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SC Court of Appeals

IN 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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FINAL BRIEF OF RESPONDENT  
SOUTH CAROLINA DEPARTMENT OF  
HEALTH AND ENVIRONMENTAL CONTROL

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March 28, 2017  
Columbia, South Carolina

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## STATEMENT OF ISSUES ON APPEAL

1. Whether the Administrative Law Court correctly determined that the contested case proceeding commenced by Appellant to challenge the Department's issuance of final approvals to operate the Town of McBee water system should be dismissed a matter of law.
2. Whether the final approvals to operate are decisions effecting legal rights, duties, or privileges of Appellant which must be determined after a contested case hearing.
3. Whether the Department's decision to issue to the Town final approvals to operate it water system with conditions is entitled to deference.
4. Whether the Administrative Law Court's dismissal of the contested case is appropriate given that the final approvals to operate issued by the Department contain recitations of a regulatory provision applicable only to the matters addressed by the Department when it issued the underlying construction permits.
5. Whether the language in the final approvals to operate reciting Regulation 61-58.2(B)(1)(b) creates a legal right, duty, or privilege in favor of Appellant to challenge the issuance of the final approvals in a contested case proceeding on the ground that the water system is not in compliance with the recited regulatory provision.

## STATEMENT OF THE CASE

Appellant is appealing the Administrative Law Court's ("ALC") Order Granting Respondent's Motion to Dismiss ("Motion to Dismiss") Appellant's contested case Petition. The ALC dismissed the Petition on the grounds that Appellant failed to file a timely challenge to the underlying permits issued by Respondent South Carolina Department of Health and Environmental Control ("Department" or "SCDHEC") and that the Court lacked the statutory authority to extend Appellant's time to request a contested case hearing. R. pp. 12-13 (Motion to Dismiss pp. 6-7 of 7.)

On January 12, 2016, the Department issued to Respondent Town of McBee ("Town" or "McBee") Final Approval to Place into Operation for Construction Permit No. 28475 and Final Approval to Place into Operation for Construction Permit No. 29779-WS (collectively referred to as the "Final Approvals"). R. pp 188 and 190 (Town's Motion to Dismiss Request for Contested Case Hearing, Exhibits A and B, respectively.) Appellant filed a Request for Final Review ("RFR") with the Clerk of the South Carolina Board of Health and Environmental Control ("Board") on January 27, 2016. On February 17, 2016, the Clerk of the Board served written notification to the parties that the Board had declined to "conduct a Final Review Conference in response to Appellant's request." R. pp. 640-41 (Request for Contested Case Hearing, Exhibit B p. 1 of 2 (Letter of Lisa Longshore).)

Appellant filed its Request for Contested Case Hearing with the ALC on March 15, 2016. R. pp. 642-55 (Motion to Dismiss p 1 of 7.) On March 17, 2016, Respondent Town filed a Motion to Dismiss to which Appellant filed a response on April 5, 2016, and the Town filed a reply on April 16, 2016. *Id.* A hearing on the Town's Motion was held on April 28, 2016. At the hearing, the Town and Appellant argued for and against the issuance

of the motion, respectively, and the Department argued in support of the Town's Motion to Dismiss. R. pp. 30-34 (Transcript pp. 16-20.) On May 5, 2016, the ALC issued an Order Granting Respondent's Motion to Dismiss. R. pp. 1-5.

Appellant filed a Motion for Reconsideration on May 15, 2016 challenging the ALC's dismissal. R. pp. 612-18. On June 10, 2016, the Town filed its Response in Opposition to Appellant's Motion for Reconsideration. R. pp. 619-23. The Department filed a Memorandum of Law in Opposition to Appellant's Motion for Reconsideration on June 13, 2016. R. pp. 624-31. In response to Appellant's Motion, the ALC issued an Order Vacating the Order Granting Respondent's Motion to Dismiss, which was filed on July 13, 2016. R. p. 6. Following reconsideration, the ALC filed another Order Granting Respondent's Motion to Dismiss on September 9, 2016. R. pp. 7-13.

