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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Case No. 11-ALJ-07-0367-CC

Rodney Connell, Barbara Connell, Edward Steers, Sally Steers, Moustafa Moustafa and
Maggie Shatilla Petitioners,

vs.

Charleston Water System and South Carolina Department of
Health and Environmental Control Respondents.

Of Whom

Rodney Connell, Barbara Connell, Moustafa Moustafa and Maggie Shatilla, are Appellants.

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SEP 04 2012

SC Court of Appeals

PETITION FOR ORDER OF SUPERSEDEAS

TO: THE COURT OF APPEALS AND THE RESPONDENTS

PLEASE TAKE NOTICE that Rodney Connell, Barbara Connell, Moustafa Moustafa and
Maggie Shatilla hereby move the Court, pursuant to S.C. Appellate Court Rule 241(c), for an
order granting supersedeas in this appeal from an administrative tribunal, to stay the work
proposed by Charleston Water System ("CWS") and to maintain the status quo pending
resolution of this appeal. The basis for this motion is as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

This case is a challenge to the critical area permit and coastal zone consistency certification issued to CWS by the South Carolina Department of Health and Environmental Control ("DHEC") for the construction of 2,150' of 48" Force Main Pipeline ("Pipeline") on and around Plum Island Wastewater Treatment Plant ("Plum Island").¹ See Exhibit 1, DHEC Permit. A total of 850' of this Pipeline will be placed in critical area salt marsh, with 140' of line being trenched within critical area and 710' being supported on piles suspended above the critical area. In total, 94 one square foot pilings will be placed in the critical area to support the 4' diameter wastewater pipeline.

Wastewater in the greater Charleston area is collected and treated by CWS at Plum Island. Plum Island is located in Charleston Harbor on the south side of the Ashley River. The Island is approximately 20 acres in size and is surrounded by critical area salt marsh. The once isolated island is now in close proximity to residential areas, including the Country Club of Charleston and, its closest neighbor, the Harbor View Circle residential area. Harbor View lies on a small island adjacent to Plum Island, and a short causeway from Harbor View is the only road access to the Plum Island Plant. The Petitioners are residents of Harbor View Circle and are therefore Plum Island's closest neighbors. The Petitioners are private citizens who brought this

¹The S.C. Coastal Zone Management Act requires a critical area permit prior to utilization of the critical area. S.C. Code Ann. § 48-39-130(A). The critical area permit requirement in turn triggers review for consistency with the State's Coastal Zone Management Plan. "Critical area" is defined as coastal waters; tidelands; beaches; and the beach/dune system. S.C. Code Ann. § 48-39-10(J). "Coastal waters" are defined as "the navigable waters of the United States subject to the ebb and flood of the tide and which are saline waters, shoreward to their mean high-water mark." S.C. Code Ann. § 48-39-10(F). The definition of "tidelands" includes "all areas at or below mean high tide . . ." S.C. Code Ann. § 48-39-10(G). The pipeline CWS is proposing to construct falls within critical area coastal waters and tidelands.

challenge out of concern for damage to their own property values and quality of life, and potential environmental damage to the surrounding salt marsh.

Wastewater arrives at Plum Island through a system of large tunnels. Wastewater from the West Ashley area of Charleston is transported to Plum Island by the West Ashley Tunnel System. The West Ashley Tunnel, which is over 8,000 feet long and runs along the bottom of Charleston Harbor, is in need of replacement. CWS acknowledges that as far back as 1987 tests revealed serious problems with the West Ashley Tunnel. See Exhibit 2, CWS's Motion to Lift Automatic Stay, p. 5. A decade later, CWS again observed deterioration of the Tunnel System. Exhibit 2, p. 6. The Pipeline is a part of the West Ashley Tunnel replacement. Once the new West Ashley Tunnel is constructed, it will carry wastewater to a new pump station to be constructed on Plum Island. The pump station will then pump the wastewater to the headworks of the facility through the Force Main Pipeline which is challenged in this action. In other words, the Pipeline carries wastewater from one part of Plum Island to another. No part of the actual Tunnel replacement or pump station is challenged here – only construction of the Force Main Pipeline. Construction of the West Ashley Tunnel has not yet begun, and in fact bidding for its construction has yet to commence.

This case centers around whether it is feasible for the Pipeline to run across the island, avoiding the critical area. In particular, there are two alternative alignments that have received extensive consideration in this case: the near-surface, on-island option (“near-surface option”) and the tunneled on-island option (“tunneled option”). The near-surface option would be built entirely on the Island, either a few feet above or below ground. The tunneled option would run deep beneath the Island. The law relied on by the Petitioners in this case make clear that, if at all

feasible, one of these options must be chosen before the proposed route:

- The Critical Area Regulations specific to pipelines provide that pipelines must avoid crossing critical areas to the “**maximum extent feasible**” and must use existing right-of-ways and topographic features “wherever feasible.” S.C. Code Ann. Regs. 30-12.D.(1) & (2).
- The Critical Area Regulations and the State’s Coastal Zone Management Plan provide specific to waste treatment facilities that placement of such facilities should avoid critical area wetlands and will not be approved there where feasible alternatives exist. S.C. Code Ann. Regs. 30-12.D.(1), CMP III-61.

There was no dispute in this case that as Plum Island exists today, a corridor exists for an on-island Pipeline route. The debate instead centered on the likelihood of conflict with future expansions on Plum Island and also the constraints on tunneling the Pipeline beneath the Island. After the ALC ruled in the Respondents’ favor, rejecting the availability of feasible alternatives, the Petitioners moved the ALC for a stay pending appeal on July 30, 2012. The ALC denied this motion for stay on August 21, 2012, primarily on the grounds that the \$5 million pipeline could be removed and rebuilt if this Court granted a reversal. Specifically, the ALC ruled that construction of the Pipeline during the pendency of this appeal would not render the appeal moot because this Court would not rule in Appellants’ favor and then allow Pipeline to remain in the marsh. Exhibit 3, Order Denying Petitioner’s Motion for Stay, p. 3. Appellants filed their notice of appeal before this Court on August 22, 2012.

II. LEGAL CONTEXT FOR COURT’S ANALYSIS

S.C. Appellate Court Rule 241 generally provides for an automatic stay when a notice of

appeal is filed in a civil matter. Exceptions to this automatic stay are found in Rule 241(b) and include an exception for “[a]ppeals from administrative tribunals as provided in S.C. Code Ann. § 1-23-380(A)(2) and § 1-23-600(G)(5).” Thus, the automatic stay provision in Rule 241 does not apply to this matter. However, “[i]n a case subject to [the automatic stay] exception, any party may move for an order imposing a supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal.” SCACR 241(c)(1). In deciding whether to issue such a stay, this Court “should consider whether such an order is **necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.**” SCACR Rule 241(c)(2) (emphasis added). The purpose of a writ of supersedeas is to preserve the jurisdiction of the court or to prevent a contested matter from becoming moot by preserving the status quo. Melton v. Walker, 209 S.C. 330, 40 S.E.2d 161 (1946). See also, S.C. Jur. Appeal and Error, §55 (Supp. 2012) (“A supersedeas suspends or stays the jurisdiction of the trial court to execute on an appealed judgment in order to preserve the status quo pending a final disposition of the appeal. . . . In ruling upon a motion to lift the stay or grant a supersedeas, the justice, judge, or court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.”)

While grant of supersedeas is discretionary, this Court’s analysis under Rule 241 must be colored by consideration of an intervening change in the law since that Rule was enacted. Article I, Section 22 of the South Carolina Constitution provides that: “No person shall be finally bound by a **judicial or quasi-judicial decision of an administrative agency** affecting private rights except on due notice and an opportunity to be heard; . . . and he shall have in all such instances

the right to judicial review.” S.C. Constitution, Article I, Section 22 (emphasis added).² The Supreme Court has interpreted that provision as providing the right to judicial review for environmental regulatory decisions. See, League of Women Voters of Georgetown County v. Litchfield-by-the-Sea, 305 S.C. 424, 426, 409 S.E.2d 378, 380 (1991) (reversed on other grounds). The Amended Final Order on appeal in this case is a quasi-judicial decision of an administrative agency, and the Petitioners are therefore constitutionally entitled to judicial review of that decision.³

However, the Petitioners now face the prospect of having the Pipeline being fully constructed while they await their first opportunity for judicial review. When Appellate Court Rule 241 was enacted, excluding administrative appeals from the automatic stay provision, administrative appeals went first to the circuit court and only then to the appellate courts. In other words, by the time Rule 241's automatic stay exception was applied, an administrative decision had already received judicial review in the circuit court. 2006 S.C. Act No. 387 amended the Administrative Procedures Act and changed the appeals process for administrative decisions. Since Act 387, appeals from the ALC for DHEC permitting decisions now go directly to the Court of Appeals, and parties do not obtain judicial review of their administrative decision,

²The Administrative Procedures Act similarly provides that a “party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review.” S.C.Code Ann. § 1-23-380.

³An agency, as that term is used in Section 22, “means each state board, commission, department, executive department or officer, other than the legislature, the courts, the South Carolina Community Development Board of the Tobacco Settlement Revenue Management Authority, authorized by law to make regulations or to determine contested cases.” S.C. Code Ann. § 1-23-10(1). The Administrative Law Court falls within the executive department and is authorized by law to determine contested case.

as guaranteed by the South Carolina Constitution, until review by the Court of Appeals.

By maintaining the automatic stay exception for administrative decisions, the Appellate Court Rules do not reflect this important procedural change, and in this instance are not consistent with Petitioners' constitutional rights to judicial review.

III. ANALYSIS

A. STAY IS NECESSARY TO PRESERVE MEANINGFUL APPEAL

CWS has estimated that Construction of the proposed pipeline would take approximately 22 months. Exhibit 4, Tr. Day 2, p. 256. The most recent representation from CWS is that bidding for construction of the Pipeline will begin in December 2012 and construction will begin immediately thereafter. Barring a stay in this case, the disputed pipeline project will almost certainly be completed or at least substantially completed during the pendency of Petitioners' appeal of this Court's decision.

The only remedy available to the Petitioners in this administrative action is reversal or modification of the permit issued by DHEC. See, S.C. Code Ann. § 1-23-380(5). With the Pipeline in place, the Petitioners would be left without a remedy because this Court is without jurisdiction to order removal of the Pipeline. The Petitioners brought this action because they believe that an on-island Pipeline route would minimize the damage to their property values and quality of life. If the opportunity for an on-island route is foreclosed by construction of the Pipeline in the marsh, the Petitioners do not have the option of recovering monetary damages or some other alternative remedy to offset this increased harm. Consequently, once this pipeline is constructed, or even substantially constructed, the Petitioners are without a remedy in this case and their appeal is moot because the Court cannot order effective relief.

B. POSSIBILITY OF PIPELINE REMOVAL

One of CWS's themes running through this action has been the difficulty of moving the Pipeline once it is in place. This difficulty has in fact been the linchpin of CWS's contention that a near-surface, on-island Pipeline route is not feasible. Particularly, CWS has contended that it is not feasible to construct a near-surface Pipeline on the Island, though there is room for such an option now, because of the problems that would arise if that Pipeline later had to be moved.

During the hearing in this case, CWS CEO Kin Hill said that moving the pipeline in the future would be "very problematic." Specifically, as it related to the feasibility of a near-surface option on Plum Island, Hill testified as follows:

You would have to build that pipeline and then at some future date have to possibly move that pipeline. That's very problematic for us because if you have to move that pipeline, you have to maintain service while you're doing that. And you've got to be able to somehow transport huge volumes of waste water while moving it. Additionally, we don't think it's a -- good expenditure of public funds, again our rate payers ultimately pay for everything that we do, to put a pipeline in where our future master plan showed that there may additional facilities in conflict.

Exhibit 4, Tr. Day 2, p. 209. Further, in his deposition, Mr. Hill testified flatly that: **"we just**

don't feel it would be good engineering or good use of public funds to construct a line and

then maybe have to move it later." Exhibit 5, Hill Deposition, p. 66 (emphasis added). In

other words, as it relates to the feasibility of a pipeline alternative, the chance of having to move the Pipeline in the future is a problem so serious as to exclude that alternative from consideration.

Of course, if moving the Pipeline once it has been constructed is a reasonable measure to undertake, CWS's argument that a on-island Pipeline is not feasible is significantly undercut.

However, this is exactly the position that CWS took in response to the Petitioners' post-trial motion for stay in the ALC – that CWS has the money and ability to move the Pipeline, should that be ordered, and that the Petitioners therefore will not suffer irreparable harm if construction proceeds. When it would benefit CWS, moving the pipeline is presented as a perfectly reasonable option despite the cost associated and disruption of service, but when these questions were presented in a context less-favorable to CWS, the picture it painted was not so optimistic.

