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, areAppellants.

RETURN OF RESPONDENT CHARLESTON WATER SYSTEM TO APPELLANTS' PETITION FOR ORDER OF SUPERSEDEAS

Respondent, Charleston Water System ("CWS") submits this Return to the Appellant's Petition for Order of Supersedeas ("Petition"). Appellants have moved before this Court pursuant to South Carolina Appellate Court Rule 241(c) for an "order granting supersedeas in this appeal from an administrative tribunal, to stay the work proposed by [CWS] ... ." (Petition at 1.) In effect, Appellants are seeking an equitable stay of the Amended Final Order and Decision of the Honorable Ralph King Anderson, III of the Administrative Law Court (ALC), dated July 23, 2012, which affirmed the

South Carolina Department of Health and Environmental Control's ("DHEC") issuance of critical area permit OCRM-10-169-D to CWS. Appellants wish to forestall CWS' initiation of construction of its new 48-inch force main ("Force Main") in the critical area adjacent to CWS' Plum Island Water Pollution Control Plant ("Plum Island").

The law in South Carolina is clear, there is no automatic stay of an appeal of an administrative law judge's order. S.C. Code Ann. §1-23-600(H)(5) provides, "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." Rule 241, SCACR specifically sets forth that "[a]ppeals from administrative tribunals as provided in S.C. Code Ann. § 1-23-380(A)(2) and § 1-23-600[(H)](5)[1] are not subject to the general rule that upon service of a notice of appeal matters decided in the order on appeal are automatically stayed. Rule 241 (b) SCACR. As such, Appellants are required to seek grant of a supersedeas if they wish to stay the effectiveness of the ALC order.

Equitable stays are court orders commanding or preventing an action, namely compliance with a decision of a lower court or administrative body, and involve a balancing test. A stay resembles an injunction not only by its commandment of action or inaction but also by the test used by a court in determining whether or not to grant a stay. An injunction "should issue only if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law." Poynter Investments, Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010). "An equitable stay may be invoked if

[1] The citation to S.C. Code Ann. § 1-23-600(G)(5) clearly is a scrivener's error as subsection (G)(5) no longer exists and is now subsection (H)(5).

justified by circumstances which outweigh any potential harm to the party against whom it is operative. In making this determination, the court '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). Therefore, in evaluating whether to impose an equitable stay, 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 Appellants if the stay is denied. Furthermore, this Court should evaluate the likelihood of Appellants' success on appeal and whether there will be irreparable harm as a result of the stay being denied.

For the reasons stated in the following argument, the extraordinary relief which the Appellants now seek should be denied, and the matter should be allowed to proceed appropriately under the South Carolina Rules of Appellate Procedure.

I. FACTUAL AND PROCEDURAL BACKGROUND

CWS operates 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. (Affidavit of F. Kin Hill, Jr., CEO of CWS, attached hereto as Exhibit 1, previously attached to CWS' Return to Motion for Stay of the Amended Order and Final Decision before the ALC.) 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 Petition. 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. (Exhibit 1) Replacement of the Tunnel System is hereinafter referred to as the Tunnel System Replacement Project. The Tunnel System consists of an excavated tunnel, approximately 8,000 feet long, located over 100 feet below ground elevation and a 30-inch diameter concrete interceptor, or carrier pipe, located within the tunnel. (Exhibit 1) The collected wastewater flows by gravity under Wappoo Creek eventually to 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.

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. (Exhibit 1) Thereafter, CWS began planning, prioritizing, financing 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.

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. (Exhibit 1) 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 the 48" Force Main. The Force Main is required to transport wastewater from the new influent pump station on the western side of Plum Island to the headworks located on the eastern side of the Island. Until the Force Main is fully installed, the new Tunnel System cannot become operational.

The record reflects that during the design phase of the Force Main, CWS undertook an extensive analysis of the feasible alternatives to routing the Force Main through the critical area, pursuant to 23A S.C. Code Ann. Reg. 30-12(D).[2] The first option evaluated by CWS was a tunneled design (Option 1), the second option was a route, which would be located on the high ground of Plum Island, either buried or pile supported (Option 2). The third option (Option 3), and the one ultimately permitted, was

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[2] Reg. 30-12(D)(2)(a) requires the applicant demonstrate "[t]o the maximum extent feasible, alignments [of pipelines] must avoid crossing the critical areas.... Reg. 30-1(D)(23) defines feasibility as follows:

> As used within these rules and regulations (e.g., "unless no feasible alternative exists"), feasibility is determined by the Department with respect to individual project proposals. Feasibility in each case is based on the best available information, including, but not limited to, technical input from relevant agencies with expertise in the subject area, and consideration of factors of environmental, economic, social, legal and technological suitability of the proposed activity and its alternatives. Use of this word includes, but is not limited to, the concept of reasonableness and likelihood of success in achieving the project goal or purpose. "Feasible alternatives" applies both to locations or sites and to methods of design or construction, and includes a "no action" alternative.

a partially trenched and aerial pile supported design to be located in the critical area on the southern side of Plum Island.

On May 3, 2011, DHEC issued the Permit to CWS for the installation of the Force Main in the critical area on the southern side of Plum Island. Petitioners instituted their appeal before the DHEC Board and subsequently the ALC. Respondent CWS filed a Motion to Lift the Automatic Stay on October 20, 2011. On January 3, 2012,, the ALC issued an order lifting the automatic stay. A hearing on the merits was held on February 21-23, 2012. On June 20, 2012, Judge Anderson issued his Final Order and Decision. On July 23, 2012, an Amended Final Order and Decision was issued. On July 30, 2012, Appellants filed a Motion for Stay, which was denied on August 21, 2012.

II. ARGUMENT

A. Appellants have Failed to Satisfy the Filing Requirements Required Under SCACR Rule 24I.

Appellants filed the Petition for an Order of Supersedeas pursuant to Rule 241(c), SCACR. Appellants, however, have not met the filing requirements for a writ of supersedeas and this Court should dismiss Appellants' Petition under Rule 260, SCACR.

Rule 241(a), SCACR, provides the general rule that the service of a notice of appeal automatically stays the decision on appeal. However, Rule 241(b), SCACR, enumerates exceptions to the general rule, including: "Appeals from administrative tribunals as provided in S.C. Code Ann. § 1-23-380(A)(2) and § 1-23-600(G)(5)[3]." Rule 241(b)(11), SCACR. Pursuant to S.C. Code Ann. § 1-23-380(2) (Supp. 2010), an appeal of a final agency decision does not stay its enforcement. Further, Section 1-23-600(H)(5) provides that "[a] final decision issued by the Administrative Law Court in a contested

[3] See supra FN 1.

case may not be stayed except by order of the Administrative Law Court or the court of appeals." S.C. Code Ann. § 1-23-600(H)(5) (Supp. 2010).

Rule 241(d)(3), SCACR, establishes the filing requirements, including documents that must be filed contemporaneously with a petition for a writ of supersedeas. These include: (1) a written petition verified by the client; (2) a certified copy of the order of the ALC; and (3) a copy of the notice of appeal with its proof of service. Additionally, Rule 241(d)(4) outlines the required contents of the petition, including:

> [A] showing that an application for this relief was made to the lower court or administrative tribunal, and was unjustifiably denied or that the relief granted failed to afford the relief which the petitioner requested. A certified copy of the lower court's or administrative tribunal's ruling must be included. If no application was made to the lower court or administrative tribunal, then the petition shall state the extraordinary circumstances which made it impracticable to make such an application.

Rule 241(d)(4)(C), SCACR (emphasis added).

Appellants have failed to meet the requirements of Rule 241, SCACR in several ways. First, Appellants have not complied with Rule 241(d)(3) because the Petition was not verified by the client. Second, a certified copy of the order of the ALC Amended Final Order and Decision was not submitted with Petition. Third, a copy of the notice of appeal with its proof of service was not provided. Finally, Appellants did not contemporaneously file a certified copy of the ALC Order denying Petitioners' Motion for Stay before the ALC. Rule 241(d)(4), SCACR. Thus, Appellants have failed to comply with the SCACR, and this Court should dismiss Appellants' Petition pursuant to Rule 260(a), SCACR ("Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court.")

B. Absence of an Automatic Stay of Administrative Orders on Appeal Does Not Violate Appellants' Constitutional Rights.

Appellants spend considerable time alleging their constitutional rights will be violated should this Court not provide for the requested drastic remedy of a grant of supersedeas. The Appellants base this argument on their interpretation of the effect of changes in the appeals process through the passage of 2006 S.C. Act No. 387. Act 387, in part, modified and merely streamlined the appeals process for administrative decisions. As this Court is no doubt aware, prior to Act 387, the appeals process of DHEC permitting decisions was convoluted. Appeals of DHEC permitting decisions were initially brought before the ALC. An appeal from the ALC went to the DHEC Board for quasi-judicial review under a substantial evidence standard. Following the DHEC Board, a party could seek judicial review before the circuit court under the substantial evidence standard. Subsequent to Act 387, a review of a final agency decision of DHEC is filed with the ALC for a contested case hearing. Any appeal from the ALC is then brought before this Court in its appellate capacity for judicial review.

