STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

A.O. Smith Corporation, Petitioner, vs. South Carolina Department of Health and Environmental Control and Town of McBee, Respondents.	Docket No.: 16-ALJ-07-0082-CC **ORDER GRANTING RESPONDENT'S MOTION TO DISMISS**

Appearances: W. Thomas Lavender, Jr., Esquire and Joan W. Hartley, Esquire for Petitioner

Belton T. Zeigler, Esquire and Kathryn Mansfield, Esquire for McBee

Stephen P. Hightower, Esquire for DHEC

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court ("the ALC" or "the Court") pursuant to the Request for Contested Case Hearing filed March 15, 2016 by A.O. Smith Corporation ("Petitioner" or "A.O. Smith"). Petitioner challenges the decision of the South Carolina Department of Health and Environment Control ("the Department" or "DHEC") to allow the Town of McBee ("Town" or "McBee") to operate two wells to supply water to its customers.

On March 17, 2016, McBee filed a Motion to Dismiss the contested case.[1] Petitioner filed a response on April 5, 2016, to which McBee replied on April 16, 2016. A hearing to hear arguments on the motion was held April 28, 2016 at the ALC in Columbia, South Carolina. After arguments and reviewing exhibits presented by the parties, I conclude that Respondent McBee's Motion to Dismiss should be granted.

[1] McBee also filed a Motion for Relief from Stay, which has been rendered moot by the Court's decision to grant the motion to dismiss, and thus will not be addressed.

BACKGROUND

McBee has a public water system that provides water to residents of the Town and to the manufacturing facility of A.O. Smith, located outside of Town limits. Several years ago McBee ceased operating the two wells used to supply the Town's water system and instead started purchasing water from a wholesaler, Alligator Rural Water and Sewer Company ("Alligator"). Approximately six years ago, the Town decided it was no longer satisfied purchasing water exclusively from Alligator and took steps to reopen its wells, and sought permits from the Department to begin operating the wells again. A Public Water System Operating Permit was issued to McBee by the Department on June 14, 2011. In November 2012, the Department issued McBee a construction permit, number 28475-WS, to modify one of the wells by adding, among other things, a new pump. By letter dated October 10, 2013, McBee notified A.O. Smith that the Town was working with the Department to place the two wells back into service and encouraged A. O. Smith to ask questions and voice concerns. Subsequently, in June 2014, the Department issued a second construction permit, number 29779-WS, to allow McBee to install a filtration system for the two wells. The November 2012 and June 2014 construction permits were issued without comments from A.O. Smith. During a meeting between attorneys for McBee and A. O. Smith on September 3, 2015, A. O. Smith expressed concerns about McBee's plans to operate its own water system.

In January 2016, McBee's engineer certified that the permitted construction was completed and the wells were ready to be placed into operation. On January 12, 2016, the Department issued two "Final Approval to Place into Operation" documents for the wells—one for each construction permit. Under the title "**SPECIAL CONDITIONS**" each document stated "[t]his Final Approval to Operate is being conditionally approved. The Department has concerns about the water system's capacity if only Well No. 1 and Well No. 2 are the sole sources for water supply." The final approvals also recited verbatim the system specific conditions included in the Public Water System Operating Permit issued by the Department in June 2011. Each approval additionally stated "[t]he Department recommends that the Town of McBee investigate this capacity issue to demonstrate that sufficient capacity exists before utilizing Well No. 1 and Well No. 2 as the primary supply for water."

A.O. Smith challenged the final approvals and requested final review by the South Carolina Board of Health and Environmental Control ("the Board"). On February 12, 2016, the Department issued a Statement of Staff Position opposing Petitioner's request for review. The Department's Statement of Staff Position included a narrative of the Department's actions relative to McBee's water system, and requested the Board deny the request for review because the request was not filed timely. In the Statement, the Department stated in part, "[i]ndeed, Requestor's challenge...is futile since the only issue decided by the Department in issuance of the Approvals is whether the work performed by [McBee] was done in accordance with the requirements of the previously issued Construction Permits." On February 17, 2016, the Petitioner was notified that the Board declined the request for final review. A.O. Smith subsequently filed for a contested case hearing with this Court.

