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THE STATE OF SOUTH CAROLINA

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In the Court of Appeals

NOV 28 2016

APPEAL FROM THE ADMINISTRATIVE LAW COURT

SC Court of Appeals

Shirley C. Robinson, Administrative Law Judge

Case No. 16-ALJ-07-0082-CC

A. O. Smith Corporation.....Appellant,

v.

South Carolina Department of Health and Environmental Control  
and Town of McBee..... Respondents.

**PETITION FOR WRIT OF SUPERSEDEAS**

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Attorneys for Appellant A. O. Smith Corporation

Pursuant to Rule 241, SCACR, Appellant A. O. Smith Corporation (“A.O. Smith”) respectfully petitions the Court to stay the September 9, 2106 Order of the Administrative Law Court (“ALC”) dismissing A.O. Smith’s contested case challenging the issuance of two agency decisions of Respondent South Carolina Department of Health and Environmental Control (“Department” or “DHEC”). A.O. Smith further requests that the Court stay the two agency decisions which authorize the operation of two public water supply wells by Respondent Town of McBee (“Town”).

### **PROCEDURAL BACKGROUND**

On January 12, 2016, DHEC issued to the Town a Final Approval to Place into Operation for Well No. 1 & 2 GAC Contactor Addition for Construction Permit No. 29779-WS (“GAC Approval”) and a Final Approval to Place into Operation for McBee Water System Well No. 2 for Construction Permit No. 28475-WS (“Well No. 2 Approval”) (collectively “Final Approvals”). On January 27, 2016, Appellant A.O. Smith Corporation (“A.O. Smith”) requested a final review of the Final Approvals by the South Carolina Board of Health and Environmental Control (“Board”) pursuant to S.C. CODE ANN. § 44-1-60(E). (*See* Exhibit 1 to Affidavit of Joan Hartley, hereinafter Hartley Aff., attached hereto as **Exhibit I**). By letter dated February 17, 2016, the Clerk of the Board notified A.O. Smith of the Board’s decision not to conduct a final review of the Final Approvals. (*See* Exhibit 2 to Hartley Aff. (Exhibit I)). On March 15, 2016, A.O. Smith filed a Request for a Contested Case Hearing in the Administrative Law Court (“ALC”) pursuant to S.C. CODE ANN. § 44-1-60(G). (*See* Exhibit 3 to Hartley Aff. (Exhibit I)). Pursuant to S.C. CODE ANN. § 1-23-600(H)(2), the Final Approvals were

automatically stayed upon the filing of A.O. Smith's request for contested case. S.C. CODE ANN. § 1-23-600(H)(2).

On March 17, 2016, the Town filed a Motion to Dismiss Request for Contested Case. (*See* Exhibit 4 to Hartley Aff. (Exhibit I)). On September 9, 2016, the ALC issued an Order Granting Respondent's Motion to Dismiss. (*See* Exhibit 5 to Hartley Aff. (Exhibit I)). Specifically, the ALC held that the Final Approvals were not staff decisions and therefore not subject to appeal under S.C. CODE ANN. § 44-1-60. The ALC thus dismissed the contested case for lack of subject matter jurisdiction.

On October 10, 2016, A.O. Smith filed and served a Notice of Appeal of the September 9, 2016 Order. Pursuant to Rule 241, SCACR, the matters decided in the September 9, 2016 Order are not stayed during the pendency of the appeal unless the ALC or this Court issues an order imposing a supersedeas. Rule 241(b)((11), (c) & (d), SCACR. On October 10, 2016, A.O. Smith filed Petitioner A. O. Smith Corporation's Motion for Stay/Supersedeas Pending Appeal ("Motion for Stay") with the ALC pursuant to Rules 205 and 241, SCACR. (A copy of October 10, 2016 Motion is attached as **Exhibit II**). On November 14, 2016, the ALC issued an Order Denying Petitioner's Motion for Stay/Supersedeas Pending Appeal ("November 14, 2016 ALC Order"). (A certified copy of the November 14, 2016 ALC Order is attached as **Exhibit III**). The ALC's denial of the Motion for Stay was based on the lack of statutory authority to hear the contested case: "If the Court may not review the actions leading to the operation of the wells, it therefore follows that the Court may not stay the operations of the well." (November 14, 2016 Order, Exhibit III, p. 2). The ALC did not rule on the evidence

presented by A.O. Smith to demonstrate that it would likely suffer irreparable harm if a supersedeas is not imposed.