In light of Act 387, Appellants reach the unfounded conclusion that by and through the 2006 APA amendments and the removal of the circuit court from the administrative appeals process, citizens are somehow deprived of their constitutionally protected right to judicial review. See S.C. Constitution, Art. I, Section 22. This argument lacks merit. The absence of the circuit court sitting in an appellate capacity certainly does not deprive citizens appealing an administrative tribunal's decision of judicial review. S.C. Code § 1-23-610 provides the procedure for judicial review of decisions of an administrative law judge. Under Section 1-23-610, the judicial review mandated by Article I, Section 22 of the Constitution is provided by this Court, which

reviews under the substantial evidence standard. See Original Blue Ribbon Taxi Corp. v. SC DMV, 380 S.C. 600, 670 S.E.2d 674, (S.C. App. 2008). Appellants have initiated this appeal and may pursue their arguments before this Court. Should this Court reverse the lower court, the Appellants will have the remedy they seek available to them, which is removal and relocation of the pipeline.[4] In the absence of a stay, Appellants will not be deprived of a legally cognizable remedy.

C. Completion of Construction of the Force Main will not Render the Appeal Moot

Appellants argue that their appeal could be rendered moot based on Upstate Forever et al. v. DHEC & Greenville Water System, Docket No. 2009-ALJ-07-00-226 (Admin. Law Court 2011). In Greenville Water, this Court dismissed the Appellants' appeal on the grounds of mootness because the pipeline under appeal had already been fully constructed. However, Greenville Water is clearly distinguishable from the present case. As Appellants point out in their Petition, in Greenville Water the appellants "were not seeking to prevent actual construction of the pipeline..." and thus had no objection to the construction of the pipeline moving forward. "Appellants consented to the lifting of the automatic stay for the very reason that its challenge was not to the actual physical construction of the pipeline, but to amount of flow released from the reservoir that the pipeline connects to." (Appellants Response to Joint Motion to Dismiss, Greenville Water, attached hereto as Exhibit 2.) In Greenville Water, the appellants were seeking to impose conditions on actual operation of the pipeline (by having DHEC include conditions on flow from the reservoir) through the mechanism of appealing the construction permit and water quality certification. As a result, the appellants in

[4] This Court has the authority to order removal of the pipeline through reversing the issuance of the critical area permit or a remand to DHEC for rescission and re-issuance.

Greenville Water did not object to the absence of a stay on actual construction of the pipeline during the course of the appeal. Appellants in Greenville Water acknowledged in their Response to Joint Motion to Dismiss that there are

> instances in which construction could move forward to completion, yet the contested case challenging a DHEC permit or certification decision would survive. This approach makes logical sense, and is consistent with case law concluding that completion of construction does not moot a challenge to the permit or certification that authorized that construction. [citations omitted]

(Exhibit 2.)

In Greenville Water, the appellants were bootstrapping their arguments regarding conditions on the operation of the raw water intake to a permit and certification, which was issued only for the purpose of construction of a new intake pipeline. The appellants were attacking the conditions or lack thereof on operation of the intake pipeline through the mechanism of an appeal of a construction permit. Because the construction was completed, the Court was not in a position to resolve any actual case or controversy, but would have been issuing an advisory opinion regarding DHEC's authority to impose operational criteria via the 401 Water Quality Certification required for the project at issue.

Before a court can rule on an issue it must confirm that there is an actual case or controversy to be decided. "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). 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). "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 Dept., 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)).

In the case before this Court, Appellants are challenging the actual construction of the Force Main and not its operation. Should construction of the Force Main begin, be substantially completed or be completed when this Court ultimately renders its decision, this Court will not have lost its jurisdiction of the appeal. A case or controversy will remain as to whether DHEC properly issued the Permit allowing for the placement of the Force Main in the critical area. The mere completion of construction of the Force Main does not render the issue on appeal moot.

A mechanism is available for a party to act on a permit during an appeal at its own risk without rendering an appeal moot. As previously discussed, the default setting for administrative appeals is that there is no stay in place. The General Assembly clearly mandated that "[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." S.C. Code Ann. § 1-23-600(H)(5) (Supp. 2010). Had the General Assembly intended to forestall activity under an appealed DHEC permit, they would not have included this provision. Similarly, the Supreme Court did not consider the absence of an automatic stay upon appeal of an administrative decision to be a *de facto* violation of Due Process; otherwise, the Court would not have excepted administrative appeals from the general rule set forth in Rule 241, SCACR.

Furthermore, this Court will not lose jurisdiction over this appeal if the pipeline is constructed prior to issuance of an opinion. Once a structure is placed in the critical area

pursuant to a DHEC permit, DHEC retains its jurisdiction to enforce the terms of the permit and to require compliance with same. Should this Court determine the permit was issued in error, DHEC would have the ability to revoke CWS' permit and require removal of the Force Main based on its inconsistency with this Court's order.

D. Appellants are not Deprived of a Meaningful Appeal

Appellants attempt to persuade this Court that the denial of the supersedeas would deprive them of a meaningful appeal and leave them without "effective relief." (Petition at 7.) This argument is without merit.

Appellants have already had a meaningful review before the ALC and will have the opportunity for meaningful judicial review before this Court. As set forth below and established in the record of this case, Appellants will not be deprived of any right should the Force Main be installed. Should the Court of Appeals or the Supreme Court reverse the issuance of the critical area permit to CWS, the Force Main in the critical area can be removed. If this Court comes to the conclusion the ALC Amended Final Order and Decision was issued in error and finds any harm to the Appellants as a result of the Force Main in its permitted location, that harm can be rectified by its removal from the critical area.

For the Appellants to say that their appeal is not meaningful or that the issue will be rendered "moot" unless the supersedeas is granted is simply incorrect. The Appellants have previously argued this point twice, in response to CWS' Motion to Lift the Automatic Stay and in their Motion for Stay following the issuance of the Amended Final Order and Decision, and twice the ALC found, based on the evidence before it, a stay was not warranted on the grounds the case would not be rendered moot. The ALC also

clearly acknowledged that should a higher court find to the contrary, any impact to the Appellants can be remedied. Removal of the Force Main, should a reviewing Court require it, is possible from an engineering standpoint as well as a financial one. ((Exhibit 1), and Exhibit 3, Affidavit of Joshua P. Farmer, P.E., previously attached CWS Return Motion for Stay of the Amended Final Order and Decision before the ALC.) CWS has the necessary funds available for removal of the Force Main and restoration of the marsh within the critical area to its original condition. CWS' expert engineers estimate the associated cost for such work to be approximately $5,000,000.00 dollars. (Exhibits 1 and 3.) Therefore, should this Court conclude the permit for the Force Main was issued in error, the alleged harm to the Appellants will certainly not be irreparable. With no harm and the presence of an absolute remedy, the ALC found based on the evidence there was no reason to further forestall CWS' activities under the Permit.

By allowing CWS to proceed with the permitted activities, the Appellants will not be deprived of a meaningful appeal or an effective remedy.

E. Possibility of Pipeline Removal does Not Equate to Feasible

Appellants next assert that because CWS has the capability to remove the Force Main from the critical area should such action be ordered, this ability undercuts CWS' feasible alternatives analysis, which determined locating the Force Main on-island was not feasible, in part, because the Force Main would undoubtedly have to be removed in the future. Again, as on several occasions prior to this point, Appellants seem to be confused. The mere possibility some action can be taken **does not equate** to the statutorily defined determination that something is "feasible."[5]

[5] See supra FN 8.

The Appellants are correct in stating that Mr. Kin Hill, CEO of CWS, when asked about the feasibility of an on-island routing of the Force Main stated that the prospect of having to move the on-island force main route was "very problematic." (Petition at 8.) Mr. Hill's expert analysis was based on actual knowledge that removing an operational Force Main would present significant technical complications. As well, Mr. Hill correctly stated that with CWS having knowledge that an on-island force main would unequivocally have to be moved in the future, a decision to locate the Force Main on island was not a "good expenditure of public funds ... ." (Exhibit 4 to Petition, Tr. Day 2, p. 209.) Appellants cite to the testimony of Mr. Hill regarding the feasibility of removing and relocating the Force Main should it be necessary in the future. Contrary to the Appellants' assertions, Mr. Hill did not say that moving an operational force main was reasonable. Mr. Hill merely stated that such work would be difficult and costly, but would be possible:

> Q: All right. And so we're clear. You heard Mr. Strickland testify yesterday, did you not?
> A: I did.
> Q: When he testified that it was – it'd possible to move an on island option whether it be buried or aerially supported if you had to in the future. Do you agree with that?
> Q: Is it possible?
> A: Yes.
> Q: Is that what you're asking? Yes.
> Q: Is it practicable?
> A: Not at all in my opinion, especially in this case because of what I mentioned earlier. You have to continue to maintain the existing flows while you're moving that – that pipeline. And the rate of construction on that is extremely slow, so it would be a very long time where you would have to employ some type of bypass pumping procedure to keep the flows going so you wouldn't have back-ups in the areas served by West Ashley.
> Q: Okay.
> A: It'd be very difficult from an operational point of view to do that. But could it be done, yes.