ISSUE

Whether the Final Approvals issued by the Department is a staff decision subject to appeal under section 44-1-60.

DISCUSSION

This Court has jurisdiction to hear this case pursuant to sections 1-23-310 et al. of the South Carolina Code (Supp. 2015) and section 44-1-60 of the South Carolina Code (Supp. 2015) (providing "[a]n applicant, permittee, licensee, or affected person may file a request with the Administrative Law Court for a contested case hearing" following a final decision by the Department).

Respondent McBee ask this Court to dismiss Petitioner's Request for Contested Case Hearing filed on March 15, 2016 because Petitioner failed to file the request timely. Specifically, Respondent McBee contends the Petitioner did not follow the procedures outlined in section 44-1-60 of the South Carolina Code, and therefore is not entitled to a contested hearing before the ALC. Petitioner argues that McBee's motion to dismiss should be denied because a timely request for final review of the Department staff's initial decision was submitted to the Board. There is, however, disagreement among the parties as to what action by the Department constituted the staff's "initial decision." McBee asserts that the 2012 construction permit to modify well #2 and the 2014 construction permit for the installation of granulated activated charcoal filters to well #1 and well #2 constituted initial decisions. Because Petitioner did not challenge the 2012 and 2014

construction permits, McBee, and the Department, contend Petitioner cannot now challenge the approvals to operate the wells since they are not the Department staff's initial decisions.

Section 44-1-60(C) provides:

> The initial decision involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other action of the department shall be a staff decision.

S.C. Code Ann. § 44-1-60(C) (Supp. 2015).

The staff decision becomes the "final agency decision" fifteen calendar days after it has been mailed to the permit applicant and other affected persons who have requested in writing to be notified, unless a written request for final review is filed with the department. Id. at § 44-1-60(E)(1)–(2). No later than sixty calendar days after the request for final review is filed, the board is required to conduct a final review conference, and if the board declines to conduct a final review conference or fails to do so within sixty days of the request, the staff decision becomes the agency final decision. Id. at § 44-1-60(F). The applicant or other affected person may file a request for a contested case hearing with the ALC within thirty calendar days after: "(1) notice is mailed to the applicant, permittee, licensee, and affected persons that the board declined to hold a final review conference; or (2) the sixty calendar day deadline to hold the final review conference lapses and no conference has been held; or (3) the final agency decision resulting from the final review conference is received by the parties." Id. at § 44-1-60(G).

The exclusive process established by section 44-1-60 is the statutory equivalent of the judicial doctrine of exhaustion of administrative remedies. See Ward v. State, 343 S.C. 14, 18–19, 538 S.E.2d 245, 247 (2000) (citations omitted) ("The general rule is that while there are several exceptions that may be applied to the judicially-imposed exhaustion requirement, those that apply to a statutory requirement are few."). As statutorily provided, a party may only request a contested case hearing at the ALC if they have first availed themselves of the administrative remedies of requesting a final review of the initial agency decision in a timely manner. Failure to file the request for final review and participate in the Department's review process in a timely manner forecloses a contested case action at the ALC. Id. § 44-1-60.

In this matter, I find the Department staff's initial decisions were the 2012 and 2014 construction permits which were not challenged by the Petitioner. Petitioner didn't submit comments voicing concerns about the permits nor did Petitioner file requests for final review,

therefore the staff decisions were final fifteen days after they were mailed. Petitioner notes the Department was not obligated by the regulations to issue any public notice for the construction permits at issue, implying that because of this, the Petitioner's failure to comment on the construction permits should not preclude its challenge of the final approvals. While the court recognizes that public notice was not required for the permits, the Petitioner had notice and the opportunity to make comments or request notification as an affected person pursuant to section 44-1-60(E) and to challenge those decisions to the Board.[2] To allow Petitioner's untimely challenge would not only conflict with the plain language of the statute, but would also defeat the public policy purpose of finality through resolution of conflicts regarding construction projects while in the initial stages, and not after substantial investments and construction has already taken place.[3]