## STATUTORY/REGULATORY FRAMEWORK FOR DEPARTMENT REVIEW

### State Safe Drinking Water Act Permit Requirements

The issuance of a Public Water System Construction Permit is governed by the requirements set forth in the State Safe Drinking Water Act, S.C. Code Ann. § 44-55-10 et seq. (Rev. 2002 and Supp. 2015) and the State Primary Drinking Water Regulations (“Drinking Water Regs.”), 4 S.C. Code Regs. 61-58 (2011 and Supp. 2015). Under these authorities, a public water system is required to apply for and obtain a permit from the Department to construct, expand, or modify the system. 4 S.C. Code Regs. 61-58.1(B)(1). A new public water system seeking a construction permit must “demonstrate to the satisfaction of the Department that the new system will be a ‘viable water system’ as defined in R.61-58(B).” 4 S.C. Code Regs. 61-58.1(B)(4). However, an existing water system, such as in this case, is not required to demonstrate viability again when it seeks a construction permit to expand or modify the system since such systems have previously been determined to be a viable water system. *See id.*

In order to place permitted construction into operation, the water system must, in pertinent part, meet the following requirements:

- (1) Newly-constructed facilities shall not be placed into operation until written approval is issued by the Department, except where allowed by a general construction permit. Upon completion of the permitted construction, the professional engineer shall make arrangements with the Department for final inspection. Prior to this inspection, the professional engineer shall submit to the Department a letter certifying that construction is complete and in accordance with the approved plans and specifications. This letter must specifically identify the project by permit number. If the project was not completed in accordance with the approved plans and specifications, the professional

engineers shall so state and shall outline any deviations to the permitted project. No written approval shall be issued to place a drinking water construction project into operation until written approval is obtained to place any associated wastewater construction into operation. The following information, where applicable, shall be submitted with the professional engineer's letter of certification:

\* \* \*

4 S.C. Code Ann. Regs. 61-58.1(K). If the permittee submits the applicable documents required under 4 S.C. Code Ann. Regs. 61-58.1(K), the Department will either issue the following: a final approval, a final approval with conditions, or a denial of final approval.

#### **SCDHEC Appellate Procedures**

The appellate procedures for appealing Department permitting decisions are set forth in Section 44-1-60 of the South Carolina Code of Laws. Specifically, the statute provides that “[a]ll department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the department which may give rise to a contested case shall be made using the procedures set forth in this section.” S.C. Code Ann. § 44-1-60(A) (Supp. 2015). The term “contested case” is not defined in Section 44-1-60, rather it is defined in the Administrative Procedures Act as “a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.” S.C. Code Ann § 1-23-310(3); *see Amisub of South Carolina, Inc. v. South Carolina Department of Health and Environmental Control*, 403 S.C. 576, 587, 743 S.E.2d 786, 792 (2013). If the Department issues a decision in which the legal rights of a party are required to be determined after an opportunity for hearing, the Department is required to send notice of the decision by certified mail, return receipt

requested to the applicant, permittee, licensee, and affected person, who requested in writing to be notified. S.C. Code Ann. § 44-1-60(E)(1). The Department's decision becomes the final agency decision fifteen calendar days after notice of the decision has been mailed to the applicant, permittee, licensee, or affected person, unless a written RFR accompanied by a filing fee is filed with the Department by the applicant, permittee, licensee, or affected person. S.C. Code Ann. § 44-1-60(E)(2). Filing of the RFR and fee with the Department is complete when they are received by the Clerk of the South Carolina Board of Health and Environmental Control ("Board") in accordance with the statutory timeframe for seeking review. The jurisdiction of the ALC to review a final agency decision is restricted to the petition of the applicant, permittee, licensee, and affected person that filed a timely RFR within fifteen calendar days after notice of the decision was mailed under Section 44-1-60(E). *See* S.C. Code Ann. §§ 44-1-60(G); *see also Simpson v. Sanders*, 314 S.C. 415, 417, 445 S.E.2d 93, 94 (1994) (finding that strict adherence to a statute of create a right is necessary to obtain the benefits of the right); *Hill v. South Carolina Department of Health and Environmental Control and South Carolina Electric and Gas*, 2010 WL 5781666 \* 3 (S.C. Admin. L. Judge. Div.) (finding that the adherence to the statutory time limits in a statute that creates a cause of action a condition precedent to the maintenance of the cause of action).