### **FACTUAL BACKGROUND**

#### **A. A.O. Smith's Operations and Water Requirements**

A.O. Smith owns and operates a facility (the "Chesterfield County facility") in an unincorporated area of Chesterfield County, South Carolina, where it manufactures water heaters and boilers. The facility also includes an engineering division which designs and tests company products. The Chesterfield County facility has been fully operational since 1983 and currently employs more than 500 persons. (See Affidavit of Jeff Barron, hereinafter "Barron Aff.," attached hereto as **Exhibit IV**, ¶ 3).<sup>1</sup> A.O. Smith has critical needs for an adequate, dependable water supply for its Chesterfield County facility, including water for its manufacturing and testing operations, fire protection, and domestic uses. The facility currently operates five days per week with two shifts of eight hours each. (Barron Aff., Exhibit IV, ¶ 3). During operating hours, the facility's manufacturing, testing, and domestic water requirements are approximately 161 gallons per minute ("gpm") on an average day and approximately 239 gpm on a peak use day. (Barron Aff., Exhibit IV, ¶ 5). Additionally, A.O. Smith's fire protection system requires an additional minimum instantaneous flow for not less than two hours. (Barron Aff., Exhibit IV, ¶ 5).

In 1979, A.O. Smith entered a 30-year "non-annexation agreement" with the Town, under which the Town agreed to supply A.O. Smith with water. (Exhibit A to

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<sup>1</sup> The Affidavit of Jeff Baron is an exhibit to Exhibit A attached to Petitioner A.O. Smith Corporation's Petition for Stay/Supersedeas Pending Appeal filed at the ALC on October 10, 2016, which was attached hereto as Exhibit II. In order to simply references to exhibits which also have exhibits, the Affidavit of Jeff Baron is attached hereto as Exhibit IV.

Barron Aff., Exhibit IV). That agreement expired in 2009. (*Id.* at ¶ 3). Although A.O. Smith has continued to purchase water services from the Town, A.O. Smith is not located within the town limits of, or contiguous to, the Town and there is no contract between A.O. Smith and the Town for water service. (Barron Aff., Exhibit IV, ¶ 5). Accordingly, A.O. Smith is merely an “at-will” customer of the Town. *See Childs v. City of Columbia*, 70 S.E. 296, 298 (1911) (non-resident has no rights to water service and municipality has no duty to furnish water to a non-resident).

**B. The Town’s Public Water Supply System**

Prior to the issuance of the Final Approvals, the Town’s public water supply system (“Town System”) was generally comprised of two (2) elevated tanks, a wholesale connection to a public water system owned and operated by Alligator Rural Water & Sewer Company, Inc. (“Alligator”), and water distribution lines of differing sizes. (Affidavit of Charles K. Parnell, hereinafter “Parnell Aff.,” attached hereto as **Exhibit V**, ¶ 7).<sup>2</sup> Alligator operates a public water supply and distribution system throughout a large area of Chesterfield County, including the area where the A.O. Smith facility is located. In 1999, the Town asked Alligator to assume the operation and maintenance of the Town’s water system. (Exhibit I to Parnell Aff. (Exhibit V)). At that time, DHEC had issued repeated unsatisfactory ratings following annual inspections of the Town’s water system. (Exhibits G, H, and I to Parnell Aff. (Exhibit V)). In 1999, the Town entered into a 40-year water supply agreement with Alligator (“1999 Agreement”). (Exhibit A to Barron Aff. (Exhibit IV)). Since that time, Alligator has been the sole source of the

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<sup>2</sup> The Affidavit of Charles K. Parnell is an exhibit to Exhibit A attached to Petitioner A.O. Smith Corporation’s Petition for Stay/Supersedeas Pending Appeal filed at the ALC on October 10, 2016, which was attached hereto as Exhibit II. In order to simply references to exhibits which also have exhibits, the Affidavit of Charles K. Parnell is attached hereto as Exhibit V.

Town's water supply. In other words, although A.O. Smith receives an invoice from and pays the Town for water service, the water used at the Chesterfield County facility has come from Alligator since 1999.

The Town's water lines are primarily small in diameter, with a larger 12-inch line extending along U.S. Highway 1 between the A.O. Smith facility and the town limits near the intersection of US Highway 1 and Juniper Avenue. One of the two elevated tanks is located in the Town near the intersection of US Highway 1 and Juniper Avenue and has a capacity of 75,000 gallons. The other is located adjacent to the A.O. Smith facility and has a capacity of 250,000 gallons. (Parnell Aff., Exhibit V, ¶ 7). In comparison to the Town's total water storage capacity of 325,000 gallons, the Alligator system has approximately 2,300,000 gallons of storage capacity within two miles of the A.O. Smith facility as well as 5.7 million gallons per day of high service pumping. Additionally, Alligator has a 24-inch water line which runs along U.S. Highway No. 1 adjacent to the Chesterfield County facility. (Parnell Aff., Exhibit V, ¶ 10).

