a trustee over a defunct private residential sewer system for the EPA and DHEC when they weren't legally obligated to do so. (R.p.449, 1.3-7).

For a law to survive scrutiny under the Contract Clause when the law substantially impairs a contract, it must be "reasonable and necessary to accomplish a legitimate public purpose." Citizens for Lee County v. Lee County, 308 S.C. 23, 30, 416 S.E.2d 641; accord Baltimore Teachers Union, 6 F.3d at 1018. When a governmental agency acts to impair a purely private contract, "courts properly defer to legislative judgments as to the necessity and reasonableness of a particular measure." United States Trust Co. v. New Jersey, 431 U.S. 1, 17, 97 S.Ct. 1505, 1515, 52 L.Ed.2d 92, 106 (1977). However, when the agency impairs a contract to which it is a party, less deference is due the legislative judgment Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727, 736 (1978). Since this new

) regulation affected a transaction that the Respondent was going to be a party to when finalized less deference should be given to their judgment. Therefore, the Court should pay little deference to any legislative judgments of necessity and reasonableness in this case, because the Respondent's self-interest is implicated, even though the contract at issue is purely a private contract.

The United States Supreme Court has said that heightened scrutiny is appropriate when a governmental agency's self-interest is at stake. United States Trust Company, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92. Traditional analysis of reasonableness and necessity focuses on such issues as (1) whether an emergency exists justifying the impairment; (2) whether the law was enacted to protect a basic societal interest, rather than a favored group; (3) whether the law is narrowly tailored to the emergency at hand; (4) whether the imposed conditions are reasonable; and (5) whether the law is limited to the duration of the emergency. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727, 736 (1978); G-H Ins. Agency, 278 S.Ct. 241, 294 S.E.2d 336. Of course, there need not be an emergency situation before a state may pass a law impairing a private contract. See Spannaus, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727.

) There is no indication in the Record that an emergency situation existed, so factors (1), (3), and (5), listed above, do not apply. Furthermore factors (2) and (4) have not been satisfied. Likewise nothing about this new regulation affects the public health or environment since it was a purely economic interest in not "holding the bag" for a defunct PSC. Furthermore, this alleged problem with PSC connections, is one created by Respondents own regulations.

Therefore, the trial officer clearly erred in failing to rule on the contract clause claims and finding there is no constitutional infirmity relative to this regulation. It clearly violated the Contract Clause of our Constitutions.

CONCLUSION

Mr. Bolo summarized the principals of this case as follows:

You know, I just wanted to impress upon the Court and just beg for mercy because, sire, we've obviously been in this process since 2006. You know, I'm not going to contend that I'm a perfect person. I got a lot of shortcomings. There's a lot of people on this project that got hurt really bad, especially Mr. Clark, and I just don't think its right, what happened. I mean how can you go through three or four years of working your heart out and doing everything right and then at the end of the day have these people just laugh in your face and turn their back on you. And now I don't even know if my children are going to have a house to live in. How's that fair to us when we did all we could and were honest and we worked so hard and this is that we get? I got to live with this. I got to try and make a living while I come and get deposed for two days and go to countless hearings and why? Why am I here? Because no one else can do it. They're all bankrupt or they're all too scared to come to Court. You heard Mr. Condor – Mr. Gene. So this isn't about -- it's a human thing. Imposing a regulation on someone three years or whatever it happened, that's why it's in our U.S. Constitution, because as citizens we have a right to be protected from retroactive laws. (R.p.410, 1.7 – 411, 1.7).

The trial officer erred in his findings of fact unsupported by the evidence. He clearly erred in relying upon Friarsgate, supra. The trial officer had to find that the Appellant had a vested right to continue under the old regulation since it was taken, prior to enactment of such regulation, the Appellant in good faith substantially entered on performance of a series of acts necessary to accomplishment of the end intended, that being to connect their subdivision to the sewer system. The trial officer failed to ascertain that the new regulation could and should not apply to the Appellant and that the application of the regulation to the Appellant violated the Contract Clause of the United State and South Carolina Constitutions and was a taking of its vested property rights based upon reasonable investment backed expectations.

The decision of the hearing officer should be reversed since there is no question about the vested rights of the Appellant, the purposeful delay by the Respondent and the Contract Clause violation by the application of the new regulation to the Appellant. Alternatively, this court should reverse and remand this matter for a new hearing on the issues presented.

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Greenville, South Carolina
Date: _____

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
Harrison Partners, LLC,
Plaintiff/Petitioner,
v.
Renewable Water Resources,
Defendant/Respondent.

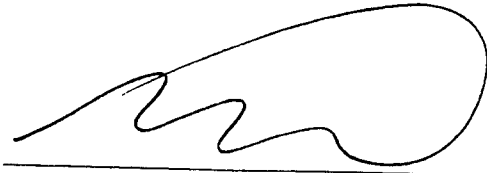
FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS
IN THE COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
2012 DEC - 7 A 9:41
C. A. No.: 2011-CP-23-6482
MOTION TO RECONSIDER

TO: Honorable Edward W. Miller, Rivers Samuel Stilwell and Lane Whittaker Davis,
Attorneys for Respondents

The Plaintiff/Petitioner moves this Honorable Court to alter, amend or reconsider pursuant to Rule 52(b) and 59(c) SCRCP and hereby respectfully requests that this Court reconsider its Order dated November 16, 2012, filed November 16, 2012 and received on November 27, 2012 as follows;

1. The Trial Court erred in failing to address the issue of whether or not the regulatory amendment in May of 2008 actually applied to Petitioner since the amendment only applied to projects outside a sewer service area and Petition's project was inside the metropolitan sewer subdistrict.
2. The Trial Court erred in finding Vulcan Materials v. Greenville County Board of Zoning Appeals, 2342 S.C. 480, 536 S.E. 2d 892(Ct. App. 2000) inapplicable to the present facts.
3. The Trial Court erred in finding that Petitioner never raised contract clause violations in the proceedings below.

Wherefore, Petitioner requests this court reconsider, alter or amend judgment to grant the relief requested by Petitioner.



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Date: 12/14/12



THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APR 03 2013

Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-06482

Appellate Case No. 2013-000329

Harrison Partners, LLC, ... Appellant,

v.

Renewable Water Resources, ... Respondent.

RESPONDENT'S MOTION TO DISMISS

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Lane W. Davis
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Poinsett Plaza, Suite 900
P.O. Box 10084 (29603)
Greenville, SC 29601
(864) 250-2300

Attorneys for Respondent

Pursuant to Rule 224 of the South Carolina Appellate Court Rules, Respondent Renewable Water Resources ("ReWa") moves the Court for an Order dismissing the appeal of Harrison Partners, LLC ("HP"). HP can only appeal the lower court's November 16, 2012 Order ("Subject Order") on grounds, which even if reversed, would not change the lawsuit's outcome. Accordingly, ReWa moves the Court of Appeals for a dismissal of HP's appeal so as to avoid the needless expenditure of resources by both the Court and the parties.

A. HP NEVER CONTESTED FIVE (5) ALTERNATIVE GROUNDS IN THE SUBJECT ORDER, INCLUDING IN ITS MOTION TO RECONSIDER.

HP appealed the Subject Order, in which, the Circuit Court sat in an appellate capacity to consider and affirm an administrative order issued by a ReWa hearing officer. ReWa has attached the Subject Order hereto as Exhibit A. The lower court's order contained several alternative grounds ("Alternative Grounds"), which HP never challenged and cannot now challenge, for the first time on appeal. The Alternative Grounds included:

1. HP failed to follow the adjudicatory process and procedure required by ReWa's Sewer Use Regulation. (*Id.* at 14.)
2. Only ReWa's Commission could grant to Appellant an interest in land owned by ReWa. Until such time, Appellant could never obtain a vested interest in project plans. Yet, ReWa's Commission never granted such interest and Appellant conceded it had to have an easement across ReWa's land, "no matter which way [it] went." (*Id.*)
3. By operation of South Carolina's Statute of Frauds, Appellant had no right to cross ReWa's property absent a written conveyance, which it never obtained. (*Id.*)

4. The doctrine of equitable estoppel has no application under the instant facts. (*Id.*) See *Berkley Elec. Coop, Inc. v. Town of Mount Pleasant*, 308 S.C. 205, 209–11, 417 S.E.2d 579, 582–83 (1992).
5. Even if Appellant's arguments were otherwise correct, the pending ordinance doctrine would defeat Appellant's allegations. (*Id.*)

When it included such grounds, the lower court simultaneously found HP never provided the Circuit Court judge with any meaningful response to the same:

While Respondent [ReWa] raised all such issues in its brief opposing Appellant [HP]'s grounds for appeal, Appellant provided no meaningful response to the same. Accordingly, the Court adopts such grounds as additional sustaining grounds in further support of its affirming the Hearing Officer's decision.

(*Id.*) HP likewise never challenged the Alternative Grounds after the lower court issued the Subject Order.

HP filed a motion to reconsider the Subject Order on December 7, 2012. ReWa has attached a copy of HP's motion to reconsider as Exhibit B. None of the grounds in HP's motion challenged (or even referenced) any of the Alternative Grounds in the Subject Order. Thus, before the lower court issued the Subject Order, HP never argued against the Alternative Grounds *and* after the Subject Order was issued, HP still never challenged any of the Alternative Grounds in the Subject Order. While HP ignored the grounds (presumably because no response existed), each of the Alternative Grounds created an independent basis to sustain the Subject Order. HP cannot now challenge the grounds for the first time on appeal.

B. UNLESS RAISED IN THE LOWER COURT, HP CANNOT CHALLENGE THE ALTERNATIVE GROUNDS ON APPEAL.

The Alternative Grounds have now ripened to finality and HP cannot raise them before the Court of Appeals. As noted *supra*, in the Subject Order, the lower court

found HP never meaningfully responded to the Alternative Grounds. (*Id.* at 14.) In light of the same, only two results can obtain, neither of which preserves the Alternative Grounds for appellate review.

HP must either admit or deny failing to respond to the Alternative Grounds. If HP concedes (as it should) that it failed to contest the Alternative Grounds below, then HP cannot now advance new arguments challenging the Sustaining Grounds. Such arguments would necessarily constitute arguments newly minted by HP and raised for the first time on appeal, which South Carolina courts expressly disallow. *See Hill v. S.C. Dep't of Health and Envtl. Control*, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) ("[T]o preserve an issue for appellate review, a matter may not be raised for the first time on appeal, but must have been both raised to and ruled upon by the trial court."); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 780–81 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled upon by the lower court."); *Ro-Lo Enters. v. Hicks Enters., Inc.*, 294 S.C. 111, 113, 362 S.E.2d 888, 889 (Ct. App. 1987) ("We cannot grant relief on issues argued for the first time on appeal."); *Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) ("Failure to argue is an abandonment of the issue and precludes consideration on appeal."); *Duck v. Jenkins*, 297 S.C. 136, 139, 375 S.E.2d 178, 179 (Ct. App. 1988) ("An unchallenged finding of fact will not be disturbed . . . on appeal.").

Conversely, if HP now contends (the record notwithstanding) that it somehow contested the Sustaining Grounds, then HP never raised such grounds—as required—in its motion to reconsider. (*See Ex. B.*) To preserve its arguments in opposition, HP

had to raise them in its Rule 59 Motion and secure a ruling about the same by the Circuit Court. *Ransom v. SC Water Res. Comm'n*, 321 S.C. 211, 219, 467 S.E.2d 463, 467 (Ct. App. 1996) (Declining to address an issue not raised in response to Respondent's summary judgment motion, in the order, or in Appellant's Rule 59 motion). Accordingly, in this latter scenario too, the Sustaining Grounds have ripened to finality, since HP never secured a ruling on any basis contesting such grounds. Thus, in either scenario, the Sustaining Grounds found by this Court in affirming the administrative decision have ripened into a final, binding adjudication.

C. RIPENED TO FINALITY, THE ALTERNATIVE GROUNDS SUSTAIN THE SUBJECT ORDER ON APPEAL.

As Appellant cannot challenge the Alternative Grounds from the Subject Order, the lower court's decision should be affirmed by this Court. Where, as here, Appellant failed to raise exceptions to the alternative rulings of the lower court, such unappealed, alternative grounds sustain the lower court's ruling. *See Portman v. Garbade*, 337 S.C. 186, 190, 522 S.E.2d 830, 832 (Ct. App. 1999) ("Thus, the other grounds listed in the order are alternate grounds for dismissal of the case. Because the Attorneys failed to appeal these alternate grounds, they stand as the law of the case."); *Columbia (SC) Teachers Fed. Credit Union v. Newsome Chevrolet-Buick*, 303 S.C. 162, 164, 399 S.E.2d 444, 446 (Ct. App. 1990) ("An alternative ruling of a trial court not excepted to constitutes a basis for affirming the trial court and is not reviewable on appeal."); *Stanley v. B.L. Montague Co.*, 299 S.C. 51, 57, 382 S.E.2d 246, (Ct. App. 1989) ("An alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal."); *Moody v. McLellan*, 295

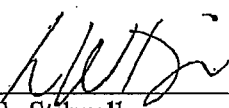
S.C. 157, 162, 367 S.E. 2d 449, 452 (Ct. App. 1988) ("An alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal"); *Nichols Motorcycle Supply, Inc. v. Regency Kawasaki, Inc.*, 295 S.C. 138, 142-143, 367 S.E.2d 438, 441 (Ct. App. 1988) (Unchallenged lower court ruling on alternate grounds constituted basis to affirm lower court); *Kolb v. Cook*, 284 S.C. 598, 603, 327 S.E.2d 379, (Ct. App. 1985) (holding appellant's failure to challenge the trial judge's alternative finding "constitutes a basis for affirming the trial court.").¹ Accordingly, HP failed to challenge any of the Alternative Grounds in the Court below; such alternative grounds now require the dismissal of HP's appeal with an order affirming the Subject Order.