## STATEMENT OF FACTS

In general, the salient facts on appeal are that since 2010, the Town has sought authorization to produce its own water resources independent of its current supplier Alligator Rural Water Service (“Alligator”). The Department approved the Town’s application to produce its own water and the Town’s subsequent applications to modify the wells that will produce the water. The Department issued Final Approval to the Town authorizing the operation of the approved modified water system. Specifically, on December 7, 2010, the Town submitted to the Department a Preliminary Engineering Report (“PER”) for review. R. pp. 164 and 182 (Town’s Motion to Dismiss, Exhibit 1 p. 2 and Town’s Motion for Relief from Stay, Exhibit 4 p. 2.) According to the PER, the Town intended to “use its own sources of drinking water and no longer use water from the Alligator Rural Water System for operation and maintenance.” R. pp. 164 and 182 (Town’s Motion to Dismiss, Exhibit 1 p. 2 and Town’s Motion for Relief from Stay, Exhibit 4 p. 2.) On June 13, 2011, the Department approved the Town’s PER and on June 14, 2011, the Department “issued a Public Water System Operating Permit to the Town of McBee.” R. pp. 164 and 182 (Town’s Motion to Dismiss, Exhibit 1 p. 2 and Town’s Motion for Relief from Stay, Exhibit 4 p. 2.) The Public Water System Operating Permit (“Operating Permit”) issued based on the PER was not challenged by Appellant. R. pp. 164 and 182 (Town’s Motion to Dismiss, Exhibit 1 p. 2 and Town’s Motion for Relief from Stay, Exhibit 4 p. 2.)

### **Construction Permit 28475-WS: Issued November 11, 2012**

On January 10, 2012, the Town submitted an application to the Department for a permit to modify Well No. 2. R. pp. 164 and 182 (Town’s Motion to Dismiss, Exhibit 1 p.

2 and Town's Motion for Relief from Stay, Exhibit 4 p. 2.) The application called for the modification of the well by installing 1) a new 200 gpm<sup>1</sup> submersible pump at a depth of 228 feet in the well shaft; 2) a HDLPE (high-density linear polyethylene) tank; 3) sodium hypochlorite feed system; 4) two chemical feed pumps; and 5) associated piping and appurtenances. R. pp. 164 and 182 (Town's Motion to Dismiss, Exhibit 1 p. 2 and Town's Motion for Relief from Stay, Exhibit 4 p. 2.) The Department approved the application on November 11, 2012, and issued Construction Permit 28475-WS to the Town authorizing construction of the modifications for Well No. 2. R. pp. 164 and 182 Town's Motion to Dismiss, Exhibit 1 p. 2 and Town's Motion for Relief from Stay, Exhibit 4 p. 2.) As with the issuance of the Operating Permit, Appellant did not challenge the Department's issuance of Construction Permit 28465-WS or the data supporting the issuance of the permit. R. pp. 164 and 182 (Town's Motion to Dismiss, Exhibit 1 p. 2 and Town's Motion for Relief from Stay, Exhibit 4 p. 2.)