Petitioner also contends that, even if the final approvals are not generally subject to appeal under the statute, the special conditions included in the approvals are new, initial staff decisions that it can appeal. This Court does not agree with Petitioner's contention. The special conditions simply reiterate the requirements of the State Primary Drinking Water regulations, and the vast majority of the special conditions in the final approvals are the same special conditions included in the Public Water System Operating Permit issued in June of 2011. Both final approvals include the additional concern and recommendation for McBee to further investigate the water capacity before utilizing Well No. 1 and Well No. 2 as the primary supply for water. And, while the public water system operated by the Town has an obligation to comply with capacity requirements under the law, that matter is not before the Court at this time.[4]

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[2] Petitioner had actual knowledge of McBee's plans to operate its own water supply system, at the latest, on October 10, 2013 when McBee sent a letter to Petitioner, detailing its plans and encouraging comments or questions.

[3] Respondents aptly analogized this issue to the construction of a house. You begin by designing the house and getting a construction permit. Once all expenditures are made and construction is complete, you then get a certificate of occupancy. Petitioners are bringing this case at the time of the certificate of occupancy. To allow such a case would jeopardize the administrative process, create great uncertainty, and allow endless contested cases at each stage of a project.

[4] Petitioner argues that the Department has a duty to provide it with "adequate assurances" that enough water will continue to be provided to its facility during the resolution of contract disputes between itself, the town, and Alligator. Adequate assurance is a contract term that has nothing to do with the actions of the Department in this case. See Black's Law Dictionary, "assurance," "adequate assurance" (10th ed. 2014). Interestingly, Petitioner itself stated at

McBee also contends that Petitioner has an ulterior motive for filing this contested case that is unrelated to the construction permits or the related final approvals. Specifically, it appears the Town has indicated that at some point in the future it intends to operate the water system independent of Alligator; and in response, Alligator allegedly threatened to cut off its water to the Town and to A.O. Smith if the town continues down that path.[5] The dispute between the Town and Alligator has caused civil litigation to be filed in the circuit court, and Petitioner finds itself in the unenviable position of being caught in the middle. However, the contract disputes and other matters involved in the civil litigation have no bearing on this case and are properly decided by the circuit court. The ALC is designed to provide review of agency actions and decisions, so that citizens of this state will not be bound by state administrative action without due process. See Engaging & Guarding Laurens County's Env't (EAGLE) v. S.C. Dep't of Health & Envtl. Control, 407 S.C. 334, 344, 755 S.E.2d 444, 449 (2014) (citations omitted).

The South Carolina Supreme Court held that dismissal of a case is proper where there is a requirement to first exhaust administrative remedies as a matter of law. See. Unisys Corp. v. S.C. Budget & Control Bd., 346 S.C. 158, 176, 551 S.E.2d 263, 273 (2001) (stating that exhaustion of remedies precludes original resort to courts where an administrative agency is granted exclusive jurisdiction by the express terms of a statute); See also. MRI at Belfair, Inc. v. S.C. Dep't of Health & Envtl. Control, 07-ALJ-07-0298-CC (July 25,2007) ("I find a clear legislative intent that a party may seek contested case review before the ALC only after a party first seeks review by the Board.") (Anderson, J.) (emphasis added); S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 07-ALJ-07-107-CC (Sept. 4, 2007) ("....the timely filing of a request for final review with the [DHEC] Board is a jurisdictional prerequisite to challenging a DHEC decision.") (Geathers, J.).

Petitioner had sufficient process proscribed by the General Assembly in section 44-1-60 by which it could challenge the Department's issuance of the construction permits. Because

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the motion hearing that it in no way seeks review of the construction actually covered by the permits, but rather the capacity of the wells.

[5] During the hearing, there was some dispute about the Town's intention, however, it is apparent from statements made to this Court and contained in the exhibits that this is or has been McBee's plan.

Petitioner failed to timely pursue these administrative remedies, this Court lacks the statutory authority to conduct a contested hearing predicated upon Petitioner's filing. Therefore, the Court concludes that this matter must be dismissed.

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED** that the Respondent's Motion to Dismiss is **GRANTED**.

IT IS FURTHER ORDERED that this matter is **DISMISSED**.

AND IT IS SO ORDERED.

SHIRLEY C. ROBINSON
Administrative Law Judge

September 9, 2016
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon the parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s)
This 9 day of September 2016
By: Judge's Assistant