¹ Moreover, where an unappealed ruling renders the issues challenged on appeal as moot, the law of the case doctrine makes it unnecessary for the Court of Appeals to reach the challenges raised on appeal. *See State v. Hough*, 319 S.C. 104, 110, 459 S.E.2d 863, 867 (Ct. App. 1996) (holding where reversal of issue would not change the result, the issue is moot, and it is unnecessary for the Court of Appeals to address it); *Jernigan v. King*, 312 S.C. 331, 335, 440 S.E.2d 379, 381-82 (Ct. App. 1993); *Daniels v. City of Goose Creek*, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993) (holding the trial court's ruling became "the law of this case," where the defendant failed to appeal it, and alternative issues were moot as "reversal would not change the result").

CONCLUSION

HP failed to challenge the Alternative Grounds cited by the lower court in support of its decision. Standing alone, such findings foreclose HP's ability to prevail on appeal. Accordingly, for the reasons stated above, the Court of Appeals should dismiss HP's appeal to avoid requiring ReWa to expend further public resources defending an appeal with only one possible outcome.

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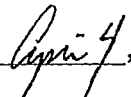
 April 4, 2013

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2011CP2306482

6769/1511
11-26-12
CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

Harrison Partners LLC vs. Renewable Water Resources

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☒ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a),

☐ SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;

☒ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded;

☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this _____

Court Reporter:

PRESIDING JUDGE - _____

This judgment was entered on the 16th day of November, 2012, and a copy mailed first class this 16th day of November, 2012, to attorneys of record or to parties (when appearing pro se) as follows:

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Greenville, SC 29609

Rivers Samuel Stilwell PO Box 10084 Greenville,
SC 29603
Lane Whittaker Davis PO Box 10084 Greenville,
SC 29603

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER

STATE OF SOUTH CAROLINA NOV 16 P 4:19
COUNTY OF GREENVILLE) IN THE COURT OF COMMON PLEAS
Harrison Partners, LLC,)
Petitioner,)
vs.)
Renewable Water Resources,)
Respondent.)

Civil Action No. 2011-CP-23-6482

ORDER

This matter comes before the Court pursuant to a notice of appeal filed by Harrison Partners, LLC's ("Appellant"). Appellant seeks to appeal the September 1, 2011 administrative order of Renewable Water Resource's ("Respondent" or "ReWa") Hearing Officer, Michael Glenn. The Court conducted a hearing on Appellant's grounds for appeal on September 4, 2012. The Honorable Edward W. Miller presided. Appellant appeared and was represented by Attorney Robbie Childs. Respondent appeared and was represented by Rivers Stilwell and Lane Davis from Nelson Mullins Riley & Scarborough, LLP.

ADMINISTRATIVE & PROCEDURAL BACKGROUND

The same dispute, albeit under a different caption, originally came before the Court on January 17, 2010. (See R. at 2-6.)¹ At that hearing, ReWa moved to dismiss Appellant's claims for failure to exhaust administrative remedies. (See R. at 5-6.) Respondent argued, and the Court agreed, that ReWa's Sewer Use Regulation outlined a detailed process whereby

¹ The caption for Appellant's initial lawsuit was: *Harrison Partners, LLC & Grant Estates, LLC v. Western Regional Sewer Authority, Raymond Orvin, Renewable Water Resources, Brian Bishop, JD Martin, Metro Sewer Subdistrict, Joe Thompson, and Mike Dickson*; C.A. No. 2009-CP-23-1770. (See R. at 2-6; R. at 21-38.)

a party could appeal decisions regarding the denial (or granting subject to conditions) of a Sewer Flow Acceptance Permit. (See R. at 5.) Governed by the procedures contained in the South Carolina Administrative Procedures Act (S.C. Code § 1-23-300), ReWa's Sewer Use Regulation allows aggrieved would-be permittees to appeal adverse decisions to: (1) first, a Hearing Officer; (2) secondly, to the Board of Commissioners; and (3) then to the Court of Common Pleas. (R. at 5.)

On March 16, 2010, the Circuit Court issued an Order dismissing the Parties' dispute without prejudice. (R. at 2-6.) In reference to Plaintiff's original Complaint, the Court found: "Plaintiffs' claims all rely upon the premise that ReWa improperly denied its request to operate a [Private Collector Sewer System]." (R. at 3.) The Court further found: "ReWa provided evidence of a process by which an aggrieved person may" appeal decisions relating to sewer use permits and private collector systems. (R. at 5.) Accordingly, the Court found: "that Plaintiff's claims against the ReWa Defendants be dismissed without prejudice pending Plaintiff's exhaustion of the administrative review process provided in the ReWa Regulations." (R. at 6.) Appellant did not move the Court to reconsider its March 16, 2010 Order, nor did Appellant appeal the Order. Accordingly, the Court's unappealed March 16, 2010 thereafter became final.

Pursuant to the Court's March 19, 2010 Order, the Parties proceeded to the ReWa Administrative Process. (See R. at 7-18.) Former Judge Michael A. Glenn presided as the designated Hearing Officer. (See R. at 18.) The Parties conducted substantial discovery in the administrative process. Hearing Officer Glenn then held an adjudicative hearing on March 23-25, 2011, lasting three (3) days and including the full direct and cross examinations of six witnesses, three from each side. (See R. at [i] - [iii].) The Parties submitted over forty

exhibits into the record and entered additional testimony, by consent, after the hearing. (See R. at 873-887.) Both Parties were allowed to submit written closings but Appellant elected not to do so, although Appellant did submit a proposed Order. (R. at 1093-1100.) In total, the parties compiled an eleven hundred (1100) page record in this case.

GROUND FOR APPEAL

Appellant has raised four (4) grounds on appeal. They are:

Issue #1: Did the Hearing Officer err in making numerous findings in the "Factual Background" of his decision?

Issue #2: Did the Hearing Officer err in not finding ReWa caused delays to Appellant's project and Appellant never completed its application for a flow acceptance permit?

Issue #3: Did the Hearing Officer err by finding the Appellant had no vested rights relating to receiving sewer service on the Subject Project?

Issue #4: Did the Hearing Officer err by failing to rule on the issue of the Contract Clauses of the United States and South Carolina Constitutions?

For the reasons set forth below, the Court affirms the decision of the Hearing Officer.

FINDINGS OF THE COURT

Issue #1: The Hearing Officer Grounded His Decision With Ample Factual Support.

First, as to Issue #1, the Court finds that several of the factual findings challenged by Appellant, for want of factual basis, would not materially change the Hearing Officer's decision even if, as Appellant contends, no factual basis supported the same. Appellant, for example, challenges the Hearing Officer's finding that Appellant knew no public sewer was offered in the area where it purchased the tract of land at issue. Appellant similarly takes exception to the Hearing Officer's findings about: whether basin-wide planning had been completed in the area in question; whether the Metropolitan Sewer Subdistrict declined to own the force main and pump station in question; whether collaboration with another developer

caused additional delays; and whether the peculiarities of Appellant's project caused problems in identifying a viable route for the sewer main running from Appellant's property. (See App. Brief, pp. 18-19.)

Appellant offers no explanation why any such findings materially impact the outcome of the administrative hearing. And, the Court fails to see how any of the factual recitations (as cited in the Administrative Order's "Factual Background," R. at 8-11) would materially change the ultimate ruling of Hearing Officer Glenn. Accordingly, the Court declines to disrupt the Hearing Officer's ruling based upon arguments lacking any materiality.

Second, even if such challenged findings proved material, ample evidence supports the Hearing Officer's factual findings now challenged by Appellant. Sitting in an appellate capacity, this Court must review the Hearing Officer's determinations under the standard of review prescribed by the South Carolina Administrative Procedures Act ("APA").² "Under the APA, [this Court cannot] substitute its judgment for that of [the Hearing Officer] as to the weight of the evidence on questions of fact." *Leventis v. South Carolina Dep't of Health & Environmental Control*, 340 S.C. 118, 130, 530 S.E.2d 643, 649-50 (Ct. App. 2000) (quoting *Ballenger v. Dep't of Health and Environmental Control*, 331 S.C. 247, 251, 500 S.E.2d 183, 185 (Ct. App. 1998); S.C. Code § 1-23-300(e)).

The Hearing Officer's factual determinations should be affirmed unless clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. *Id.*

² ReWa's Sewer use Regulation incorporates the hearing process, guidelines, and standard of review set forth in the South Carolina Administrative Procedures Act ("APA"). (See R. p. 1031, ReWa Sewer Use Reg. § 6.1, ¶ 2 ("[U]nder same guidelines applied to state agencies which are set forth in S.C. Code § 1-23-300(c).") The APA constrains a reviewing court from upsetting an agency's factual determinations, unless they are "(c) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code § 1-23-380(e).

"The possibility of drawing two inconsistent conclusions from the evidence" will not mean the Hearing Officer's conclusion was unsupported or improper. *Waters v. South Carolina Land Res. Conservation Comm'n.*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996) (quoting *Palmetto Alliance, Inc. v. South Carolina Pub. Serv. Comm'n.*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). The "burden is on the [Appellant] to prove convincingly that the [Hearing Officer's] decision is unsupported by the evidence." *Id.*; see also *Tennis v. S.C. Dep't. Soc. Servs.*, 355 S.C. 551, 558 (Ct. App. 2003).

Applying the aforementioned standards to this case, the Court finds substantial evidence supported the factual findings challenged by Appellant. (See Brief of App., pp. 18-19, Subsections A through E.) Indeed, contrary to Appellant's assertions, ample evidence of record exists to support the factual findings now challenged by Appellant in Issue #1.³ On the

³ An illustrative but non-exhaustive summary of the evidence of Record supporting the factual findings challenged by Appellant in Issue 1 includes: R. at 632: 8-25; R. at 633: 1-8 (Testimony of ReWa Engineering Supervisor Brian Bishop discussing basin-wide planning in subject basin as typical especially, when as here, no public sewer is in the basin.); R. 441: 4-8 (Indicating "when the development came on the table, there wasn't a plan for how that whole area would be handled."); R. at 438: 15-18 ("I think a lot will depend on how development occurs in the basin and how it works out, you know, with growth."); R. at 88: 4-25 ("[T]he sewer subdistricts said they weren't taking [pump stations] anymore."); R. at 109: 7-10 (Condor planned to own the pump station and force main because Metro did not want to own them.); R. at 95: 1-16 (Manifold main for both developments "kind of a unique issue here" causing, "an engineering coordination problem" and "question[s] for the design engineers for" each project); R. at 95: 1-16 ("meaning there's two separate submittals"); R. at 596: 4-16 (discussing atypical nature of manifold line); R. at 596: 21-25 (second project at least a year behind); R. at 816, Ex. 21; R. at 878 (p. 23: 2-22); R. at 993 (unanswered Request to Admit #7 stating: "The owners of the Riversway development" objected to one route "due to cost reasons."); R. at 822, Ex. 26 (reflecting uncertainty how two projects would build force main as of 4/14/08); R. at 96: 4-7 (reflecting project proposed unusual engineering aspects); R. at 229: 13-17 (discussing atypical manifold); R. at 596: 4-7 (Never approved project with similar engineering); R. at 596: 14-16 (Never permitted force main on ReWa property); R. at 596: 23-25; R. at 597: 1-2 (Collaborating project developer one year behind Appellant). Respondent cites additional evidence in its brief, see Respondent Brief, pp. 30-36, which the Court incorporates by reference in further support of the instant order.

other hand, many of the citations to the Record made by Appellant appear to be unfounded. The Court declines to address every one of the individual points in dispute. Any point not specifically addressed herein should be deemed as reviewed and found inadequate to upset the Hearing Officer's weighing of the evidence. Accordingly, as to Issue #1, the Court finds Appellant has failed to prove "convincingly that the [Hearing Officer's] decision was unsupported by the evidence." *Waters*, 321 S.C. at 219.

Issue 2: Ample Evidence Shows ReWa Did Not Cause Appellant's Delays and Appellant Never Submitted a Complete Permit Application.

As to Issue #2, Appellant was similarly required, but did not, prove the Hearing Officer's findings were "unsupported by the evidence." *See Waters*, 321 at 219; *see also supra discussion*. According to Appellant, the Hearing Officer erred by not finding ReWa caused delays to Appellant's project and further erred when concluding Appellant never completed its permit application by submitting information required by ReWa. Contrary to Appellant's assertions, however, the Court finds substantial evidence supported both aspects of the Hearing Officer's decision.

First, of the "two year" delay cited by Appellant (*see* Brief of App., p. 20), substantial evidence reflects the first eighteen months of delay resulted because Appellant failed to provide ReWa with information concerning its initial route (referred to by the Parties as the Flag Lot Route).⁴ After the problems with the Flag Lot were discovered, ReWa immediately began

⁴ At the project's inception, the evidence of Record reflects as follows: Bishop instructed Appellant to specify the initial route before completing substantial engineering work. (*See* R. at 805, Ex. 13.) Bishop sought to help Appellant avoid spending a lot of time and money until the route was approved. (R. at 578; 2-12.) Correspondence during the eighteen month period reflects Bishop repeatedly requested information about the location of the Flag Lot Route. (*See e.g.*, R. at 806, Ex. 14; R. at 807-808, Ex. 15.) Despite Bishop's requests, Appellant failed to specify the route location until August of 2007, nearly eighteen months after Bishop first

working with Appellant to identify an alternative route. Through no fault of ReWa, the alternative route (named by the Parties as the "Bishop Proposal") was rejected, even though viable. (See R. at 332: 14-21; *see also* R. at 993 (Unanswered Request for Admission #9.) A three month delay ensued before ReWa helped Appellant identify a final route (called the "River Route"). Appellant settled upon the River Route in late November of 2007.