On October 10, 2013, the Town notified Appellant in writing of its plans to operate its own water supply system instead of purchasing water from Alligator Rural Water System.<sup>2</sup> R. p. 11 (Order Granting Respondent's Motion to Dismiss p. 5 of 7 fn. 2.) A month later on November 11 and 13, 2013, the Town conducted testing of the water pumped from the two wells that it was authorized to use under the PER to supply water to its customers. R. pp. 164 and 182 (Town's Motion to Dismiss, Exhibit 1 p. 2 and Town's Motion for Relief from Stay, Exhibit 4 p. 2.) The testing identified the presence of ethylene dibromide ("EDB") and dibromo-3-chloropropane ("DBCP") in the water. R. pp. 164 and

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<sup>1</sup> The term "gpm" refers to gallons per minute.

<sup>2</sup> Appellant has argued that it did not file a timely challenge to the construction permits underlying the Final Approvals to operate because it did not have notice of the Town's intention to seek the permits. App. Br. at 16.

182 (Town's Motion to Dismiss, Exhibit 1 p. 2 and Town's Motion for Relief from Stay, Exhibit 4 p. 2.) In order to render the water potable, the Town sought permission from the Department to remove the contaminants by active treatment. R. pp. 164 and 182 (Town's Motion to Dismiss, Exhibit 1 p. 2 and Town's Motion for Relief from Stay, Exhibit 4 p. 2.)

**Construction Permit 29779-WS: Issued June 30, 2014**

On December 20, 2013, the Town submitted to the Department an application proposing to remove the EDB and DBCP contaminants from Well Nos. 1 and 2 by filtering the water through two granulated activated carbon ("GAC") contactors and associated appurtenances. R. pp. 164 and 182 (Town's Motion to Dismiss, Exhibit 1 p. 2 and Town's Motion for Relief from Stay, Exhibit 4 p. 2.) The Department reviewed the application and on June 30, 2014, issued Construction Permit 29779-WS, to the Town authorizing the Town to modify both wells to allow the filtering of the water through GAC contactors. R. pp. 164 and 182 (Town's Motion to Dismiss, Exhibit 1 p. 2 and Town's Motion for Relief from Stay, Exhibit 4 p. 2.) As with the Department's approval of the PER and its issuance of issuance of the Operating Permit, and its Construction Permit 28475-WS, the Appellant did not challenge the Department's issuance of Construction Permit 29779-WS not the Department's review of the data supporting the issuance of the permit. R. pp. 164 and 182 (Town's Motion to Dismiss, Exhibit 1 p. 2 and Town's Motion for Relief from Stay, Exhibit 4 p. 2.)

**Final Approvals: Issued January 12, 2016**

On January 12, 2016, the Department received two letters from one Joseph McGougan, P.E., certifying the completion of the modifications authorized by Construction Permits 28475-WS and 29779-WS by the Town and that the construction and

installation was in accordance with the specifications set forth in the respective permits.<sup>3</sup> R. pp. 164-165 and 182-183 (Town's Motion to Dismiss, Exhibit 1 p. 2 and Town's Motion for Relief from Stay, Exhibit 4 p. 2.) On the same date, the Department issued Final Approvals for the "operation of . . . potable water system[s] permitted under Construction Permit" No. 29779 and No. 28475. R. pp. 164-165 and 182-183 (Town's Motion to Dismiss, Exhibit 1 p. 2 and Town's Motion for Relief from Stay, Exhibit 4 p. 2.) The Final Approvals each contained language that recited almost verbatim the language contained in 4 S.C. Code Ann. Regs. 61-58.2(B)(1)(b) and contained 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," prior to disconnecting from Alligator's system. R. pp. 170, 172, 188 and 190 (Appellant's RFR, Appendix A and Request for Contested Case Hearing, Exhibit A.)

#### **Request for Final Review and the Department's Response**

On January 27, 2016, Appellant filed a RFR with the Clerk of the Board. In its RFR, Appellant cited eleven grounds for the Board to reverse the decision of Staff to issue the Final Approvals. R. pp. 633-34 (Appellant's RFR pp. 2-3.) Each of the eleven grounds cited were based upon a claim that the Department had failed to ensure that the Town's water system complied with the technical provisions found in 4 S.C. Code Ann. Regs. 61-58.2(B). R. pp. 633-34 (Appellant's RFR pp. 2-3.)