Transcript of Hearing, Day 2, p. 210 l. 25- p. 211 l. 24.

The testimony and significant evidence presented at the hearing centered on the feasibility of alternative locations for the Force Main. Significantly, Appellants have consistently mischaracterized the standard of feasibility and attempted to equate "feasible" with "possible." 23A S.C. Code Ann. Reg. 30-1(D)(23) is clear. The term feasible under the regulations presumes an alternative is possible but provides for an assessment of the alternative under certain criteria and through the lens of reasonableness.[6] The fact an alternative is possible certainly does not make it feasible.

F. No Irreparable Harm

Appellants allege they will suffer harm, in the form of reduced property values and a decrease in their enjoyment of their properties and quality of life on Harborview Circle, should this Court deny the Petition and CWS be allowed to proceed with its permitted activities. This is entirely without merit. This ALC's Amended Final Order and Decision made extensive factual findings as to the propriety of the issuance of the critical area permit, which are supported by the overwhelming evidence in the record. The ALC concluded, "[g]iven the project's minimal impact on the value and enjoyment of the adjacent property owners...," there will be a *de minimis* impact on the Appellants if the permitted Force Main is installed. (Amended Final Order and Decision at 5.) Since the issuance of the Amended Final Order and Decision, these facts remain the same.

Further, Appellants cannot show that any alleged harm, even *de minimis*, to them will be irreparable. Removal of the Force Main, should a reviewing Court require it, is possible from an engineering standpoint as well as a financial one.

[6] See supra FN 2.

G. Imposition of a Stay Will Unduly Harm CWS and its Customers

Appellants argue that CWS and its customers will not be harmed by an additional delay in construction based on the naïve premise CWS has waited 25 years to undertake this work; therefore, waiting another two years will not result in any harm. As argued in CWS' motion to lift the automatic stay and at trial, the deteriorating nature of the existing West Ashley Sewer Tunnel System must be rectified. (See Exhibit 1.)

Appellants submit CWS has sat on its heels by failing to implement the plan to replace the existing Tunnel System. While Appellants recognize CWS had to prioritize the replacement of all five of its existing tunnels according to the level of deterioration, they fail to understand the scope and magnitude of the replacement process, which CWS has been undertaking since the mid-1980s. (Exhibit 1.) The Appellants' argument ignores the fact that over these years the Tunnel System has continued to deteriorate despite repeated repair and maintenance efforts by CWS. Appellants would have this Court believe CWS has sat idly by watching "Rome burn." Such a proposition is a mischaracterization, at best. To argue now for a third time that a further delay of some two years will not harm CWS or the public demonstrates ignorance of the substantial evidence in the record. It was clearly propounded by the evidence at the ALC, concurred to by Appellants' own expert witness and confirmed by Judge Anderson that the current situation in the Tunnel System is emergent. As Judge Anderson points out, "[h]ere there is a pressing need for the permitted project. The Tunnel System is deteriorating and threatens to fail. Without action, untreated wastewater could potentially spill into the surrounding soil." (Amended Final Order and Decision at 24.) Further delaying the installation of the entire Tunnel System Replacement Project exposes CWS and the public as a whole to a potential environmental and health emergency.

The only conclusion to draw when weighing the potential for harm in this case to the Appellants against the potential for harm to the public should this Force Main installation not move forward, is that the Petition must be denied.

H. Appellants Cannot Demonstrate a Likelihood of Success on Appeal

Consideration of whether to impose a stay must be evaluated in the context of the Appellants' likelihood of success on appeal. Given the strict standard of review, Appellants' likelihood of success is low. Section 1-23-610(B) of the South Carolina Administrative Procedures Act provides the standard of review of appeals from the Administrative Law Court:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> a) in violation of constitutional or statutory provisions;
> b) in excess of the statutory authority of the agency;
> c) made upon unlawful procedure;
> d) affected by other error of law;
> e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record;
> f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Appellants appear to overlook the fact that they have the burden of proof regarding whether this Court will grant a supersedeas. The playing field is no longer level. Appellants had a full and fair opportunity to present their case. The ALC heard their case and determined the preponderance of the evidence weighed in favor of CWS. The Petition must be evaluated in that context.

II. CONCLUSION

In conclusion, Appellants have asked this Court to grant the Petition and to impose a stay on CWS' initiation of construction of the new Force Main in accordance with the Permit issued by DHEC. Appellants make several arguments, each of which is based on the incorrect assertion that this Court cannot provide a cognizable remedy and thus, if a stay is not imposed, the Appellants will be deprived of their constitutional right to Due Process. Appellants have argued this same issue twice before and at each occasion the trier of fact found the preponderance of evidence supported the absence of a stay. Nothing has changed. The ALC conducted a full and fair hearing on their allegations and, after hearing from the witnesses for both sides and reviewing all of the documentary evidence presented at trial, discounted the Appellants arguments regarding the alleged harm to the Appellants by the installation of the Force Main and the risk of abrogating the Appellants constitutional rights. Appellants attempted to persuade the ALC that a stay was necessary post trial to preserve their right to judicial review. The ALC disagreed. The Petition must be evaluated in that context, and denied.

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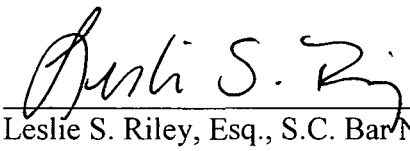
Respectfully submitted,



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Dated: September 10, 2012

Charleston, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Rodney Connell, Barbara Connell, Edward Steers, Sally Steers, Moustafa Moustafa and Maggie Shatilla, Petitioners, vs. South Carolina Department of Health and Environmental Control, and Charleston Water System, Respondents.	DOCKET NO. 11-ALC-07-0367-CC **AFFIDAVIT OF F. K. HILL, JR., CEO CHARLESTON WATER SYSTEM**

COMES NOW the undersigned, who hereby avers and states as follows:

1. I am the Chief Executive Officer for the Commissioners of Public Works of the City of Charleston, d/b/a Charleston Water System ("CWS"). I have held this position since July 2006.

2. I have been employed with CWS since July, 1987. I am a licensed Professional Engineer in South Carolina. My curriculum vitae is attached hereto as EXHIBIT 1 to this Affidavit.

3. CWS owns and operates the Plum Island Water Pollution Control Plant ("Plum Island"). The West Ashley Tunnel Interceptor System (Tunnel System) serves CWS's West Ashley Service Area and transports untreated wastewater from the West Ashley Service Area to Plum Island. The Tunnel System serves a population of approximately 100,000 customers, and has been in operation since 1971.

4. The existing Tunnel System consists of an excavated tunnel of approximately 8,000 linear feet, located over 100 feet below ground elevation and a 30-inch concrete interceptor, or carrier pipe, located within the tunnel. The Tunnel System begins in an area adjacent to Albemarle Road in the West Ashley area of Charleston and runs under the high ground, saltmarsh and creeks adjacent to Plum Island to eventually reach Plum Island.

EXHIBIT 1

5. Similar to the Tunnel System, CWS also owns and operates four (4) other tunnel systems which individually serve other areas of Charleston. These tunnels also collect and transport wastewater to Plum Island.

6. In the late 1980s, CWS began inspections and testing of all its existing wastewater tunnel systems and determined an urgent need to initiate a systematic program to replace all of the wastewater tunnels.

7. Consequently, CWS commenced a comprehensive project to replace all of its existing tunnels. Replacement of the tunnels was prioritized based on the then existing conditions within the individual tunnels. The most deteriorated tunnels were given higher priority and were replaced first. Replacement of the Tunnel System is the fifth phase and final replacement phase of a six-phase project. The sixth phase will be the construction of a new extension to serve the West Ashley Service Area.

8. This fifth phase consists of the replacement of the Tunnel System, which includes installation of a new tunnel and a 54-inch interceptor, or carrier pipe, within the tunnel ("New Tunnel System"). This replacement also necessitates the installation of a 48-inch force main (authorized by critical area permit number OCRM-10-169-D) ("Force Main") and construction of a new influent pump station on Plum Island, together the "West Ashley Sewer Tunnel Replacement Project". The New Tunnel System will enter Plum Island at a location on the western side which necessitates the construction of the Force Main to transport wastewater to the headworks of the plant which is located on the eastern side of Plum Island. The engineer's estimate for construction of the new Force Main is 22 months. The New Tunnel System cannot become operational until the Force Main is installed and ready to operate. The engineer's estimate for construction of this New Tunnel System is approximately 24 months, and it must be constructed in concert with the Force Main as one unit, and not bifurcated.