The evidence of Record demonstrates the River Route was, in turn, delayed for three reasons. First, another governmental entity (not ReWa) raised concerns about Bolo's engineering calculations. (R. at 631: 11, 22-25; 632: 1-7; *see also* R. at 993 (Unanswered Request for Admission #10.) Second, Appellant began entertaining plans to build two force mains on ReWa's property (not one) but never disclosed this fact until mid January of 2008. (See R. p. 821, Ex. 25.) Third, the evidence reflects that Appellant and its collaborator, Riversway, never agreed how to design the force main across ReWa's property and, therefore, never completed finalized plans for the same. (See R. p. 822, Ex. 26.)⁵ Thus, the Court finds

requested the route. (R. p. 189, 11, 20-25); (R. p. 453, lines 5-8) (Route identified to Bishop in August 2007 timeframe because, "he'd come to me in August about that.") Even then, Appellant never submitted an easement application or the required surveys. (R. at 589: 4-18; R. at 130: 20-24 (No application for ReWa encroachment since no final plans.) Appellant similarly failed to submit engineering plans for the Flag Lot Route. (R. at 586: 18-25; p. 587: 1; R. at 130: 8-10.) When Appellant finally disclosed the proposed route to Bishop, he walked the route within only a few days with Appellant's surveyor, Mike Deaton. (R. at 604: 11, 14-23.) While walking the route, it became obvious to both Bishop and Deaton the route was not viable. (R. at 813, Ex. 20; R. at 608.) Bishop notified Appellant of the problems either the same day or next morning. (R. at 609: 2-7; R. at 813, Ex. 20; R. at 608.) Importantly, the problems with the Flag Lot Route could have been detected as early as March of 2006, had Appellant followed Bishop's instruction and supplied the requested information. (R. at 609: 22-25.)

⁵ ReWa's Executive Director, Ray Orvin, did testify the Board, at some point in late 2007, instructed staff not to approve private pump stations without further Board input. But, the testimony clearly was that ReWa's personnel were instructed to continue working with Appellant (and others) to finalize permit applications at all times prior to the Sewer Use Regulation's Amendment. (R. at 639: 12-16) (Never instructed to stop work); (R. at 492: 1-8)

the Hearing Officer did not err when he found ReWa did not cause the delays afflicting Appellant's project.

Second, the Court likewise finds the Hearing Officer did not err when he found Appellant failed to submit a complete permit application to ReWa. Initially, if Appellant did submit the finalized materials necessary for issuance of a Flow Acceptance Permit, then Appellant failed to introduce them to the Hearing Officer, as they appear nowhere in the Record. By contrast, ReWa submitted an abundance of evidence demonstrating Appellant, in fact, never completed its permit application.

The evidence of Record reflects that at the time of the regulatory amendment in May of 2008, Appellant had not: finalized its engineering plans for the force main, submitted an application for an easement across ReWa's land, had not finalized an agreement for the ownership of force mains and pump station with the public entities, and had not obtained a Flow Acceptance Permit. (See R. at 635-637; see also R. at 993 (Unanswered Requests for Admissions ##14, 15, and 18.) Moreover, the Hearing Officer cited Exhibits 13, 14, 15, 17, 18, 23, and 26 as documentary evidence reflecting Appellant failed to provide the information needed to obtain a Flow Acceptance Permit as first identified to Appellant by Bishop in Exhibit 13 from March of 2006. (R. at 12-14.) Bishop's testimony likewise confirms ReWa never received the required information and as of May of 2008, Appellant's project file remained "substantially incomplete." (R. at 637: 1-4.) Accordingly, as to Issue 2, Appellant has not "convincingly" proved the Hearing Officer's factual findings are "unsupported by the

(Instructed to continue working with Appellant "to get all of their paperwork in" and let Board evaluate.) No evidence of Record indicates ReWa's Board would not have granted the Flow Acceptance Permit, had Appellant's application ever been completed. Moreover, in the instance of Appellant, Board approval was required in any event, as Appellant required an easement from ReWa to complete its project. (R. 261: 1-4.) Only the Board could have granted the easement. (See *infra*.)

evidence." *Waters v. South Carolina Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996).

Issue 3: The Hearing Officer Did Not Err By Finding Appellant Lacked Vested Rights and That ReWa Did Not Retroactively Apply Its Regulation.

The Court finds Appellant's claims both hinge *and* fall upon a previously unstated theory of vested rights. The Court notes Appellant never pleaded the Vested Rights issue. (See R. at 21-38.) On the appeal, Appellants argue that ReWa should have grandfathered its project under the Amendment to the Sewer Use Regulation, altogether allowing Appellant to escape the effect of the Sewer Use Regulation's May 5, 2008 Amendment. (See Brief of App., p. 40.) Stated differently, Appellant contends it had a legal right to be grandfathered under ReWa's Sewer Use Regulation before its amendment. Yet, no legal basis exists for such a request since an incomplete permit application, as a matter of law, fails to vest the rights of a would-be permittee.

Consistent with the Hearing Officer's ruling, without a complete permit application, a putative permittee's rights do not vest, since it would be impossible to determine *what* rights vested. (See R. at 17; *see also* R. at 637: 5-25; R. at 638: 1) (ReWa had insufficient information from Appellant even to know what it would be grandfathering.) As the leading local government law treatise notes:

[A]n application for a permit made before a zoning ordinance becomes effective gives in itself no right to a use excluded by the ordinance. Indeed, generally speaking, no preliminary proceedings to the obtaining of a permit give rise to any vested right to pursue a use in a zoned district.

8 *McQuillin Mun. Corp.* § 25:179.24 (3d ed.). This analysis applies here thereby foreclosing Appellant's vesting claims.

The Court finds the evidence reflects Appellant never submitted a finalized permit application and, therefore, had no vested rights prior to ReWa's May 5, 2008 amendment to the Sewer Use Regulation. As discussed *supra*, the evidence of record shows Appellant:

- Never submitted a finalized set of engineering plans for any proposed route;
- Never even applied for the necessary right of ways across ReWa's Plant property;
- Never executed an agreement with public utilities about the ownership of the proposed private pump station and force mains.

(R. at 635: 14-25; R. at 636: 25) (Appellant never submitted finalized engineering plans for any proposed route, applications for right of way from ReWa, and never executed final agreement among service providers.)

Dating back to March of 2006, ReWa informed Appellant of these prerequisites to obtaining a Flow Acceptance Permit at the onset of the process. (See R. at 805-808; R. at 810, Ex. 13, 14, 15, & 17; R. at 636: 15-19). As a consequence, Appellant's failure to submit a complete application, as a matter of law, fails to vest any rights to obtain a Flow Acceptance Permit prior to the Sewer Use Regulation's amendment. See *In re Ross*, 151 Vt. 54, 557 A.2d 490 (1989); *City of Aspen v. Marshall*, 912 P.2d 56 (Colo. 1996); *Frlarsgate, Inc. v. Town of Irmo*, 290 S.C. 266, 349 S.E.2d 891 (Ct. App. 1986). Accordingly, substantial evidence supports the Hearing Officer's findings regarding the vesting of rights.

Appellant also questions the Hearing Officer's reliance upon the *Frlarsgate* decision and instead insists the opinion of *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000) controls. The Court finds the *Vulcan*

decision is inapposite to the instant facts in a number of ways. Accordingly, the Court rejects Appellant's reliance on *Vulcan*.

In *Vulcan*, Greenville County sought to impose *post facto* prohibitive zoning after *Vulcan* already commenced a nonconforming use it could pursue as a matter of right. *Id.* at 498. Here, the alleged nonconforming use (i.e., the incomplete plans submitted in Appellant's Flow Acceptance Permit Application) was the nonconforming use Appellant sought to commence, but could not, because a Flow Acceptance Permit never issued. In *Vulcan*, the Respondent did not need to obtain a grant of a real property interest (i.e., easement) before it could commence its nonconforming use. Here, Appellant concedes all of its plans for use required ReWa's Board to convey an easement before it could obtain a Flow Acceptance Permit and a DHEC permit to commence its nonconforming use in the first instance. (R. 261: 1-4.)⁶ Notably, ReWa had no legal obligation (ever) to grant an easement to Appellant.

In *Vulcan*, the Respondent only needed an operating permit from DHEC before it could commence mining granite on its property. *Id.* at 498. Unlike Appellant, the *Vulcan* Respondent had fully completed its DHEC application for an operating permit over a year before the County enacted the prohibitive zoning. *Id.* at 484 & 486. Here, Appellant's project file remained substantially incomplete when ReWa amended its Regulation and remains so, to date. (R. at 637: 2-4) Moreover, the *Vulcan* Court acknowledged the nonconforming use only vests if "already in existence at the time his property is zoned..." *Id.* at 498. In the instant case, the nonconforming use could not exist in advance of the issuance of an easement and

⁶ Appellant spends considerable time discussing the lack of an effective date in the ReWa's Amended Sewer Use Regulation. (See Brief of App., p. 11.) Apparently, Appellant has not actually analyzed the Regulation, as it clearly contains an effective date. (See R. at 1048.)

Flow Acceptance Permit. In short, ReWa did not apply its Amended Sewer Use Regulation retroactively. Accordingly, the Court affirms the Hearing Officer's decision.

Issue 4: The Hearing Officer Did Not Err By Finding ReWa's Amended Sewer Use Regulation Did Not Violate the Contracts Clause of the State and Federal Constitutions.

The Court finds Appellant's statements concerning alleged Contract Clause violations lack any merit. According to Appellant, "Appellant argued at the hearing that the enactment of the new regulations impaired its contract with Condor and Eastwood, thus violating the Contract Clause of the United States Constitution and South Carolina Constitution." (Appellant's Brief, p. 30.) The Court fails to see where Appellant ever raised this issue prior to the appeal.

Even after Respondent argued the issue cannot be raised for the first time on appeal, Appellant failed to supply the Court with any citation to the Record indicating where such grounds were previously pled and argued. Indeed, the issue appears nowhere in Appellant's Complaint from the proceeding below. (See R. at 19-38; see also R. at 15 ("[Appellant] has offered no evidence to contest the validity of the amended Sewer Use Regulation.")⁷ The Court finds Appellant cannot raise the issue for the first time on appeal. *Elam v. S.C. DOT*, 361 S.C. 9, 23 (2004).

Second, in evaluating legislative acts such as the Amended Sewer Use Regulation; "every presumption is made in favor of...constitutionality." *Knotts v. S.C. Dep't of Nat. Resour.*, 348 S.C. 1, 558 S.E.2d 511 (2002). A "legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable

⁷ Appellant never filed the necessary pleading to commence the administrative process. Nonetheless, the Hearing Officer allowed Appellant to proceed and used the original "complaint filed in the Court of Common Pleas." (R. at 12.)

doubt." *Joytime Distribs. & Amusement Co., Inc. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999); *see also Beaufort County v. State*, 353 S.C. 240, 242 (2003). Thus, the Court finds Appellant was required, but did not, prove "beyond a reasonable doubt" how ReWa's Sewer Use Regulation runs afoul of the State and Federal Contract Clauses.⁸

Finally, so long as ReWa's Sewer Use Amendment aimed to accomplish a "reasonable and necessary...public purpose," then, no constitutional infraction exists, even if everything else alleged by Appellant proved true. *Hodges v. Rainey*, 341 S.C. 79, 93, 533 S.E.2d 578, 585 (2000). The Hearing Officer made specific findings regarding the reasonability and necessity of the amendment based upon evidence presented. (*See R.* at 9-10 (Amendment designed to foreclose "long-term viability risks, environmental risks, and risks to development."); *see also R.* at 901: 21-25; *R.* at 902: 1-16.)

With respect to such policy determinations, then, the Court will, "properly defer to [ReWa's] legislative judgments as the necessity and reasonability" of the Amended Sewer Use Regulation. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17, 97 S.Ct. 1505, 1515 (1977). Accordingly, when the Court filters the evidence of Record through Appellant's burden of beyond a reasonable doubt and properly accords deference to ReWa's legislative authority, the decision of the Hearing Officer should be affirmed.

Additional Sustaining Grounds:

As raised by Respondent, the Court finds several additional sustaining grounds exist to affirm the decision of the Hearing Officer. *See I'On, LLC v. Town of Mt. Pleasant*, 338 S.C.

⁸ Appellant argues that the Court should show ReWa less deference because the Amended Sewer Use Regulation impairs a contract to which it is a party. (*See Appellant's Brief*, p. 32) The Court finds no evidence of Record demonstrating that ReWa's Amended Sewer Use Regulation impairs any existing contract to which ReWa was a party. Appellant did not provide the Court with any citation to the Record to support any such contention.

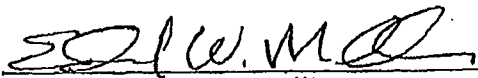
406, 526 S.E.2d 716 (2000) ("Under the present rules, a respondent—the "winner" in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.") Those grounds include:

- Appellant failed to follow the adjudicatory process and procedure required by ReWa's Sewer Use Regulation. (See Respondent's Brief, pp. 52-56.)
- Only ReWa's Commission could grant to Appellant an interest in land owned by ReWa. Until such time, Appellant could never obtain a vested interest in project plans. Yet, ReWa's Commission never granted such interest and Appellant conceded it had to have an easement across ReWa's land, "no matter which way [it] went," (R. at 261: 1-4; see also Respondent's Brief, pp. 56-58.)
- By operation of South Carolina's Statute of Frauds, Appellant had no right to cross ReWa's property absent a written conveyance, which it never obtained. (See Respondent's Brief, p. 58.)
- The doctrine of equitable estoppel has no application under the instant facts. See *Berkley Electric Co-Op, Inc. v. Town of Mount Pleasant*, 308 S.C. 205, 417 S.E.2d 579 (1992). (See also Respondent's Brief, pp. 58-60.)
- Even if Appellant's arguments were otherwise correct, the pending ordinance doctrine would defeat Appellant's allegations. (See Brief of Resp., pp. 60-61.)

While Respondent raised all such issues in its brief opposing Appellant's grounds for appeal, Appellant provided no meaningful response to the same. Accordingly, the Court adopts such grounds as additional sustaining grounds in further support of its affirming the Hearing Officer's decision.

For the reasons set forth above, the Court **AFFIRMS** the decision of Hearing Officer Michael Glenn dated September 1, 2011.

IT IS SO ORDERED.


Honorable Edward W. Miller
Judge, Thirteenth Judicial Circuit

Greenville, South Carolina

4/16, 2012

EXHIBIT B

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS
IN THE COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Harrison Partners, LLC,

Plaintiff/Petitioner,

v.

Renewable Water Resources,

Defendant/Respondent.