The Department filed its Staff Response to the Appellant's RFR on February 12, 2016. In its Staff Response, the Department stated, in pertinent part, the following:

With regard to the first ground [(the claims raised by Requestor are time barred since they should have been raised

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<sup>3</sup> Mr. McGougan is a licensed South Carolina professional engineer and holds Registration No. 12335.

years ago when the Construction Permits were issued’)], Requestor set forth 11 bases for challenging the Final Approvals to Place Into Operation for Construction Permits 28475-WS and 29779-WS. **These claims allege violations of the requirements of R.61-58.2(B) or other technical issues that were reviewed and acted upon by the Department during the decision making process that culminated in the Department’s issuance of Construction Permits 28475-WS and 29779-WS, in 2012 and 2014, respectively. The Construction Permits constituted Department decisions, pursuant to the appellate requirements contain in the S.C. Code Ann. § 44-1-60 (Supp. 2015), and the only way that Requestor could appeal them was to file its RFR within 15 days of the service of these documents to the Town by certified mail. S.C. Code Ann. § 44-1-60(E)(2). Since Requestor failed to file a RFR within 15 days of the mailing of the Construction Permits, Requestor is now barred from challenging the decision contained in the Permits by challenging the Department’s ministerial issuance of the Final Approvals to Place Into Operation. Indeed, Requestor’s challenge of the Department decision to issue Final Approval for the Construction Permits is futile since the only issue decided by the Department in issuance of the Approvals is whether the work performed by the Town was done in accordance with the requirements of the previously issued Construction Permits.**

R. pp. 165 and 183 (Staff Response) (emphasis added.)

On February 17, 2016, the Clerk of the Board served written notice upon the parties that the Board had declined Appellant’s RFR and a final review conference would not be held. R. pp. 640-41 (Letter from Lisa Lucas Longshore, dated February 17, 2016.) On March 15, 2016, Appellant filed a Request for Contested Case Hearing with the ALC. R. pp. 642-55 (Request for Contested Case Hearing pp. 1-12.)

## ARGUMENTS

### I. THE ALC CORRECTLY DETERMINED THAT THE CONTESTED CASE PROCEEDING COMMENCED BY APPELLANT SHOULD BE DISMISSED AS A MATTER OF LAW.

In its Order Granting Respondent's Motion to Dismiss, the ALC concluded that the matter should be dismissed based on its findings that "the Department staff's initial decision were the 2012 and 2014 construction permits which were not challenged by the Petitioner" and "[t]he 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." R. pp. 10-11 (Order Granting Respondent's Motion to Dismiss pp. 4-5 of 7.) The ALC made these findings after careful consideration based on the filed pleadings and the arguments of counsel at the hearing on the matter and reconsideration following Appellant's Motion for Reconsideration and the responses filed by the town and by the Department.

#### **A. Final Approvals are not decisions in which the legal rights, duties, or privileges of Appellant are required by law to be determined by an agency after an opportunity for a hearing.**

Appellant's claim that the ALC erred, because the Final Approvals are Department decisions within the scope of the appellate procedures governing appeals of Department decisions, is without merit. While final approvals to operate are decisions that can be challenged in a contested case proceeding, as discussed below, such challenge is limited and is not available under the facts in this case.

As noted, contested case proceedings are limited to those decisions "in which the legal rights, duties, or privileges of a party are required by law to be determined by an