9. Replacement of the Tunnel System, as soon as possible, is necessary due to its current corroding and ever-deteriorating condition as well as its limited hydraulic capacity. Prior inspection and testing of the Tunnel System in 1987 revealed an estimated capacity reduction of between 22 and 28 percent. Subsequent hydraulic modeling performed in 2007 revealed an estimated capacity reduction of approximately 37%. Consequently, the Tunnel System is currently operating at a restricted capacity of approximately 19 million gallons per day (mgd) versus the original unrestricted flow capacity of 30 mgd. Presently, under heavy rain

events, to effectively transport the wastewater from the West Ashley Service Area 44 mgd of capacity is needed.

10. The population growth in the West Ashley area has also increased the amount of wastewater flow through the Tunnel System. Such customer growth continues today, adding additional wastewater flow to an already overstressed Tunnel System.

11. The Tunnel System, is in such deterioration that it has also experienced cave-ins onto the top of the carrier pipe near the existing Plant Control Pump Station. Additional cave-ins to the Tunnel System would have disastrous consequences.

12. The Tunnel System is a single point of failure for the entire West Ashley Service Area. If the Tunnel System fails, there will be no alternate route for an average of 10 to 12 million gallons per day of raw wastewater to reach Plum Island, with flows much higher than that during a storm event. Any such failure will result in catastrophic wastewater overflows of untreated wastewater into the environment, and possibly into homes and businesses within the West Ashley Service Area. Such a failure would also have extreme economic impacts by likely necessitating the closing of businesses, schools, hospitals, and other establishments in the West Ashley area due to the potential existence of conditions hazardous to public health.

13. Sanitary sewer overflows ("SSOs") in the West Ashley neighborhoods of Byrnes Down and South Windermere have occurred as a result of current conditions and capacity limitations.

14. SSOs can occur as a result of excess storm water (from rain events) entering the wastewater collection system through points such as pipe joints, manholes, private service laterals, and sewer cleanouts. This extraneous flow entering the CWS sewer system is known as "infiltration and inflow." ("I&I") The additional I&I entering the system results in excessive flow volumes which can cause back-ups and overflows of untreated wastewater from the collection system directly into the environment.

15. There have been at least 29 documented SSOs between 2000 and 2010, 22 of which resulted in greater than 500 gallons of raw wastewater being discharged to the environment.

16. SSOs can constitute a significant public health hazard, can be costly to abate and clean up and can interfere with normal activities and general commerce within the affected areas.

17. The West Ashley Sewer Tunnel Replacement Project will cost approximately $48 million dollars, and will be financed by the prior issuance of Series 2010 municipal revenue bonds funded via series of three Commission-approved customer rate increases.

18. All relevant permits necessary to initiate construction have been obtained and all other regulatory design elements will be in place to accept formal bids in December 2012 for construction of the New Tunnel System, Force Main, and pump station. Once we publically bid the project and accept formal bids, we become legally obligated to issue the Notice to Proceed to the contractor to start the construction.

19. Upon issuance of the Notice to Proceed to the contractor, construction is scheduled to last approximately 24 months.

20. Therefore, immediate initiation of activities necessary to begin and ultimately complete the construction of the West Ashley Sewer Tunnel Replacement Project is imperative to protect the public health and safety and provide reliable and uninterrupted sewer service to the 100,000 Charleston Water System customers within the West Ashley Service Area.

21. In the event a court reverses OCRM's issuance of the Permit and the Force Main has been constructed pursuant to the Permit, funding for the removal of the Force Main is immediately available to CWS. CWS currently has available to it, in its Construction Fund Account with the Bank of New York, in excess of $80 Million in construction funds, a portion of which, as necessary, can be used to fund the removal of the pipeline and related facilities from the critical area, should such removal be ordered by the Court.

22. The current engineer's estimate, provided by CWS' project engineer, Joshua Farmer of Hazen and Sawyer, P.C., Environmental Engineers and Scientists is that the complete removal of the pipeline and related facilities from the critical area and returning the marsh to its original condition will cost approximately Five Million ($5,000,000) Dollars. Such funds are on hand and immediately available.

23. The existing OCRM and US Army Corps of Engineers permits require any affected marshland areas to be restored to their pre-existing condition. Based upon my 30+ years of experience with utility companies laying pipelines through marshland critical areas, it is my opinion that the marshland area will be re-

vegetated and restored to its pre-existing condition through natural growth and replanting, if necessary to comply with the permit requirements. CWS has performed such successful restorations on prior critical area projects of a similar nature.

Conclusion: Construction of the West Ashley Sewer Tunnel Replacement Project is imperative to protect public health and the environment and should be initiated as soon as possible to avoid the potential for a Tunnel System failure, which would result in a catastrophic disaster impacting the environment and over 100,000 residents who rely upon that Tunnel System to provide wastewater services to their homes and businesses everyday.

FURTHER THE AFFIANT SAYETH NOT.

F. K. Hill, Jr. CEO
Charleston Water System

SWORN to before me this
7th of August, 2012

Notary Public for South Carolina
My Commission Expires: 4/25/22

CURRICULUM VITAE

Floyd K. "Kin" Hill, Jr., PE

EMPLOYMENT HISTORY

2006 – Present **Chief Executive Officer – Charleston Water System**

Chief Executive Officer of water and wastewater utility serving a population of 400,000 customers in greater Charleston Region. Report directly to elected Board of Commissioners.

1987 – 2006: **Chief Operating Officer – Charleston Commissioners of Public Works**

Responsible for managing all water distribution and wastewater collection operations.

1978 – 1987: **District Director, South Carolina Department of Health and Environmental Control, (SC DHEC) Aiken, SC**

Responsible for management and administration of six (6) county area in all fields of environmental quality control.

EDUCATION

- **Bachelor of Science Degree in Agricultural Engineering, Clemson University, May, 1978**
- **Master of Science Degree in Environmental and Water Resources Engineering, University of South Carolina, May, 1986**
- **Registered as a Licensed Professional Engineer (PE) in SC (#9600)**

PROFESSIONAL ASSOCIATIONS / AFFILIATIONS, ETC.

- **Registered "A" Level Water Distribution System Operator in SC (#0004)**
- **Registered "A" Level Wastewater Collection System Operator in SC (#0003)**
- **Current member SC Chamber of Commerce, Environment & Technical Committee**
- **Member American Water Works Association, National and State Chapters**
- **Member Water Environment Federation**
- **Board Member of Charleston Regional Development Authority (CRDA)**
- **Board Member of Trident United Way**
- **Board Member of Charleston Chamber of Commerce**
- **Board Member of Clemson University Board of Visitors**
- **Stono Ferry, Home Owners Association Board**

Personal

- **Member, John Wesley United Methodist Church**
- **Member, Charleston County Clemson Club**

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

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

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

vs.

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

APPELLANTS' RESPONSE TO JOINT MOTION TO DISMISS

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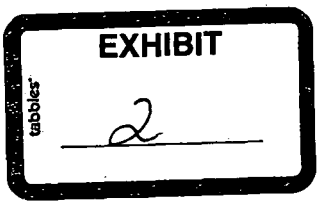
March 22, 2012



INTRODUCTION

Prior to construction of the pipeline project in dispute in this appeal, Greenville Water Systems ("GWS") withdrew drinking water from Table Rock Reservoir through two 30-inch diameter pipes. In the decision challenged here, DHEC authorizes GWS to construct a 42-inch diameter pipe while leaving one of the existing 30-inch pipes in place, greatly increasing water withdrawal capacity from the Reservoir. The Reservoir was formed by damming the South Saluda River, and GWS has direct control over both the water withdrawn and released from the Reservoir. GWS' management, specifically its failure to release adequate flows of water from the Reservoir, has had and continues to have a severe detrimental impact on the South Saluda River.

The South Saluda is of vital ecological significance and maintaining a minimum water level is necessary to its functionality. The South Saluda is managed by the S.C. Department of Natural Resources ("DNR") as a cold water trout fishery, and it is one of South Carolina's very few trout streams. (R. pp. 218-220, Report of SCDNR). It is also provides habitat for numerous aquatic and land species, including over a dozen species of fish. (R. p. 218). When mountain streams are impounded or dammed like the South Saluda has been with the Table Rock Reservoir, there is less flow often resulting in a significantly warmer stream or river downstream. (R. pp. 218-220). The South Saluda River base flow (below TRR) is currently at a fraction of the historic flow and at a fraction of the potential flow. DNR's uncontradicted opinion is that water temperature regimes and limited flow are significant factors in species diversity, and that trout habitat is limited because the water is not cold enough to support the trout population. *Id.* Warmer waters and limited flow are having adverse impacts on the

designated uses of the river, and could ultimately result in a total loss of the natural, remnant trout population which hold over and remain in the stream. *Id.*

Through the 401 Certification at issue in this appeal the United States Fish and Wildlife Service has expressed concerns to DHEC about the impacts of GWS's management of the dam and reservoir on the South Saluda River and its fisheries:

> Table Rock Reservoir and the water distribution system was built in the 1930's, prior to any current State or Federal environmental regulation. Therefore, no minimum flow requirements have been in effect for this reservoir. The result is that the South Saluda River system has had a deficit of stream flow resulting in impacts to approximately 1 ½ miles of river . . . it is appropriate to require minimal stream flow in order to protect the resources and integrity of the ecology of the system downstream. Minimum flows are very important and integrated flow regimes are needed for both the North and South Saluda Rivers that are controlled by the Greenville Water System.