2012 DEC - 7

A 9:41
C.A. No.: 2011-CP-23-6482

MOTION TO RECONSIDER

TO: Honorable Edward W. Miller, Rivers Samuel Stilwell and Lane Whittaker Davis,
Attorneys for Respondents

The Plaintiff/Petitioner moves this Honorable Court to alter, amend or reconsider pursuant to Rule 52(b) and 59(c) SCRPC and hereby respectfully requests that this Court reconsider its Order dated November 16, 2012, filed November 16, 2012 and received on November 27, 2012 as follows;

1. The Trial Court erred in failing to address the issue of whether or not the regulatory amendment in May of 2008 actually applied to Petitioner since the amendment only applied to projects outside a sewer service area and Petition's project was inside the metropolitan sewer subdistrict.
2. The Trial Court erred in finding Vulcan Materials v. Greenville County Board of Zoning Appeals, 2342 S.C. 480, 536 S.E. 2d 892(Ct. App. 2000) inapplicable to the present facts.
3. The Trial Court erred in finding that Petitioner never raised contract clause violations in the proceedings below.

Wherefore, Petitioner requests this court reconsider, alter or amend judgment to grant the relief requested by Petitioner.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals



APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-06482

Appellate Docket No. 2013-329

Harrison Partners, LLC, ... Appellant,

v.

Renewable Water Resources, ... Respondent.

APPELLANT'S RETURN

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RETURN OF THE APPELLANT

Respondent's motion misconstrues the applicability of the cases which it cites.

First, the Respondent argues that the Appellant never contested the five alternative grounds in the "subject order". The Order under appeal in the present case is an order from the Circuit Court *sitting as an appellate court*. Sitting as the appellate court, the Circuit Court issued a ruling affirming the lower tribunal. The Circuit Court's opinion listed five additional sustaining grounds as a basis for its ruling. Contrary the Appellant's contention, the Respondent was not required to raise those issues in its Rule 59(e) motion:

Third, our rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

Elam v. S.C. Dep't of Transp., 361 S.C. 1, 698 S.E.2nd 612. (*emphasis in original*).

Rule 59, SCRCF, is a vehicle to obtain a ruling from the court on issues that were raised but not ruled upon. Here, the issues was raised and the Circuit Court made a ruling which included the alternative sustaining grounds. As a result, no further action was required to preserve that Appellant's right to appeal from the Circuit Court. As a party aggrieved by the Circuit Court's order, Appellant was entitled under Rule 201(b) SCACR to an appeal to this Court.

Second, the Respondent argues that the Appellant can not raise "new grounds" on appeal. This argument misconstrues the holdings of each of the cases cited by the Respondent in his motion:

The court's ruling in Hill involved an issue that was not ruled on by the trial court but argued on appeal. In Elam, although the court referenced issue preservation in its reasoning, the court's holding deals with the issue of timeliness of an appeal where multiple Rule 59(e) motions were filed. In Biales the appellant did not argue several issues in the Court of Appeals. This Court held that it would not rule on issues that it was not presented. Similarly, in Duck this Court ruled that it would not rule on an issue that had not been presented on appeal. Ion, also cited by the Respondent, stands for the proposition that on appeal, the Respondent may argue additional sustaining grounds. Although all of the cases cited by the Respondent deal with, or at least mention issue preservation in some way, none are applicable in the present case.

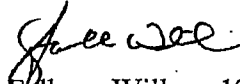
Likewise, Portman, and all of the other cases argued by the Respondents under the theory of "ripened to finality," each deal with findings of the trial court that were not argued to the Court of Appeals and therefore considered the law of the case. Here, the Appellant was not required to file a post trial motion in the Circuit Court regarding alternative sustaining grounds, or any other ruling that was expressly included in the Circuit Court's order. Therefore, rulings of the Circuit Court can not possibly "ripen" into the law of the case at this stage of the present appeal.

The question of issue preservation is not an issue for the summary dismissal of an appeal. The failure to preserve an issue for appeal does not deprive an appellate court of jurisdiction to hear the appeal. Hill v. S.C. Dep't of Health & Envtl. Control, 389 S.C. 1, 17, 698 S.E.2d 612, 621 (2010). As to issue preservation, there simply was nothing more required of the Appellant to protect his right to appeal from the issues addressed in the Circuit Court's decision. Whether or not the Circuit Court erred in its ruling, what arguments are persuasive, or which party will ultimately prevail, is a matter for this Court to determine based on the party's briefs and the record on appeal. Here the Respondent

seeks to short cut the process and have the Appellant denied the right to appeal issues that were clearly ruled on by the Circuit Court without the benefit of the Appellant being able to fully brief his case or provide the court with a record on appeal.

WHEREFORE, the Appellant submits that the motion of the Respondent should be denied and the Appellant allowed to proceed with briefing of the case.

Respectfully submitted,



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April 23, 2012.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals



APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-06482

Appellate Case No. 2013-000329

Harrison Partners, LLC, ... Appellant,
v.
Renewable Water Resources, ... Respondent.

RESPONDENT'S REPLY TO APPELLANT'S RETURN

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Pursuant to Rule 240(f) of the South Carolina Appellate Court Rules, Respondent Renewable Water Resources ("Respondent" or "ReWa") respectfully submits the instant Reply to Appellant Harrison Partners, LLC's ("Appellant" or "HP") Return.

INTRODUCTION

Riddled with preservation infirmities, which Appellant concedes, the instant appeal can never succeed, thereby warranting its immediate dismissal. Respondent moved to dismiss the instant appeal on April 4, 2013 demonstrating the lower court's November 16, 2012 Order ("Subject Order") contained five (5) alternative grounds ("Alternative Grounds"), which HP never contested. As a result, Appellant cannot now challenge the Alternative Grounds for the first time on appeal.

Appellant interposed a Return to ReWa's Motion to Dismiss ("Motion") on April 24, 2013. Importantly, Appellant's Return concedes the factual basis supporting ReWa's Motion. And, Appellant's Return raises no viable legal response to the Motion. Accordingly, the Court of Appeals should dismiss the instant appeal to avoid the needless expenditure of time and resources by both this Court and the parties.

I. BEFORE AND AFTER THE SUBJECT ORDER ISSUED, APPELLANT CONCEDES IT NEVER DISPUTED THE ALTERNATIVE GROUNDS.

Only one issue, strictly legal in nature, now remains in resolving Respondent's Motion. It is: Can Appellant raise arguments against the Alternative Grounds for the first time on appeal? This is true because Appellant's Return admits all the predicate facts supporting the instant Motion.

Appellant's Return fails to dispute any of the following:

- (1) Respondent raised the Alternative Grounds to the Circuit Court.

(See App. Return, p. 1 ("Here, the issues [were] raised and the Circuit Court made a ruling which included the alternative sustaining grounds."); *see also* Resp. Mot. to Dism., Ex. A (Subject Order, pp. 13-14, "As raised by Respondent..." and, "While Respondent raised all such issues in its brief opposing Appellant's grounds for appeal...").)¹

- (2) **Appellant never responded to the Alternative Grounds in the lower court.**

(See App. Return, p. 1 ("As a result, no further action was required to preserve...Appellant's right to appeal..."); *see also* Resp. Mot. to Dism., Ex. A (Subject Order, p. 14, "While Respondent raised all such issues in its brief opposing Appellant's grounds for appeal, Appellant provided no meaningful response to the same.").)

- (3) **Appellant's Motion for Reconsideration never challenged, questioned, or interposed any counter-arguments to any of the Alternative Grounds.**

(See App. Return, p. 2 ("Here, the Appellant was not required to file a post trial motion in the Circuit Court regarding alternative sustaining grounds, or any other ruling that was expressly included in the Circuit's order."); *see also* Resp. Mot. to Dism., Ex. B (App. Mot. to Recon., p. 1 (Raising three grounds to "alter, amend, or reconsider" but embracing none of the Alternative Grounds.))

- (4) **Each Alternative Ground independently sustains the Subject Order.**

(See App. Return, *passim* (Failing to address argument altogether); *see also* Resp. Mot. to Dism., p. 2 ("[E]ach of the Alternative Grounds created an independent basis to sustain the Subject Order."))

Thus, if the Court agrees South Carolina law required Appellant to raise arguments in the lower court before raising them in this Court, the Court should grant Respondent's Motion to Dismiss. As discussed *infra*, that is exactly what South Carolina law requires.

¹ Respondent also raised all of the Alternative Grounds during the administrative hearing wherein Appellant similarly failed to respond to any of the same.

II. RULE 59(e) OPERATES THE SAME WHEN THE CIRCUIT COURT SITS IN AN APPELLATE CAPACITY.

Appellant's Return principally argues that Rule 59(e) somehow functions differently when a Circuit Court sits in an appellate capacity.² (See App. Return, p. 1 ("The Order under appeal in the present case is an order from the Circuit Court *sitting as an appellate court*.")) Not so. The South Carolina Supreme Court decision of *Pikaart v. A & A Taxi, Inc., et al.*, 393 S.C. 312, 324, 713 S.E.2d 267, 273 (2011) squarely belies Appellant's argument.

Mirroring the instant facts, in *Pikaart*, the Circuit Court issued an opinion containing additional findings beyond what the administrative body found in the administrative decision presented on appeal. *Id.* at 324. Appellants thereafter failed to, "present[] any argument to the circuit court" challenging the additional findings thereby allowing "it the opportunity to amend its ruling." *Id.* As a consequence, on appeal, the Supreme Court ruled: "[A]ny error was not preserved and it is not properly before this Court." *Id.*

Here, without explanation and citing no authority, Appellant announces the Circuit Court's "*sitting as an appellate court*" excused its procedural obligation to afford the lower court an opportunity to correct potential errors infecting its ruling. (App. Return, p. 1.) But, the *Pikaart* Court squarely rejected Appellant's argument:

Although Rule 59(e), SCRPC motions are not applicable in matters before the Commission itself, such motions are applicable when the circuit court sits in an appellate capacity, and they are required to preserve an issue for review by the Court of Appeals or this Court. See *Sheaty*, 341 S.C. at 460, 535 S.E.2d at 444 (holding, in a workers' compensation case, that the alleged error was not preserved for appellate review where the circuit court did not rule on the issue and no Rule 59(e), SCRPC motion was made); *Leviner v. Sonoco Prods. Co.*, 339 S.C. 492, 530 S.E.2d 127 (2000) (observing neither party filed a timely

² Appellant fails to explain how it contends a Rule 59(e), SCRPC Motion differs in relation to an order issued while the Circuit Court sits in an appellate capacity. Indeed, as explained *infra*, it does not.

motion under Rule 59(e), SCRCF seeking clarification of the circuit court's order in an appeal from the Commission); *see also Hill v. South Carolina Dep't. of Health & Env'tl Control*, 389 S.C. 1, 698 S.E.2d 612 (2010) (stating Rule 59(e), SCRCF motions are necessary to preserve issues not ruled upon for review when the circuit court sits in an appellate capacity (citing *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007))).

Pikaart v. A & A Taxi, Inc., 393 S.C. 312, 324-325 (2011). This analysis controls and warrants the immediate dismissal of Appellant's appeal.

Just like in *Pikaart*, Appellant failed to respond to the Alternative Grounds. Just like in *Pikaart*, Appellant failed to present "any argument to the circuit court" allowing an "opportunity to amend its ruling." *Pikaart*, at 324. Just like in *Pikaart*, the Circuit Court sat in an appellate capacity reviewing an administrative decision. *Id.* at 324. Just like in *Pikaart*, then, Appellant cannot contest any of the Alternative Grounds included in the Subject Order. *Id.*; *see also Hill v. S.C. Dep't. of Health & Env'tl. Ctrl.*, 389 S.C. 1, 17, 698 S.E.2d 612, 621, FN11 (2010) (Rule 59 Motions required to preserve issues for appeal even when Circuit Court sits in an appellate capacity.)

III. THE SUBJECT ORDER'S FINDINGS AGAINST APPELLANT DO NOT PRESERVE COUNTER-ARGUMENTS NEVER MADE BY APPELLANT.

Appellant mistakes the Subject Order's inclusion of Alternative Grounds as sufficient to preserve Appellant's unmade counter-arguments. (App. Return, p. 1 ("Here, the issues [were] raised and the Circuit Court made a ruling which included the alternative grounds. As a result, no further action was required to preserve [the] Appellant's right to appeal from the Circuit Court.") Appellant's analysis errs by conflating its own error preservation obligations with the lower court's adverse findings. If such logic held true, a litigant would never have to

respond to arguments in the Circuit Court since it could withhold points of error until it reached the Court of Appeals. This is the exact opposite of the law.

The South Carolina Supreme Court explicated a litigant's preservation obligations in *I'on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). In so doing, the I'on Court expressly rejected Appellant's argument concerning unmade counter-arguments:

[T]he losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will view those issues and arguments...If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review...Imposing this preservation requirement is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. The requirement also serves as a keen incentive for a party to prepare his case thoroughly. It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, and give him another opportunity to prove his case.

Id. at 422 (emphasis added). Here, no dispute exists: Appellant never argued against any of the Alternative Grounds raised by Respondent; Appellant never challenged the Alternative Grounds in a Rule 59(e) Motion; Appellant never gave the lower court an opportunity to correct potential infirmities; and the Alternative Grounds independently sustain the Subject Order. Appellant, therefore, cannot now challenge the Alternative Grounds for the first time on appeal.

IV. RESPONDENT NOWHERE MISCONSTRUED SOUTH CAROLINA LAW.

Lacking any *bona fide* arguments and in search of *any* response, Appellant remarkably suggests *Respondent* has mis-cited case holdings in its Motion to Dismiss. This is untrue.³ An actual review of the authority cited by Respondent unmasks Appellant's argument for what it really is—legerdemain—a dust-up—aimed at confusing the Court to conceal Appellant's lack of a cogent response.

Every decision cited by Respondent stands exactly for the contention cited:

- *Hill v. S.C. Dep't. of Health & Envtl. Ctrl.*, 389 S.C. 1, 17, 698 S.E.2d 612, 621 (2010)⁴ held:

"In contrast, to preserve an issue for appellate review, a matter may not be raised for the first time on appeal, but must have been both raised to and ruled upon by the trial court." *Id.* (emphasis added.)