agency after an opportunity for hearing.” S.C. Code Ann § 1-23-310(3); *see Amisub of South Carolina, Inc.*, 403 S.C. at 587, 743 S.E.2d at 792. 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. *See* 4 S.C. Code Ann. Regs. 61-58.1(K). Specifically, Appellant is limited to challenging whether the Town installed the following: 1) a new 200 gpm submersible pump at a depth of 228 feet; 2) a hypochlorite feed system that included a 200 gallon HDPE tank and two chemical feed pumps; and 3) associated piping and appurtenances, approved under Construction Permit 28475, issued in 2012. *See* Town’s Motion to Dismiss Request for Contested Case Hearing, Exhibits A; Similarly, Appellant’s challenge is limited to whether the Town modified Wells No. 1 and No. 2 by installing a 366 cubic foot GAC contactor for Well No. 1 and installing a 241 cubic foot GAC contactor for Well No. 2, as approved underlying Construction Permit No. 29779, issued in 2014. R. p. 190 (Town’s Motion to Dismiss Request for Contested Case Hearing, Exhibits.) Appellant’s eleven claims, however, relate only to whether Wells No. 1 and No. 2 are capable of meeting “the requirements of S.C. Regulation 61-58.2(B).” R. pp. 645-46 (Request for Contested Case Hearing, pp. 4-5.) *see* App. Br. p. 18.

Matters regarding S.C. Regulation 61-58.2(B) cannot be addressed in a challenge of the Final Approvals. Specifically, S.C. Regulation 61-58.2 “prescribes minimum design standards for the construction of groundwater sources and treatment facilities.” 4 S.C. Code Ann. Regs. 61-58.2(A). Appellant is attempting to challenge the sufficiency and validity of plan, designs, and specifications supporting the issuance of the underlying

Construction Permits in 2012 and 2014. Appellant's challenges of the sufficiency of the Department's review and decisions on the effective construction permits cannot be revived by challenging the Final Approvals, since the sole ground to challenge a final approval to operate is whether the construction work was in compliance with the permit requirements. In its Order, the ALC explicitly stated that the decisions that should have been challenged by Appellant were the issuance of the construction permits in 2012 and 2014, and that this failure is fatal. R. p. 10 (Order Granting Respondent's Motion to Dismiss p. 4 of 7.) ("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.") Appellant claims that it should be excused from filing for timely challenges to the issuance of the underlying Construction Permits in 2012 and 2014 because it did have actual notice of the permitting process. This argument is without merit since Section 44-1-60 expressly limits notice that must be given to affected persons to persons who submit a request in writing to receive such notice. S.C. Code Ann. § 44-1-60(E)(1). In *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control*, 390 S.C. 418, 430, 705 S.E.2d 246, 253 (2010) (holding that Section 44-1-60 is complied with when the Department mails its decision by certified mail simultaneously to the permittee and affected person who has submitted a written request to receive the notification). Appellant did not comply with Section 44-1-60(E)(1) by requesting in writing notification of the Department's decisions with regard to the underlying Construction Permits. Coupled with the fact that it cites no authority that would relieve it of its burden to submitted a written request prior to the Department's issuance of the underlying permits there is legal basis for why the contested case hearing should have gone

forward. Accordingly, the ALC correctly dismissed the contested case hearing for lack of jurisdiction.

**B. Dismissal of the contested case is warranted because the Department's issuance of the Final Approvals is entitled to deference.**

Appellant claims that the Final Approvals are not valid approvals because they were issued with conditions and with guidance to the Town. App. Br. p. 15. The Department interprets this regulation to allow conditional approvals. The South Carolina “deference doctrine provides that courts defer to administrative agency’s interpretations with respect to the statutes entrusted to its administration or its own regulations ‘unless there is a compelling reason to differ.’” *Kiawah Development Partners, II v. South Carolina Department of Health and Environmental Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014) (citations omitted). If the language is silent or ambiguous, then “the court must give deference to the agency’s interpretation.” *Id.*, 411 S.C. at 32-33, 766 S.E.2d at 717.

Here, Appellant concedes that 4 S.C. Code Ann. Regs. 61-58.1(K) is silent on whether the final approval can be conditioned. App. Br. p. 15. Given this fact, it is clear that the Department’s issuance of the Final Approvals in this case is entitled to deference since the regulation at issue is silent on conditional approval and conditional approval is consistent with the authorization that the Department exercises under other regulations. *See Kiawah Development Partners, II*, 411 S.C. at 32-33, 766 S.E.2d at 717. Therefore, the conditional language contained in the Final Approvals cannot provide a ground upon which Appellant can challenge their validity.