Based on these inconsistencies, the Petitioners and the Court have reason to doubt removal of the pipeline as a viable option. More specifically, relying on removal of the Pipeline, which is a multi-million dollar permanent structure with an almost two-year construction time, as a viable option eschews reality and presumes that this Court would impose this costly remedy on a public utility, should the Appellants prevail. Under the circumstances, in considering whether supersedeas is “necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot,” the possibility of removing the permanent Pipeline from the marsh should be entitled to very little weight.

C. MOOTNESS REGARDLESS OF PIPELINE REMOVAL

Even if CWS could and would remove the permanent Pipeline and this Court would order such a measure, this appeal could still be rendered moot if the Pipeline is completed during its pendency, as undersigned law firm recently experienced in another case before this Court. In Upstate Forever et al. v. DHEC and Greenville Water System, 2009-ALJ-07-00226,⁴ a case with many parallels to the one at hand, undersigned's clients challenged a permit for construction of a

⁴Court of Appeals Order of Dismissal attached as exhibit 6; Motion to Dismiss and Memo attached as exhibit 7.

pipeline in Greenville County. Because petitioners were not seeking to prevent actual construction of the pipeline, they consented to lifting the automatic stay in the ALC, allowing construction of the pipeline to move forward. Once on appeal, the respondents moved to dismiss the case on the grounds that the appeal had been mooted by completion of the pipeline project. Exhibit 6, p. 1. Specifically, the respondents contended that because the pipeline construction was complete, the project was no longer covered by the DHEC permit being challenged and “there [was] nothing left for the Court to reverse, modify, amend or affirm by this appeal.” Exhibit 7, Motion, p. 2. This argument – “that construction has been fully completed, and the [DHEC permit] has no more legal effect” (Exhibit 7, Memo, p. 7) – was adopted by this Court, and the petitioners’ appeal was dismissed. See, Exhibit 6, p. 2.⁵

Under the logic adopted by this Court only three months ago, CWS could move to dismiss this appeal for mootness after construction of the Pipeline is complete, on the grounds that the permit and certification challenged here have no more “legal effect.” This logic would apply equally whether or not it is feasible for CWS to remove the Pipeline after-the fact. Certainly, under authority of this recent holding, a supersedeas is “necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.”

D. HARM TO CWS FROM SUPERSEDEAS

The harm to CWS from a supersedeas comes in the form of delay in replacing the ailing West Ashley Tunnel. However, it is important to both put that delay in context and to nail down

⁵The petitioner in Upstate Forever, has sought rehearing on the grounds that relief can still be granted. This case is different from Upstate Forever in that it wasn’t the actual pipeline that was challenged in that case, it was DHEC’s failure to impose conditions on its permit necessary to protect water quality. In this case, it is the location of the pipeline itself that is being challenged, and there is consequently no remedy available once the pipeline is constructed.

exactly how long that delay is likely to be. First of all, giving some context, the delay that would be occasioned by a stay of actual construction of the Pipeline pending appeal pales in comparison to the overall time-frame on which this project has operated. As discussed above, the need for the West Ashley Tunnel replacement was identified in the late 1980's. At that time, CWS created a six-phase plan for updating its infrastructure, based on the urgency of need. The West Ashley Tunnel replacement is the fifth phase of the plan, and almost 25 years later construction has not begun. CWS has submitted evidence that during very heavy storm events, sanitary sewer overflows have occurred at a couple of points in the West Ashley wastewater system due to the system's insufficient capacity. However, those overflows have been occurring in the West Ashley system for over a dozen years, and at no time before, during or after the hearing in this case has CWS given any indication that these overflows have grown substantially worse or substantially more intractable over time.

Further, it is important not to lose sight of the fact that CWS is the company who constructed this system, is responsible for its maintenance, and receives lucrative benefits from its operation. It is CWS's decisions that have resulted in a problem that was discovered in 1987 not being remedied in the year 2012. Further, CWS certainly realizes that litigation and permitting delays are a reality of its business, which has the potential to implicate serious environmental and social issues. The Petitioners do not debate that the condition of the West Ashley Tunnel is deteriorated, but the Petitioners should not lose the opportunity to pursue judicial review because CWS has not made this long-standing problem a priority until now or has not properly planned for foreseeable delay.

In calculating how long the delay in completion of this project would be, the Court should

consider that the West Ashley Tunnel takes longer to build than the Pipeline.⁶ CWS has never explained why Tunnel construction could not begin independently of Pipeline construction, though Tunnel construction has not yet begun. As was revealed at the trial in this case, CWS considered three alternative routes for the pipeline project. Each of these alternatives shows the Tunnel terminating at an identically located pump station and shows the Pipeline extending from the pump station. In other words, no matter what pipeline alignment CWS uses, the Tunnel route and its connection to the pump station will remain the same. Through depositions and the trial of this case, CWS would in fact not go so far as saying that the Pipeline had to be constructed concurrent with the Tunnel, or that Pipeline construction must be complete before Tunnel construction. The most CWS stated was that both the Tunnel and pipeline must be constructed for the system to become operational. Exhibit 4, Tr. Day 2, 240-241. Though CWS changed its tune slightly in response to the Petitioners' post-trial motion for stay in the ALC, stating that the Tunnel and Pipeline must not be "bifurcated," CWS has provided no basis for this counterintuitive postscript. While CWS may not want to start building the Tunnel with the Pipeline in litigation, the Petitioners submit that it is possible to do so.

To the extent CWS contends that the delay occasioned by a stay is infeasible or would result in an unacceptable outcome, that contention is contradicted by CWS's own delays in addressing this problem. Given that it would take at least 30 months for the West Ashley system

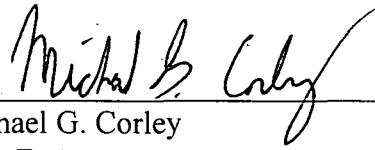
⁶The Tunnel is a 30-month project. See, Exhibit 4, Tr. Day 2, p. 239; Tr. Day 3, p. 75. The Pipeline construction time has been a subject of some uncertainty. Ken Hill testified at the trial that it was a 15-month project. Exhibit 4, Tr. Day 2, p. 239. The "PER Technical Memo" compiled for CWS indicates that it is between a 21 and 22-month project, depending on the material chosen. Exhibit 4, Tr. Day 2, p. 256. Based on the testimony at the trial in this case, that decision has not yet been made. At any rate, based on evidence in the record, the difference in construction times is at least 8 months.

to become operational even if construction of the Tunnel started today, and that for 25 years this project has essentially waited on the sidelines, the prejudice to CWS in staying the actual construction aspect of this project does not warrant denial of the Petitioners' rights to judicial review.

The Petitioners submit that the difference in Pipeline and Tunnel construction time creates an approximately 8-month buffer for this case. To assure that this case goes as little over that 8-month period as possible and that the prejudice to CWS is thereby minimized, the Petitioners suggest an expedited briefing schedule in this case. This is exactly the measure that was taken in another of undersigned law firm's recent cases, a joint appeal between Kiawah Development Partners, II, the Coastal Conservation League and DHEC (09-ALJ-07-0029, 09-ALJ-07-0039). In that action, the Supreme Court granted the Coastal Conservation League's motion for supersedeas, staying construction of Kiawah Development Partners' proposed project that had been authorized by the ALC, on the condition that the appeal briefing schedule be expedited. Exhibit, . The Petitioners respectfully submit that a comparable scheduling order could allay some of the concerns CWS is likely to present.

III. CONCLUSION

For the reasons discussed above, the Petitioners submit that a supersedeas is appropriate in this case, staying construction of the Pipeline and maintaining the status quo pending appeal. Such stay need only cover actual physical construction activities, as any pre-construction work does not jeopardize the Petitioners' remedy.



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PROJECT

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Georgetown, South Carolina

August 29, 2012



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

May 3, 2011

Mr. Mark Cline
Charleston Water System
103 St. Philip Street
Charleston SC 29402

**SEE SPECIAL
CONDITIONS(S)**

Re: OCRM-10-169-D
Charleston Commissioners of Public Works

Dear Mr. Cline:

The SCDHEC Office of Ocean and Coastal Resource Management has reviewed your application to construct a elevated utility pipeline at 539 Harbor View Circle, Charleston, Charleston County, South Carolina and has issued a permit for this work. You should carefully read the description of the authorized project and any special conditions that have been placed on the permit, as these conditions may modify the permitted activity. In addition, there are a series of general conditions that should be reviewed. The original and one photocopy of the permit, as issued, are enclosed. After carefully reading the permit, if you wish to accept the permit as issued, sign and date in the signature block entitled "PERMITTEE" on the original version of the permit and return it to this Department. Keep the photocopy for your records.

PLEASE READ CAREFULLY: You are required to sign and return the original version of your permit to this Department. If this permit is not signed and returned within thirty (30) days of issuance, OR appealed within 15 days as described on the enclosed "Notice of Appeal Procedure", the Department reserves the right to cancel this permit. Please carefully review the enclosed "Notice of Appeal Procedure" for information and deadlines for appealing this permit.

We have also enclosed a "request for a construction placard" card. You must send in this card before the time you wish to start construction. At that time a construction placard will be sent to you to post at the construction site.

PLEASE NOTE: You are not authorized to commence work under the permit until we have received the original version of the entire permit signed and accepted by you, and a construction placard has been issued and posted at the construction site. The receipt of this permit does not relieve you of the responsibility of acquiring any other federal or local permits that may be required.

Sincerely,

David J. Thompson
Wetland Section Project Manager

Enclosure

cc: Blair Williams, Section Manager
Scott Abrams, Hazen & Sawyer

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Ocean and Coastal Resource Management

Charleston Office • 1362 McMillan Ave, Suite 400 • Charleston, SC 29405-2047

Phone: 843-953-0200 • Fax: 843-953-0201 • www.scdhec.gov



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

Notice of Appeal Procedure
Pursuant to S.C. Code Section 44-1-60

1. This decision of the S.C. Department of Health and Environmental Control (Department) becomes the final agency decision 15 calendar days after notice of the decision has been mailed to the applicant or respondent, unless a written request for final review accompanied by a filing fee in the amount of \$100 is filed with the Department by the applicant, permittee, licensee, or affected person.
2. An applicant, permittee, licensee, or affected person who wishes to appeal this decision must file a timely written request for final review with the Clerk of the Board at the following address or by facsimile at 803-898-3393. A filing fee in the amount of \$100 made payable to SC DHEC must also be received by the Clerk within the time allowed for filing a request for final review. However, if a request for final review is filed by facsimile, the filing fee may be mailed to the Clerk of the Board if the envelope is postmarked within the time allowed for filing a request for final review.

Clerk of the Board
SC DHEC
2600 Bull Street
Columbia, SC 29201

**SEE SPECIAL
CONDITIONS(S)**

3. In order to be timely, a request for final review must be received by the Clerk of the Board within 15 calendar days after notice of the decision has been mailed to the applicant or respondent. If the 15th day occurs on a weekend or State holiday, the request is due to be received by the Clerk of the Board on the next working day. The request for final review must be received by the Clerk of the Board by 5:00 p.m. on the date it is due. A request for final review will be returned to the requestor if the filing fee is not received on time as described above.
4. The request for final review should include the following:
 - a. the grounds on which the Department's decision is challenged and the specific changes sought in the decision
 - b. a statement of any significant issues or factors the Board should consider in deciding whether to conduct a final review conference
 - c. a copy of the Department's decision for which review is requested
5. If a timely request for final review is filed with the Clerk of the Board, the Clerk will provide additional information regarding procedures. If the Board declines in writing to schedule a final review conference, the Department's decision becomes the final agency decision and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court within 30 calendar days after notice is mailed that the Board declined to hold a final review conference.

The above information is provided as a courtesy; parties are responsible for complying with all applicable legal requirements.

July 1, 2010

**SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT**

CRITICAL AREA PERMIT & COASTAL ZONE CONSISTENCY CERTIFICATION

Permittee(s): Charleston Commissioners of Public Works
Permit Number(s): OCRM-10-169-D
Date of Issuance: May 3, 2011
Expiration Date: May 3, 2016
Location: On and adjacent to Charleston Harbor at 539 Harbor View Circle,
Charleston, Charleston County, South Carolina

**SEE SPECIAL
CONDITIONS(S)**

This permit is issued under the provisions of S.C. Code Ann. Section 48-39-10, *et seq.*, and 23A S.C. Code Ann. Regs. 30-1 through 30-18 (Supp. 2005). Please carefully read the project description and any special conditions that may appear on this permit/certification as they will affect the work that is allowed. If there are no special conditions, then the work is authorized as described in the project description and as modified by the general conditions. The general conditions are also a part of this permit/certification and should be read in their entirety. The S.C. Contractor's Licensing Act of 1999, enacted as S.C. Code Ann. Section 40-11-5 through 430, requires that all construction with a total cost of \$5,000 or more be performed by a licensed contractor with a valid contractor's license for marine class construction, except for construction performed by a private landowner for strictly private purposes. Your signature on and acceptance of this permit denotes your understanding of the stated law regarding use of licensed contractors. All listed special and general conditions will remain in effect for the life of the project if work commences during the life of the permit. This applies to permittee, future property owners, or permit assignees.