Compare Resp. Mot. to Dismiss, p. 3 (quoting *Hill*, "[T]o preserve an issue for appellate review, a matter may not be raised for the first time on appeal, but must have been both raised to and ruled upon by the trial court.") (emphasis added.)

- *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 780-81 (2004) held:

"Second, a great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments preserved for appellate review only

³By contrast, Appellant's Return tellingly cites no authority of its own.

⁴Without elaboration, Appellant suggests *Hill* "involved an issue that was not ruled on by the trial court but argued on appeal." (App. Return, p. 2.) Respondent cannot discern what Appellant references. *Hill* involved a wide variety of issues raised by both Appellant and Respondent. It also involved jurisdictional issues. Respondent cannot identify any unpreserved issues in *Hill*.

when they are raised to and ruled on by the lower court." *Id.* (emphasis added.)

Compare Resp. Mot. to Dismiss, p. 3 (quoting *Elam*, "Issues and arguments preserved for appellate review only when they are raised to and ruled upon by the lower court.")

- *RO-LO Enterprises v. Hicks Enterprises, Inc.*, 294 S.C. 111, 112, 362 S.E.2d 888, 889 (Ct. App. 1987) held:

"During oral argument, counsel for Hicks conceded the defense of waiver had not been presented to the trial judge for consideration...We cannot grant relief on issues argued for the first time on appeal." *Id.* (emphasis added.)

Compare with Resp. Mot. to Dismiss, p. 3 (Quoting *RO-LO*, "We cannot grant relief on issues argued for the first time on appeal.") (emphasis added.)

- *Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) held:

"Failure to argue is an abandonment of the issue and precludes consideration on appeal. SCACR Rules 207(b)(1)(B)(D). *See also Howell v. Pacific Columbia Mills*, 291 S.C. 469, 354 S.E.2d 384 (1987). Accordingly, we affirm the trial court's ruling on this issue."

Compare with Resp. Mot. to Dismiss, p. 3 (Quoting *Biales*, "Failure to argue is an abandonment of the issue and precludes consideration on appeal.")⁵

- *Duck v. Jenkins*, 297 S.C. 136, 375 S.E.2d 178 (Ct. App. 1988) held:

"An unchallenged finding of fact will not be disturbed by this court on appeal. *Evans v. Bruce*, 245 S.C. 42, 138 S.E.2d 643 (1964) (absence of an exception precludes review)".

Compare with Resp. Mot. to Dismiss, p. 3 (Quoting *Duck*, "An unchallenged finding of fact will not be disturbed by this court on appeal.")

- *Ransom v. S.C. Water Res. Comm'n*, 321 S.C. 211, 219, 467 S.E.2d 463, 467 (Ct. App. 1996) held:

⁵ Failing to respond constitutes an abandonment of an issue in all judicial proceedings. For example, Appellant's failure to respond to various contentions raised in Respondent's Motion to Dismiss constitutes abandonment of those issues.

"This issue was not raised in Ransom's response to the Commission's motion for summary judgment, in the order, or in Ransom's motion to alter or amend the judgment, pursuant to Rule 59, SCRCP. An appellate court cannot address an issue unless it was raised to and ruled upon by the trial court." *Id.*

Compare with Resp. Mot. to Dismiss, p. 4 (Citing *Ransom* as "Declining to address an issue not raised in response to Respondent's summary judgment motion, in the order, or in Appellant's Rule 59 motion.")

Accordingly, Appellant's argument in this regard wholly lacks merit.

V. RESPONDENT NEVER SUGGESTED APPELLANT'S FAILURE TO PRESERVE ISSUES IMPLICATED JURISDICTION.

Appellant's Return later cites the *Hill* decision arguing the failure to preserve an issue does not impact this Court's jurisdiction to hear the appeal. (App. Return, p. 2.) But such argument has no bearing on the instant Motion. Respondent never argued Appellant's preservation failures impaired the Court's jurisdiction.⁶ By contrast, Respondent *did* argue Appellant's appeal wholly lacks viability.

Respondent's argument is simple: (1) Appellant never challenged the Alternative Grounds below; (2) Appellant cannot now challenge the Alternative Grounds on appeal; (3) the Alternative Grounds independently sustain the Subject Order; (4) thus, even if Appellant wins all other issues, the Subject Order still must be affirmed. Thus, Appellant's argument lacks merit and the instant appeal warrants dismissal.

VI. THE ALTERNATIVE GROUNDS RIPENED TO FINALITY SUSTAINING THE SUBJECT ORDER.

Whether intentionally or by confusion, Appellant misapprehends the issues relating to the Alternative Grounds ripening to finality. A litany of decisions (cited in Respondent's

⁶ The analogy of a cause of action where Plaintiff fails to allege the *prima facie* elements of a claim proves similar. A court has jurisdiction to hear the claim but the litigant has no right to proceed with its prosecution. Here, the Court of Appeals has jurisdiction to hear the appeal but Appellant has no right to proceed with its prosecution.

Motion to Dismiss, pp. 4-5) expressly establish unchallenged alternative grounds will support affirming a trial court order. Appellant's Return fails to refute such legal tenet.

The instant case presents this exact situation. Appellant never challenged—and cannot now challenge—the Alternative Grounds. Appellant has, therefore, failed to preserve any arguments it can raise against the Alternative Grounds, which will consequently sustain the Subject Order. Appellant offers no reason why its inability to challenge the Alternative Grounds does not foreclose its ability to prevail on appeal. This is because none exists. As a consequence, the Alternative Grounds have ripened to finality and the Court should grant Respondent's Motion to Dismiss.

CONCLUSION

Contrary to Appellant's assertions, no right exists to pursue an unwinnable appeal. For the reasons stated in Respondent's Motion, and for the reasons set forth above, the Court should grant Respondent's Motion to Dismiss.

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4/30, 2013

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF GREENVILLE) IN THE COURT OF COMMON PLEAS
3
4 Harrison Partners, LLC,)
5 Appellant,) TRANSCRIPT OF RECORD
6 -vs-) 2011-CP-23-6482
7 Renewable Water Resources,)
8 LLC,)
9 Respondent.) September 4, 2012
10 Greenville, South Carolina
11

12 B E F O R E:

13 HONORABLE EDWARD W. MILLER, JUDGE
14

15 A P P E A R A N C E S:

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Circuit Court Reporter
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NO EXHIBITS INTRODUCED

1 THE COURT: Okay, yes.

2 MR. TRAXLER: We have various motions. I'm Tom Traxler
3 and Knox Haynsworth on behalf of the defendants Metropolitan
4 Sewer Subdistrict, Mr. Thomas -- Thompson and Mr. Dickson. We
5 have a motion for sanctions related to the 30(b)(6) deposition
6 of the plaintiff in this case. Without speaking for the
7 others, I think the other motions you have were a motion for
8 the plaintiff to amend and then you also have an appeal of an
9 administrative agency decision with regard to ReWa.

10 THE COURT: Alright, well who wants to go first?

11 MR. TRAXLER: Alright, we ready to proceed -- I'm ready
12 to proceed if you want or ---

13 MR. CHILDS: It it really doesn't matter to me. I think
14 administratively we have two separate lawsuits, one is the
15 6482 which is the administrative appeal to which the ReWa has
16 filed a motion to dismiss based upon that and then we've got
17 the actual merits of that administrative appeal and then in
18 1957 we have our motion to amend the complaint and then they
19 have their motion for sanctions on a deposition so whatever
20 the Court sees fit. It's probly easiest I would say from my
21 perspective to deal with ReWa's motion to dismiss the appeal.

22 MR. TRAXLER: And ---

23 THE COURT: Okay.

24 MR. TRAXLER: --- before he gets heard on the motion to
25 amend, I would like to be heard on the sanctions with regard

1 to the 30(b)(6) because we're not in a position to respond to
2 a motion to amend until he gives us a deposition like he's
3 supposed to.

4 THE COURT: Okay. Alright, well let's let's go with the
5 motion to dismiss the appeal.

6 MR. STILWELL: Your Honor, I I don't even know what the
7 motion to dismiss the appeal is. There's an appeal, we came
8 in here and said as part of that appeal we said this appeal
9 shouldn't be heard because it's not final yet at the agency.
10 This what we took before Judge Macaulay. I'm pushin' five
11 years on this case, I got two months and I'll hit fifth year.
12 I was countin', I had all outlined up for Judge Macaulay,
13 we've come back. You may remember we were here in February of
14 2010 and this case came before Your Honor and it dealt with
15 the denial of a sewer use permit and Your Honor sent it
16 back ---

17 THE COURT: On a subdivision, right?

18 MR. STILWELL: Yes, sir, ---

19 THE COURT: Okay ---

20 MR. STILWELL: --- way down Harrison Bridge Road, way
21 down ---

22 THE COURT: Okay.

23 MR. STILWELL: --- there. We took it back down for the
24 administrative hearing, this was three lawyers ago before
25 Mr. Childs there was anoth -- another lawyer in Columbia who

1 had it and we came before Your Honor, then another lawyer took
2 it down to the administrative level and we got Mike Glenn in
3 there to do the hearing and we had a, well we had a fi -- full
4 week hearing, plus we had to go one extra day to catch another
5 witness so it ended up bein' over a week at the hearing. We
6 did discovery, written discovery, we did six or eight
7 depositions, we had a full blown hearing and then Mike Glenn
8 made his decision and he said, I reviewed all of the, all of
9 the facts in the complaint that they pled originally, I've
10 looked at everything and I find that claimant has not stated a
11 claim against ReWa for any of the relief they asked for so
12 then Mr. Childs came in and he appealed the matter to the
13 circuit court and this is where we got hung up, I'm I'm gonna
14 simplify this, we got hung up with Judge Macaulay because we
15 said, Hey, our sewer use reg. says you gotta go to the board
16 first, you can't just come walkin' into circuit court, you
17 gotta go to the board first and I think, I only have this many
18 notes from Judge Macaulay before we got off off track, but he
19 said, the argument came up that it was futile to go back to
20 the board and Judge Macaulay felt like, Well if Judge Miller
21 sent you down there in the first place, I don't feel like I
22 can rule on that futility argument and we got completely off
23 track, it went a long time. This what I wanna do today: I've
24 sought from the board and received permission from them to
25 consent to find Mike Glenn's ruling the final order. We don't

1 have to go back down to the board, we're not gonna use those
2 arguments that it was untimely 'cause when he appealed up here
3 he missed his dates down below to the board. If, like I said,
4 I'm pushin' five years and, um, ---

5 THE COURT: Okay.

6 MR. STILWELL: --- think I probly have more patience than
7 my board does to see this thing through to the end so if we
8 could today if we could proceed with the other motions and the
9 appeal itself, that's the way my client would like to proceed
10 and that's I believe a benefit to them because it waives a
11 substantial jurisdictional argument that they otherwise face.

12 THE COURT: Alright.

13 MR. CHILDS: I have no objection to that, Your Honor.

14 THE COURT: Alright.

15 MR. CHILDS: Your Honor, as you might recall back
16 sometime ago this is a dispute over sewer service for a
17 planned subdivision known as Rivertrace here in Greenville
18 County. 2006 I believe you should have memorandums from
19 everybody in your file that we submitted to Judge Macaulay but
20 if you do not, I have my memorandums and I will pass that up
21 for Your Honor.

22 THE COURT: Well don't -- before you pass the thing up
23 let's see if we can't ---

24 MR. CHILDS: That would be in 6482.

25 THE COURT: Okay. Alright. Why did Judge Macaulay not

1 wanna hear this?

2 (Laughter.)

3 MR. STILWELL: We gave him ---

4 MR. CHILDS: I'll I'll tell ya my brief was only 34 pages
5 long.

6 THE COURT: Okay.

7 MR. STILWELL: Your Honor, it's only a hundred pages, he
8 had two days to read it.

9 (Laughter.)

10 THE COURT: Alright.

11 MR. CHILDS: I think they, I think we answered our own
12 question then.

13 THE COURT: Okay.

14 MR. CHILDS: But we, kinda historically this this this
15 development went into a a situation where they started their
16 project which was about a \$2 million initial investment in the
17 project and started the process of getting the permits and
18 getting the proper alliances. Are you still lookin' for the
19 brief, Your Honor?

20 THE COURT: Um, that's alright, keep going, I'll I'll ---

21 MR. CHILDS: Alright, and durin' this process ReWa
22 decided that they were gonna put a hold on several projects
23 that were using private sewer companies. The private sewer
24 companies were used in order really to to provide pumping
25 facilities where a project would be below grade of adjacent

1 trunk lines and they would create a private utility for the
2 subdivision which would provide a fee to the homeowners in the
3 subdivision and allow the pumping of the sewer from the
4 subdivision into the trunk lines of the adjacent sewer
5 collection system. As parta that process, Harrison Partners
6 was joined into the Metropolitan Subdistrict, thereby
7 Mr. Traxler's client is involved in that respect. The initial
8 difficulty was actually getting all the coordination of the
9 facilities and all that together. Ultimately, Harrison
10 Partners signed a contract with Condor Environmental to
11 provide the private sewer company and the a pump station for
12 the project. Unbeknownst to Harrison Partners, ReWa decided
13 to put a hold on all pending projects that used a private
14 sewer company as its pumping station. That took place in
15 approximately the summer of 2007, almost a year, a little over
16 a year into the project. Durin' that time the ReWa board was
17 supposed to be reviewing new regulations that would affect the
18 use of private sewer companies. It's our contention that
19 during that time ReWa just simply delayed our project while it
20 was on hold administratively from the director. It wasn't
21 until May of 2008 that ReWa actually did a policy and passed a
22 policy that affected the private sewer companies and that was
23 a policy that says, To operate and maintain collector systems
24 inside Western Carolina Regional Sewer Company, now ReWa,
25 authorized service area but outside of the service area of any

1 county, municipality or sewer subdivi -- district pursuant to
2 contracts for the provision of sewer sub -- services, such
3 collector system may include lateral lines, force main or pump
4 stations and and it authorized the board to enter into such
5 contracts only upon the sole discretion of Western Carolina
6 Regional Sewer Authority and pursuant to such terms as may be
7 mutually agreeable to the parties, such terms shall include,
8 however, the expenses and liabilities for such services must
9 be borne in whole by the person enjoyin' the services. In
10 effect what Western Carolina decided to do was to prohibit the
11 private sewer companies from solely providing that service
12 while allowing Metropolitan Sewer District in this case to
13 operate the collector lines from the individual subdivisions,
14 it required a solidarity of ownership between the Sewer
15 Subdistrict and the pump station, basically it was operating
16 privately. This policy that was enacted in May of 2008
17 basically didn't apply to Harrison Partners. Harrison
18 Partners was already part of the Metropolitan Sewer
19 Subdistrict but, nevertheless, they were told and advised that
20 they could not proceed unless they had sole ownership of the
21 entire collector system in one entity and solely if
22 Metropolitan would agree to basically back it and so from
23 there the project essentially hit a road block and and went
24 towards failure. From there they filed suit, went before Your
25 Honor, you sent it back to the, to the board and we had the

1 appeals hearing that was heard in front of Mr. Glenn.