(R. pp. 214-217).

DNR has expressed similar concerns to DHEC in commenting on this Certification:

> Dewartering one of the states's most important freshwater rivers has, and will continue to, result in vast impacts to aquatic organisms and the entire riverine system for many miles. Lack of water in the river obviously causes direct negative effects upon aquatic resources, but it also impairs the function of the entire ecosystem along the riparian corridor.

(R. pp. 202-205).

GWS' management of the Reservoir and its withdrawals and releases from the Reservoir have had obvious and devastating impacts on the river, the river's trout fishery, other aquatic life, and public recreation (fishing, swimming, wading and paddling). (R. pp. 205-220). Through this 401 Certification appeal, Upstate Forever, S.C. Native Plant Society and S.C. Wildlife Federation have asked this honorable Court for an Order concluding that DHEC has the authority and duty to require GWS to release minimum flows to protect the water quality of the South Saluda. Respondents seek dismissal of this important action through a motion relying on

strained legal interpretations and citing no supporting authority.

ARGUMENT

The Respondents assert that the Court should not hear this issue because DHEC's 401 Certification at issue in this appeal "has no more legal effect," because the pipeline at issue has been constructed and because DHEC has given approval to operate the system.[1] This argument is flawed because 1) the 401 Certification has "legal effect," both by virtue of this appeal and by the terms of the 401 Certification itself; 2) the Court has the ability to provide the relief sought, which is not foreclosed merely because construction is complete; and 3) it presumes that lifting the statutorily-authorized automatic stay could effectively moot an appeal and thus eliminate due process rights, as well as deprive this Court of its jurisdiction.

Further, even if the case were moot, it meets both the "public interest" and the "capable of repetition, yet evading review" mootness exceptions.

I. THIS CASE IS NOT MOOT

"A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d

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[1]Appellants note that the February 1, 2012 "Final Approval" referred to in Respondents' Motion is not in record, nor does Respondent offer the document for inclusion in the record. Moreoever, it is unclear what, if any, relationship this document bears to the 401 Certification at issue in this case. The "final approval" does not reference the 401 Certification, and the 401 Certification makes no mention of the need to obtain a "final approval" to place into operation. Further, the final approval does not cite any authority for its issuance, and if the document possesses any legal significance, it is not evident from the face of the document nor Respondents' motion.

While Respondents cite Appellants' failure to appeal the final approval, there is again no indication that the final approval document would rise to the level of a contested case so that it could even be appealed. In confirmation of this fact, a review of South Carolina ALC cases reveals no instances where such a "final approval" document has been challenged.

591. 596 (2001) (citing *Mathis v. South Carolina State Highway Dep't,* 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)). If the court has the "power to grant a legally cognizable remedy requested by a party" then the case is not moot. *United States v. Hahn*, 359 F.3d 1315, 1337 (10th Cir. 2004); *Smith v. Plati,* 258 F.3d 1167, 1179 (10th Cir. 2001) ("An issue becomes moot when it becomes impossible for the court to grant any effectual relief whatsoever on that issue to a prevailing party").

A. The Court Can Grant Effectual Relief and a Cognizable Remedy

In order for the Court to conclude that this case is moot, it would have to find that no effectual relief or cognizable remedy could be provided. The relief sought in this case is unique in the very fact that completion of the disputed project in no way diminishes availability of the relief.

The Appellants seek relief from this Court in the form of an order remanding this 401 Certification decision with instructions to DHEC to place minimum instream flow conditions on the 401 Certification. The basis for this relief is found in S.C. Code Ann. Regs. 61-101. In reviewing 401 Certifications for compliance with 61-101, DHEC is required to consider "all potential water quality impacts of the project, both direct and indirect, over the life of the project including:

(1) **impact on existing and classified water uses;**

(2) physical, chemical, and biological impacts, including cumulative impacts;

(3) the effect on circulation patterns and water movement;

(4) the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others."

S.C. Code Ann. Regs. 61-101.F.(3) (emphasis added). Regulation 61-101 gives DHEC broad authority to establish "**any limitation, conditions, or monitoring requirements necessary to assure maintenance of classified and existing water uses and standards** and compliance with other requirements of these regulations or other appropriate requirements of State law" on an applicant's water quality certification.[2] S.C. Code Ann. Reg. 61-101(A)(5) (emphasis added). In this case, the South Saluda River is legally classified as "Trout-Put, Grow and Take" waters, which means the waters are suitable for supporting growth of trout populations and a balanced indigenous aquatic community of fauna and flora. S.C. Code Ann. Regs. 61-68.E.2(b). The existing use of the South Saluda is for recreational trout fishing, among other recreational activities. Under this classification and the existing uses, the South Saluda is managed by the S.C. Department of Natural Resources ("DNR") as stocked trout stream and is capable of supporting year round trout growth. DNR's current strategy is to stock the river with trout as a replacement or surrogate for a wild population to provide recreational trout fishing. (R. pp. 218-220).

Appellants (and the Proposed Amicus, Trout Unlimited) assert that uses of the South Saluda are jeopardized by this project, that minimum instream flows are an appropriate and

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[2]The Respondents admit that DHEC does have authority to impose minimum instream flows as a condition to a 401 water quality certification, and that DHEC has, in fact, imposed a minimum instream flow regime as part of 401 Water Quality Certifications related to dams in the past. (R. p. 151, Respondents' Joint Motion for Summary Judgment). Respondents simply assert that DHEC cannot impose those minimum instream flow conditions to Greenville Water Systems' water quality certification because it is not a new dam.

Notably, the Respondents point to no statutory or regulatory support for this claim that DHEC has no authority to apply minimum flow requirements to GWS' 401 water quality certification, and in fact, there is no statutory or regulatory support for this claim. Respondents' argument has no legal basis, and is contrary to the plain language of the 401 Water Quality Regulations at R. 61-101, the Water Quality Standards at R. 61-68, and case law interpreting the 401 program, as discussed more fully in Appellants' Final Brief.

necessary condition to protect those uses, and that DHEC must therefore impose conditions on this 401 Certification. If the Court agrees that DHEC has the authority and duty to impose minimum flow conditions on Greenville Water Systems' 401 Certification in order to protect water quality as mandated under the law, the Appellants relief would be fully and completely accomplished. This Court's remedy would not require removal of the pipeline or otherwise jeopardize the project as constructed.

This case is therefore not moot because it is possible for the reviewing Court to grant effectual relief and provide a cognizable remedy. The issue is whether DHEC is required by law to place conditions on GWS' permit and certification requiring minimum flow releases in order to protect water quality. Should this Court rule that DHEC does have the authority and erred by failing to include minimum flow conditions in its certification, then the Court could remand the decision back to DHEC with instructions to place flows conditions necessary to protect water quality.

Only by ignoring the purpose and nature of the GWS project can one argue that this certification decision is moot. 401 Certifications typically impose conditions on projects, and DHEC has, in fact, imposed conditions on the 401 certification in this case. As Respondents admit, flow conditions can be imposed on 401 certifications of dam relicensing projects. (R. pp. 416-418). The controversy in this case can still (and easily) be remedied by the imposition of a minimum flow condition. The fact that effective relief can be granted conclusively shows that the case is not moot. *See Seabrook v. Knox,* 369 S.C. 191, 631 S.E.2d 907 (2006); *Mathis v. S.C. State Highway Dep't,* 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

B. Completion of Construction Does Not Moot a 401 Certification

The Respondents attempt to sidestep the clear availability of effective relief by making the strained and illogical argument that the "certification has no more legal effect," and that the certification is "supplanted by" DHEC's approval to GWS that the pipeline is operable because the construction has been completed. (Resp. Brief p. 7). There is no legal support for Respondents' apparent conclusion that the 401 Certification has vanished and is no longer a valid approval. Tellingly, GWS and DHEC point to no legal support for this conclusion.

While there are no South Carolina cases on point, there are federal cases that have held that a case is not moot simply because the construction activity authorized by an environmental statute has been completed. In *City of Olmsted Falls, Ohio v. U.S. Environmental Protection Agency* 435 F.3d 632, 636 (6th Cir. 2006), the Plaintiffs challenged a 404 permit and 401 certification for a plan to fill a creek to construct a new airport runway. At the time the appeal was heard, the project was complete and the creek was filled. Even so, the court determined that the case was not moot. The court stated its conclusion as follows: "should Plaintiffs prevail in their suit, the permit issued . . . would have to be invalidated and another permitting process would be required. Because a live controversy exists with respect to the permit itself, we agree that the issues raised in Plaintiffs' complaint are not moot." *Id.* at 636. Certainly the case for mootness was more compelling in *City of Olmsted* than here, where the relief sought by Appellants remains fully available without any jeopardy to the completed pipeline.