DESCRIPTION OF THE PROJECT, AS AUTHORIZED

The plans submitted by you, attached hereto, show the work consists of the following: The work as proposed and shown on the attached drawings consists of installing a new sewer force main. Specifically, the applicant seeks to install a new 2150' of 48" force main to connect the new West Ashley Influent Pump Station to the existing facilities at Plum Island Water Pollution Control Plant. Approximately 850' of the new line will impact critical area wetlands. 140' of line will require trenching with the remainder of the line constructed as an aerial, pile supported pipe. The applicant proposes to construct a temporary trestle where needed to access areas associated with the elevated pipeline. The applicant also proposes to realign existing power poles in order to re-route power during construction and to prepare for facility upgrades. 2.42 acres will be impacted by construction access to realign 6 existing piles and add one new one. All disturbed wetlands will be returned to their current conditions and include replanting. The work as described is for the installation of sewer line.

SPECIAL CONDITIONS

1. Provided the applicant must implement best management practices during construction to minimize erosion and migration of sediments off site. These

practices may include use of mulches, silt fences, or other devices capable of preventing erosion and migration of sediments.

2. Provided that the applicant restores all unintentionally disturbed areas to their original contours and conditions following construction.
3. Provided access to the project site must be attained from uplands, when possible.
4. Provided that an as-built survey of the pipeline must be submitted to the Department within 90 days of the expiration date of the final construction placard. The survey must be performed by a registered land surveyor, must show all components of the pipeline, and must list the starting and ending coordinates of the pipeline in the State Plane Coordinate System, which can be obtained by survey-grade Global Positioning System equipment.
5. Provided that in the event that archaeological or paleontological remains are found during the course of work, the applicant should notify the South Carolina Institute of Archaeology and Anthropology (Mr. James Spirek at 803-777-8170) pursuant to South Carolina Underwater Antiquities Act of 1991, (Article 5 Chapter 7, Title 54, Code of Laws of South Carolina, 1976). Archaeological remains consist of any materials made or altered by man, which remain from past historic or prehistoric times (ie, older than 50 years). Examples include old pottery fragments, metal, wood, arrowheads, stone implements or tools, human burials, historic docks, structures, or non-recent vessel remains. Paleontological remains consist of old animal remains, original or fossilized, such as teeth, tusks, bone, or entire skeletons.

PERMITTEE'S ATTENTION IS DIRECTED TO GENERAL CONDITIONS NUMBERS FOUR (4) AND FIVE (5). BY ACCEPTANCE OF THIS PERMIT, PERMITTEE IS PLACED ON NOTICE THAT THE STATE OF SOUTH CAROLINA, BY ISSUING THIS PERMIT, DOES NOT WAIVE ITS RIGHTS TO REQUIRE PAYMENT OF A REASONABLE FEE FOR USE OF STATE LANDS AT A FUTURE DATE IF SO DIRECTED BY STATUTE.

THE PERMITTEE, BY ACCEPTANCE OF THIS PERMIT AGREES TO ABIDE BY THE TERMS AND CONDITIONS CONTAINED HEREIN AND TO PERFORM THE WORK IN STRICT ACCORDANCE WITH THE PLANS AND SPECIFICATIONS ATTACHED HERETO AND MADE A PART HEREOF. ANY DEVIATION FROM THESE CONDITIONS, TERMS, PLANS AND SPECIFICATIONS SHALL BE GROUNDS FOR REVOCATION, SUSPENSION OR MODIFICATION OF THIS PERMIT AND THE INSTITUTION OF SUCH LEGAL PROCEEDINGS AS THE DEPARTMENT MAY CONSIDER APPROPRIATE.

Permit Number: OCRM-10-169-D

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

(PERMITTEE(S))

Charleston Commissioners of Public Works

(DATE)

This permit becomes effective when the State official, designated to act for the Office of Ocean and Coastal Resource Management, has signed below.

D. J. Thompson

May 3, 2011

(WETLAND SECTION PROJECT MANAGER) (DATE)

David J. Thompson

Or his Designee

Other Authorized State Official

**SEE SPECIAL
CONDITIONS(S)**

GENERAL CONDITIONS:

This construction and use permit is expressly contingent upon the following conditions which are binding on the permittee:

1. That the permittee, in accepting this permit, covenants and agrees to comply with and abide by the provisions and conditions herein and assumes all responsibility and liability and agrees to save OCRM and the State of South Carolina, its employees or representatives, harmless from all claims of damage arising out of operations conducted pursuant to this permit.
2. That if the activity authorized herein is not constructed or completed within five years of the date of issuance, this permit shall automatically expire. A request, in writing, for an extension of time shall be made not less than thirty days prior to the expiration date.
3. That all authorized work shall be conducted in a manner that minimizes any adverse impact on fish, wildlife and water quality.
4. That this permit does not relieve the permittee from the requirements of obtaining a permit from the U. S. Army Corps of Engineers or any other applicable federal agency, nor from the necessity of complying with all applicable local laws, ordinances, and zoning regulations. This permit is granted subject to the rights of the State of South Carolina in the navigable waters and shall be subject, further, to all rights held by the State of South Carolina under the public trust doctrine as well as any other right the State may have in the waters and submerged lands of the coast.
5. That this permit does not convey, expressly or impliedly, any property rights in real estate or material nor any exclusive privileges; nor does it authorize the permittee to alienate, diminish, infringe upon or otherwise restrict the property rights of any other person or the public, nor shall this permit be interpreted as appropriating public properties for private use.
6. That the permittee shall permit OCRM or its authorized agents or representatives to make periodic inspections at any time deemed necessary in order to ensure that the activity being performed is in accordance with the terms and conditions of this permit.
7. That any abandonment of the permitted activity will require restoration of the area to a satisfactory condition as determined by OCRM.
8. That this permit may not be transferred to a third party without prior written notice to OCRM, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit and thereby agreeing to comply.
9. That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and special signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.
10. That the permit construction placard or a copy of the placard shall be posted in a conspicuous place at the project site during the entire period of work.
11. That the structure or work authorized herein shall be in accordance with the plans and drawings attached hereto, and shall be maintained in good condition. Failure to build in accordance with the plans and drawings attached hereto, or failure to maintain the structure in good condition, shall result in the revocation of this permit.
12. That the authorization for activities or structures herein constitutes a revocable license. OCRM may require the permittee to modify activities or remove structures authorized herein if it is determined by OCRM that such activity or structures violates the public's health, safety, or welfare; or if any activity is inconsistent with the public trust doctrine. Modification or removal under this condition shall be ordered only after reasonable notice stating the reasons therefore and provision to the permittee of the opportunity to respond in writing. When the Permittee is notified that OCRM intends to revoke the permit, Permittee agrees to immediately stop work pending resolution of the revocation.
13. That OCRM shall have the right to revoke, suspend, or modify this permit in the event it is determined the permitted structure (1) significantly impacts the public health, safety and welfare, and/or is violation of Section 48-39-150, (2) adversely impacts public rights, (3) that the information and data which the permittee or any other agencies have provided in connection with the permit application is either false, incomplete or inaccurate, or (4) that the activity is not in compliance with the drawings submitted by the applicant. That the permittee, upon receipt of OCRM's written intent to revoke, suspend, or modify the permit has the right to a hearing. Prior to revocation, suspension, or modification of this permit, OCRM shall provide written notification of intent to revoke to the permittee, and permittee can respond with a written explanation to OCRM. (South Carolina Code Section 1-023-370 shall govern the procedure for revocation, suspension or modification herein described).
14. That any modification, suspension or revocation of this permit shall not be the basis of any claim for damages against OCRM or the State of South Carolina or any employee, agent, or representative of OCRM or the State of South Carolina.
15. That all activities authorized herein shall, if they involve a discharge or deposit into navigable waters or ocean waters, be at all times consistent with all applicable water quality standards, effluent limitations and standards of performance, prohibitions, and pretreatment standards established pursuant to applicable federal, state and local laws.
16. That extreme care shall be exercised to prevent any adverse or undesirable effects from this work on the property of others. This permit authorizes no invasion of adjacent private property, and OCRM assumes no responsibility or liability from any claims of damage arising out of any operations conducted by the permittee pursuant to this permit.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Rodney Connell, Barbara Connell,	)	DOCKET NO. 11-ALC-07-0367-CC
Edward Steers, Sally Steers,	)	
Moustafa Moustafa and Maggie Shatilla,	)	
	)	
Petitioners,	)	
	)	
vs.	)	RESPONDENT CHARLESTON
	)	WATER SYSTEM'S MOTION TO
South Carolina Department of Health and	)	LIFT AUTOMATIC STAY AND
Environmental Control, and	)	MEMORANDUM IN SUPPORT
Charleston Water System,	)	
	)	
Respondents.	)	
	)	

TO: AMY E. ARMSTRONG, ESQ. & BRADLEY D. CHURDAR, ESQ.:

YOU WILL PLEASE TAKE NOTICE that Respondent, Charleston Water System ("CWS"), by and through its undersigned attorneys, will move before the Honorable Ralph King Anderson, III, Chief Administrative Law Judge, ten (10) days after service hereof or as soon thereafter as this Court may allow, for an Order lifting the automatic stay imposed pursuant to S.C. Code Ann. §1-23-600(H) during the pendency of this contested case appeal. This motion is being filed pursuant to §1-23-600(H)(4) and Rule 19 of the Rules of Procedure for the Administrative Law Court. The permit at issue in this case, P/N OCRM-10-169-D ("Permit"), authorizes the installation of 2,150 linear feet of 48 inch force main in the critical area, with 140 feet to be trenched and the remaining portion to be supported by pilings.¹ All wetland impacts are temporary with replanting required by the Permit.² The grounds for lifting the automatic stay to allow the permitted activity to commence are set forth below.

¹ See Permit No. OCRM-10-169-D, attached hereto as **EXHIBIT 1**.

² "All disturbed wetlands will be returned to their current conditions and include replanting." **EXHIBIT 1**.

BACKGROUND

CWS operates the Plum Island Water Pollution Control Plant ("Plum Island"), which serves, in addition to the Charleston Peninsula, James Island, Folly Beach, Daniel Island and parts of the Cainhoy Peninsula, as well as the West Ashley areas of Charleston, which include the Towns of Hollywood, Ravenel, Meggett and parts of Johns Island.³ The West Ashley areas of service, hereinafter referred to as the "West Ashley Service Area", are the subject of the above-captioned contested case and of this motion. Though the Permit authorizes only critical area impacts for installation of the 48-inch force main and relocation of power line poles, the authorized work is an integral and necessary part of a larger project. This is the replacement of the West Ashley Tunnel Interceptor System ("Tunnel System"), which transports wastewater to Plum Island from the entire West Ashley Service Area and serves approximately 100,000 customers.⁴ The Tunnel System consists of an excavated tunnel, approximately 8,000 feet long, located over 100 feet below ground elevation and a 30-inch concrete interceptor, or carrier pipe, located within the tunnel.⁵ There are three collection points where untreated wastewater enters the tunnel. These are known as Croghan Shaft, Country Club Shaft, and the Porter Gaud Academy drop pipe. The Croghan Shaft, located on Albemarle Road, receives the vast majority of the total wastewater flow. At each collection point, wastewater flow is collected just below ground level by a surface collection system. It then passes through a vortex chamber structure and drop pipe to enter the Tunnel System, which flows by gravity under Wappoo Creek to eventually reach Plum Island. The wastewater then enters a deep influent pump station wet well at Plum Island where it is lifted to the head works of the above-ground treatment facility.⁶

³ Affidavit of F. Kin Hill, P.E., attached as **EXHIBIT 2**.

⁴ Affidavit of F. Kin Hill, P.E., **EXHIBIT 2**.

⁵ Affidavit of F. Kin Hill, P.E., **EXHIBIT 2**.

⁶ Report on Increasing Capacity of West Ashley Tunnel Interceptor, May 1985, **EXHIBIT 3**.

The Tunnel System has been in operation since 1971. In the late 1980s, CWS began inspections and testing of all of its approximately 8 miles of existing wastewater tunnel systems throughout the Charleston area and determined a need to replace the tunnels.⁷ Thereafter, CWS began planning, prioritizing, and implementing a six-phase project to replace all of the existing wastewater tunnel systems, with the most critical phases implemented first. The Harbor Tunnel (Phase I) was completed in 2002. The Ashley River Tunnel (Phase II) was completed in 2006. The Cooper River Tunnel (Phase III) was completed in 2007. The Daniel Island Tunnel (Phase IV) was completed in 2008. The Tunnel System Replacement Project is the fifth phase of this six phase project. Currently, the existing Tunnel System has capacity of approximately 19 million gallons per day ("mgd"), whereas the capacity needed to properly operate the system is 44 mgd.⁸

The Tunnel System Replacement Project has become necessary for the following reasons: corrosion and deterioration of the Tunnel System; lack of adequate flow capacity; and documented sanitary sewer overflows.