**C. The Town's Failure to Meet Regulatory Capacity Requirements**

The Town's two water supply wells were closed in the 2000s when contaminants were detected in the last operating well. (Exhibits B, F, and I to Parnell Aff. (Exhibit V)). In June 2011, DHEC issued the Town a Public Water System Operating Permit ("Town's 2011 Operating Permit"). (Exhibit H to Parnell Aff. (Exhibit V)). The Town's 2011 Operating Permit identifies the connection to the Alligator system is the only water supply authorized under the Permit. *Id.* While the Town's 2011 Operating Permit identifies the Town's well and treatment facility, the Permit clearly states that the "[w]ell

and treatment plant are offline due to EDB [ethylene dibromide] detection, and not included in the reliable system capacity analysis.” *Id.*

DHEC has never required the Town to demonstrate that the Town’s two wells alone provide sufficient capacity for the Town’s system. Section 61-58.2(B)(1)(b) of the State Primary Drinking Water Regulation provides as follows:

The total developed groundwater source capacity shall equal or exceed the design maximum day demand without pumping more than sixteen (16) hours a day. With the largest producing well out of service, the capacity of the remaining well(s) pumping twenty-four (24) hours a day shall equal or exceed the design maximum daily demand, except those systems requiring only one well. The capacity from an additional source (Surface Water Plant or Master Meter) will be included in the quantity analysis. However, emergency and stand-by wells will not be included in the quantity analysis.

S.C. CODE REG. § 61-58.2(B)(1)(b). Although the Town repeatedly advised DHEC of its intent to operate its two wells independent of the Alligator system, DHEC never required the Town to demonstrate compliance with this regulatory requirement. Instead, the Final Approvals merely expressed concerns about the Town’s ability to meet this regulatory requirement and recommended that the demonstration should be made prior to operating the Town system without the Alligator water source. The Final Approvals each contain the following identical “Special Conditions”:

This 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 Town of McBee’s Public Water System Operating Permit, Permit Number 1310004, contains the following language:

**B. System Specific Conditions**

The Town of Mc Bee shall maintain its water system in compliance with all of the applicable requirements of the State Primary Drinking Water Regulations, 61-58. The operator of record for the treatment system and the distribution system must be of the appropriate grade.

The total developed groundwater source capacity shall equal or exceed

the design maximum day demand without pumping more than sixteen (16) hours a day. With the largest producing well out of service, the capacity of the remaining well(s) pumping twenty-four (24) hours a day shall equal or exceed the design maximum daily demand, except those systems requiring only one well. The capacity from an additional source (Surface Water Plant or Master Meter) will be included in the quantity analysis. However, emergency and stand-by wells will not be included in the quantity analysis. If the Town decides to operate and maintain their water systems either by themselves, or through a different contract operator, they can not violate either the water quantity or water quality portion of the SPDWR and the SDWA. Since Alligator's contract for operation and maintenance is linked to their supply of water, this means that prior to possible independent operation (as contemplated by the preliminary engineering report dated December 6, 2010), the Town must have at least two DHEC-approved sources of sufficient quality and quantity to ensure compliance.

The Department recommends that the Town of McBee investigate this capacity issue to demonstrate sufficient capacity exists before utilizing Well No. 1 and Well No. 2 as the primary supply of water.

(Final Approvals, attached to Exhibit 1 of Hartley Aff. (Exhibit I)). The Final Approvals are clearly stated to be "conditionally approved" and state that DHEC "has concerns about the water system's capacity if only Well No. 1 and Well.No. 2 are the sole sources for water supply." Moreover, in the Special Conditions of the Final Approvals, DHEC acknowledges that the Town has submitted to the Department a preliminary engineering report ("PER") to support the use of Well No. 1 and Well No. 2 as the sole source for the McBee water system. Again, the Special Condition further acknowledges that the Town has failed to demonstrate that Well No. 1 and Well No. 2 meet the regulatory requirement for source capacity.