Airport Neighbors Alliance, Inc. v. U.S., 90 F.3d 426 (10th Cir. 1996), was a National Environmental Policy Act ("NEPA") case in which the plaintiffs also brought challenges related to construction of a new runway. The runway had been constructed by the time the case reached

the 10th Circuit. In a holding that draws many parallels to the instant case, the court concluded that the case was not moot because "[t]he majority of environmental concerns surrounding [the new runway] relate not to the actual physical construction of the enlarged runway, but rather to the new patterns of commercial jets using the runway." *Id.* at 429. In much the same way, the environmental challenges in this case are not to actual physical construction of the new pipeline, but rather to maintenance of minimum stream flows released from the reservoir that the pipeline transfers water from. The 10th Circuit's holding rested on the fact that it could still award relief, even though construction was complete. The same is true in this case.

Tyler v. Cuomo, 236 F.3d 1124 (9th Cir. 2000), was a NEPA and National Historic Preservation Act case in which the 9th Circuit held that a challenge to a HUD housing project could still be maintained, despite the fact that the housing project had been completed. The basis of the court's ruling that the case was not moot was that the plaintiffs sought not the demolition of the housing project, but rather, compliance with regulatory requirements. The *Tyler* court concluded that a case is not moot "if changes can still be made to help alleviate any adverse effects." *Id.* at 1137. In this case, a change can still be made to the decision on appeal to alleviate the adverse impacts on water quality caused by inadequate flows from the Reservoir which the pipeline withdraws from.

Nothing in those cases nor any other cases Petitioners are aware of support the Respondents' arguments that an environmental certification or permit simply vanishes once the authorized activity is constructed.

i. If Certification Has No Legal Effect DHEC Would be Divested of Jurisdiction

If a 401 Certification no longer has any legal effect after the authorized construction is

complete, DHEC would effectively be divested of its jurisdiction and its ability to ensure continuing compliance with certification conditions. DHEC routinely places conditions on 401 Water Quality Certifications that survive well beyond the actual construction activity that necessitated the Certification, regularly imposing long-term monitoring requirements and other conditions related to continued maintenance and protection of water quality. In fact, DHEC has done so in this particular case. The very first condition imposed in DHEC's 401 certification of the GWS project provides that GWS must follow best management practices[3] "on and off the project site during and *after construction.*" (R. p. 416, condition #1). This condition demonstrates not only DHEC's authority to impose conditions extending beyond the construction period, but also DHEC's authority to impose conditions not directly related to the project activity. As another example, condition 16 of the 401 Certification addresses how wetlands impacted by GWS's construction must be maintained in the future. GWS must replant vegetation in impacted wetlands and maintain the vegetation in such wetlands in an "uncleared or uncut state." (R. p. 417, condition #16). Clearly such condition imposes obligations on GWS beyond the period of construction. Under Respondents' argument, GWS would have no obligation to comply with these conditions and DHEC would have no authority to enforce them. This argument is in direct contradiction with the clear language of the 401 Certification itself.

The 401 Certification states that DHEC "reserves the right to impose additional conditions on this Certification/Permit to respond to unforseen, specific problems that might

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[3]DHEC's Best Management Practices ("BMP") handbook describes the goals of BMPs as erosion and sediment controls to 1) minimize the extent and duration of disturbed soil exposure; 2) protect off-site and downstream locations, drainage systems and natural waterways from impacts of erosion and sedimentation; 3) limit the exit velocities of the flow leaving the site to non-erosive or pre-development conditions; and 4) design and implement an on-going inspection and maintenance plan.
http://www.scdhec.gov/environment/ocrm/docs/BMP_Handbook/BMP_Handbook.pdf, page 2.

arise and to take any enforcement action necessary to ensure compliance with State standards." (R. p. 417). Thus in issuing this Certification, DHEC clearly contemplated the potential need to add additional conditions, as well as the potential need to bring enforcement for compliance with the existing conditions. For example, if GWS failed to maintain the wetlands vegetation in an "uncleared and uncut state," DHEC would have the authority under the 401 Certification to enforce that condition. The fact that DHEC retains the right to both impose additional conditions and to enforce existing conditions and state water quality standards indicates that the 401 Certification has "legal effect" beyond the completion of construction and indeed presently has "legal effect."

ii. If Certification Had No Legal Effect Appellants Would be Denied Procedural Due Process Rights to Judicial Review

The requirements of procedural due process, which apply in a contested case or hearing which affects an individual's property or liberty interest, generally includes adequate notice, the opportunity to be heard at a meaningful time and in a meaningful way, the right to introduce evidence, the right to confront and cross-examine witnesses whose testimony is used to establish facts, and the right to meaningful judicial review. *Sloan v. S. Carolina Bd. of Physical Therapy Examiners*, 370 S.C. 452, 484-85, 636 S.E.2d 598, 615 (2006); S.C. Constitution, art. 1, §22 ("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"). Due Process guarantees notice, an opportunity to be heard in a meaningful way, and judicial review. *See Stono River Envtl. Protection Ass'n v. S.C. DHEC*, 305 S.C. 90, 406 S.E.2d 340 (1991). "[P]arties with an interest in certification are entitled to notice, an opportunity to be heard, and judicial review. *League of*

Women Voters of Georgetown County v. Litchfield-by-the-Sea, 305 S.C. 424, 427, 409 S.E.2d 378, 380 (1991) (*overruled on other grounds by Brown v. SCDHEC*, 348 S.C. 507, 560 S.E.2d 410 (2002)). "To prove the denial of due process in an administrative proceeding, a party must show that it was substantially prejudiced by the administrative process." *Leventis v. S.C. DHEC*, 340 S.C. 118, 131-32, 530 S.E.2d 643, 650 (Ct. App. 2000).

In this case, if Appellants are denied judicial review after availing themselves at every opportunity of the procedural safeguards afforded them through the Administrative Procedures Act and the S.C. Constitution, they would effectively be denied their procedural due process rights to judicial review before this Court. Lifting of the automatic stay, which is a result that occurs with some regularity in the ALC, is not intended to act as a mechanism through which to deny judicial review and prejudice the challenging party, but that is exactly what the Respondents argue for here.

C. The Automatic Stay Envisions Construction Moving Forward in the Face of an Appeal

The Administrative Procedures Act ("APA") provides for an automatic stay of DHEC decisions. S.C. Code Ann. §1-23-600(H)(2). The automatic stay prevents an activity from moving forward once a request for contested case hearing is filed in the Administrative Law Court. *Id.* The automatic stay acts to preserve procedural due process rights until judicial review is obtained. The automatic stay can be lifted by the ALC "for good cause shown or if no irreparable harm will occur." S.C. Code Ann. § 1-23-600(H)(4). The APA envisions instances in which construction could move forward to completion, yet the contested case challenging a DHEC permit or certification decision would survive. This approach makes logical sense, and is consistent with case law concluding that completion of construction does not moot a challenge to

the permit or certification that authorized that construction. *See Airport Neighbors Alliance, Inc. v. U.S.*, 90 F.3d 426 (10th Cir. 1996); *City of Olmsted Falls, Ohio v. U.S. Environmental Protection Agency* 435 F.3d 632, 636 (6th Cir. 2006).

In this case, the Appellants consented to lifting the automatic stay for the very reason that its challenge was not to the actual physical construction of the pipeline, but to the amount of flow released from the reservoir that the pipeline connects to. The Appellants now face severe adverse consequences – elimination of judicial review rights – as a result of this willingness to be cooperative and reasonable. If lifting the automatic stay to allow construction would result in a court rendering a contested case hearing moot, then no court should ever allow the automatic stay to be lifted. In actuality, the lifting the stay presumes that the project goes forward, but the appeal goes forward as well, with a recognition that the permit or certification under appeal could be reversed or modified by the reviewing court, as has been the practice in federal courts.

D. Even if the 401 Certification "Has No Legal Effect" DHEC Has a Mandatory Duty to Require Minimum Flows

DHEC has express authority to "protect classified and existing uses, such as below dams and in tidal situations." S.C. Code Ann. Regs. 61-68.C.4.a.(2). And DHEC has a mandatory duty to maintain "stream flows necessary to protect classified and existing uses and the water quality supporting these uses." S.C. Code Ann. Regs. 61-68.D.1.b. The regulations provide that:

> "[e]xisting water uses and the level of water quality necessary to protect these existing uses ***shall*** **be maintained and protected** regardless of the water classification... Existing uses and water quality necessary to protect these uses are presently affected or may be affected by instream modifications or water withdrawals. **The stream flows necessary to protect classified and existing uses and the water quality supporting these uses *shall* be maintained** consistent with riparian rights to reasonable use of water."

S.C. Code Ann. Reg. 61-68(D)(1)- 61-68(D)(1)(b) (emphasis added).

These provisions give DHEC the authority to impose minimum flow requirements to GWS's operation of the Table Rock Dam *sua sponte* and absent a 401 Certification or other permit under review. The plain and clear language of these regulations vests the agency with ample and express authority to require a minimum flow release to the South Saluda River. And when "an administrative agency such as DHEC is acting for the protection of the health of the environment, the delegation of authority to that agency should be construed liberally." *City of Rock Hill v. S.C. DHEC*, 302 S.C. 161, 165, 394 S.E.2d 327, 330 (1990) (citing *City of Columbia v. Board of Health and Envtl. Control*, 292 S.C. 199, 355 S.E.2d 536 (1987)).