The construction of the Tunnel System Replacement Project is scheduled to last 30 months, at a cost of approximately \$48 million dollars.⁹ In order to effectuate replacement of the Tunnel System, it is necessary to conduct the work authorized under the Permit, which includes the construction of a 48" force main.

In March of 2010, Charleston Water System completed a Master Plan Update for its Plum Island Water Pollution Control Plant, hereinafter referred to as the "Master Plan," where all

⁷ Affidavit of F. Kin Hill, P.E., **EXHIBIT 2**.

⁸ Croghan Shaft Collection System Improvement Project, Capacity Review and Modeling Evaluation, Technical Memo, April 5, 2007, attached as **EXHIBIT 4**.

⁹ Affidavit of F. Kin Hill, P.E., **EXHIBIT 2**.

the untreated wastewater in the CWS service area is treated.¹⁰ This Master Plan identified long-term improvements for providing future treatment capacity for wastewater flows generated in the CWS service area, approximately half of which are transported to the Plum Island Plant via the Tunnel System.

ARGUMENT

Section 1-23-600(H)(2) imposes an automatic stay on the issuance of permits from Respondent Department of Health and Environmental Control (“DHEC”) (“A request for a contested case hearing for a decision to issue a new license stays all actions for which the license is a prerequisite...”). Subsection (4) of §1-23-600(H) provides, “[u]pon motion by any party, the court shall lift the stay for good cause shown **or** if no irreparable harm will occur, then the stay shall be lifted [emphasis added].” This statutory provision, amended in 2008¹¹, provides for two circumstances under which an Administrative Law Judge shall lift the automatic stay: “for good cause shown,” or “if no irreparable harm will occur.” In H. Heath Hill v. SCDHEC & SCE&G, Docket No. 08-ALJ-07-0183-CC (Order Lifting Automatic Stay, filed July 10, 2008) the Administrative Law Court lifted the automatic stay governing a landfill permit issued to SCE&G. The Court concluded SCE&G demonstrated “good cause” to lift the automatic stay, defining the term as “[a] legally sufficient ground or reason’ ...” Id. The Administrative Law Court also stated, “a determination of whether good cause exists may require a balancing of the needs of the parties and public policy.” Id., citing Doe v. Ward Law Firm, 353 S.C. 509, 514-15, 579 S.E.2d 303, 305 (2003). In Hill, SCE&G demonstrated that compliance with federal law was a compelling reason to lift the stay. The Court also noted the Petitioners failed to

¹⁰ 2010 Master Plan Update, attached hereto as **EXHIBIT 5**.

¹¹ 2008 Act No. 334 amended §1-23-600, which, prior to 2008 as to the automatic stay, merely provided as follows: “After a contested case is initiated before the Administrative Law Court, any party may move before the presiding administrative law judge to lift the stay imposed pursuant to this subsection.” S.C. Code Ann. §1-23-600(G)(4) (2007).

demonstrate an irreparable harm because the vast majority of their complaints related to activities authorized under other permits, which were not before the Court for review.

The Administrative Law Court has also lifted the automatic stay in the matter of Upstate Forever et al. v. SCDHEC & Greenville Water System, Docket No. 09-ALJ-07-0226-CC (Admin. Law Court 2011), relating to the issuance of a water quality certification and construction in navigable waters permit for the construction of a Raw Water Transmission Main. Like in this case, the grounds for lifting the stay related to public health and safety. The purpose of Greenville Water System's project was to "ensure continued service of safe, clean drinking water to the community."¹²

CWS submits there is both good cause to initiate the work now as well as a lack of irreparable harm to the Petitioners.

I. Good Cause.

A. Lack of Capacity, Corrosion and Deterioration of the Existing System

Replacement of the Tunnel System is necessary due to its capacity deficiencies. In 1987, CPW conducted tests on the capacity of the Tunnel System, which revealed an estimated blockage in the carrier pipe of between 22 and 28 percent.¹³ The Tunnel System is still operating at a restricted capacity of approximately 19 mgd, where what is currently necessary to effectively transport the wastewater during heavy rain events from the West Ashley Service Area is 44 mgd.¹⁴ The growth in population in the West Ashley and Johns Island areas has also placed a

¹² Order Granting Respondents' Joint Motion for Summary Judgment at 1.

¹³ Report on Hydraulic Testing of the West Ashley Tunnel Interceptor for Commissioners of Public Works, April 14, 1987, page 7, attached as **EXHIBIT 6**.

¹⁴ Affidavit of Clint E. Shealy, P.E., **EXHIBIT 7**.

greater capacity burden on the Tunnel System, making the capacity deficiencies more significant.¹⁵

The Tunnel System is also corroding and deteriorating. In the 1990s, inspections of the Charleston area wastewater tunnels by divers revealed severe deterioration.¹⁶ Inspection reports and photographs have documented the highly deteriorated state of the Tunnel System.¹⁷ The deterioration was also documented during the most recent inspection of the Tunnel System in January of 2011.¹⁸ This evidence clearly indicates the Tunnel System integrity is compromised and continues to deteriorate. Given that the timeline for construction is estimated to be at least 30 months, it is imperative that construction begin as soon as possible. The West Ashley Service Area spans over 100 square miles and the Tunnel System is a single point of failure for the entire service area.¹⁹ A failure of the Tunnel System would result in a catastrophic environmental disaster, with corresponding economic, social, and public health consequences.²⁰

B. Sanitary Sewer Overflows

During heavy rain events, excess water enters the near surface wastewater collection system through pipe joints, manholes, private service laterals, sewer cleanouts, and other points of entry. This extraneous water entering the collection system is known as "infiltration and inflow (I/I)."²¹ The additional flow volume caused by I/I periodically results in flow volumes, which exceed the Tunnel System capacity, thereby causing back-ups and overflows of **untreated wastewater** from the collection system into the environment.²² The West Ashley neighborhoods of Byrnes Down and South Windermere have experienced 29 Sanitary Sewer Overflows.

¹⁵ Affidavit of F. Kin Hill, P.E., **EXHIBIT 2**.

¹⁶ West Ashley Sewer Tunnel Replacement Study, December 2009, attached as **EXHIBIT 8**.

¹⁷ See Photographs of Tunnel System, attached as **EXHIBIT 9**.

¹⁸ See Affidavit of Clint E. Shealy, P.E., attached as **EXHIBIT 7**.

¹⁹ Affidavit of F. Kin Hill, P.E., **EXHIBIT 2**.

²⁰ Affidavit of Clint E. Shealy, P.E., **EXHIBIT 7**.

²¹ Affidavit of F. Kin Hill, P.E., **EXHIBIT 2**.

²² Affidavit of F. Kin Hill, P.E., **EXHIBIT 2**.

("SSOs") between 2000 and 2010, 22 of which were greater than 500 gallons.²³ In 2007, CWS commissioned a study to investigate the SSOs in the West Ashley area.²⁴ The report concluded, "upon reviewing the results of the hydraulic model runs for the West Ashley collection system, it was observed that the flooding concern in Byrnes Down area is not a local problem, but is due to capacity restriction at the West Ashley Tunnel."²⁵ "The only solution to improve the level of protection in the West Ashley system is to replace the tunnel and carrier pipe with a larger carrier pipe or to install a parallel line to the existing line. The difficulty in modifying the existing carrier pipe within the existing tunnel is with the ability to maintain flow during construction. For this reason, replacement of the tunnel is considered a more viable option."²⁶ Therefore, it is clear that the documented SSOs are a direct result of the limited capacity of the Tunnel System.²⁷

The periodic sanitary sewer overflows constitute a public health, safety and welfare issue as well as an environmental concern.²⁸

Correction of the flow limitations and preventing further SSOs from occurring is in the public interest and are environmentally sound reasons for allowing construction to proceed.

II. There is No Irreparable Harm.

Even if this Court determines there is no good cause to proceed with the work authorized under the Permit, there will be no irreparable harm. Petitioners argue the "Petitioner's aesthetic interests, property values, and overall quality of life will be harmed and degraded as a result of the proposed project." However, the gravamen of Petitioners' complaint is the following allegation:

²³ Affidavit of F. Kin Hill, P.E., **EXHIBIT 2**.

²⁴ Croghan Shaft Collection System Improvement Project, Capacity Review and Modeling Evaluation, April 5, 2007, **EXHIBIT 4**.

²⁵ **EXHIBIT 4** at 6-7.

²⁶ **EXHIBIT 4** at 18.

²⁷ Affidavit of Clint E. Shealy, P.E., **EXHIBIT 7**.

²⁸ Affidavit of Clint E. Shealy, P.E., **EXHIBIT 7**.

CWS has revealed its overall plan to substantially increase the capacity of Plum Island, which includes a significant amount of fill in critical area salt marsh. As a part of this plan, CWS has stated its intent to apply for permits from the US Army Corps of Engineers and the SCDHEC Office of Ocean and Coastal Resource Management (OCRM) for approval to expand the island's footprint with fill in critical area salt marsh. In other words, future expansion of the Plant's capacity will require significant critical area wetland fill to increase the size of Plum Island.²⁹

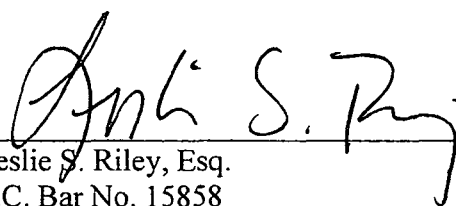
Petitioners gloss over the fact that the work authorized under this permit does not require any wetland fill and requires restoration of the impacted wetlands to their current state. Their attempt to broaden the scope of this appeal by incorporating plans for future expansion that may or may not be implemented is inappropriate and should not be grounds for a claim there will be irreparable harm.

CONCLUSION

The work being conducted under the Permit does not lead to an inevitable conclusion that all of the improvements identified in the Master Plan will be implemented. Moreover, Petitioners recognize the requirement that if and when CWS chooses to implement the improvements identified in the Master Plan that require the placement of fill, CWS will be required to seek all applicable permits from state and federal agencies, with all of the due process protections afforded Petitioners under such permit applications. For the foregoing reasons, CWS respectfully requests this Court lift the automatic stay imposed by §1-23-600(H).

[SIGNATURE BLOCK APPEARS ON FOLLOWING PAGE]

²⁹ Notice of Request for Contested Case Hearing at 3.



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*Attorneys for Respondent,
Charleston Water System*

Dated: October 20, 2011

Charleston, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Rodney Connell, Barbara Connell,)
Edward Steers, Sally Steers,)
Moustafa Moustafa and Maggie Shatilla,)
)
Petitioners,)

DOCKET NO. 11-ALC-07-0367-CC

vs.)

CERTIFICATE OF SERVICE

)
South Carolina Department of Health and)
Environmental Control and)
Charleston Water System,)
)
Respondents.)

The undersigned hereby certifies that on the 20th day of October, 2011, that she served a copy of the foregoing **RESPONDENT CHARLESTON WATER SYSTEM'S MOTION TO LIFT AUTOMATIC STAY AND MEMORANDUM IN SUPPORT** via U.S. Mail, postage pre-paid, on the following parties and counsel of record as listed below:

Bradley D. Churdar, Esq.
SCDHEC-OCRM
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

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

Charleston, South Carolina

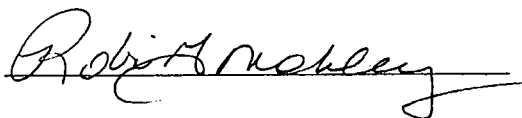


Exhibit 3

STATE OF SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Rodney Connell, Barbara Connell, Edward Steers,	)	Docket No. 11-ALJ-07-0367-CC
Sally Steers, Moustafa Moustafa and Maggie	)	
Shatilla,	)	
	)	
Petitioners,	)	ORDER DENYING PETITIONER'S
	)	MOTION FOR STAY
vs.	)	
	)	
Charleston Water System and South Carolina	)	
Department of Health and Environmental Control,	)	
	)	
Respondents.	)	

This matter comes before the Administrative Law Court (ALC or Court) pursuant to a Motion for Stay of Amended Order and Decision filed by the Petitioners on July 30, 2012 in response to the Amended Final Order and Decision issued by this Court on the July 23, 2012. In its Final Order and Decision, this Court agreed with the decision of the South Carolina Department of Health and Environmental Control (Department or DHEC) to issue a critical area permit, Permit No. OCRM-10-169-D (Permit), and a coastal zone consistency certification (Certification) to Charleston Water System (CWS) for the construction of the Force Main, the pipeline that transports wastewater to the waste treatment system on Plum Island. For the reasons set forth herein below, this Court denies Petitioner's Motion for Stay of Amended Order and Decision.¹

DISCUSSION

Potential Mootness of Appeal

Petitioners argue that a stay from this Court's July 23, 2012 Amended Final Order and Decision is necessary because otherwise, their case would be rendered moot, and they would be denied their procedural due process right to a "meaning judicial review of this important matter."