DHEC's comments on the PER referenced in the Special Conditions to the Final Approvals further demonstrate that the Town has failed to meet the regulatory requirements for operation of Well No. 1 and Well No. 2 as the primary source for the Town's water system, which should have been a prerequisite to issuance of any approval

to operate these wells. (Exhibit I to Parnell Aff. (Exhibit V)). In its 2011 comments on the PER, DHEC states that the “PER was written to support the Town’s desire to end its long-standing (since Dec. 1999) operations and maintenance contract with ARW [Alligator Rural Water].” Indeed, in its Motion to Dismiss, the Town acknowledges that it “submitted a Preliminary Engineering Report to DHEC regarding this plan to transition the Town’s water supply.” (Town’s Motion, p. 2, Exhibit 4 to Hartley Aff. (Exhibit I)). In its Motion to Dismiss, the Town also admitted that the purpose of permitting these two wells is “to operate its own sources of drinking water and to **cease using water purchased from Alligator.**” (Town’s Motion, p. 1, Exhibit 4 to Hartley Aff. (Exhibit I)) (emphasis added). The DHEC comments on the PER provide in relevant part as follows:

From 1995 until 1999 the McBee water system received three consecutive unsatisfactory sanitary survey ratings leading up to this O&M agreement with ARW to maintain the system for McBee. DHEC inventory records indicated the McBee system was merged with ARW system when this O&M agreement was initiated and the systems were then one system. However, during this PER review we noted McBee was still an independent system whose only connection to ARW is this agreement.

Since this agreement’s inception subsequent sanitary surveys have been satisfactory; however, keep in mind those sanitary surveys cover the entire ‘merged’ system composed of McBee and ARW but no operational issues have been noted. McBee has significant debt outstanding to USDA Rural Development (RD) for financing its system upgrades. It should be noted here that the final item of Article III, #9, of the O&M agreement between these entities states the O&M “agreement is pledged to the United States of America acting through the United States Department of Agriculture as part of security for a long to the Purchaser and Seller from USDA, Rural Development.” The purchaser is McBee and the seller is ARW; this indicates the loan’s security lies with both entities, thereby complicating McBee’s desires to hire a different operator.

McBee’s well #1 was placed offline by ARW in 2009 when “contaminants” were discovered during routine water sampling. This well is still offline and other wells in the system area are showing varying levels of EDB, DBCP, radium, MTBE and dry cleaning fluid, although all detects appear to be under the MCLs so far.

(Exhibit I to Parnell Aff. (Exhibit V)). DHEC expressed serious and multiple concerns in response to the Town's PER which contemplates operation of the Town's water system independent of Alligator. Indeed, DHEC has repeatedly conveyed such concerns to the Town. In a May 25, 2007 letter, DHEC expressed similar concerns to the Town in response to communications regarding the Town's "desire to regain operational control of the McBee water system." (Exhibit B to Parnell Aff. (Exhibit V)). In this letter, DHEC advises in relevant part:

According to our records your water system was *merged* with the Alligator Rural Water Company (Alligator) system in August of 2000, indicating to us McBee's customers became customers of Alligator and Alligator assumed ownership of McBee's water system assets. Each of the Department's final three (3) sanitary surveys of the McBee system rated it unsatisfactory due to **lack of quantity to meet the system's customers' needs**, wellhead security issues and distribution system shortcomings. The merger with Alligator led to the resolution of those problems.

Before McBee can terminate the contract with Alligator, the Town must develop and submit an approvable Business Plan that details fully how the system will be operated as a *viable* water system; this business plan must be prepared and submitted to, and approved by, the Department before we can issue an operating permit to the Town of McBee. Please go to our website at [www.scdhec.gov/eqc/water/pubs/viability.pdf](http://www.scdhec.gov/eqc/water/pubs/viability.pdf) for the guidance document that is available to assist public water systems in preparing their business plans.

In reviewing the State Primary Drinking Water Regulations (SPDWR), section R.61-58.1, you will note a *viable* water system is defined as having the technical, managerial and financial commitment to consistently comply with the SPDWR and the State Safe Drinking Water Act (SDWA). You will also note a business plan must contain a facilities plan, a management plan and a financial plan.

To become financially viable, an adequate rate structure needs to be established that allows the system's revenues to exceed its operations and maintenance costs and provide a 'cushion' for any unforeseen repairs.

(Exhibit B to Parnell Aff. (Exhibit V)) (emphasis in bold added; emphasis in italics in original). Again, DHEC acknowledges that the Town has not made met the regulatory requirements to operate the Town's water system independent of Alligator. Moreover, in the February 12, 2016 Statement of DHEC Staff Position submitted to DHEC Board in response to A.O. Smith request for final review by the Board, the DHEC staff contends that the demonstration of viability requirement does not apply to the Town. (Exhibit 4 to Affidavit of Joseph W. McGougan, attached the Town's Motion, Exhibit 4 to Hartley Aff. (Exhibit I)). Yet, DHEC's 2011 comments of the Town's PER clearly states the viability must be demonstrated for the Town's independent operation of its water system. (Exhibit I to Parnell Aff. (Exhibit V)). Both the conditions in the Final Approvals and DHEC's prior communications with the Town regarding its independent operation of its water system unquestionably acknowledge that the Town has not met the regulatory requirements for operation of the Town's water system with the Town's two wells as the primary source of potable water.