Regulation 61-68 thus recognizes that water withdrawal may adversely affect existing and classified uses, in this case Trout-Put, Grow and Take waters, which means the waters are suitable for supporting growth of stocked trout populations and a balanced indigenous aquatic community of fauna and flora. S.C. Code Ann. Regs. 61-68.E.2(b). The uncontradicted evidence from the S.C. Department of Natural Resources, the U.S. Fish and Wildlife Service and Appellants' expert, Dr. David Hargett, is that a minimum flow release is necessary to protect the South Saluda's use as a trout fishery. Thus Regulation 61-68 mandates that DHEC impose conditions to protect these uses, regardless of whether there is a water quality certification. In this case, however, the Court need not reach that conclusion because there is a 401 Certification on which DHEC can mandate minimum flows.

II. EVEN IF THE COURT CONCLUDED THAT THIS CASE IS MOOT, WHICH IT IS NOT, EXCEPTIONS TO THE MOOTNESS DOCTRINE APPLY

In the civil context, there are three general exceptions under which an appellate court

can issue a ruling on an appeal on an otherwise moot controversy: (1) if the issue raised is capable of repetition but evading review; (2) if the question is one of imperative and manifest urgency to necessitate establishing a rule for future conduct in matters of important public interest; and (3) if the trial court's decision may affect future events, or have collateral consequences for the parties. *McClam v. State,* 386 S.C. 49, 55(Ct. App. 2009). Appellants have shown that this case is not moot, but assuming *arguendo* that it is, this case satisfies at least two of these exceptions and is nevertheless appropriate for review.

Application of the public interest exception requires the question at issue to be (1) of "public importance," and (2) of "imperative and manifest urgency." *See Sloan v. Greenville County,* 361 S.C. 568, 570–71, 606 S.E.2d 464, 465–66 (2004).

Resolution of DHEC's authority to protect water quality in this State's rivers by imposing minimum instream flows is an issue of paramount public importance. This dispute arises in the context of DHEC's 401 Water Quality Certification review. That Certification review is the primary mechanism through which DHEC applies the water quality protections provided by South Carolina law. If the narrow interpretation of DHEC's authority adopted by the lower court stands, our State's ability to ensure the health of our public rivers by maintaining minimum water flows will be extremely diminished.

The greater public interest at stake in this appeal is evident in the facts of this case. The South Saluda River and its tributaries are used for fishing (including trout), swimming, boating, and other public recreation activities and as a source of irrigation for production of food crops. The South Saluda River, one of South Carolina's very few trout waters, is considered a jewel of the Blue Ridge Escarpment, an area that has been recognized as an ecosystem of global

significance.

As a result of GWS' operation, the flow in the South Saluda is so low that it is a fraction of the historic flow and at a fraction of the potential flow. (R.pp. 218-220, DNR Report). The hatchery-supported (surrogate) trout fishery is taxed. *Id.* With the continued low flow conditions that exist in the South Saluda River, DNR may not be able to manage the surrogate trout fishery over the long term. *Id.* With lack of adequate flows DNR believes it is possible to have a total loss of the natural, remnant trout population which hold over and remain in the stream. There is a substantial and imperative public interest in resolving the issue of DHEC's authority to protect water levels in the South Saluda River and other rivers of our State.

The exception to the mootness doctrine for issues capable of repetition yet evading review applies when a challenged action is too short in duration to be fully litigated before its cessation or expiration. The Respondents' arguments in their motion to dismiss would create an entire class of cases that will evade review: that being, Administrative Law Court cases in which the automatic stay is lifted.

South Carolina's Administrative Procedures Act provides for an automatic stay of an agency decision to issue a new permit or license when a contested case hearing is requested. S.C. Code Ann. § 1-23-600(G)(2). Under certain circumstances, that automatic stay can be lifted, as it was here, and work authorized by the permit or license can begin during the pendency of the contested case. The Respondents arguments would essentially foreclose appeal of any permit or license for which the automatic stay is lifted.

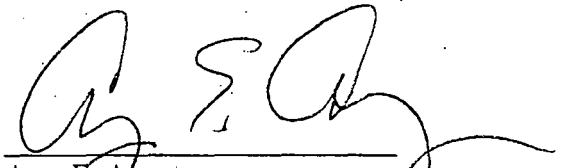
If construction of a project begins upon lifting of the automatic stay, in most cases the project would be completed before an appellate Court could render a decision on a contested

case appeal. In other words, if the project is completed while the contested case is being resolved in the ALC or while an appeal is pending before this Court, Respondent's position would be that the case is moot. By dismissing this case as moot, this Court would essentially foreclose appeal of contested cases in which the automatic stay is lifted, and deny due process rights of judicial review in the face of a clear and viable remedy.

CONCLUSION

For the reasons set forth above, Upstate Forever, the South Carolina Native Plant Society and the South Carolina Wildlife Federation respectfully request that this Court deny the Respondents' Joint Motion to Dismiss.

Respectfully submitted,



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Attorney for the Appellants

Georgetown, South Carolina

March 22, 2012

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

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

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

vs.

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

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the Appellants' Response to Motion to Dismiss upon counsel for the Respondents GWS and DHEC by placing copies of same in the United States mail, first class postage prepaid, addressed as follows:

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Greenville, SC 29605

Stephen Hightower, Esquire
DHEC Legal Office
2600 Bull Street
Columbia, SC 29201

Randolph R. Lowell, Esquire
Willoughby & Hoefer, PA
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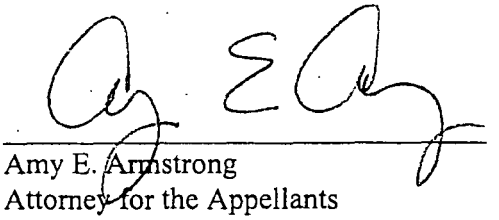
Columbia, SC 29202



Amy E. Armstrong
Attorney for the Appellants

Georgetown, South Carolina

March 22, 2012

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Rodney Connell, Barbara Connell, Edward Steers, Sally Steers, Moustafa Moustafa and Maggie Shatilla, Petitioners, vs. South Carolina Department of Health and Environmental Control, and Charleston Water System, Respondents.	DOCKET NO. 11-ALC-07-0367-CC **AFFIDAVIT OF JOSHUA P. FARMER**

COMES NOW the undersigned, who hereby avers and states as follows:

1. I am an associate with Hazen and Sawyer, P.C., Environmental Engineers and Scientists ("Hazen and Sawyer"). I have held this position since March 2012. My resume is attached hereto as EXHIBIT 1 to this Affidavit.
2. I have been employed with Hazen and Sawyer since 2001. I am a licensed Professional Engineer in South Carolina. Hazen and Sawyer have been the primary consulting engineers for the Plum Island Wastewater Treatment Plant since its original design and primary treatment studies beginning in 1965 and its construction in 1971 through today.
3. I am the Project Engineer for the 48-inch Force Main as part of the overall West Ashley Sewer Tunnel Replacement Project, which is the subject of this appeal.
4. Construction scheduling for the West Ashley Tunnel Replacement and the Influent Pump Station is estimated to require 24 months to complete following a Notice to Proceed given to the awarded contractor. Construction of the 48-inch

EXHIBIT 3

Force Main, which requires construction in the critical area per OCRM Permit OCRM-10-169-D, is estimated to require a 22-month construction schedule. Therefore, construction of the West Ashley Tunnel Replacement and Influent Pump Station and the 48-inch Force Main are to be constructed concurrently in order to minimize the length of time required to bring the new wastewater conveyance facilities online and operational within 24 months, thereby alleviating the burden on the existing West Ashley Sewer Tunnel.

5. If an appeals court were to overturn the critical area permit and order the removal of the Force Main and related facilities from the critical area and return the marsh to its condition prior to construction, it is possible to comply with such order. We estimate that the cost to comply with such an order should not exceed Five Million ($5,000,000) Dollars.

FURTHER THE AFFIANT SAYETH NOT.

Joshua P. Farmer

JOSHUA P. FARMER, P.E.

SWORN to before me this
8th of August, 2012

Notary Public for South Carolina
My Commission Expires: 4/25/22

Joshua P. Farmer
Senior Principal Engineer

Professional Record

Mr. Farmer has more than 10 years of experience in design and management of small and large water and wastewater conveyance projects for municipal facilities. These projects include varying complexity including rural and urban settings, as well as environmentally sensitive crossings. He has served as a project engineer and project manager for design and construction administration of wastewater collection systems, water distribution systems, closed and open network stormwater conveyance, and water and wastewater pumping facilities. His specific design experience includes pipeline routing, hydraulic design, piping and mechanical equipment layout, pipe material evaluation, trenchless technologies, site work, and coordination of disciplines. Mr. Farmer has followed up the majority of his design work with construction administration responsibilities. Mr. Farmer is Hazen and Sawyer's Buried Infrastructure Group Tunneling, Microtunneling, and Jacking Trenchless Technologies Practice Leader, providing both traditional open-cut and trenchless pipeline expertise corporate-wide. Mr. Farmer has received additional certificates in Trenchless Technology New Construction from the CUIRE School at University of Texas at Arlington and Horizontal Directional Drilling Good Practices Courses from Louisiana State University.