**C. Dismissal of the contested case is warranted despite the fact that the Final Approvals recite a regulatory provision only applicable to the issuance of the underlying construction permits.**

Appellant claims that the contested case should not have been dismissed, because the language reciting the regulatory provision applicable to constructions permits makes that provision subject to a challenge of the Final Approvals. App. Br. pp. 16-17. Appellant makes this claim without citing any authority in support. As discussed in Section A, *supra*, a contested case challenge to the Final Approvals is limited to a challenge regarding whether the construction modifications were implemented as authorized by the underlying permits. Regulation 61-58.2 is a design standard for the construction of a groundwater source including modification of existing public water systems, and not a requirement for obtaining a final approval to place a water system into operation a water system pursuant to an underlying construction permit. *See* 4 S.C. Code Ann. Regs. 61-58.1(K). Moreover, as noted by the ALC, any challenge to a requirement applicable to the underlying permits in this case is time barred. Therefore, Appellant's claim is without merit.

**D. The language in the Final Approvals does not create a legal right, duty, or privilege that allows Appellant to appeal the Final Approvals.**

Finally, Appellant claims it is entitled to a contested case hearing on the ground that the recommendation in the Final Approvals allow the Town to avoid coming onto compliance with the regulatory requirement contained in Regulation 61-58.2(B)(1)(b). App. Br. p. 18. This claim is without merit because the regulation does not create impact a right, duty, or privilege of Appellant's that must be determined by an agency. In particular, the regulation contains no requirement or language that authorizes a permittee, licensee, or affected person authority to compel compliance with its provisions. In fact, the State Safe Drinking Water Act, which is the enabling statute for the State Primary

Drinking Water regulations, expressly authorizes only the Department to commence actions for civil penalties and/or injunctive relief for a person's failure to comply with permit conditions. S.C. Code Ann. § 44-55-90(B)(2) and (C) (Rev. 2002).<sup>4</sup> Thus, with regard to whether the McBee water system is in compliance with Regulation 61-58(B)(1)(b), Appellant has no legal right, duty, or privilege that must be determined by an agency after a hearing. Accordingly, Appellant's claim is without merit.

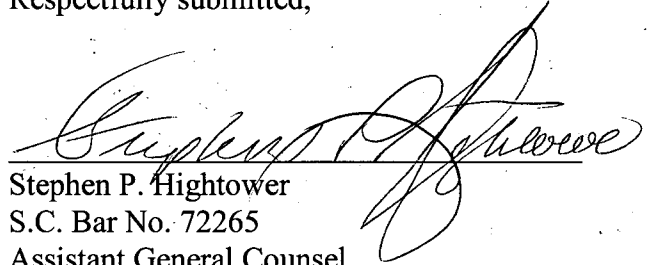
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<sup>4</sup> Although not applicable in this case, the statute also provides that the Department can request that the Attorney General commence an action in an appropriate State court to secure a civil penalty. S.C. Code Ann. § 44-55-90(B)(1).

**CONCLUSION**

Based on the foregoing arguments, the Court should affirm the dismissal of the contested case proceeding by the ALC.

Respectfully submitted,



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In the Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT  
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Case No. 16-ALJ-07-0082-CC

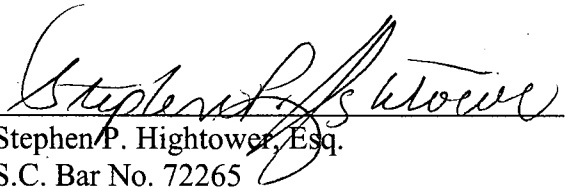
A.O. Smith Corporation.....Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the final Brief of Respondent South Carolina Department of Health and Environmental Control complies with Rule 211(b), SCACR.



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