THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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

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

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

v.

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

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# REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Appellant A. O. Smith Corporation ("A.O. Smith") submits this Reply Brief in response to the briefs of Respondent South Carolina Department of Health and Environmental Control ("DHEC" or "Department") and Respondent Town of McBee ("Town") and in further support of its appeal.

## ARGUMENTS

### I. DHEC CONCEDES THAT THE FINAL APPROVALS ARE APPEALABLE DECISIONS UNDER S.C. CODE ANN. § 44-1-60.

In its brief, DHEC acknowledges that the Final Approvals to Place into Operation ("Final Approvals") at issue in this case could have been appealed, but "[a] party's challenge of a final approval to operate is limited to whether the Department accurately concluded based upon the information supplied by the applicant's professional engineer, that the authorized project complies with the requirements of the underlying construction permit." (Initial Brief of Respondent South Carolina Department of Health and Environmental Control, hereinafter "DHEC Brief," p. 13). DHEC thus now concedes that the Final Approvals are subject to appeal under S.C. CODE ANN. § 44-1-60(E), but attempts to limit any such appeal to a narrow section of the State Primary Drinking Water Regulation. There is no legal basis for such limitation.

The Final Approvals were issued pursuant to the State Primary Drinking Regulation, which was promulgated under the State Safe Drinking Water Act, S.C. CODE ANN. §§ 44-55-10 *et seq.* *See* S.C. CODE REG. § 61-58(A). The State Safe Drinking Water Act provides that "[a]ny public water system must be adequately protected and maintained so as to continuously provide safe and potable water in sufficient quantity and pressure and free from potential hazards to the health of the consumers." S.C. CODE ANN. § 44-55-40(D). Section 61-58.2(B)(1)(b) 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). This provision of the Regulation was promulgated to ensure that groundwater sources provide "safe and potable water in sufficient quantity and pressure." On the face of the Final Approvals, DHEC expressly acknowledges that the Town has not demonstrated compliance with this provision of the State Primary Drinking Water Regulation. Therefore, DHEC's failure to require compliance with this provision of the Regulation is a valid basis for challenging the Final Approvals.

## II. A.O. SMITH TIMELY FILED ITS APPEAL OF THE FINAL APPROVALS.

In appealing the Final Approvals, A.O. Smith complied with the procedures and deadlines set forth in S.C. Code Ann. § 44-1-60. DHEC issued the Final Approvals to the Town on January 12, 2016. On January 27, 2016, A.O. Smith requested a final review of the Final Approvals by the South Carolina Board of Health and Environmental Control pursuant to S.C. CODE ANN. § 44-1-60(E). (R. pp. 632-639). 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. (R. pp. 640-41). On March 15, 2016, A.O. Smith filed a Request for a Contested Case Hearing in the Administrative Law Court pursuant to S.C. CODE ANN. § 44-1-60(G). (R. pp. 642-55). Accordingly, the appeal of the Final Approvals was timely. Moreover, as discussed above, DHEC has acknowledged that the Final Approvals are an appealable decision.

Respondents do not assert that A.O. Smith failed to meet these deadlines as to the Final Approvals. Instead, Respondents argue that any challenge related to compliance with the capacity requirement in Section 61-58.2(B)(1)(b) must have been brought when the construction permits were issued. The Town cites to the Administrative Law Court holding in *Hubbard v. South Carolina Department of Health and Environmental Control* (07-ALJ-07-0594-CC May 2, 2008), for the ruling that "that parties may not use a recent agency action that incorporates a prior agency decision as a vehicle to reach backwards in time to challenge the original agency decision." (Town Brief, p. 5). As a preliminary matter, a ruling of the ALC is not binding on this Court and is not binding precedent in the ALC except as provided in Rule 70 of the Rules of Procedure for the Administrative Law Court. Moreover, the *Hubbard* case does not involve a DHEC decision under the State Safe Drinking Water Act or the State Primary Drinking Water Regulations. Finally, the *Hubbard* ruling is easily distinguished from this case. In *Hubbard*, neighbors were challenging the renewal of a license for a tattoo facility. The neighbors argued that DHEC should not issue the renewal license because the facility did not meet the location restrictions for the initial license. The ALC ruled that the distance requirements could not be a basis for appeal on the renewal license because the applicable statute expressly provides that location restrictions "do not apply to the renewal or licenses." *Id.* at *9 (citing S.C. Code Ann. § 44-34-110(A)(3)). The statute also set forth express criteria for determining when DHEC may revoke, suspend, or refuse to issue or renew a license. *Id.* at *10. The State Primary Drinking Water Regulation contains no comparable provision.