2 We've alleged several errors in Mr. Glenn's order as set
3 forth in our brief and I will highlight those for Your Honor
4 consideration. First of all, the the officer made numerous
5 findings in his factual background that were not supported by
6 the evidence before him and I've outlined several of those
7 which I'll rely upon my brief to cover.

8 The second real primary issue was that the hearing
9 officer found that the delays in the project were not caused
10 by ReWa durin' the 2-year period and he erred in failin' to
11 show that that Harrison Partners had complied with all the
12 requirements as set forth by ReWa. The the main thing that
13 the hearing officer failed to consider was really the issue at
14 all of this administrative hold that was placed on them by the
15 ReWa staff. This hold essentially stopped them from
16 considerin' these projects durin' the time of its inception in
17 the summer of 2007 until it was passed in in May of 2008.
18 This essential hold stopped the project at the behest of
19 Western Carolina or ReWa. After continuing back and forth
20 between the parties durin' this whole period, the hearing
21 officer just simply overlooks the fact that they couldn't
22 process this application anyway because they had been directed
23 not to do so by the director. There's a number of things the
24 hearing officer placed a a substantial amount of weight on
25 during this whole period but that's irrelevant based upon the

1 fact that it was ReWa that said this pro -- these projects
2 have to stop until the board issues a decision. There is no
3 evidence whatsoever that the respondent did not comply with
4 all their requests durin' the course of processing their
5 application.

6 The third error of the hearin' officer is that he failed
7 to find that the retroactive application of the new policy to
8 Harrison Partners was not a a a violation of their vested
9 right to continue and in particular in respect to the *Vulcan*
10 *vs. Greenville County Board*, it's on an appeals case, which
11 clearly sets forth the substantial investments and progress
12 that Harrison Partners went toward in pleading this project
13 only to be stopped by ReWa in their efforts to change their
14 policy. They invested in the promise -- premises, they had,
15 they had bought 'em for about \$2 million, actually the
16 purchase price was about a \$1 million dollar, another million
17 dollars in investments in the premises and they had executed
18 contracts with Condor to provide the private sewer service and
19 they had a clearly vested interest in proceeding and so we
20 think the hearin' officer erred in relyin' on *Friarsgate* as
21 opposed to *Vulcan Materials* in his decision.

22 In addition to that, we think that the hearin' officer
23 erred in applying the actual policy to Harrison Partners. As
24 I stated earlier, the second paragraph in the new policy says
25 it applies to collector systems inside Western Carolina's

1 authorized service area but outside the service area of any
2 county, municipality or sewer subdistrict. Harrison Partners
3 had already been annexed in the Metropolitan Sewer Subdistrict
4 and so the policy couldn't conceivably apply to them based on
5 the clear language of the policy itself.

6 The last real issue that we have with the hearin'
7 officer's decision is his failure to consider or rule upon the
8 issue of the impairment of the existing contract obligations
9 under Section 4, Article I of the South Carolina Constitution.
10 Harrison Partners had already executed a contract with Condor
11 Environmental to provide the sewer district service and the
12 effect of that new regulation was to interfere, impair and
13 actually completely prevent that contract from goin' into
14 execution. I think that the hearin' officer clearly erred in
15 not considerin' the fact that the new regulation violated the
16 contract clause of the United States and South Carolina
17 Constitution, there was the existence of contract was clearly
18 established in the evidence, the law was changed which
19 actually impaired that con -- contract, made that contract
20 impossible and the law was not reasonable and necessary to
21 co -- carry out a legitimate, uh, purpose. The sole basis of
22 the law's reasoning was addressed variously by various parties
23 during the proceeding, some a which said it was Western
24 Carolina's interest in just bein' -- ownin' the whole system,
25 it was a financial interest they had, the second was an

1 interest they had in avoiding the issue of defunct private
2 sewer companies and the only issue that was ever raised that
3 Western Carolina had experienced a problem with a, with a
4 defunct sewer service was the Altamont Sewer Service that was
5 taken over actually by DHEC and was requested by DHEC that
6 Western Carolina take it over. That that was a system that
7 had nothin' real, no applicability to the present facts and
8 circumstances nor the seven other projects that were stopped
9 by the enactment of this policy so we think the decision of
10 the hearin' officer was clearly wrong and erroneous, it relied
11 upon erroneous findings of fact, it failed to find the vested
12 right of Harrison Partners to proceed after their substantial
13 investment progress toward this project, it it overlooked
14 contract clause issues entirely and it overlooked the
15 inapplicability of this policy to this project and was
16 erroneous and must be reversed.

17 THE COURT: Alright. Stilwell.

18 MR. STILWELL: Your Honor, this is a strange case to say
19 the least. We're on appeal basically of that original case
20 that came before you. Before we sat down with Mike Glenn, we
21 didn't know it at the time, Mr. Childs' predecessor refiled
22 the same case with ten causes of action. I don't, I still
23 don't understand why he did it but that's why this other case
24 exists. We basically had two cases that are the shadows of
25 each other goin' at the same time so that's the case that the

1 motion to compel is in is in that one. This appeal was
2 actually filed as a new case number but it's the same one that
3 came before you before. What Mr. Childs just mentioned to you
4 was basically a box of factual issues and then he had a couple
5 of claims, contract clause invested rights which were legal
6 claims so I'm gonna talk about the factual issues first.
7 Those factual issues, and there are about five of 'em, there
8 were four assorted ones and then there's the one sayin', Hey,
9 whose fault was it that this project got delayed which is
10 ultimately basically the most important point. The most
11 important thing Mr. Childs said was the standard of review
12 because Your Honor is sitting here as an appellate court today
13 which is a lot easier than your regular day job. You got all
14 these record on, the record on appeal I apologize is gigantic,
15 we basically put everything in there because we didn't brief
16 it until the very last minute so nobody, there were no draft
17 briefs or anything, there was just briefing two days before we
18 went to Judge Macaulay but there's some tools that we provided
19 to you to help you through it. First of all, there's our
20 brief, then there's Mr. Childs' brief, then there's a little
21 bit of an odd mechanism in there. We took Mr. Childs' brief
22 and annotated through it each fact saying this fact's not
23 right, this fact's not right, that fact's not right and cited
24 to the record of e-mails and testimony of where it was
25 contradicted by the evidence and the story you just heard is

1 basically that's the kind of unfiltered story you get the
2 first day you sit down with your client and he tells you this
3 is what happened, this is how they did me wrong, it's
4 uncontradicted by actual facts and actual documents. When you
5 look at Mr. Glenn's order, when you look at our brief and our
6 annotation of his brief, you'll see what the actual facts
7 were. This gets me back down to the standard of review. It's
8 a clearly erroneous standard of review. If you look on Page
9 30 of our brief we've cited the authority for it, As to issues
10 of fact the hearing officer's decision should be affirmed
11 unless clearly erroneous in view of the reliable, probative
12 and substantial evidence of a whole record. The possibility
13 of drawing two inconsistent conclusions from the evidence will
14 not mean the agency's conclusion was unsupported or improper,
15 and finally, the burden is on appellants to prove convincingly
16 that the agency decision is unsupported by the evidence. Your
17 Honor, if you look through those specific facts, it's not even
18 close. There are things in the appellant's brief that are
19 flat out wrong, flat out wrong. Like for instance the first
20 one he said this morning that there was a hold placed on the,
21 on the, on the developments in mid-2007, there's not a shred
22 of evidence anywhere in anything put in the record that that
23 ever happened, it's six months off entirely from when anything
24 happened with this controversy about this, about this project.
25 I don't know where it came from; secondly, I don't even know

1 why it matters. You'll look at the first four factual issues
2 they've raised and you look at 'em and say, How do these
3 actually make a difference because they've gone through
4 Mr. Glenn's order, they just basically contradicted everything
5 he said, even the stuff that's akin to the whereas clauses and
6 I'll go into those right now. They said first they disputed
7 whether there was evidence that there was sewer available in
8 that area before he purchased it. Your Honor, I don't know
9 what I can do other than put into evidence of everybody who
10 testified. This thing is so far down in Greenville County on
11 the Reedy River there ain't no sewer down there. There's a
12 sewer plant and then you go down like another mile and there's
13 this development. There are no sewer pipes down there, that's
14 why this is such a hard development because somebody's gotta
15 figure out how to take sewer and pump it back up hill to the
16 Lower Reedy Plant which is the last one down on that area of
17 Greenville County. There's not even a contradiction of
18 evidence on that, I don't know why they're pickin' on it. The
19 second factual issue is that there were no basin-wide studies
20 before this project came long. Your Honor, there were
21 basin-wide studies done after. Nobody had even looked at how
22 to provide sewer down here, it was a *tabula rasa* as to how to
23 get sewer uphill. Again, there's not even a contradiction in
24 the facts much less clear error. Third, Metro would not own
25 the pump station. Your Honor, if Metro owned the pump

1 station, we wouldn't even be in here today, it be a done deal.
2 They'd be happy to have Metro own the pump station, we'd be
3 happy to have Metro own the pump station. In fairness to
4 them, they didn't wanna own it and that was their prerogative
5 and that's what brought us here today: basically nobody
6 wanted to own it, there's no evidence otherwise on that point.
7 That's again the one he sh -- he needs to show there's clear
8 error on. There's not even a contradiction in the evidence on
9 it. Gene McCall, came in here who's a third-party witness who
10 owned the private provider and he said, Yeah, Metro wouldn't
11 own it.

12 The last of the four factual points in the first part of
13 his brief are that two projects down there made the project
14 basically twice as complicated. Your Honor, we went over that
15 over and over at the hearing. When there was one neighborhood
16 that Harrison Partners was gonna do, later on another
17 neighborhood came behind them, they were like a year behind
18 them, and they decided, Hey, let's get together and put our
19 pipes together and get it in the back door of the sewer plant,
20 everything about that complicated things and we can go through
21 it in different ways that it complicated it but the evidence
22 was over and over and over how complicated that was. In the
23 brief they cited another third development as to whether that
24 com -- that development doesn't have anything to do with this,
25 that was a separate development, it didn't even go with this

1 one. So again those are four ways where the the facts are not
2 only not clearly erroneous, they're essentially not
3 contradicted and; secondly, not material to Mr. Glenn's
4 decision. Those aren't the things that drive it, the things
5 that drive it is the next point.

6 The next point was whose fault was it this project got
7 delayed? This is what we told Your Honor, we came in here in
8 2010, we said, Let's say this guy has a right to sewer, what
9 sewer? Where are the plans? Where's the project plans that
10 you say you're entitled to? He came in here with a mandamus
11 claim sayin', Your Honor, you should force them to grant sewer
12 to my project and we said the problem is where is his
13 application? What is he saying that he has a right to?
14 That's what we went back down to do with Mr. Glenn and and we
15 said, Put it on the table, show us your final plans and
16 application, 'cause it's indisputed they can't show a permit,
17 okay, all this vested rights stuff drives off a permit which
18 never issued. Show me the plans. We finished that hearing,
19 ya know what was still sittin' on that table? nothing, no
20 final plans, that's what Mr. Glenn's order says. You're
21 sayin' it's all our fault that it's delayed and stuff but
22 where are the plans that you're sayin' you put in to sewer
23 this project? Now he's got nice plans for his neighborhood
24 down there but getting from that neighborhood up the road and
25 through the back of our plant no plans, no nothing, that's now

1 how the sewer system works, Your Honor. You gotta come in
2 there with engineered plans, they gotta get approved by them,
3 they gotta get approved by us, they gotta get stamped by an
4 engineer, that's what never happened. You essentially have a
5 timing question where this guy wants to put himself in the
6 point where he's got an approved permit, final plans
7 permitted, and that's not how the law works and that's not how
8 the facts work. The delay you'll see, and it's in Mr. Glenn's
9 order, when the guy called up originally and said, Hey, can
10 you get sewer down here, he got a what we call a "capacity
11 letter". The capacity letter says there is capacity in the
12 Lower Reedy Plant, it has excess capacity, it still does today
13 because believe me, ain't nobody buildin' neighborhoods down
14 there in Greenville County in the last three years. It has
15 capacity, that's not disputed. The question is whether you're
16 permitted in the use you want, that's the piece he never got
17 to. He never gave us the final plans and apps. Between the
18 time that he called us and got that capacity letter and
19 actually came back around to say, Hey, how 'bout that route we
20 talked about, 18 months. I don't know what happened durin'
21 those 18 months, the economy was red hot durin' that time,
22 people were actually buildin' neighborhoods but durin' his 18
23 months, he was doin' whatever he wanted to do. None a that's
24 attributable to us, none a that delay. Then in the rest of
25 the time he comes up and when he first looks at that route

1 that people talked about which goes across ReWa property which
2 is a highly, that's not highly unusual, it's unprecedented, it
3 is truly unique, one of a kind, they came to look at that
4 route and they found out, Uh-oh, this route doesn't actually
5 work. No one had ever looked at it before. The route went, I
6 call it the hey diddle diddle right up the middle, it went
7 right through the plant, over a -- through a buncha trees, up
8 and down these gullies and everyone agreed, and this is in the
9 record, in the testimony everyone agreed that route's not
10 gonna work and so they started looking for another route and
11 what did we do? We said, Hey, don't come into our plant
12 directly, go around the back. Go up to Metro's lines and come
13 in the front like everybody else, go up to the top. They went
14 and looked at that route. They decided not to go that route.
15 They and their partners, the other development, decided that
16 costs too much money, okay. He's tryin' to sue us for
17 millions of millions of dollars and this other workaround cost
18 a couple hundred thousand that they refused to pay at the
19 time. They didn't wanna do that, they wanted it the way they
20 want it. Well, Your Honor, that's another thing about sewer
21 service: You don't get it the way you want it. We've said
22 yes to this project so many times and wh -- I can count 'em,
23 it's four or five times we said, Yes, do it this way, yes do
24 it this way. That regulation says yes, you can have a private
25 pump station, you either own the who -- the -- you own the

1 whole thing, that's how it works, own the whole thing, don't
2 split it up and you can have this. We've said yes to other
3 ways. We've said yes, you can go around the top. We later
4 said yes, you can go up the river route which was goin' right
5 up through the river to the plant, said yes to that. We said
6 yes to a package plant. We've said yes to so many things but
7 he doesn't want it, he doesn't want any a that. Nobody would
8 build a neighborhood down there in 2008, 2009, this lawsuit is
9 better than the neighborhood. This is what Goldman Rheney's
10 (phonetic) got even though his property's in foreclosure and
11 the thing is completely torpedoed. So Mike Glenn looked at
12 all this stuff and he said there's nothing here. How can you
13 say that our delay caused the harm when there's nothing in
14 that box. Where are the final plans? That's a real simple
15 factual determination, Your Honor, and Mr. Glenn spells out
16 the evidence, it's spelled out in our brief, it's essentially
17 not contradicted. Not only is it not clearly erroneous, it's
18 really not even contradicted. Six days a testimony not really
19 even contradicted so based on that standard of review, Your
20 Honor, there's no clear error here, your job is easy on that
21 score.