According to Rule 241(a), SCACR, the general rule is that "the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree

¹ Petitioners filed a Reply to Respondent CWS's Return to Motion for Stay. However, this document is improperly before the Court and, as such, will be neither considered nor addressed in this Court's decision.

FILED

August 21, 2012

SC ADMIN. LAW COURT

or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision.” As an initial matter, Rule 241(a) does not apply in this case because Petitioners have not filed a notice of appeal, which would generally be required for an automatic stay. Even if that rule were applicable, an exceptions to the general rule regarding automatic stays is “[a]ppeals from administrative tribunals as provided in S.C. Code Ann. § 1-23-380(A)(2) and § 1-23-600[(H)](5)”.² Rule 241(b)(11), SCACR; see also S.C. Code Ann. § 1-23-610(A)(2) (2012) (“Except as otherwise provided in this chapter, the serving and filing of the notice of appeal does not itself stay enforcement of the administrative law judge’s decision.”). “An order that is not automatically stayed remains enforceable while pending appeal unless the party seeks a stay.” Bakala v. Bakala, 352 S.C. 612, 631, 576 S.E.2d 156, 166 (2003). Nevertheless, the ALC has the authority to stay its final decision in a contested case. See S.C. Code Ann. § 1-23-600(H)(5) (“A final decision issued by the Administrative Law Court in a contested case may not be stayed except by order of the Administrative Law Court or the court of appeals.”). Pursuant to Rule 29(E), SCALCR, the ALC may, “at any time prior to the filing of a petition for judicial review, and upon the motion of any party, with notice to all parties, . . . stay the final order upon appropriate terms.”

Though Rule 241(c)(2), SCACR, would not require this matter be stayed if appealed, the language of Rule 241(c)(2) reasonably suggest that the determination of whether to grant a stay under ALC Rule 29(E) in this matter should be based upon whether “such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.” Indeed, “[t]he purpose of a supersedeas is to stay proceedings in order to preserve the status quo pending the determination of the appeal and to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him.” Graham v. Graham, 301 S.C. 128, 130, 390, 470 S.E.2d 469 (Ct. App. 1990) (ellipses and internal citation omitted); see also 4 C.J.S. Appeal and Error § 528 (2012) (“[I]t is an abuse of discretion to deny supersedeas where a refusal to supersede the judgment would deny the right to any appeal.”).

In this case, there is no indication that Petitioners’ appeal would be rendered moot in the absence of a stay. Petitioners argue that CWS has estimated that the planning and construction

² S.C. Code Ann. § 1-23-600(H)(5) (2012) was formerly Section 1-23-600(G)(5). Rule 241(b)(11), SCACR, still refers to this statute using the old designation.

of the proposed pipeline would take approximately 22 months,³ and that the pipeline will likely be completed by the time the court of appeals decides this case.⁴ Thus, Petitioners argue that they will have no remedy, their appeal will be moot, and the court of appeals will be “effectively divested of jurisdiction.”⁵ The blatant flaw in Petitioners contention is that the Court of Appeals would find that their contentions are meritorious, yet allow the pipeline to remain in the critical area. CWS has averred that based on the evaluations by its engineers and consultants, that if a reviewing court requires removal of the Force Main from the critical area it can remove of the Force Main and restoration of the marsh within the critical area to its original condition. Therefore, should a reviewing court ultimately conclude that the permit for the Force Main was issued in error, Petitioners will have a remedy.

Furthermore, as to Petitioners’ argument concerning a lack of financial remedy for their diminished property values, this Court, in its Amended Final Order and Decision, made extensive factual findings, and concluded that this project will not materially impact the property values or enjoyment of adjacent property owners. Indeed, Petitioners presented no real estate appraisals or expert testimony of diminished property values but instead relied upon their own surmising and conjecture. Therefore, no financial remedy will be necessary to compensate Petitioners for diminished property values or enjoyment of their properties.

In short, there has not been, nor will be, any deprivation of Petitioners’ due process rights, and denial of a stay will not render their appeal moot.

Undue Prejudice

Petitioners contend that since they only request that “the actual physical construction of the disputed pipeline be stayed,” a stay will not unduly prejudice CWS.

“An equitable stay may be invoked if justified by circumstances which outweigh any potential harm to the party against whom it is operative. In making this determination, the court

³ CWS, in its Return to Motion for Stay of Amended Order and Decision, does state that “installation of the Force Main will take close to 22 months actual construction time.”

⁴ CWS, in its Return to Motion for Stay of Amended Order and Decision, states that “[b]ased on [its] review of recent decisions of the Court of Appeals, it takes on average approximately 30 months from the decision of the lower court to have a case decided by the Court of Appeals.

⁵ It is interesting to note that Petitioners have no faith in CWS’s ability to complete the West Ashley Tunnel within the 30 months estimated for its completion, yet they believe so strongly in CWS’s ability to complete the pipeline within the estimated 22 months, even though both the Tunnel and the pipeline must be constructed for the system to become operational.

‘must weigh competing interests and maintain an even balance.’” Merritt Bros., Inc. v. Marine Midland Realty Credit Corp., 307 S.C. 213, 213, 414 S.E.2d 167, 169 (1992). Also, “[a] party requesting a stay pending appeal must show [not only] that a stay will not substantially harm other interested parties [but also that a stay will not substantially harm] the public interest.” 4 C.J.S. Appeal and Error § 528. Therefore, in evaluating whether to impose an equitable stay of the its order, this Court must weigh the potential prejudice of imposing the stay, including the potential for prejudice to CWS as well as to the general public, against the potential prejudice to the Petitioners if the stay is denied.

In this case, the Court concluded that CWS used all feasible safeguards to minimize environmental impacts for the permitted Force Main. This Court also concluded that the Force Main would not materially alter or impact the views of the Petitioners or the enjoyment of their property.⁶ In addition, as mentioned earlier, Petitioners clearly did not establish that their property values would be diminished by the installation of the Force Main. Also as previously discussed, the Force Main can be removed and the marsh within the critical area restored to its original condition, should a reviewing court require it. Thus, any prejudice to Petitioners resulting from a stay of this Court’s Amended Order and Decision would be minimal.

On the other hand, any prejudice to Petitioners is greatly outweighed by the risk of harm to the public vis-à-vis a potential spill of untreated wastewater into the surrounding soil that would result if the deteriorating Tunnel System fails. Petitioners argue that the Tunnel System’s deterioration has been recognized since 1987, and that CWS has delayed in fixing the problem and has not given it priority.⁷ However, even if this were true, it is not for this Court to substitute its judgment for the judgment of CWS as to how it prioritizes its construction projects and allocates its resources. In fact, the evidence in this case reflected that replacement of the existing Tunnel System has been immense in scope and magnitude, and has been part of the greater project of revising the transportation of sewage to the CWS facility.

⁶ The top of the Force Main will be level with the ground level of Plum Island, which already is an industrial complex with several large buildings between 35’ and 50,’ a fact of which Petitioners were aware when they purchased their properties.

⁷ Petitioners seem to be of the belief that if a condition has been deteriorating for a long period of time, it will not hurt to allow the deterioration to continue a little bit longer. The Court rejects this logic, believing instead that the longer a condition deteriorates, the closer it draws to destruction, which is all the more reason why such prolonged deterioration should be remedied as soon as possible.

Finally, Petitioners point out that CWS never stated that the pipeline must be constructed concurrent with the Tunnel or that the pipeline must be installed prior to the Tunnel's construction (Petitioners do not challenge the construction of the actual Tunnel). They also point out that the Tunnel will take approximately thirty months to complete, and construction thereof has not yet begun. However, as Petitioners admit, CWS stated that the Tunnel and pipeline must **both** be constructed before the system will become operational. Thus, if a stay is granted, even if construction of the Tunnel finished by the time the court of appeals rendered a decision (assuming it was in favor of CWS), the delay in the system would be substantial. Instead of approximately thirty months that it would take for the system to become operational if construction of the Tunnel and pipeline is allowed to proceed concurrently, there could be a delay of at least twenty-two months – the time necessary to construct and install the Force Main – **beyond** the thirty months spent appealing to, and awaiting a decision from, the court of appeals.⁸ More importantly, if a stay is granted, the aforementioned risk of harm to the coastal environment and public would necessarily be prolonged (beyond thirty months) by at least twenty-two months. In short, to allow the deterioration of the West Ashley Tunnel System to continue for an additional twenty-two months without the possibility of a replacing it with a new operational system would pose a risk of harm that greatly outweighs any harm caused by denying a stay in this case.

Irreparable Harm

Petitioners argue that if this Court denies a stay of the Order, it will cause them harm in the form of diminished property values and loss of enjoyment of their properties, and that they will be without any monetary or alternative remedy.

A party seeking a stay pending appeal must also demonstrate “irreparable injury in the absence of a stay.” 4 C.J.S. Appeal and Error § 528. Little need be said on this issue, as it has already been discussed at length. In its Amended Order and Decision, this Court concluded that any harm to the Petitioners in this case was minimal. But even if, arguendo, Petitioners had demonstrated appreciable harm, this harm would not be irreparable. As discussed earlier, CWS

⁸ CWS argues that it would take 52 months to bring the Force Main online if the stay is granted. But if, as Petitioners point out, the Tunnel has not undergone construction yet, and that will take an estimated 30 months to build, then presuming construction of the Tunnel commenced immediately, its completion would nearly coincide with Petitioners projected time for the Court of Appeals to complete its decision. The extra delay under this assumed scenario would thus be 22 months beyond the 30 months. Of course, this scenario presumes a decision with 30 months and that there be no motions for reconsideration or request for certiorari.

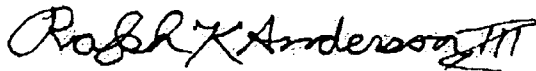
has the ability and the financial wherewithal to remove the Force Main from the critical area and restore of the marsh within the critical area to its original condition, should a reviewing court require it. Therefore, Petitioners have failed to establish any irreparable harm that would result from a denial of a stay of the Order.

Likelihood of Prevailing on the Merits

If all of the other factors of a case “strongly favor[] interim relief, a court may exercise its discretion to grant the stay if the movant has made a substantial case on the merits. The movant need not always establish a high probability of success on the merits, but is always required to demonstrate more than a mere possibility of success. 4 C.J.S. Appeal and Error § 528. In this case, for the reasons discussed above, this Court finds that all of the other factors do not strongly favor interim relief, and indeed reflect that such relief should be denied. This Court also finds that Petitioners have failed to demonstrate more than a mere possibility of success on the merits.

ORDER

IT IS THEREFORE ORDERED that the Appellant’s Motion for Stay is **DENIED**.
AND IT IS SO ORDERED.

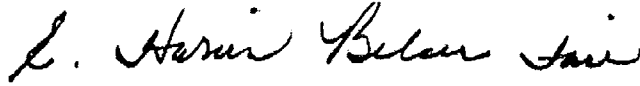


Ralph King Anderson, III
Chief Administrative Law Judge

August 21, 2012
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

August 21, 2012
Columbia, South Carolina

Exhibit 4

Transcript of the Testimony of **CONNELL v CHARLESTON WATER SYSTEM** **DAY TWO**

Date: February 22, 2012

CREEL COURT REPORTING, INC.
Condensed Transcript and Word Index

1230 Richland Street
Columbia, SC 29201
Phone: (803) 252-3445 / (800) 822-0896
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Email: contact@creelreporting.com

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INDEX

PAGE

JAMES T. MORRIS, Ph.D.:	
MS. ARMSTRONG . DIRECT EXAMINATION	4
MR. LENHARDT . CROSS EXAMINATION	46
MR. CHURDAR . CROSS EXAMINATION	59
DAVID J. THOMPSON:	
MS. ARMSTRONG . DIRECT EXAMINATION	62
DAVID J. THOMPSON:	
MR. CHURDAR . DIRECT EXAMINATION	79
MS. RILEY . CROSS EXAMINATION	111
MS. ARMSTRONG . CROSS EXAMINATION	118
FLOYD K. HILL:	
MS. RILEY . DIRECT EXAMINATION	139
MS. ARMSTRONG . CROSS EXAMINATION	238
MS. RILEY . RE-DIRECT EXAMINATION	255
Certificate	263

EXHIBITS

Respondent's Exhibit Number Thirty-two
(Photo with visual line)

(The original exhibits were retained by the Court.)