Respondents further argue that compliance with Section 61-58.2(B)(1)(b) is not a valid ground for challenging the Final Approvals because this provision of the State

Primary Drinking Water Regulation is not a requirement for issuance of a final approval to place a water system into operation. This argument rings hollow since DHEC acknowledges that Section 61-58.2(B)(1)(b) is "recited almost verbatim" in the Final Approvals, which also contain "a recommendation that the Town 'investigate [the] capacity issue to demonstrate that sufficient capacity exists before utilizing Well No. 1 and Well No. 2 as the primary supply of water.'" (DHEC Brief, p. 10). Contrary to Respondents' assertions, DHEC's issuance of the Final Approvals is not merely a perfunctory confirmation that the appropriate paperwork had been submitted to DHEC, certifying that the well and treatment equipment had been constructed in accordance with the construction permits. If that were the case, there would be no need to impose "Special Conditions" in those Final Approvals.

The Final Approvals in this instance are not simply a confirmation by DHEC that the wells and filtration system were constructed in accordance with the construction permit. The Final Approvals here 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. Therefore, even if final approvals to operate were not generally appealable, which DHEC concedes they are, DHEC's decision goes beyond the Respondents' characterization of the Final Approvals as perfunctory confirmation of limited criterial related to the approved construction permits and thus subjects the Final Approvals to appeal under S.C. Code Ann. § 44-1-60.

Additionally, the conditional nature of the Final Approvals is inconsistent with the State Primary Drinking Water Regulation. Section 61-58.1(K) of the Drinking Water Regulation sets forth the requirements for obtaining an approval to place a newly-constructed facility into operation. In its brief, DHEC contends that "[i]f the permittee submits the applicable documents required under 4 S.C. Code Ann. Regs. 61-58(K), the Department will either issue the following: a final approval, a final approval with conditions, or a denial of final approval." (DHEC Brief, p. 5). However, Section 61-58(K) of the Regulation does not authorize DHEC to issue an approval with conditions. Indeed, DHEC acknowledges that this section "is silent on whether the final approval can be conditioned." (DHEC Brief, p. 15). However, DHEC argues that its interpretation of this regulation to allow conditional approval is entitled to deference. *Id.* The staff decision to issue a conditional approval is not entitled to deference. *S.C. Coastal Conservation League v. South Carolina Dep't of Health and Envtl. Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005) (holding that the OCRM appellate panel, not the staff, was entitled to deference with respect to interpretation of its regulations). Moreover, in promulgating other regulations, DHEC has provided for conditional approval of other permits and licenses, but chose not to provide for conditional approval in the State Primary Drinking Water Regulation. *cf.* S.C. CODE REGS. § 61-67.100.E.5 (providing that a final permit decision on a wastewater facility construction permit may be a decision to issue the permit, deny the permit or issue the permit with conditions); S.C. CODE REGS. § 61-62.5 St. 7(q)(2) (an application for an air permit may be approved, approved with conditions, or disapproved). Therefore, DHEC clearly lacks regulatory authority to issue a conditional

approval to place the wells and treatment system into operation. As such, A.O. Smith is entitled to review of such conditions under Section 44-1-60.

## III. THE TOWN'S PUBLIC WATER SYSTEM IS SUBJECT TO THE CAPACITY REQUIREMENT UNDER SECTION 61-58.2(B)(1)(b).

In their briefs, Respondents argue that Section 61-58.2(B)(1)(b) is not applicable to the authorization to operate the Town's wells and treatment system because this provision of the Regulation does not apply to an existing public water system. (DHEC Brief, p. 16; Town Brief, pp. 9-11). Specifically, Respondents contend that the Town's public water system is an existing system which is only subject to the capacity requirements of S.C. CODE REG. §§ 61-58.7(C)(12) and (D)(12). Contrary to this contention, Section 61-58.2 clearly applies to any expansion or modification of the Town's public water system. Specifically, Section 61-58.2(A) identifies the applicability of this section of the Regulation as follows:

> This regulation applies to **all new construction and all expansions or modifications of existing public water systems**. If the Department can reasonably demonstrate that safe delivery of potable water to the public is jeopardized, a system may have to upgrade its existing facilities in order for an expansion or modification to meet the requirements of this regulation. This regulation prescribes **minimum design standards for the construction of groundwater sources and treatment facilities**.