Mr. Farmer is currently serving as Hazen and Sawyer's South Carolina's Corporate Buried Infrastructure Representative. In addition to this role, Mr. Farmer provides Corporate AutoCAD Civil 3D Leadership and Business Development in South Carolina. He provides water distribution, wastewater collection, water and wastewater treatment, and stormwater engineering services for municipal clients such as Charleston Water System, Renewable Water Resources, Mount Pleasant Water Works, North Charleston Sewer District, Greenwood Metropolitan District, and the City of Columbia.

Mr. Farmer is currently serving as Project Manager for the 48" Influent Pump Station Elevated Force Main at Plum Island Water Pollution Control Plant for Charleston Water System in Charleston, SC. The project includes design, permitting, and construction management of 2,300 LF of 48-inch restrained joint and ball joint ductile iron pipe with buried and elevated structural support, temporary trestle supported construction in a coastal marsh, surge modeling, new and modification of pump station discharge headers, existing plant headworks modifications, primary power distribution alignment modifications, and 50-year facility master plan coordination.

Other ongoing responsibilities include project management of the **Renewable Water Resources in Greenville, SC Piedmont Conveyance Facilities** consisting of 12,000 linear of 14-inch force main and 12-inch reclaimed water main; project management of the development of **Mount Pleasant Water Works sewer collection system capacity, management, operations, and maintenance program** (3-year asset class engineer); lead tunnel design engineer for **Rivanna Water and Sewer in Charlottesville, VA Rivanna Pump Station Replacement Project** consisting of 1,700 linear feet of 96" sewer tunnel by tunnel boring machine in rock and mixed face conditions; technical advisor for the **City of Raleigh Crabtree Interceptor Improvements** consisting of over 50,000 linear feet of 42, 54, 60 and 72-inch gravity interceptors, force main, and 96-inch tunnel by microtunnel boring machine; technical advisor to **New York City Department of Environmental Protection Bergin Basin Sewer Project** consisting of 800 linear feet of 48-inch parallel combined sewer tunnels installed by microtunneling boring machine; technical advisor for the **Charleston Water System Thomas Island Regional Wastewater Pump Station and Collection System** consisting of the upgrade of two submersible wastewater pumping stations, 20,000 feet of 24-inch force main including horizontal directional drill and 5,000 feet of gravity sewer ranging in size from 8 to 36 inches.

Areas of Specialization

- Water and wastewater conveyance system design
- Trenchless technologies including horzontial auger boring, tunneling, microtunneling, and horzontial directional drilling
- Sewer and wastewater assessment and rehabilitation
- State and municipal environmental permitting
- Stormwater analysis and modeling and quality treatment design
- CAD production coordination (Autodesk Civil 3D Software Corporate Coordinator)

Academic Credentials

BS North Carolina State University, 2003

Professional Certifications

Professional Engineer: North Carolina, South Carolina

Employment Record

2001 - Present Hazen and Sawyer, PC

Professional Affiliations

- Member of American Water Works Association (AWWA) and SCAWWA
- Member of Water Environment Federation and SCWEA
- Member of North American Society of Trenchless Technologies
- Trenchless Technology New Construction Best Practices Certification, by the Center for Underground Infrastructure Research and Education at the University of Texas at Arlington
- Horizontal Directional Drilling Design and Construction Best Practices School and Certification (Arizona State University)

Professional Record (cont.)

Additional work completed under Mr. Farmer's direction includes project management for **City of Durham Cary Interconnection Project Booster Pump Station and Water Main** consisting of 7,500 LF of 16-inch water main and a 3-mgd Booster Pump Station to connect the drinking water distribution systems of Town of Cary and City of Durham, NC; **City of Raleigh Johnston County Interconnection Project** including 15,000 linear feet of 16-inch water main interconnecting the drinking water distribution systems of the City of Raleigh and Johnston County.

Mr. Farmer provided additional recent professional engineering services to **Western Wake Partners in Cary, NC.** He served as Project Engineer of a 65,000 LF, 60-inch diameter effluent force main and influent conveyance facilities including approximately 11,500 LF of parallel 30-inch force mains and 26,600 LF of 36-inch and 42-inch parallel force mains. Mr. Farmer served as a Technical Design Lead for the upgrade of the West Cary Influent Pump Station to 44 mgd, permitting, site selection, and design of the new 60-mgd Beaver Creek Influent Pump Station, and permitting, site selection, and design of the new 65-mgd Western Wake Reclamation Facility Effluent Pump Station. This project includes Horizontal Directional Drilling, Microtunneling, Horizontal Auger Boring, and Pipe Jacking trenchless technologies.

Other recent experience includes serving as project engineer for the design of 8,000 LF of 24-inch piping and a 12 mgd pump station to convey reuse water from the **OWASA Mason Farm WWTP** to the UNC Campus. This project had environmental, public impact, special use permitting, and construction challenges including sections through the NC Botanical Garden, residential neighborhoods, wetlands and the University of NC Campus. Project engineer of the **Atlantic Avenue – Capital Boulevard Transmission Main in Raleigh.** This $3 million project included design of approximately 6,500 LF of 30-inch transmission main that includes a railroad bore and a bore of US Highway 1. Technical advisor for the 30 to 42-inch **Liberia Interceptor Replacement, Manassas, VA, and the Fairmount Park, Phase 8 utility replacement project, Norfolk, VA.**

Additional engineering services provided by Mr. Farmer's include **City of Raleigh, NC, Glenwood Avenue Force Main Rehabilitation:** 7000 LF of a 24 and 30-inch sewer force main rehabilitation using cured-in-place pipe and dig and replace methods. Air release valves and associated vaults were replaced utilizing mechanical line stops to control flow and bypass the existing force main fed by five pump stations; **Prince William County Service Authority, VA:** Linton Hall 30-mgd Lift Station, 8,000 LF 54" Gravity Sewer and 36" Force Main, Roadway Design, Prince William County Site Development Permit; City of Greensboro, NC: North Buffalo Creek WWTP, Transfer Pump Station, 24,000 LF 54" Force Main, Access Roadway, City Of Greensboro Site Plan Permit, NC ESC Permit; **City of Raleigh, NC: 1-mgd Northeast Elevated Water Tank and 16" Water Main; NY City DEP, NY Catskill Delaware 2000-mgd Ultraviolet Facility,** 18" – 54" Gravity Sanitary and Storm Sewer; **City of Columbia, SC: Columbia Metropolitan WWTP Improvements,** Septage Hauling, Elevated Roadway and Stormwater Design, SC Erosion and Sedimentation Control, Stormwater, and Floodplain Permitting; **Greenville Utilities Commission, Greenville, NC: Southside Collection Improvements,** 2,000 LF 20" Force Main, 30,000 LF 30" FM. **City of Tallahassee, FL T.P. Smith WWTP 32.5 MGD Upgrade** closed network stormwater retrofit and extension 18' - 54" piping, infiltration pond qulity and quanity design with completed retention of 25 year storm. Project experience includes including extensive traffic control planning and coordination with regulatory and permitting agencies such as NCDOT, SCDOT, SCDHEC, OCRM, NCDENR, NCDWQ, NCDLR, and CSX Transporation.

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.

PROOF OF SERVICE

I, Leslie S. Riley, do hereby certify that I have on this 10th day of September, 2012, served one (1) copy of the foregoing **Return of Respondent Charleston Water System to Appellants' Petition for Order of Supersedeas** upon the following counsel of record by having said copy to be deposited with the United States Postal Service, first class postage prepaid and addressed as follows:

Amy E. Armstrong, Esq.
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Lucas C. Padgett, Jr., Esq., S.C. Bar No. 4319
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Attorneys for Respondent,
Charleston Water System

Dated: September 10, 2012
Charleston, South Carolina

MCNAIR
ATTORNEYS

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September 10, 2012

Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Rodney Connell, et al. vs.
Charleston Water System and SCDHEC
Administrative Law Court Case No.: 11-ALJ-07-0367-CC

Dear Ms. Kitchings:

Please find enclosed the original and six (6) copies of Return of Respondent Charleston Water System to Appellants' Petition for Order of Supersedeas, along with my Proof of Service, in regard to the above referenced matter.

I would appreciate your filing the same with the Court and returning a time-stamped copy to me in the envelope provided.

Sincerely,

McNAIR LAW FIRM, P.A.

Leslie S. Riley

LSR/rgm
Enclosure

cc: Amy E. Armstrong, Esq.
Michael G. Corley, Esq.
Bradley D. Churdar, Esq.
Lucas C. Padgett, Jr., Esq.
R. Cody Lenhardt, Jr., Esq.
F. Kin Hill, P.E., CEO, Charleston Water System

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