**D. Alligator's Discontinuation of Service to Town**

Alligator has repeatedly advised the Town and DHEC that it will not serve as a back-up water supply if the Town places its wells back into operation. For example, by letter dated September 3, 2013, Alligator advised the Town that it would not serve as a back-up water supply if the Town used its own wells as a source for its system and that Alligator "will physically disconnect lines [Alligator] has tied into the Town of McBee's water system." (Exhibit D to Parnell Aff. (Exhibit V)). Alligator copied DHEC on this letter and further stated that it had repeatedly communicated to DHEC and Rural Development that it would not serve as a backup to the Town's system. Indeed, the

DHEC file on the Town's public water system includes multiple communications from Alligator advising DHEC of this position. (*See, e.g.*, Exhibits E and F to Parnell Aff. (Exhibit V)). Based on these communications, A.O. Smith reasonably expects that if the Town is allowed to place its wells into service, those two wells will be the sole source of the Town's water supply. Yet, the Town has failed to demonstrate that the operation of these wells without the Alligator connections will comply with the regulatory requirement of Section 61-58.2(B)(1)(b) of the State Primary Drinking Water Regulation.

Additionally, and significantly, A.O. Smith has engaged an engineer to evaluate the capacity of the Town's system with the Town's two water wells as the primary source of potable water. According to A.O. Smith's engineer, the two water wells will not be sufficient to meet A.O. Smith's demands, including its instantaneous fire flow demands for its Chesterfield County facility. (Parnell Aff., Exhibit V, ¶ 12). A.O. Smith's engineer further opines that the capacity of the Town wells does not meet the redundancy requirements of Section 61-58.2(B)(1) of the State Primary Drinking Water Regulation. (Parnell Aff., Exhibit V, ¶ 12). The Town is thus incapable of meeting its regulatory obligations without Alligator's water supply. Alligator has advised the Town and DHEC that it will disconnect its service line to the Town if the Town places its wells back into operation. Therefore, if the Town places its wells into operation, A.O. Smith's Chesterfield County facility will be left with only the Town's wells as a source of water, and A.O. Smith's engineer has determined that these wells cannot provide an adequate supply of water for the Chesterfield County facility.

### **E. State Court Litigation**

In 2014, A.O. Smith upgraded its fire protection system and its engineer determined that the Town's water storage capacity was not sufficient to support the upgraded system. At that time, A.O. Smith entered into discussions with Alligator to provide water service to the Chesterfield County facility. (Barron Aff., Exhibit IV, ¶ 6). In May 2015, Alligator began construction of approximately 925 linear feet of 12-inch water line to connect its 24-inch line to the A.O. Smith facility water system. (Barron Aff., Exhibit IV, ¶ 7). On June 17, 2015, prior to the completion of the Alligator service line for the Chesterfield County facility, the Town commenced an action in the Court of Common Pleas for Chesterfield County, claiming the legal and exclusive right to provide water service to A.O. Smith under federal law. (See Hartley Aff., attached to Exhibit A to Motion for Stay/Supersedeas (Exhibit II)). On August 17, 2015, Alligator filed an answer and counter-claim, also claiming the legal right to provide water service to the Town of McBee and, in turn A.O. Smith, as a customer under federal law. *Id.* Pursuant to a Consent Order in this state action, Alligator has agreed that it will not provide water service directly to A.O. Smith pending the full and final resolution of that litigation. *Id.*

### **ARGUMENTS AND CITATION OF AUTHORITY**

The ALC's denial of A.O. Smith's Motion for Stay is based on the September 9, 2016 Order finding that the ALC lacks statutory authority to hear the contested case. Specifically, the ALC held that the Final Approvals are not agency decisions subject to appeal under S.C. CODE ANN. § 44-1-60. (September 9, 2016 Order, Exhibit 5 to Hartley Aff. (Exhibit I), p. 3 (citing S.C. CODE ANN. § 44-1-60(B)-(D))). In ruling on A.O. Smith's Motion for Stay, the ALC held that "[i]f the Court may not review the actions

leading to the operation of the wells, it therefore follows that the Court may not stay the operations of the well.” (November 14, 2016 Order, Exhibit III, p. 2). However, the ALC’s authority to rule on A.O. Smith’s Motion for Stay does not arise under S.C. CODE ANN. § 44-1-60. Section 1-23-610 of the South Carolina Administrative Procedures Act, S.C. CODE ANN. §§ 1-23-10 *et seq.* (“APA”), establishes the procedures and jurisdiction for an appeal of a decision of the ALC. S.C. CODE ANN. § 1-23-610(A)(1). Section 1-23-610 further provides that the ALJ decision may be stayed by order of the ALC or this Court. S.C. CODE ANN. § 1-23-610(A)(2). Accordingly, the ALC has express statutory authority to grant a stay of the September 9, 2016 Order, and the ALC unjustifiably denied A.O. Smith’s Motion for Stay.