STIPULATIONS

It is stipulated and agreed that this hearing is being taken pursuant to the rules of the Administrative Law Judge Division and the South Carolina Rules of Civil Procedure.

1 options in options two -- option two.

2 A: Right.

3 Q: And option -- the option twos don't work, is
4 that --

5 A: Correct.

6 Q: You didn't decide -- you didn't make that
7 choice. Okay. So regardless of whether or not
8 its buried or aerially supported, what are the
9 problems with option two?

10 A: There are conflicts with utilities, some
11 existing facilities and some plan in the future
12 facilities with option two. You would have to
13 build that pipeline and then at some future
14 date have to possibly move that pipeline.
15 That's very problematic for us because if you
16 have to move that pipeline, you have to
17 maintain service while you're doing that. And
18 you've got to be able to somehow transport huge
19 volumes of waste water while moving it.
20 Additionally, we don't think it's a -- good
21 expenditure of public funds, again our rate
22 payers ultimately pay for everything that we
23 do, to put a pipeline in where our future
24 master plan showed that there may additional
25 facilities in conflict.

1 Q: How long would it take to actually construct
2 just the force main portion of this project?

3 A: I don't have that exact figure at my
4 fingertips. I believe it would be somewhere in
5 the neighborhood of 12 to 15 months. I can
6 refer to my engineers, but its not a short
7 period of time but it's somewhere around a
8 year.

9 Q: And the overall project time is 30 months to --
10 to completion correct?

11 A: Correct. That's the full project.

12 Q: So even if you finished this option three route
13 in a shorter period of time of 15 months, you'd
14 still have about 15 months you have to go
15 before you can actually put it into service
16 when the whole West Ashley tunnel project is
17 complete right?

18 A: Theoretically that's possible. If I'm correct
19 on my 15 months.

20 Q: And you're not actually ready to start any
21 construction today are you?

22 A: We would be prepared, if we were to prevail in
23 this case, to proceed very quickly. We have
24 every permit we need at this point.

25 Q: Okay. And you understand that you've got the

1 automatic stay lifted for purposes of going out
2 and seeking bids and other -- entering into
3 contracts, is that correct?

4 A: Yes, yes. And for moving the power poles.

5 Q: And have you started that process yet?

6 A: Which process?

7 Q: Have you started the bidding process yet?

8 A: No. We have started work towards moving the
9 poles.

10 Q: So you wouldn't be ready to start this project,
11 despite this appeal for a number of months, is
12 that correct?

13 A: Yes, we wouldn't want to bid a project if we
14 were in litigation and then -- that's just not
15 how it works.

16 Q: And whether or not this case was in litigation,
17 you wouldn't -- you wouldn't -- the earliest
18 you would be able to start any construction
19 until July, isn't that right?

20 A: I believe that's correct.

21 Q: And it would actually be possible to begin work
22 on the West Ashley tunnel portion of the
23 project without working on the force main at
24 the same time, isn't that right?

25 A: It would be possible but wouldn't be very

1 practical from an engineering point of view.
2 Because you may end up with a tunnel that goes
3 to nowhere. Like a bridge to nowhere. Because
4 the -- the tunnel and the pump station and the
5 force main are inter-related, otherwise you
6 would have a dead end tunnel. If you were held
7 up through some legal proceeding.

8 Q: You were talking about the growth projections
9 that were provided to you by your consultants.

10 A: Right.

11 Q: You're not actually growing quite as quickly as
12 you thought you would initially, is that right?

13 A: That's correct.

14 Q: When you learned in April of 2010 that you --
15 the limitations on UOD were much less
16 restrictive, that was pretty good news for the
17 Charleston Water System, wasn't it?

18 A: That was very good news.

19 Q: Because you could accomplish your goals with a
20 lot less structures, isn't that right?

21 A: Yes.

22 Q: That's sort of a windfall of sorts, wasn't it,
23 for water systems?

24 A: You could view that way I suppose.

25 Q: Because you weren't expecting such a huge

1 events that occurred prior to that too?

2 A: Yes. Initially two concepts for the force main
3 were considered. The near surface routed on
4 the existing island and the tunnel option.

5 Q: Okay. So was the design of the force main
6 commenced prior to August and September -- and
7 September, 2010?

8 A: Yes.

9 Q: Okay. And Ms. Armstrong was asking you some
10 questions about the construction duration of
11 the -- right, yes -- the construction -- times
12 for the force main. I'll just direct your
13 attention to TM 1-22 of the tech memo.

14 A: Okay.

15 Q: Which is Petitioners Exhibit Three, I think.

16 A: Okay.

17 Q: All right. Does that contain estimates for the
18 construction duration?

19 A: It appears that it does.

20 Q: And what were those estimates?

21 A: For the aerial crossing in the marsh in ductile
22 iron pipe, it was like 21 months is the
23 estimate. And aerially crossing the marsh
24 using the alternate stainless steel pipe would
25 be 22 months.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 11-ALJ-07-0367-CC

Rodney Connell, Barbara Connell,)
Edward Steers, Sally Steers,)
Moustafa Moustafa and Maggie)
Shatilla,)
)
Petitioners,)
)
v.)
)
Charleston Water System and)
South Carolina Department of)
Health and Environmental Control,)
)
Respondents.)
-----)

ADMINISTRATIVE HEARING

DAY THREE

Thursday, February 23, 2012
10:42 a.m. - 12:38 p.m.

The hearing before the Honorable Ralph King Anderson, III was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 23rd of February, 2012 before Carla S. Dominick, Court Reporter and Notary Public in and for the State of South Carolina.

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INDEX

PAGE

JOSHUA PRESTON FARMER:

MS. RILEY . . . DIRECT EXAMINATION	3
MR. CORLEY . . . CROSS EXAMINATION	44
Certificate	82

EXHIBITS

(There were no exhibits for day three.)

STIPULATIONS

It is stipulated and agreed that this hearing is being taken pursuant to the rules of the Administrative Law Judge Division and the South Carolina Rules of Civil Procedure.

1 THE COURT: On the record.

2 MS. RILEY: Your Honor, at this time we call Josh
3 Farmer.

4 JOSHUA PRESTON FARMER, having been duly sworn,
5 testified and deposed as follows:

6 MS. FARMER - EXAMINATION BY MS. RILEY:

7 Q: Good morning, Mr. Farmer. Just before we get
8 started I just want to make sure that you speak
9 clearly and loudly so the court reporter can
10 hear you and address your testimony to the
11 Judge as much as possible. Where do you
12 reside?

13 A: 104 Clouter Creek in Charleston, South
14 Carolina.

15 Q: Okay. And where did you go to college?

16 A: I went to North Carolina State University.

17 Q: And what was your -- what did you obtain your
18 degree in?

19 A: I have a Bachelor of Science degree in Civil
20 Engineering with a double concentration in
21 water resources and environmental engineering.

22 Q: Okay. And would you please describe your
23 engineering area of concentration?

24 A: I'm a pipeline design engineer. I'm a buried
25 infrastructure specialist.

1 Q: Do you have any information that construction
2 of option one would delay the overall
3 completion date of the West Ashley Tunnel
4 Project?

5 A: I believe it would, compared to, I mean, we're
6 ready to go. We would have to redesign the
7 force main and then additionally, whatever
8 additional construction time that might be
9 associated with that option, would also have to
10 be taken into account. But, I mean, the
11 biggest item is that we'd have to start over
12 their design.

13 Q: What -- has construction of the West Ashley
14 Tunnel begun at this point?

15 A: I don't believe so.

16 Q: And how long would that take to complete?

17 A: The tunnel portion is somewhere between 26 and
18 30 months, is my understanding, the schedules
19 that I've seen.

20 Q: And so, do you know that if you started option
21 one now that it would take more than 30 months?
22 That's what you're saying?

23 A: I think I may actually mention in my tech memo
24 a design, a time to redesign for option one.
25 Let me see if I can put my finger on that. We

STATE OF SOUTH CAROLINA) ADMINISTRATIVE LAW
) DOCKET NO.
) 11-ALJ-07-0367-CC

RODNEY CONNELL,)
BARBARA CONNELL,)
EDWARD STEERS, SALLY)
STEERS, MOUSTAFA)
MOUSTAFA, & MAGGIE)
SHATILLA,)
)
Petitioners,)
)
vs.)
)
CHARLESTON WATER)
SYSTEM & SOUTH)
CAROLINA DEPARTMENT OF)
HEALTH AND)
ENVIRONMENTAL CONTROL,)
)
Respondents.)

* * * * *

DEPOSITION OF: FLOYD KNIGHT HILL, Jr.

DATE TAKEN: Friday, January 13, 2012

TIME: 10:00 a.m.

PLACE: McNair Law Firm
100 Calhoun Street
Suite 400
Charleston, South Carolina

REPORTED BY: KELLY DUSAK
Professional Court Reporter
and Notary Public

* * * * *

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ALSO PRESENT:

Mark Cline
Don Benjamin

TESTIMONY OF FLOYD KNIGHT HILL

Direct Examination by Ms. Armstrong	4
Cross-Examination by Ms. Riley	88

REPORTER'S CERTIFICATE	92
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INDEX OF EXHIBITS

EXHIBITS MARKED FOR IDENTIFICATION

Exhibit No. 1 - Notice of Deposition	4
Exhibit No. 2 - South Carolina Coastal Council Permit issued February 1987	16
Exhibit No. 3 - April Power Point Presentation	21
Exhibit No. 4 - November 22, 2011, NPDES Permit	36
Exhibit No. 5A - Technical Memo of March 3, 2011	45
Exhibit No. 5B - Joint Federal and State Application Form	54
Exhibit No. 6 - Series of E-mails	71
Exhibit No. 7 - Critical Area Permit	90

1 consultant's opinion.

2 Q. And that's because there's a -- you're
3 potentially going to fill in the marsh?

4 A. Potentially. It's possible. We're not
5 sure when that day will come. We're going to
6 continue to evaluate the flows, as I mentioned,
7 we're going to continue to evaluate new treatment
8 technologies, as I mentioned. But we feel we're
9 good to go until 2035 and beyond where we are.
10 But when and if we did have to expand the
11 footprint to meet the demands that have been
12 placed on our service area, we just don't feel it
13 would be good engineering or good use of public
14 funds to construct a line and then maybe have to
15 move it later.

16 We feel like the Option 3 boundary route
17 is a better use of public funds and minimal
18 impacts because you only have to do it one time
19 and then is a much, much longer term solution for
20 us in the long-term.

21 Q. But if you decided -- if you knew today
22 that you were not going to do an expansion of the
23 facility, you could do an onsite following the
24 existing contours force main?

25 A. Your question is flawed because we don't

Exhibit 6

The South Carolina Court of Appeals

Upstate Forever, South Carolina
Native Plant Society, and South
Carolina Wildlife Federation, Appellants,

v.

South Carolina Department of
Health and Environmental
Control and Greenville Water
System, Respondents.

The Honorable John D. McLeod
Administrative Law Court
Trial Court Case No. 2009-AL-07-00226

ORDER

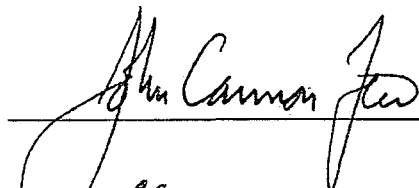
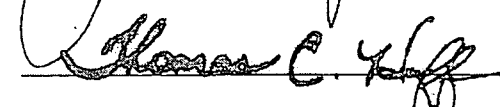
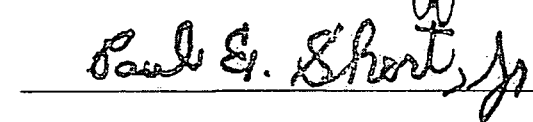
Appellants appeal an order from the administrative law court (the ALC) affirming the decision of the Board of the Department of Health and Environmental (the Department) and granting Respondents' motion for summary judgment. Respondents have filed a motion to dismiss this appeal as moot because no justiciable controversy exists due to the completion of the project. Additionally, Respondents argue Appellants' sole issue on appeal, whether the Department has the authority to impose minimum stream flow requirements as a condition of its water quality certification permits, is a purely hypothetical question that does not fall within any of the mootness exceptions. However, Appellants argue this appeal is not moot because this court can provide effectual relief and a cognizable remedy. In support, Appellants argue the Department has the discretion to establish any limitations on certification permits, the ability to modify the conditions of the certification, and the authority to mandate protections for navigable waterways in South Carolina. Moreover, Appellants asserts that even if

this court determines the appeal is moot, the public importance exception applies because the consequences of a low flow stream are of global significance.

Generally, this Court "will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Sloan v. Dep't of Transp.*, 379 S.C. 160, 167, 666 S.E.2d 236, 240 (2008). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy." *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). "This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Id.* at 567-68, 549 S.E.2d at 596. However, the public importance exception to mootness permits a court to consider moot issues if "the issue . . . present[s] a question of imperative and manifest urgency requiring the establishment of a rule for future guidance in matters of important public interest." *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 27, 630 S.E.2d 474, 478 (2006) (citation and quotation marks omitted).