22 I wanna transition over to the legal arguments. The good
23 news for those is they're easy too, ya know why? they've never
24 been raised before. Appellate courts are real good at sayin',
25 I don't do that and I don't do that and the first thing is if

1 you never argued it below, I aint gonna hear it. He's got two
2 arguments here that are brand spankin' new, right. I said he
3 had ten causes of action in his complaint. Along the way in
4 the middle we saw Judge Welmaker, he chunked out about four or
5 five of 'em includin' the individuals who were sued in their
6 individual capacities but anyway he had ten causes of action.
7 You know what wasn't in there? vested rights wasn't in there,
8 contracts clause wasn't in there. Neither one of those
9 appeared in the complaint, here they are on appeal. You just
10 can't do business like that and I'll tell you why they're not
11 right any ei -- either, Your Honor. The vested rights
12 argument. - He doesn't like our *Friarsgate* case and says *Vulcan*
13 should have applied. Your Honor, *Friarsgate*, again, was a
14 case where in Lexington County the guy had permit appli -- he
15 had permits on condominiums. He had 14 condominium buildings
16 and he built one of 'em before they changed the law, right,
17 he'd actually built one of 'em. This would be the akin if
18 this guy half built this neighborhood. He built one of 'em
19 and they changed the law. He said, Hey, I'm entitled to build
20 my other 14 and the Court said no you're not, you're not
21 entitled like that. He didn't like that *Friarsgate* case, it's
22 the closest thing to this. I tell you what it's not close to:
23 *Vulcan*. *Vulcan* had to do with they had a permit and they were
24 in operation and the thi -- the law changed. This
25 neighborhood's not built, this neighborhood's not even planned

1 yet, it's not even close, so either one of these cases would
2 work but this idea that we conceded that *Vulcan* applied in
3 this is absurd. What we -- when that *Vulcan* comes up in the
4 transcript is when Gene McCall and the lawyer doin' the direct
5 examination start havin' a discussion about *Vulcan* and we
6 objected to it and said, Let's let's not have a lawyer
7 discussion in the middle of what's supposed to be testimony.

8 The next issue is the contracts clause issue, Your Honor.
9 Like I said, it had never been raised before and again, he's
10 sayin' it's an unconstitutional legislative act, it has to be
11 proved clear and beyond a reasonable doubt, there has to be no
12 reasonable basis for the action. Your Honor, if you look at
13 Page 50 of our brief, it's got all of the testimony of
14 Mr. Boyette, our chairman at the time, talkin' about why it is
15 bad policy to have split systems and, you know, they talked
16 about how Altamont doesn't have anything to do with this, Your
17 Honor, think about this one: Think if they ever did build
18 five houses down there, there's supposed to be a hundred and
19 fifty somethin' houses, you got five people payin' for a pump
20 station because it isn't gonna finish, it's gonna be left in
21 the lurch; exactly what we're worried about, is what woulda
22 happened. You have a barely built out system, a set of
23 homeowners who can't handle it and it runs right in the ditch
24 and when DHEC comes and asks you to take over somethin',
25 believe me, in our world, Your Honor, that's an offer you

1 can't refuse. We're not runnin' to Altamont because we're
2 happy about it, we're runnin' it 'cause we have to.

3 There's additional sustaining grounds, Your Honor, in the
4 back of the brief. The first part was they never made a
5 pleading below. It says right in our sewer use application
6 you gotta make a pleading so we know what we're dealin' with.
7 You know what it prevents you from havin' to deal with is
8 things like this that come outta the blue. They never did
9 make a pleading below. We argued that to Mr. Glenn and he
10 said, I'll just consider the complaint they already made.

11 Secondly, under our Enabling Act and under the Statute of
12 Frauds I told you this sewer use was supposed to come right
13 through our plant, right through our plant, it required an
14 easement or a right-of-way. All the evidence said they never
15 made an application for an easement or right-of-way. When you
16 come lookin' for a property right from a special purpose
17 district right like us, there's only one entity that can grant
18 that and that is the board, that has to go to the board. He's
19 charged with the knowledge of the law, he has to know that as
20 a matter of law that he's not gonna get that right-of-way
21 until the board acts on it so all he says about I had these
22 e-mails and calls with staff and stuff, none a that counts as
23 to a property right and then also it's an interest in land so
24 obviously it has to be in writing. There is no writing saying
25 you can come through the back of our plant. For the same

1 reason he's not entitled to an equitable estoppel argument. I
2 don't even know if he's made that, Your Honor, but we briefed
3 it because we are dealing with a part where there's no no
4 pleading.

5 And lastly, the pending ordinance doctrine we've got,
6 it's at Page 60 of our brief. Even if the timing had been
7 different, even if this guy had put something right here, if
8 he had an application sitting right there that he could
9 actually show someone, we could say, Hey, when we've got a
10 pending ordinance right on the table like that, we're entitled
11 to hold it, that's what the law says. We didn't even do that
12 because he never put us in that box. He never put anything in
13 that application box but even if he had, we woulda been
14 entitled to do that. So, Your Honor, this is actually a
15 complicated case but the appeal piece of it is easy. I
16 understand he had to appeal it, I don't know where it goes
17 after this, that's somethin' that Judge Welmaker left, he said
18 we finish the appeal first then we finish whatever happens,
19 how it plugs back into the resta the case. The appeal piece
20 is easy, Your Honor. This was a deliberate and a deliberate
21 process where he got every chance to puts -- put up his
22 evidence. A lotta time went into it and on appeal it's just
23 not even close so we'd ask that Your Honor affirm the decision
24 of Mr. Glenn so we can move on with this dispute.

25 THE COURT: Alright. Alright, Mr. Child.

1 MR. CHILDS: Your Honor, I'll read you directly for the
2 record as Mr. Orvin testified.

3 He was asked, "As I understand it we're talkin' about
4 after August of '07, sometime after or during the
5 consideration of the river route Brian brought you a stack of
6 papers and that's when you took it to the board and wrote down
7 the words that you were told to hold up everything while we
8 figure out what our policy is going to be on this, is that
9 right?"

10 His answer was, "Brian brought me those I believe in late
11 October, early November," mindful, Your Honor, that this
12 policy was not passed until May of 2008, "we went to the board
13 and the board said hold up on the pump station portion but to
14 continue working with the developers 'cause they needed to do
15 planning, they needed to get rid a -- get right-of-way, they
16 needed to get all their paperwork in but to work with them to
17 try to move these projects along while we deliberated on the
18 pump station issue."

19 Question: "But you definitely told to hold up at that
20 point in time on approving any pump station?"

21 Answer: "That's right, that was November of '07, that's
22 around November of '07."

23 They held up on a project and our testimony was the
24 summer of '07 because that's where Mr. Bishop went and talked
25 to Mr. Orvin so the record clearly shows that a central issue

1 was the board holdin' up all pending applications, not to
2 delay on behalf of Harrison Partners.

3 THE COURT: Well let me ask ya this: What if they had
4 said, No, go ahead and rule on it at that time in November of
5 '07, what would the result have been?

6 MR. CHILDS: They would have had, one way or the other
7 they would have had their project. They say no, we say yes.
8 They had Metropolitan lines in the area, they had the
9 discussions with ReWa on various rights-of-ways that were
10 ongoin' even while this hold was there. They talk about four
11 different routes, three of the four different routes were
12 proposed by ReWa and not by my client. So ReWa was actually
13 out there sayin', Oh, how 'bout this way, how bout this way,
14 um, and ultimately I think that ---

15 THE COURT: Well how does that, how does that mix with or
16 jell with the, ya know, you're sayin' they're stoppin' it but
17 here they are making proposals with route as far ---

18 MR. CHILDS: Well ---

19 THE COURT: --- routes ---

20 MR. CHILDS: --- well the routes actually proposal came
21 up after the policy was enacted in May of 2008, that's that's
22 my recollection yet and so I think the evidence would be that
23 they would have, once the pump station had been cleared under
24 the old regs., they would have gotten their connection one way
25 or the other.

1 THE COURT: Okay.

2 MR. STILWELL: Your Honor, it's, the dates are confusing
3 but the part about where we, the factual background in our
4 brief where we talk about the route starts at Page 5.

5 THE COURT: Let me go back 45 pages, I'm sorry, just a
6 minute.

7 MR. STILWELL: Those routes all came up before the
8 regulation ever changed, Your Honor. When I talked about
9 goin' through Metro, that wa -- the the change in the pump
10 station policy wasn't even a glimmer in the eye of the board
11 yet, that they coulda had it there. They coulda had it
12 through the river route. This was even after in November like
13 he said, it's not August, it's November, when we say, How
14 'bout you go up the river? If he had ever given us acceptable
15 designs, final plans up the river, he'd have it. He ha -- I
16 won't say those neighborhoods had been built 'cause we all
17 know that they'd a never gotten built, but he woulda had his
18 permit if he'd a put in up the river route. The delay that
19 Mr. Glenn found was on this side. The quote he read you from
20 Mr. Orvin says just like every witness said, The board said
21 we're gonna do the final approval on these which they had to
22 because it had property interests but keep working with them.
23 Like Your Honor said, we're offerin' 'em this, we're offering
24 'em this, we're offerin' 'em this. The last thing we ever
25 offered is that nobody wants these pump stations. After the

1 thing had changed, the regulation had changed, we offered to
2 own it our self but like I said, he doesn't want anything
3 except the way he wants it, well that's not the way sewer
4 service works for any applicant, any time.

5 THE COURT: Alright. Okay, what's the next motion?

6 MR. TRAXLER: In the other lawsuit where they are sewing
7 for all sorts of causes of action against Metro and two of my
8 individual employees, we have our motion for sanctions with
9 regard to a 30(b)(6) deposition of Mr. Bolo, the plaintiff, in
10 this particular case.

11 THE COURT: Okay, well ---

12 MR. TRAXLER: Mr. Bolo who's seated with Mr. Childs is
13 representative of the plaintiff in the civil lawsuit. They
14 had alleged -- first of all, the original lawsuit was filed
15 against my clients in 2009 as I recall, that case was 40(j)'d.
16 Rather than restorin' it, they refiled it in March of 2011,
17 that case it presently pending. We were scheduled to go to
18 trial and also this motion hearing especially with regard to
19 the appeal was scheduled for today. We sent out in mid-June a
20 30(b)(6) notice saying we want to take the deposition of the
21 30(b)(6) witness for Harrison Partners. It was scheduled for
22 early August or late July. I believe Mr. Bolo showed up in
23 his deposition and we've submitted this to you and without
24 going through all the deposition after pages and pages and
25 pages of diatribe by Mr. Bolo, I said, What did you do to

1 prepare for your deposition today?

2 He says, Absolutely, nothing.

3 And I say, Let me ask you about the allegations of your
4 complaint.

5 Well I don't know.

6 Well let me ask you about your damages. I said, you got
7 several categories of damages here in your answer to
8 interrogatories, how do you get to these numbers?

9 I don't know.

10 Well what did you do to prepare?

11 Nothing. These are lawy -- numbers my lawyers came up
12 with. I don't know what the answers are.

13 And we have given you excerpt from his deposition where
14 time after time for about three hours he says, I don't know
15 and I haven't done anything to prepare, and we finally after a
16 lotta consultation among the lawyers, and my fuss is not with
17 Mr. Childs but with Mr. Childs over their objection, I said,
18 I'm adjourning the deposition, we're going before the judge
19 and I am going to ask the Court for an order, this is why
20 we're here today, for sanctions, we're asking as part of the
21 sanctions that he have to be re-deposed. We have the right to
22 re-depose him 'cause we never finished and he wasn't prepared.
23 We want him to have to pay my legal fees for getting ready for
24 him in that wasted deposition for three or four hours. We
25 want him to be videotaped at his deposition and we want it

1 done here in the courthouse so that we'd have recourse to a
2 judge if we get into the same games that we got into with his
3 original 30(b)(6) deposition. And I can sit there and I can
4 refer you to page after page of his, of his transcript where
5 it's just insane and to give you an idea of the insanity of
6 this entire process, this entire lawsuit, the subdivision that
7 they're arguin' about was foreclosed on and taken over by BB&T
8 who had the mortgage on the subdivision. They are suin'
9 Mr. Bolo for a personal guarantee along with two or three of
10 his other partners. That foreclosure lawsuit has been pending
11 down in Richland County for quite sometime. We got word about
12 two weeks ago that all of a sudden he has filed a motion to
13 add us in that Richland Coun -- County third-party action, the
14 same allegations that we're in this lawsuit on and we all know
15 how crazy and ludicrous that is and probably sanctionable to
16 file a motion to amend to raid -- to raise the same
17 allegations that are pending in Greenville. This is what
18 we've had to put up with. So what we're movin' before the
19 Court for is order that he be deposed and have to be prepared
20 in a 30(b)(6) to testify on the areas we identified in his
21 notice, that he have to pay my attorney's fees for getting
22 ready in this case and I'll address that in a minute, that it
23 be done by videotape downstairs in the ADR rooms or somewhere
24 here where we can have access to a judge if we get into the
25 same game plan that we got into with the original deposition

1 and like I said, that he had to be prepared to respond to
2 them.