Additionally, and significantly, even though the ALC denied A.O. Smith’s Motion for Stay based on lack of statutory authority to hear A.O. Smith’s contested case, the ALC’s ruling and the basis thereof does not constrain this Court’s authority to issue an order staying the September 9, 2016 Order and the Final Approvals at issue in this contested case. The ALC based its ruling on the appeal of agency decisions pursuant to S.C. CODE ANN. § 44-1-60. However, this Court’s jurisdiction over an appeal of a final decision of the ALC is conferred under Section 1-23-610 of the APA—not S.C. CODE ANN. § 44-1-60. *See* S.C. CODE ANN. § 1-23-610(A)(1). Again, as noted above, Section 1-23-610 expressly authorizes this Court to stay an ALC order during the pendency of an appeal to this Court.

Rule 241, SCACR, establishes the procedures and the standard for a supersedeas to stay an ALC order when a motion for a stay is “unjustifiably denied” by the ALC. Rule 241(d)(4)(C), SCACR. Additionally, the South Carolina Supreme has expressly

held that “the Court of Appeals has the power and the authority to rule upon issues arising under SCACR, including those arising under Rule 225.” *State v. Cooper*, 536 S.E.2d 870, 876, 342 S.C. 389, 398 (2000) (ruling on Court of Appeal authority over issues under former Rule 225, which is now Rule 241). “[T]he purpose . . . of a supersedeas . . . is to . . . stay proceedings in the trial court, to preserve the *status quo* pending the determination of the appeal . . . , and to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him.” *Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990) (citations omitted). In deciding a motion for supersedeas, the court “should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.” Rule 241(c)(2), SCACR. As discussed below, a supersedeas is required to preserve the *status quo* and to preserve to A.O. Smith the fruits of a meritorious appeal of the September 9, 2016 Order. Additionally, A.O. Smith will likely suffer irreparable harm if the September 9, 2016 Order and Final Approvals are not stayed during the pendency of this appeal.

A supersedeas is required to preserve the *status quo* pending this Court’s ruling on the September 9, 2016 dismissing the contested case. As discussed above, DHEC has repeatedly acknowledged that the Town has not demonstrated that it meets the regulatory requirements of the State Primary Drinking Water Regulation for operation of its water system without the wholesale connection to a public water system owned and operated by Alligator Rural Water & Sewer Company, Inc. (“Alligator”). The Final Approvals each contain the following identical “Special Conditions” which clearly acknowledge that such demonstration has not been made:

This 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 Town of McBee's Public Water System Operating Permit, Permit Number 1310004, contains the following language:

B. System Specific Conditions

The Town of Mc Bee shall maintain its water system in compliance with all of the applicable requirements of the State Primary Drinking Water Regulations, 61-58. The operator of record for the treatment system and the distribution system must be of the appropriate grade.

The total developed groundwater source capacity shall equal or exceed the design maximum day demand without pumping more than sixteen (16) hours a day. With the largest producing well out of service, the capacity of the remaining well(s) pumping twenty-four (24) hours a day shall equal or exceed the design maximum daily demand, except those systems requiring only one well. The capacity from an additional source (Surface Water Plant or Master Meter) will be included in the quantity analysis. However, emergency and stand-by wells will not be included in the quantity analysis. If the Town decides to operate and maintain their water systems either by themselves, or through a different contract operator, they cannot violate either the water quantity or water quality portion of the SPDWR and the SDWA. Since Alligator's contract for operation and maintenance is linked to their supply of water, this means that prior to possible independent operation (as contemplated by the preliminary engineering report dated December 6, 2010), the Town must have at least two DHEC-approved sources of sufficient quantity and quality to ensure compliance.

The Department recommends that the Town of McBee investigate this capacity issue to demonstrate sufficient capacity exists before utilizing Well No. 1 and Well No. 2 as the primary supply of water.