After careful consideration of the parties' filings, we dismiss this appeal as moot. Furthermore, we find the public importance exception does not apply to this appeal. Moreover, because we dismiss this appeal, we need not address Trout Unlimited's motion to file an amicus curiae brief.

IT IS SO ORDERED.

 C.J.
 J.
 J.

Columbia, South Carolina

cc: Amy E. Armstrong, Esquire
Eugene C. McCall, Jr., Esquire
Randolph R. Lowell, Esquire
Chad N. Johnston, Esquire
Stephen Philip Hightower, Esquire
David D. Armstrong, Esquire
Frank S. Holleman III, Esquire
Nicholas S. Torrey, Esquire

FILED
5/25/12 

Exhibit 7

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Case No. 09-ALJ-07-0226-CC

Upstate Forever, South Carolina Native Plant Society, and
South Carolina Wildlife Federation, ... Appellants,

v.

South Carolina Department of Health and Environmental Control and
Greenville Water System, ... Respondents.

MOTION TO DISMISS CASE AS MOOT

Pursuant to Rule 240 of the South Carolina Appellant Court Rules (SCACR), Respondents South Carolina Department of Health and Environmental Control (“DHEC”) and Greenville Water System (“Greenville Water”), (collectively hereinafter referred to as “Respondents”), submit the within motion and accompanying memorandum in support of their joint motion to dismiss the above-captioned case as moot. In support of this motion, Respondents would show the Court as follows:

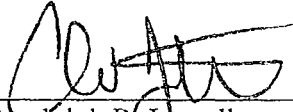
1. This case has been fully briefed. The Record on Appeal and Appellants’ Final Briefs were filed with the Court on December 5, 2011. Greenville Water’s Final Brief of the Respondent was filed with the Court on December 19, 2011, in which DHEC joined by December 22, 2011 letter to the Court.

2. Subsequent to the filing of this appeal and the above-referenced briefs, Greenville Water has completed construction of the replacement intake pipe at issue in this case and which required Certification from DHEC due to its temporary discharge of material in navigable waters in conjunction with the stream crossings and wetlands areas.
3. On February 1, 2012, DHEC issued its Final Approval to Place Into Operation (“Final Approval”) for the replacement pipe, signifying that the construction project is complete and the water system permitted under the permit is operational.
4. The issuance of the Final Approval by DHEC was not appealed.
5. Because the project construction is complete and the final operational approval for the completed project has been issued, there is nothing left for the Court to reverse, modify, amend or affirm by this appeal.
6. The matter is moot and should be dismissed as non-justiciable, as there exists no active case or controversy between the parties.

Therefore, for the reasons listed above, and as more fully articulated in the accompanying memorandum in support of Respondents’ motion to dismiss, Respondents respectfully move that this case be dismissed as it is moot and not justiciable.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



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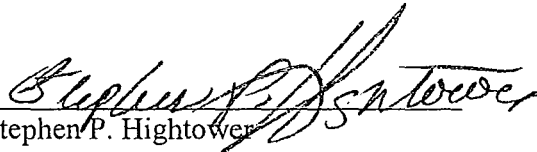
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March 1, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Case No. 09-ALJ-07-0226-CC

Upstate Forever, South Carolina Native Plant Society, and
South Carolina Wildlife Federation, ... Appellants,

v.

South Carolina Department of Health and Environmental Control and
Greenville Water System, ... Respondents.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS CASE AS MOOT

Respondents South Carolina Department of Health and Environmental Control (“DHEC”) and Greenville Water System¹ (“Greenville Water”), (collectively hereinafter referred to as “Respondents”), pursuant to Rule 240(c)(2), SCACR, submit the within memorandum in support of their joint motion to dismiss above-captioned case as moot. This case has been fully briefed² and is currently pending before the Court, awaiting assignment to the Court’s roster. For the reasons discussed herein, both the construction of the project at issue in the case is fully completed, and the final certification and permit authorizing its use has been issued; therefore,

¹ Subsequent to the initiation of this litigation, Respondent’s name has changed to “Greenville Water”; therefore, Respondent will use this name for purposes of this appeal.

² The Record on Appeal and Appellants’ Final Briefs were filed with the Court on December 5, 2011. Greenville Water’s Final Brief of the Respondent was filed with the Court on December 19, 2011, in which DHEC joined by December 22, 2011 letter to the Court.

Respondents respectfully submit that there is nothing left for the Court to modify or amend through this appeal. Accordingly, Respondents respectfully request that the Court dismiss this appeal as moot and non-justiciable.

FACTUAL AND PROCEDURAL BACKGROUND

Greenville Water completed construction of the Table Rock Dam and Reservoir (“Reservoir”) in the mid to late 1920s, and since that time it has protected the surrounding watershed through donations of land for State Parks and grants of conservation easements. Due to Greenville Water’s efforts, the watershed provides protection and habitat for hundreds of plant and animal species.

Today, the Reservoir and watershed provide drinking water to Greenville, Pickens, Laurens, and Anderson County residents through two 30-inch diameter Raw Water Transmission Mains (“RWTM”). **(R.p. 1).** RWTM #1 was constructed in 1930, and RWTM #2 was constructed in 1939. Id. These RWTMs are the conduit through which raw water originating in the Reservoir is “transmitted” to a treatment plant and then provided to the community. Thus, the RWTMs are used to take water from the Reservoir, and are not used for any discharge purposes.

On November 13, 1985, Greenville Water was issued an Interbasin Transfer Registration (“IBTR”) pursuant to the South Carolina Interbasin Transfer Act and corresponding regulations. **(R.p. 1).** See S.C. Code Ann. §§ 49-21-10 et seq. (repealed Jan. 1, 2011); 27 S.C. Code Ann. Regs. 121-12 et seq. (repealed Jan. 1, 2011). The IBTR authorizes Greenville Water to withdraw up to thirty-two (32) million gallons of water per day (“MGD”) from the Reservoir that may be transferred to another water basin. Greenville Water’s IBTR expires on September 1, 2016. Id.

In order to ensure the continued provision of safe, clean drinking water to the community, Greenville Water proposed to replace RWTM #2, which was found to be aging and the most likely to be involved in an incident. In its place, and as a preventative maintenance measure to minimize future risks of incidents and protect the drinking water supply, Greenville Water proposed to install a 42-inch diameter pipe spanning approximately 7.8 miles ("Project"). (R.p. 2); see also (R.pp. 13-16, 416-418), DHEC Final Agency Decision; DHEC Notice of Dep't Decision. To that end, in 1999, a 42-inch diameter connection was installed at a pump station, with a second 42-inch diameter connection installed at the Reservoir in 2005. (R.p. 2). Greenville Water's replacement intake pipe connects these existing endpoints and ultimately transmits water to the treatment plant. Id. The remaining intake pipe (RWTM #1) will continue to be used daily to keep it in operational condition, but its primary purpose will be as a back-up to the replacement intake pipe to provide redundancy in case of an incident or failure. Id.

To that end, on January 29, 2008, Greenville Water submitted a "Joint Federal and State Application for Activities Affecting Waters of the United States" to the United States Army Corps of Engineers, Charleston District ("Corps") and DHEC (for a Section 401 Water Quality Certification). (R.p. 2). On March 28, 2008, Greenville Water submitted a "Permit Application for Construction in Navigable Waters" to the DHEC. Id. After review of the applications submitted by Greenville Water, subsequent filings and comments from the public, including Appellants, and other resource agencies, on February 11, 2009, DHEC issued the "Notice of Department Decision – Water Quality Certification and Construction in Navigable Waters Permit."³ (R.pp. 416-418). The Project's 7.8 mile route in mostly existing right-of-way had

³ Pursuant to law, one document serves as the Permit and Certification. See 25A S.C. Code Ann. Regs. 61-101.A.9 ("If an activity also requires a permit for construction in State navigable waters pursuant to applicable laws and regulations, the review for the water quality certification will

temporary impacts of 0.332 acres of federally jurisdictional wetland and 0.2451 acres of open water. **(R.pp. 13-14)**, DHEC Final Agency Decision. The Certification and Permit contained eighteen (18) conditions, which addressed concerns raised by Appellants and others during the public comment period.⁴ **(R.p. 2)**.

Appellants' case, currently pending before the Court, challenges the South Carolina Administrative Law Court's ("ALC") decision below. That action was commenced with the February 26, 2009, Request for Final Review Conference submitted by Appellants Upstate Forever, South Carolina Native Plant Society, and South Carolina Wildlife Federation⁵ (collectively hereinafter referred to as "Appellants" or "Upstate Forever") the DHEC Board ("Board") concerning the DHEC staff decision to issue the Section 401 Water Quality Certification ("Certification") and Construction in Navigable Waters Permit ("Permit"). **(R.pp. 17-25)**, Request for Final Review. The Certification and Permit authorized Greenville Water to replace an aging water pipe. **(R.pp. 416-418)**, DHEC Notice of Dep't Decision. A Final Review Conference was held on April 9, 2009. See **(R.pp. 271-349)**. On May 8, 2009, the Board issued its Final Agency Decision, which upheld, without modification, the staff decision to issue the Certification and Permit. **(R.13-16)**. Specifically, the Board held that Appellants' request for minimum flow requirements, public verification of water withdrawals, and stricter enforcement of the conditions of the Certification and Permit were without merit. Id.

consider issues of that permit and the Department will not issue a separate permit for construction in State navigable waters. The certification will serve as the permit.").

⁴ The conditions include, among other things, protections for wildlife, water quality impacts (such as the imposition of best management practices), and the restoration of natural areas. **(R.pp. 416-418)**. DHEC Notice of Dep't Decision. As the ALC found, these conditions adequately protected water quality from the Project's impacts. **(R.p. 7)**, ALC Order at 7.

⁵ The Request for Final Review Conference was also joined by the Sierra Club and Save Our Saluda; however, those parties did not join the Request for Contested Case Hearing before the Administrative Law Court and are not parties to this appeal.

On June 5, 2009, Appellants filed a Request for Contested Case Hearing with the ALC pursuant to Sections 1-23-600(H) and 44-1-60(G) of the South Carolina Code. (R.pp. 26-39). Greenville Water filed, inter alia, a motion to dismiss Appellants' request. (R.pp. 40-74). Thereafter, Greenville Water submitted a motion to lift the automatic stay in the case, seeking to resume construction activities on the project during the pendency of the contested case. (R.pp. 75-83). A hearing was held before the ALC with respect to Greenville Water's motion on August 5, 2009, which the ALC granted in an order filed August 11, 2009. (R.pp. 11-12).

Greenville Water has since completed construction of the replacement intake pipe that required the Certification requirements due to its temporary discharge of material in navigable waters in conjunction with the stream crossings and wetlands areas. On February 1, 2012, DHEC issued its Final Approval to Place Into Operation ("Final Approval"), signifying that the construction project is complete and the water system permitted under the permit is operational. A true and correct copy of same is attached as Exhibit A. As no request for final review was filed within the fifteen (15) days designated under Section 44-1-60 of the South Carolina Code, the permit decision is final and unchallenged.

ARGUMENT

I. THE WORK AND IMPACTS IN PROJECT AREAS TRIGGERING THE CERTIFICATION HAVE BEEN FULLY COMPLETED; THEREFORE, THE CASE IS MOOT AND NOT JUSTICIABLE.

The portions of the Project which required the Certification and which were challenged by Upstate Forever have been fully completed.⁶ Furthermore, the Project as a whole has been fully completed, as evidenced by the DHEC Final Approval, issued on February 1, 2012. See Ex. A. Consequently, this appeal is moot, as there exists no justiciable controversy between the

⁶ The only issue on appeal involved the Certification. The Appellants waived and abandoned any challenge to the Permit.

parties and this action does not meet one of the articulated exceptions to the doctrine of mootness.

“A threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy.” Holden v. Cribb, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002) (quoting Lennon v. S.C. Coastal Council, 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct. App. 1998)). “A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character.” Byrd v. Irmo High Sch., 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996).

The concept of justiciability includes the doctrine of mootness. Jackson v. State, 331 S.C. 486, 490 n.2, 489 S.E.2d 915, 917 n.2 (1997). An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (citing Jackson, 331 S.C. 486, 489 S.E.2d 915). “A case becomes moot when judgment, if rendered, will have no practical effect upon [an] existing controversy.” Seabrook v. City of Folly Beach, 337 S.C. 304, 306, 523 S.E.2d 462, 463 (1999) (quoting Mathis v. S.C. State Highway Dep’t, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)).