S.C. CODE REG. § 61-58.2(A) (emphasis added). Respondents argue that this regulation is not applicable to the equipment authorized to operate under the Final Approvals because that equipment did not constitute an expansion of the existing system. As a preliminary matter, the equipment authorized to operate under the Final Approvals is an expansion of the Town's system. The Regulation defines expansion as follows:

> "Expansion" means installation of additions, extensions, changes, or alterations to a public water system's **existing source**, transmission, storage or distribution facilities which **will enable** the system to increase

in size its existing service area and/or number of authorized service connections.

S.C. CODE REG. § 61-58(B)(65) (emphasis added). The Final Approvals authorize operation of a new pump system, chemical feed system, and tank for Well No. 2 and GAC Contactors for Well No. 1 and Well No. 2. (R. pp. 636-39). Prior to the issuance of the Final Approvals, the metered water from the Alligator system was the only source for the Town's public water system. While the Town's Operating Permit includes a reference one groundwater well, the Permit states that the well was offline due to EDB detection. (Operating Permit, R. p. 472). The Operating Permit did not include the second well or the GAC contactor treatment system authorized by the Final Approvals. The Town argues that Section 61-58.2 is not applicable to the Final Approvals because "[a] capacity analysis, however, is only required when an entirely ***new*** public water system is proposed or when the owner of an existing system seek to expand its system to serve ***new*** customers." (Town Brief, p. 10 (emphasis in original)). The Town imposes an intent requirement to the definition of "expansion" which does not exist. Any additions and alterations to an existing groundwater source are an expansion if such additions are of the nature that "will enable" the system to increase its service area or connections. Therefore, the Final Approvals were for an expansion of the Town's system.

Moreover, even if the Final Approvals did not authorize operation of an "expansion," which it does, the Final Approvals clearly authorize operation of equipment which constitutes a modification of the Town's existing system. Section 61-58.2(A) expressly provides that this provision of the Regulation "applies to all new construction and all expansions **or modifications** of existing public water systems." S.C. CODE REG. § 61-58.2(A) (emphasis added). The addition of another groundwater source and treatment

facilities, neither of which is authorized by the Town's Operating Permit, is at the very least a modification of the system. As such, the equipment authorized by the Final Approvals must meet the minimum design requirements of Section 61-58.2, including the capacity requirement in Section 61-58.2(B)(1)(b). Under the Town's interpretation of the Regulation, an existing public water system could add new groundwater sources and treatment facilities and avoid compliance with the requirements of Section 61-58.2, which governs "Groundwater Sources and Treatment," as long there is no intent to add new customers. This is clearly contrary to the purpose of the Regulation and the State Safe Drinking Water Act.

DHEC acknowledges that the Final Approvals are subject to appeal under S.C. CODE ANN. § 44-1-60. Contrary to DHEC's assertions, the Final Approvals must be issued in compliance with all applicable provisions of the State Primary Drinking Water Regulation, including the capacity requirement in Section 61-58.2(B) of the Regulation. Accordingly, A.O. Smith is entitled bring a contested case to challenging DHEC's issuance of the Final Approvals for failure to comply with Section 61-58.2(B)(1)(b).

## IV. A.O. SMITH HAS THE LEGAL RIGHT TO APPEAL THE FINAL APPROVALS.

In its brief, DHEC contends that A.O. Smith is not entitled to bring a contested case to compel compliance with the State Primary Drinking Water Regulations. DHEC asserts that the State Safe Drinking Water Act "expressly authorizes only the Department to comment actions for civil penalties and/or injunctive relief for a person's failure to comply with permit conditions." (DHEC Brief, p. 17). A.O. Smith is not seeking to enforce a permit condition. A.O. Smith is challenging the Department's decision to issue

the Final Approvals with special conditions which expressly acknowledge that the Town has failed to demonstrate compliance with the applicable regulations.

Additionally, DHEC argues that the A.O. Smith may not seek to challenge the conditions of the Final Approvals "because the regulation does not create [or] impact a right, duty, or privilege of Appellant's that must be determined by an agency." (DHEC Brief, p. 16). Our appellate courts have long recognized that a group or individual may challenge the Department's issuance of a permit or authorization to a third-party as long as that group or individual can establish standing to bring the challenge. *See, e.g., Smiley v. South Carolina Dep't of Health and Envtl. Contro*l, 374 S.C. 326, 649 S.E.2d 31 (2007) (individual had standing to challenge issuance of an OCRM permit for excavation on a public beach which the individual used for rehabilitative jogging); *South Carolina Wildlife Federation v. South Carolina Coastal Council*, 296 S.C. 187 (1988) (environmental groups and league of women voters had standing to maintain action to challenge certification for residential development project, which involved dredging canal through freshwater wetlands). In order to establish standing, a party must demonstrate (1) an injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) the likelihood that the injury will be redressed by a favorable decision. *Sea Pines Ass'n for the Prot. of Wildlife v. South Carolina Dep't of Natural Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). In its Request for Contested Case Hearing, A.O. Smith clearly stated the basis for standing to challenge the Final Approvals:

> A.O. Smith has standing to bring this action pursuant to S.C. Code Ann. § 44-1-60 as a party aggrieved by a staff decision. A.O. Smith is currently an at-will "retail" customer of the Town which has since approximately 1999 has been supplied potable water by Alligator Rural Water & Sewer Company, Inc. ("Alligator System") and will be directly impacted by the

> Town's operation of its water system without adequate potable water supplied by the Alligator System.

(Request for Contested Case Hearing, pp. 1-2, R. pp. 642-43). Neither Respondent has challenged A.O. Smith's standing; however, there is no question that A.O. Smith has standing to challenge DHEC's issuance of the Final Approvals. On the face of the Final Approvals, DHEC acknowledges that the Town has not demonstrated compliance with the capacity requirements in Section 61-58.2(B)(1)(b). In its brief, the Town states that any deficiency in the capacity of the Town's public water system would require "drilling an additional well at a cost on the order of $250,000 to $500,000." (Town Brief, p. 13). However, permitting and construction of the additional well would take a substantial period of time. During that time, A.O. Smith would be left without reliable water service for its operations. Therefore, A.O. Smith is entitled to a contested case hearing on DHEC's issuance of the Final Approvals.

## V. THE TOWN'S ARGUMENTS ON THE MERITS ARE NOT PROPERLY BEFORE THIS COURT.

In its brief, the Town argues in great detail that the Town can demonstrate that its two wells are sufficient to meet the capacity requirement in Section 61-58.2(B)(1)(b) of the Regulation. (Town Brief, pp. 14-19). The Town presents this argument as an additional sustaining ground. However, such arguments go to the merits of the case, which were not presented or decided by the ALC. A.O. Smith's contested case was dismissed for lack of subject matter jurisdiction prior to any discovery. No party moved for summary judgment. The affidavits cited by the Town in its Brief were affidavits presented to the ALC on the Town's motion to lift the automatic stay. (Town of McBee's Motion for Relief from Stay, R. pp. 89-175). These affidavits were not submitted in support of any motion for a dispositive ruling by the ALC. Moreover, the Town would not be entitled to a ruling on

such motion at this stage. A.O. Smith offered the Affidavit of Charles K. Parnell, which clearly creates a genuine issue of material facts on the substantive grounds for A.O. Smith's contested case. (Affidavit of Charles K. Parnell, attached to Petitioner A.O. Smith Corporation's Response in Opposition to Town of McBee's Motion for Relief from Stay, R. pp. 221-487). Accordingly, the Town's arguments of the merits of the contested case as an additional sustaining ground is premature and is not supported by the record in this case.

## CONCLUSION

A.O. Smith respectfully requests that this Court reverse the decision of the ALC and remand this matter to the ALC for a contested case hearing on the Final Approvals issued to the Town on January 12, 2016.

March 29, 2017

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**CERTIFICATE OF COUNSEL**

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The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

March 29, 2017

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# PROOF OF SERVICE

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I certify that I served Brief of Appellant and Reply Brief of Appellant by depositing a copy in the United States Mail, postage prepaid, on March 29, 2017, addressed to the following:

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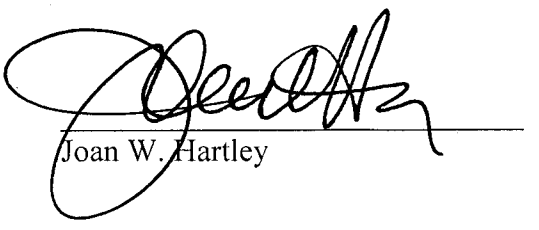

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**HAND DELIVERY**

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Re: *A.O. Smith Corporation v. 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:

Enclosed for filing are the original and 15 copies each of Brief of Appellant, Reply Brief of Appellant, and Record on Appeal. Also enclosed for filing is Proof of Service of the Brief of Appellant and Reply Brief of Appellant. Please return a clocked-in copy of each via our courier.

Thank you for your assistance in this matter

Best regards,

Joan W. Hartley

JWH/dh

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