The Final Approvals are clearly stated to be "conditionally approved" and state that DHEC "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 Special Conditions of the Final Approvals includes a verbatim recital of Section 61-58.2(B)(1)(b) of the State Primary Drinking Water Regulation, which provides as follows:

The total developed groundwater source capacity shall equal or exceed the design maximum day demand without pumping more than sixteen (16)

hours a day. With the largest producing well out of service, the capacity of the remaining well(s) pumping twenty-four (24) hours a day shall equal or exceed the design maximum daily demand, except those systems requiring only one well. The capacity from an additional source (Surface Water Plant or Master Meter) will be included in the quantity analysis. However, emergency and stand-by wells will not be included in the quantity analysis.

S.C. CODE REG. § 61-58.2(B)(1)(b). DHEC acknowledges that the Town has submitted to the Department a preliminary engineering report (“PER”) to support the use of Well No. 1 and Well No. 2 as the sole source for the McBee water system. The Special Condition further acknowledges that the Town has failed to demonstrate that Well No. 1 and Well No. 2 meet the regulatory requirement for source capacity. There is no dispute that the Town has failed to demonstrate that the operation of these two wells without the Alligator connections will comply with the regulatory requirement of Section 61-58.2(B)(1)(b) of the State Primary Drinking Water Regulation.

Additionally, and significantly, Alligator has advised the Town and DHEC that it will not serve as a backup system if the Town places its wells into operation. (*See, e.g.*, Exhibits E and F to Parnell Aff.). A.O. Smith has critical needs for an adequate, dependable water supply for its facility, including water for its manufacturing and testing operations, fire protection, and domestic uses. The facility currently operates five days per week with two shifts of eight hours each. (Barron Aff., ¶ 3). During operating hours, the facility’s manufacturing, testing, and domestic water requirements are 161 gallons per minute (“gpm”) on an average day and 239 gpm on a peak use day. (Barron Aff., ¶ 5). Additionally, A.O. Smith’s fire protection system requires an additional minimum instantaneous flow for not less than two hours. (Barron Aff., ¶ 5). Without the Alligator water source, A.O. Smith’s engineer has determined that the Town’s two wells will not be sufficient to meet A.O. Smith’s demands, including its instantaneous fire flow

demands for its Chesterfield County facility. (Parnell Aff, ¶ 12). Accordingly, a stay of the September 9, 2016 Order and the Final Approvals is necessary to preserve the *status quo* and to prevent irreparable harm which A.O. Smith would likely suffer if the stay is not imposed.

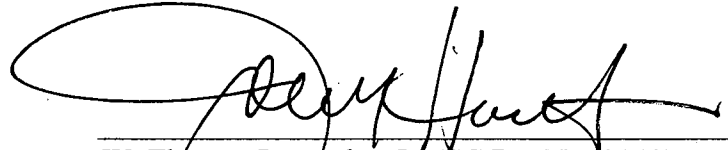
Finally, if the September 9, 2016 Order and the Final Approvals are not stayed during the pendency of this appeal, A.O. Smith would be deprived of the requested relief if this Court thereafter reverses the ALC's dismissal of the contested case. A writ of supersedeas is necessary "to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him." *Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990) (citations omitted). For the reasons stated above, A.O. Smith filed this contested case because DHEC has failed to require the Town to satisfy the regulatory requirement to demonstrate adequate capacity under Section 61-58.2(B) of the State Primary Drinking Water Regulation prior to operating its public water supply system independent of Alligator. Specifically, in the contested case, A.O. Smith requests that DHEC require the Town to demonstrate compliance with the regulatory requirement of Section 61-58.2(B) of the State Primary Drinking Water Regulation prior to operating its public water supply system independent of Alligator. In its Motion to Dismiss, the Town admitted that the purpose of permitting these two wells is "to operate its own sources of drinking water and to **cease using water purchased from Alligator.**" (Exhibit 4 to Hartley Aff., Exhibit I. p. 2) (emphasis added). Moreover, Alligator has repeatedly stated that it will not serve as a back-up source for the Town System. Accordingly, without a stay of the September 9, 2016 Order and the Final Approvals, it may be expected that Alligator will discontinue service to the Town and that the Town

will cease using water from Alligator. Therefore, even if A.O. Smith prevails in this appeal, the ALC would no longer be able to grant the relief requested in the contested case—i.e., requiring the Town to demonstrate compliance with the regulatory requirement of Section 61-58.2(B) of the State Primary Drinking Water Regulation prior to operating its public water supply system independent of Alligator. Without such relief, A.O. Smith and the other water customers of the Town are at risk. A.O. Smith's engineer has opined that the Town's wells are not adequate to meet this regulatory requirement. Without Alligator, the Town would be required to develop another source to meet the regulatory requirement for capacity and development of this source would likely take years. During that time, A.O. Smith and the other water customers of the Town would be dependent on an unreliable and inadequate public water supply system. Given the basis of the ALC's ruling on A.O. Smith's Motion for Stay and the likelihood of irreparable harm to A.O. Smith if a stay is not imposed, the ALC's unjustifiably denied A.O. Smith's Motion for Stay and this Court should grant a writ of supersedeas staying the September 9, 2016 Order and the Final Approvals.