As described above, this Project involved the replacement of an existing intake pipe used to withdraw water from the Reservoir for use as drinking water for the surrounding Greenville, Pickens, Laurens, and Anderson counties. This Project was not a new withdrawal from the Reservoir. Additionally, this Project was not a request to withdraw more water from the Reservoir than Greenville Water does currently, or to modify the existing legal restriction on

withdrawals from the Reservoir found in the IBTR. Rather, Greenville Water's request here was merely to replace an aging intake pipe. (R.p. 2).

Nor did this Project relate to construction and/or alteration of the Reservoir. Instead, the basis for the replacement intake pipe's requirement of permitting and certification⁷ from both the Corps and DHEC was that, in the construction of the replacement intake pipe, there were **temporary** impacts to 0.332 acres of federally jurisdictional wetland and 0.2451 acres of open water. (R.pp. 13-14), DHEC Final Agency Decision. Because the regulated impacts from installation of the intake pipe now have concluded, there are no more on-going discharges of material into waters and therefore no longer a need for Certification.⁸ That construction has been fully completed, and the Certification has no more legal effect.

Further, because the portions of the Project implicating and requiring Certification requirements have ended, even taking Upstate Forever's allegation that DHEC has the authority to impose minimum instream flows as true, there exists no regulated project on which to attach Upstate Forever's request; therefore, there exists no case or controversy with respect to these parties, and this action is moot and non-justiciable. In other words, because the work has been completed, the Certification has no more force and effect and has been supplanted by the operating permit—which has not been appealed. This Court, consequently, is without jurisdiction to hear this action and the appeal should be dismissed.

⁷ See 23 S.C. Code Ann. Regs. 19-450 (providing that “a permit issued by the Department of Health and Environmental Control is required for any dredging, filling or construction or alteration activity in, on, or over a navigable water”); see 33 U.S.C.A. §§ 1251 *et seq.*; 25A S.C. Code Ann. Regs. 61-101 (stating that “[a]ny applicant for a Federal license or permit to conduct any activity which during construction or operation may result in any discharge to navigable waters is required by Federal law to first obtain a certification from the Department”).

⁸ Significantly, the trigger for Certification is the construction of the actual pipeline in wetlands and navigable waters, not the withdrawal or discharge of water contained in the Reservoir.

Moreover, this appeal, as proffered to the Court, is the definition of a hypothetical: does DHEC have the authority to impose a minimum flow release as a condition of its 401 Certification (even when there is no release of flow by the Project)? The Appellants limited themselves to this single question before the ALC. (R.p. 3-4, 419). As presented, this issue does not even allege that DHEC erred in **not** imposing a minimum flow as a condition to Greenville Water's Certification on this replacement intake pipe. Consequently, Appellants are requesting the Court answer a purely hypothetical question that will have no bearing on this action. See In re: Treatment & Care of Luckabaugh, 351 S.C. 122, 146, 568 S.E.2d 338, 350 (2002) (stating that a contingent, hypothetical or abstract dispute does not constitute a justiciable controversy) (quoting Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983)).

Additionally, none of the three recognized exceptions to the doctrine of mootness are applicable to this action.⁹ Cf. Sloan v. Greenville County, 356 S.C. 531, 551-55, 590 S.E.2d 338, 349-51 (Ct. App. 2003) (finding an appeal moot due to the construction project's completion before further finding that an exception existed). First, this Court could take jurisdiction over this matter, despite mootness, if the issue raised is capable of repetition but evading review. Curtis, 345 at 568, 549 S.E.2d at 596. Here, DHEC does not have the authority to impose minimum flow requirements under a Certification for a project of this kind. See (R.p.

⁹ "In the civil context, there are three general exceptions to the mootness doctrine. First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." Curtis, 345 S.C. at 568, 549 S.E.2d at 596 (2001); see also Byrd, 321 S.C. at 431-32, 468 S.E.2d at 864 (clarifying that South Carolina recognizes an exception to the mootness doctrine allowing the court to retain jurisdiction when an issue is capable of repetition, yet evading review). "Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." Curtis, 345 S.C. at 568, 549 S.E.2d at 596. "Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." Id.

6), ALC Order at 6. Under a 401 Certification, minimum flow conditions may be imposed if the project in question discharges into a water of the United States affecting water quality. Greenville Water's intake pipe replacement project did not affect existing flows or even result in any discharge to the Reservoir.¹⁰ Similarly, this Project did not involve the impoundment of water to create a reservoir or dam. See (R.p. 6), ALC Order at 6. Appellants have not appealed this finding; therefore, it is the law of the case. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding that an unappealed ruling is law of the case). Because a project of this type does not implicate DHEC's authority to impose minimum flow requirements, there is no issue here that would constitute a violation or could be repeated or evade the review of the Court. With the Project completed, there is no further action to be taken and thus the issue is not capable of repetition.

Second, this case does not present the Court with a question of imperative or manifest urgency to establish a rule for future conduct in matters of public interest. See Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88 (1947) (discussing the public interest exception). The Project at issue in this case, and the 401 Certification under which it was undertaken, did not occupy the realm of public importance required to satisfy this exception. This pipe replacement did not in any way change the withdrawal limits in place for the Reservoir. (R.pp. 4-5), ALC Order at 4-5. Additionally, because minimum instream flows are not properly a part of a project of this type, there is no manifest urgency to decide an issue for

¹⁰ Contrary to the inaccurate claim put forward by Upstate Forever, the replacement intake pipe will not affect Greenville Water's withdrawal capacity limitation from the Reservoir. See App. Br. at 9. Greenville Water's allowable interbasin withdrawal capacity is expressly limited by its existing IBTR, which remains unaffected by Greenville Water's capital improvement project, and by the Reservoir's safe yield. (R.pp. 4-5), ALC Order at 4-5.

future guidance and public interest.¹¹ This completed water pipe replacement has no effect on future pipe replacements and certainly doesn't present an imperative or urgent need to establish a rule for future conduct, as such rules already exist.

Finally, this appeal does not present an issue that could affect future events or have collateral consequences for the parties. As the ALC found, flow requirements are outside the scope of DHEC's controlling regulations with respect to the instant Project's Certification; therefore, DHEC is without the authority to impose these requirements going forward. (R.p. 6), ALC Order at 6. Moreover, as presented and **at best**, this appeal posits only a discretionary standard to be applied by DHEC and cannot be challenged by a court absent extraordinary circumstances. See Cole v. Manning, 240 S.C. 260, 267-68, 125 S.E.2d 621, 625 (1962) ("[C]ourts may not substitute judicial discretion for administrative discretion, and therefore as a general rule will not attempt to interfere with the exercise of discretionary power by a governmental agency...."). Without the possibility that Upstate Forever could force DHEC to impose instream flow requirements, the hypothetical presented by this appeal cannot affect future events. See McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."). Replacing this water pipe is separate and apart from flow requirements which may have collateral consequences for the parties. As such, this exception to the doctrine of mootness does not apply to the now-completed water pipe replacement in this case.

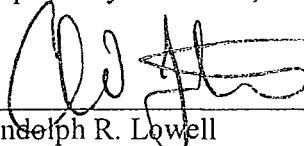
¹¹ If Appellants seek to change the law, then they should do so through the legislative process. Moreover, the General Assembly has chosen to address surface water withdrawals as they relate to minimum instream flows in a separate regulatory scheme.

CONCLUSION

The only issue in the appeal before this Court is DHEC's Certification and Permit authorizing Greenville Water to replace an aging water pipe. Greenville Water has now completed the water pipe replacement and thus the Certification and Permit is, likewise, completed. Further, DHEC has issued its Final Approval for the project, authorizing it to be placed into operation. There is nothing left for the Court to modify or amend with respect to this completed Project. Thus, there is not an active case or controversy and Appellants' case is moot. Moreover, none of the three recognized exceptions to the doctrine of mootness are present in this case. For these reasons, Respondents hereby respectfully move that this case be dismissed as it is moot and not justiciable.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



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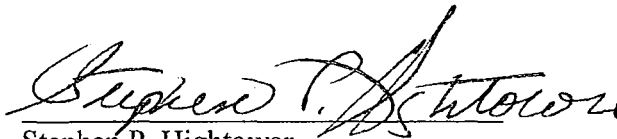
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S.C. Department of Health and

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March 1, 2012

Exhibit 8

The Supreme Court of South Carolina

Kiawah Development Partners,
II,

Respondent,

v.

South Carolina Department of
Health and Environmental
Control,

Appellant.

and

South Carolina Coastal
Conservation League,

Appellant,

v.

South Carolina Department of
Health and Environmental
Control and Kiawah
Development Partners, II, of
whom South Carolina
Department of Health and
Environmental Control is
and Kiawah Development
Partners, II, is

Appellant,

Respondent.

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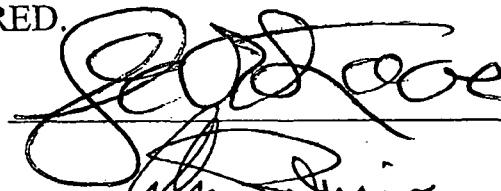
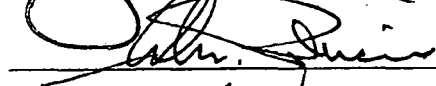
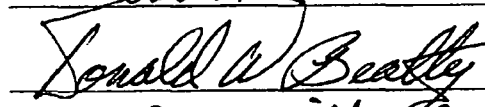
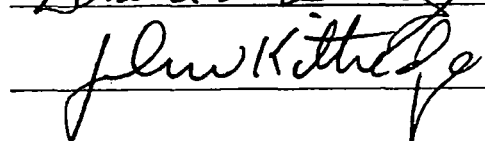
ORDER

The South Carolina Coastal Conservation League (SCCCL) has
filed a petition for a writ of supersedeas, pursuant to Rule 241(c), SCACR.

We grant SCCCL's petition for a writ of supersedeas, and expedite the appeal.

The Appellants' initial briefs and Designations of Matter to be Included in the Record on Appeal (DOM) shall be served and filed within fifteen (15) days of this Order. Respondent shall serve and file its initial brief and DOM within fifteen (15) days after service of Appellants' initial briefs and DOM. Any reply briefs must be served and filed within five (5) days after service of Respondent's initial brief. Appellants shall serve a copy of the Record on Appeal on all parties who have served a brief within fifteen (15) days after service of the last brief. Within ten (10) days after service of the Record on Appeal, each party shall serve a copy of its final brief(s) on every other party to the appeal, and shall file fifteen (15) copies of the final brief(s) with the Clerk of Court. Appellants shall file the Record on Appeal no later than the date the final briefs are due. No extensions will be granted.

IT IS SO ORDERED.


C. J.

J.

J.

J.

Kaye L. Heam J.

Columbia, South Carolina

July 22, 2010

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Case No. 11-ALJ-07-0367-CC

Rodney Connell, Barbara Connell, Edward Steers, Sally Steers, Moustafa Moustafa and
Maggie Shatilla Petitioners,

vs.

Charleston Water System and South Carolina Department of
Health and Environmental Control Respondents.

Of Whom

Rodney Connell, Barbara Connell, Moustafa Moustafa and Maggie Shatilla, are ... Appellants.

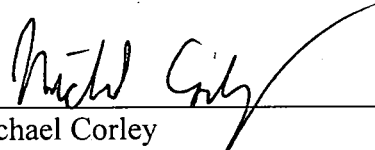
CERTIFICATE OF SERVICE

I certify that on this date I served the foregoing Petition for Order of Supersedeas upon
counsel for the Respondents, by placing copies of same in the United State Mail, addressed to:

Bradley Churdar
SCDHEC/OCRM
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

Leslie Riley
McNair Law Firm
P.O. Box 1341
Charleston, SC 29402

Georgetown, South Carolina
August 29, 2012



Michael Corley

65441

South Carolina Environmental Law Project

Lawyers for the wild side of South Carolina

a 501c3 non-profit
organization

August 29, 2012

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Michael G. Corley
Staff Attorney

Honorable Jenny Abbott Kitchings
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RE: Connell et al. v. SCDHEC & Charleston Water Systems
Admin. Law Court Case No.11-ALJ-07-0367-CC

(843) 527-0078
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E-mail: amy@scelp.org
michael@scelp.org
Website: www.scelp.org

Dear Ms. Kitchings:

Enclosed for filing is the Appellants' Petition for Order of
Supersedeas in the above-referenced case, along with my proof
of service and a check for the filing fee.

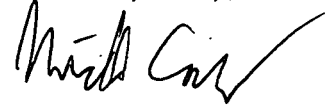
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Leon Rice

Please return a clocked-in copy of the Petition in the
enclosed envelope. Thank you for your assistance.

Yours very truly,



Michael Corley

OUR MISSION

*To protect the natural
environment of South
Carolina by providing
legal services and advice
to environmental
organizations and
concerned citizens
and by improving the
state's system of
environmental
regulation.*

cc: Leslie Riley, Esq.
Bradley Churdar, Esq.

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SEP 04 2012

SC Court of Appeals