3 This case is very complicated. He gave he gave a 3 to
4 500-page deposition in the BB&T case with his rambling
5 diatribes and the like, he gave a very lengthy deposition
6 probably one, it was a 2-day deposition with Mr. Davis in the
7 administrative agency appeal that I had to plow through along
8 with untold documents. Get ready for several months to
9 prepare for his deposition and including the aborted time,
10 just for me alone my deposti -- my fees for preparation of
11 deposition were almost 12,000. Some of that time I do not
12 have to go back and and and repeat but to get back up to speed
13 to do his deposition the way it's supposed to do is probly
14 gonna require about half a that work so we are here asking for
15 attorney's fees, it took us \$12,000 to do this aborted 3-hour
16 deposition, we're asking for half a that back from him, like I
17 said, that we depose him downstairs videotape with recourse to
18 a judge here if necessary.

19 THE COURT: Alright.

20 MR. TRAXLER: Thank you.

21 THE COURT: Mr. Haynsworth.

22 MR. HAYNSWORTH: Just to chime in because Mr. Traxler
23 left mine out. I'm no -- I'm not asking for as as much in
24 fees because I'm not as smart as him and can't charge as much
25 but I did likewise prepare for the depositions after all the

1 nonsense and I hope Your Honor got the memo that I submitted
2 sort of addressing the specific testimony that Mr. Traxler
3 alluded to, I quoted it in the brief, I attached the actual
4 pages from the 30(b)(6) deposition. If it has not hit your
5 file, I'll be happy to hand up ---

6 THE COURT: You have an extra copy?

7 MR. HAYNSWORTH: This is my copy but I have extra ones
8 back at the office.

9 THE COURT: Okay.

10 (Whereupon, counsel handed the document to the Court.)

11 MR. HAYNSWORTH: And that was, Judge, that was mailed
12 Thursday and I should've e-mailed to you, I e-mailed to
13 everyone else thinking that postal service might not get in in
14 time but but that goes into the specific questions and answers
15 that Mr. Traxler was alluding to and and obviously quotes the
16 the civil procedure rule dealing with the obligations of a
17 30(b)(6) designee.

18 THE COURT: Okay. Well he gave me some numbers, were ya
19 gonna give me some numbers that you're askin' for?

20 MR. HAYNSWORTH: Your Honor, it is, I'll have to refer
21 back to my affidavit, it's ---

22 THE COURT: Well here, okay.

23 MR. HAYNSWORTH: Your Honor, I'm seeking \$1,750 ---

24 THE COURT: Okay.

25 MR. HAYNSWORTH: --- which is roughly half of what I

1 believe I put in preparation and likewise as Tom said, I mean,
2 I'm not gonna have to reinvent the wheel completely but by the
3 time we get around to it, ---

4 THE COURT: Alright.

5 MR. HAYNSWORTH: --- have to redo some work.

6 THE COURT: Alright, Mr. Child.

7 MR. CHILDS: Your Honor, the the deposition took place
8 over just a period of three hours in comparison to previous
9 2-day depositions they've taken of Mr. Bolo a number of other
10 times and he's testified, you know, we we've we've offered him
11 to to resume that deposition any time they wanted to, they're
12 the ones that moved to adjourn. I understand they weren't
13 satisfied with his answers but he was the most qualified
14 representative the corporation to testify. I don't know that
15 if in general you can make a person after three hours of
16 deposition have a better recollection than they had initially
17 anyway. I think that he has in good faith complied with with
18 what they've asked him to do, I think when they got to the
19 point of the damages question they they they just quit and and
20 they could've asked questions like, you know, what were your
21 cro -- what were your expenses expected to be on the project,
22 what was your income expected to be? They didn't follow up on
23 all those questions and I think that those those answers
24 woulda been forthcoming if they continued with the
25 deposition.

1 As to their requests for attorney's fees for preparation
2 of depositions, I I really don't understand the logic behind
3 that request, I certainly don't think they're entitled to
4 attorney's fees. We're still in the midst of discovery in
5 this case, they still haven't answered my discovery yet.
6 We're still waiting on that response from them and so, ya
7 know, after they adjourned I said retake it any time you want
8 to, I mean, if you're not happy, tell me specifically, you
9 know, ---

10 THE COURT: Well, Mr. Childs, the the rule says you go --
11 that that the the designee shall be prepared to talk about
12 what it is, uh, ---

13 MR. CHILDS: He he was prepared to talk about the
14 corporation, he is the highest, uh, person most familiar with
15 the corporation, ---

16 THE COURT: Well, Mr. Childs, ---

17 MR. CHILDS: --- that ---

18 THE COURT: --- he's he represents the company that
19 filed suit and he he's comin' in as the designee to discuss
20 that, ---

21 MR. CHILDS: Right.

22 THE COURT: --- what the claims are and all that, he
23 comes in and says he didn't do anything to prepare for it, he
24 doesn't know the answers.

25 MR. CHILDS: Well he he answered a lotta questions about

1 the claims and he answered a lotta questions about the factual
2 situation. When he hit hit the issue of how do you calculate
3 the damages, I I think that's really what what their problem
4 was is him sayin', Well I'm not sure how they were calculated
5 by the attorneys, which frequently you'll run into in
6 depositions sometime, but they didn't ask the other questions
7 of what, you know, what were your expected pro profits on the
8 project, what were your expenses on the project, they just
9 adjourned it at that point and I'm not ever in a position of
10 tryin' to dissuade the other side from doin' discovery, I want
11 them to do their discovery and we're willin' to submit to
12 whatever conditions they want if it makes 'em feel better
13 about it, you know, but we don't think that that they're
14 entitled to any kind of sanctions basically because they
15 didn't like his answers. I mean, what happens at trial is
16 that, you know, you take a guy's deposition and when he claims
17 at trial, you know, I got a million dollars in damages, you're
18 gonna say well in your deposition you had no idea, I mean,
19 that's how that works and I think if they had a delved in
20 further he woulda said, Well this is what we would have
21 expected from our, you know, our expenses and our our our
22 profits were expected to be this per lot but, you know, they
23 just quit right there.

24 MR. TRAXLER: I asked him, I said, "What did you do to
25 prepare for your deposition today as a 30(b)(6) witness?"

1 Answer: "Absolutely nothin'."

2 "In preparation for today, did you review the documents
3 and e-mails and information that you have in order to answer
4 that question?"

5 Answer: "I didn't review anything. I showed up here
6 this morning based on the memory and the bad experience that I
7 had in dealing with these people for the last six years now."

8 Later: "Okay, so is it your testimony that you have no
9 damages separate from the rest of the damages in this lawsuit,
10 separate by virtue of..."

11 He says, "Is that a legal question?"

12 "Damages is somethin' for the judge, judge is going to
13 have determine. I'm not qualified to determine what the
14 damages -- where the damages occurred or how they occurred,
15 that's a matter for the Court. Mr. Bolo, I need for you to go
16 to interrogatory Number 3 and your answer in Exhibit Number 2
17 please, this relates to damages." And I said, "C'mon down, I
18 said, "Your response started off by sayin' damages are still
19 being evaluated and quantified and then you set forth an
20 answer. Do you have any more of a complete answer or any
21 changes to the answers to this interrogatory today or is this
22 an accurate statement of damage you you seek?"

23 "That's somethin' I will have to talk to my attorney
24 about. We have not discussed this. Since the time that this
25 was prepared, we haven't reviewed it or updated it so I think

1 it's a good ballpark number,"

2 I go on through and I start asking him for the specifics,
3 time after time recited in the excerpts given to you he goes,
4 I don't know, I don't know and I don't know. The man did not
5 prepare for his deposition. I have wasted days upon days
6 getting ready for his deposition reading prior deposition,
7 reading documents, to get these answers at my one bite of the
8 apple and he comes in having done absolutely nothin'. It's
9 certainly within discretion of this court that he have to
10 reimburse me our, and Mr. Haynsworth, our reasonable
11 attorney's fees having to get here and back up.

12 THE COURT: Anything else, Mr. Childs?

13 MR. CHILDS: No, sir, Your Honor,

14 THE COURT: Well, wanna reconvene your deposition, you
15 can do it by videotape, do it in the courthouse. I'll
16 instruct whoever the 30(b)(6) designee is to be prepared to
17 answer the questions. They are the moving party, they filed
18 the lawsuit and if they cannot, there there are other
19 sanctions available for discovery abuse and I would consider a
20 failure to be prepared to be discovery abuse.

21 With respect to the payment of attorney's fees, I will
22 find that they're, the amounts requested are reasonable but
23 I'm not gonna order payment. At this time I will leave that
24 issue open to that whether or not the the payment should be
25 made to be determined should should a subsequent issue arise

1 with respect to discovery or to be ruled upon by the trial
2 judge so at this time I'm not gonna make a ruling in that
3 respect but that the amounts requested, the \$6,000 and the
4 \$17,250 or whatever it was Mr. Haynsworth cited, are
5 reasonable and appropriate should a a payment become
6 appropriate. Alright.

7 MR. TRAXLER: Yes, thank you.

8 THE COURT: Okay, and, uh, I mean, I -- I'll -- I'm gonna
9 review the thing before I rule on the, on the appeal. I'd I'd
10 like a little bitta time, that's a lotta ---

11 MR. CHILDS: But we got the motion to amend is is our
12 last one.

13 THE COURT: Okay, well then I probly oughta, I'll just
14 tell ya my gut reaction is to deny, is to to to affirm the
15 ruling of of Mr. Glenn. I'll go ahead and do it right now,
16 okay? Alright, now you wanna amend sumtin'?

17 MR. CHILDS: Yes, the the original underlying lawsuit
18 from 2000-1957 we have filed a motion back on March of 2012 to
19 amend our complaint. One of those a a series amendments was
20 to reflect the judge's rulings in a previous motion hearing
21 leading certain defendants, certain individual defendants, so
22 I basically cleaned up the complaint in compliance with the
23 Court's prior ruling, also added Mr. Bolo personally and his
24 corporation Insite Group, LLC which were both damaged by the
25 situation and also added a second cause of action for inverse

1 condemnation.

2 THE COURT: Okay.

3 MR. TRAXLER: As to my particular clients Metropolitan
4 Sewer Subdistrict and Mr. Thompson and Mr. Dickson, we we'd
5 ask that that matter be held in abeyance and decided. I wanna
6 finish his 30(b)(6) deposition before I address the amendment.
7 He's way past the statute a limitations on this but it's not
8 quite right for me to bring it to you yet. While I understand
9 and appreciate the liberality with which a Court is to
10 consider a motion to amend, nonetheless law is clear that if
11 the amendment is an exercise in futility then that motion
12 should be denied and I would ask that his motion to amend
13 either be denied or held in abeyance till we finish his
14 30(b)(6) deposition and I can come in here will fully show you
15 why it is that exercise in futility. This was a project where
16 as they talked about he had the subdivision, they're gonna
17 have to pump all the sewage uphill to get to the plant. To be
18 able to start with that, he's gonna have to get a DHEC
19 Construction Permit, he needed a letter from ReWa, he needed a
20 letter from me to give to DHEC two letters sayin' we will
21 accept it, it will work. You just ruled that he didn't
22 properly do the ReWa route, never got the letter from us.
23 This process started in 2006, 2008 he knew what was goin' on,
24 he knew in 2007 was goin' on, that of which he complains.
25 They've refiled this lawsuit, did not restore it, they refiled

1 it in March of 2011, ---

2 THE COURT: Okay.

3 MR. TRAXLER: --- he's outside a the statute. I would
4 ask that the motion to amend be held in abeyance till I get
5 his 30(b)(6) deposition.

6 THE COURT: Alright, that sounds reasonable to me. Why
7 why would we allow the amendment and then be plowin' the same
8 road twice?

9 MR. CHILDS: My only concern was this case has -- had had
10 been on the trial roster and so and and subsequently comin'
11 back up on the trial roster shortly I assume ---

12 THE COURT: Well I don't think it's ready for trial and I
13 don't think, uh, I don't think that'll be an issue ---

14 MR. CHILDS: Alright.

15 THE COURT: --- so hold it in abeyance pending the
16 completion of the 30(b)(6) and I would ask prevailing party in
17 the motions to to prepare the appropriate orders, submit 'em
18 to opposing counsel and and then s -- if ya'll can agree on
19 the language, send it to me. Let's get it done, okay?

20 MR. TRAXLER: Thank Your Honor.

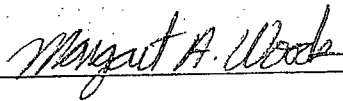
21 THE COURT: Alright.

CERTIFICATE OF REPORTER

I, Margaret A. Woods, Court Reporter in and for the State of South Carolina at Large, hereby certify that I reported the preceding case on September 4, 2012 at the time and place heretofore set forth; and that the foregoing pages numbered from 3 through 41, inclusive, constitute a true and accurate transcription of my stenographic notes of the said proceeding.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties connected to the action, nor am I financially interested in the action.

March 17, 2013



Margaret A. Woods, Court Reporter
in and for the State of South Carolina at Large.