**CONCLUSION**

Based on the foregoing arguments and citation of authority, A.O. Smith respectfully requests this Court grant a Writ of Supersedeas staying the September 9, 2016 Order and the Final Approvals, pending the outcome of this appeal.

November 28, 2016



W. Thomas Lavender, Jr. (SC Bar No. 3143)

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Attorneys for Appellant A. O. Smith Corporation

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NOV 28 2016

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT  
Shirley C. Robinson, Administrative Law Judge

Case No. 16-ALJ-07-0082-CC

A. O. Smith Corporation.....Appellant,

v.

South Carolina Department of Health and Environmental Control  
and Town of McBee..... Respondents.

VERIFICATION

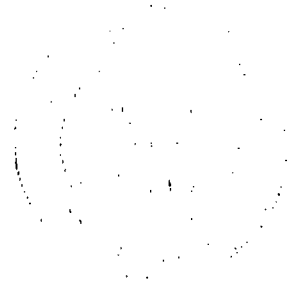
Personally appeared before me, the undersigned, who being duly sworn, deposes and states under oath that he is the agent for the Appellant in the above reference action and that he has read the contents of the foregoing Petitioner A.O. Smith Corporation's Petition For Writ of Supersedeas and that the matters contained therein are true to the best of his knowledge.

*Jeff Barron*

Jeff Barron  
Director of Operations  
A. O. Smith Corporation

Sworn to before me  
this 28 day of November, 2016

*Imogene L. Wallace Sr*  
Notary Public for Darlington Co. South Carolina  
My Commission expires: 6/27/2026



**RECEIVED**

NOV 28 2016

**SC Court of Appeals**

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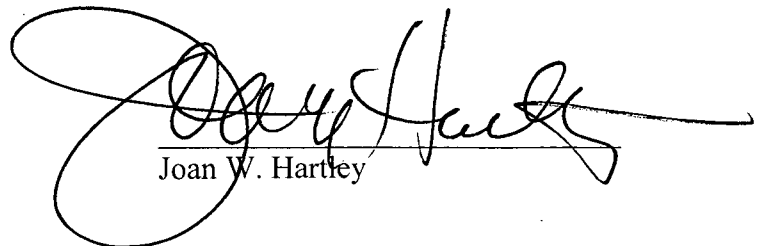
South Carolina Department of Health and Environmental Control  
and Town of McBee..... Respondents.

**PROOF OF SERVICE**

I certify that I served Petition for Writ of Supersedeas and Verification on counsel of record for Respondents by depositing a copy of them in the United States Mail, postage prepaid, on November 28, 2016, addressed to the following:

Stephen P. Hightower, Esquire  
Office of General Counsel  
South Carolina Department of Health and  
Environmental Control  
2600 Bull Street  
Columbia, SC 29201

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Kathryn Mansfield, Esquire  
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Joan W. Hartley

Joan W. Hartley  
Special Counsel  
Admitted in SC, NC

November 28, 2016

**HAND DELIVERY**

**RECEIVED**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, SC 29201

NOV 28 2016

SC Court of Appeals

Re: *A.O. Smith Corporation vs. South Carolina Department of Health  
and Environmental Control and Town of McBee*  
Docket No. 16-ALJ-07-0082-CC  
Appellate Case No. 2016-002108

Dear Ms. Kitchings:

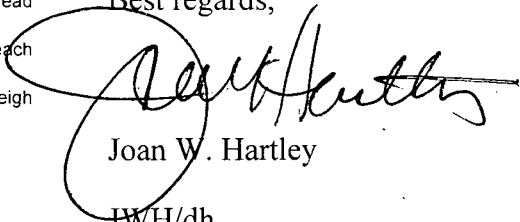
Charleston  
Charlotte  
**Columbia**  
Greensboro  
Greenville

Enclosed for filing are the original and seven copies each of Petition for Writ of Supersedeas, Verification, and Proof of Service in the above-referenced matter. Please return a clocked-in copy of each via our courier.

By copy of this letter, we are serving same on counsel of record. Thank you for your assistance in this matter

Hilton Head  
Myrtle Beach  
Raleigh

Best regards,



Joan W. Hartley

JWH/dh

cc: Stephen P. Hightower, Esquire  
Belton T. Zeigler, Esquire  
M. Todd Carroll, Esquire  
Kathryn Mansfield, Esquire